STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case Nos. 2018AP1075 & 2018AP1076

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LARRY W. OLSON,

Defendant-Appellant.

On Notice of Appeal from an Order
Entered in the Marathon County Circuit Court,
the Honorable Greg Grau, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant

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ISSUE PRESENTED

Larry Olson was found not guilty by reason of mental disease or defect in these two cases, and placed on supervised release. On October 18, 2017, the Department of Health Services took him into custody, which by statute meant it had 72 hours, excluding Saturdays, Sundays, and holidays, to file a probable cause statement and petition to revoke his conditional release. The Department did not do this; instead it filed a statement and petition three days after the deadline had expired, on October 26, 2017. Did this untimely petition properly bring the matter before the circuit court, such that it had competency to revoke Mr. Olson's conditional release?

The circuit court concluded it could proceed.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Olson does not request oral argument. Publication may be appropriate, as no appellate case addresses the question presented here.

STATEMENT OF FACTS AND OF THE CASE

Mr. Olson pleaded not guilty due to mental disease or defect to three counts in these two cases:

first-degree sexual assault of a child under 13, felony bail jumping, and misdemeanor battery. (77:9; 75:14).[1] In September 2017, the court committed Mr. Olson to the Department for 19 years and ordered that he be placed on conditional release. (78:6-7).

On October 18, Mr. Olson reported to the probation office. He admitted smoking methamphetamine on two occasions, and his urine tested positive for the drug. He was taken into custody and held at the jail. (55:1; 60:1; 79:4; App. 112, 113-14, 104).

October 18, 2017, was a Wednesday. Eight days later, on Thursday, October 26, 2017, the Department filed a statement of probable cause and petition to revoke Mr. Olson's conditional release. (55:1; App. 112). Mr. Olson filed a motion to dismiss the petition on the ground that it was filed well after the statutory deadline. (60:1-2; App. 113-14). The court heard and denied the motion and revoked Mr. Olson's conditional release. (79:10-11, 30-31; App. 110-11). This appeal follows. (63; 68).

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[1] For simplicity, all factual citations are to the record in Case No. 2018AP1075.

ARGUMENT

I. The filing deadline in Wis. Stat. § 971.17(3)(e) is mandatory; the Department is not free to detain people indefinitely; its failure to timely seek the court's authorization to hold Mr. Olson means it could not lawfully proceed against him.

A. General principles and standard of review

It is undisputed that the Department's petition was untimely: it came after Mr. Olson had been detained for eight days, and six of those days were countable under the statute. Thus, the Department's filing missed the 72-hour deadline by approximately 72 hours. Wis. Stat. § 971.17(3)(e).[2]

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[2] The relevant portion of Wis. Stat. § 971.17(3)(e) reads:

> If the department of health services alleges that a released person has violated any condition or rule, or that the safety of the person or others requires that conditional release be revoked, he or she may be taken into custody under the rules of the department. The department of health services shall submit a statement showing probable cause of the detention and a petition to revoke the order for conditional release to the committing court and the regional office of the state public defender responsible for handling cases in the county where the committing court

The only question in this case is about the effect of the Department's failure. If the statutory deadline is mandatory, then the circuit court was obligated to dismiss the Department's tardy petition. *State v. R.R.E.*, 162 Wis. 2d 698, 709, 470 N.W.2d 283 (1991). If, on the other hand, the time limit is merely directory, there are no consequences at all for the Department's failure to timely file. Whether the 72-hour limit is mandatory or directory is a question of law this court reviews de novo. *State v. Kywanda F.*, 200 Wis. 2d 26, 32, 546 N.W.2d 440 (1996).

"The word 'shall,' when used in a statute, is presumed to be mandatory unless another construction is necessary to carry out the clear intent of the legislature." *State v. Koopmans*, 210 Wis. 2d 670, 677, 563 N.W.2d 528 (1997). When deciding whether a statute is mandatory or directory, a court considers factors including "the objectives sought to be accomplished by the statute, its history, the consequences which would follow from the alternative interpretations, and whether a penalty is imposed for its violation." *R.R.E.*, 162 Wis. 2d at 708. In particular, the supreme court has said that "a time

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> is located within 72 hours after the detention, excluding Saturdays, Sundays, and legal holidays. The court shall hear the petition within 30 days, unless the hearing or time deadline is waived by the detained person. Pending the revocation hearing, the department of health services may detain the person in a jail or in a hospital, center or facility specified by s. 51.15(2)(d).

limit may be construed as directory when allowing something to be done after the time prescribed would not result in an injury. But where the failure to act within the statutory time limit does work an injury or wrong, this court has construed the time limit as mandatory." *Karow v. Milwaukee Cty. Civil Serv. Comm'n*, 82 Wis. 2d 565, 572, 263 N.W.2d 214 (1978).

B. The 72-hour filing deadline is mandatory.

The statute says the Department "shall" submit its petition to revoke conditional release within 72 hours of detaining a person. The legislature's use of "shall" is the beginning of the analysis; it raises a presumption that the time limit is mandatory. The circuit court, though, held it to be directory, relying on *State v. Schertz*, 2002 WI App 289, 258 Wis. 2d 351, 655 N.W.2d 175.

Schertz dealt with another time limit found in the same statutory paragraph as the 72-hour limit raised here: Wis. Stat. § 971.17(3)(e) also says the court "shall hear the petition within 30 days, unless the hearing or time deadline is waived by the detained person." In *Schertz* the hearing was set for the 30th day, but the mental institution declined to produce Schertz for the hearing. *Schertz*, 258 Wis. 2d 351, ¶3 n.2. Defense counsel moved to dismiss the petition, and the court did so, saying the Department could file another. *Id.* When the new petition was filed, Schertz again moved to dismiss, but the circuit court held the 30-day deadline merely directory, and Schertz's extended supervision was revoked. *Id.*, ¶4.

This court affirmed. It looked to *R.R.E.*, 162 Wis. 2d 698. In that case the committee had filed a petition for release that the court misplaced for three months; R.R.E. argued the court's failure to timely hear his petition required his release. The supreme court observed that such a result would "place a heavy burden on society for even nominal procedural delays of the court," *id.* at 709, and accordingly held the time limit directory. This court, in turn, relied on *R.R.E.*'s reasoning and held that Schertz's unavailability for his scheduled hearing was not grounds to release him. 258 Wis. 2d 351, ¶¶9-14.

1. The first two *R.R.E.* factors: "the objectives sought to be accomplished by the statute" and "its history".

Mr. Olson's case is not like *Schertz*, or like *R.R.E.*, because the relevant time limits are set out in differing language, reflecting a different legislative intent for each. The 30-day deadline at issue in *Schertz* is expressly made waivable. Wis. Stat. § 971.17(3)(e) ("The court shall hear the petition within 30 days, unless the hearing or time deadline is waived by the detained person.") There is no such exception for the 72-hour rule. Of course, saying a time limit can be waived is not the same thing as saying it's directory, but the lack of any statutory exception to the 72-hour rule says something about the legislature's purpose: unlike the 30-day hearing deadline, the legislature intended it to be followed in

every case. As we see from the facts here, this legislative goal is not met if there is no enforcement mechanism.

The legislative history buttresses this conclusion. Prior to 2007, the statute set out a 48-hour deadline, rather than 72, and did not exclude Saturdays, Sundays and holidays from the calculation. *See, e.g.*, Wis. Stat. § 971.17(3)(e) (2003-04). But the budget bill that year amended the law to its current form. 2007 Wis. Act 20 § 3875. What would be the point of extending the deadline if, as the circuit court held, nothing happens if the deadline isn't met?

There is another reason for treating the two timelines in Wis. Stat. § 971.17(3)(e) differently: they govern different actors. The 30-day limit is a directive to the court. The 72-hour rule violated here, though, governs not the court, but a litigant: the Department. While it is unusual to see a court deprived of competency by its own delays, it is unremarkable to see an untimely litigant's claim dismissed. *See, e.g.*, Wis. Stat. § 939.74 (criminal statute of limitations); Wis. Stat. ch. 893 (civil statutes of limitations).

There is good policy behind this distinction, and it illustrates that the different time limits have different objectives—the first factor in determining whether a statute is mandatory. *R.R.E.*, 162 Wis. 2d at 708. Statutes placing time limits on the courts are necessarily aimed at efficient *resolution* of claims. Those aimed at litigants, however, govern the time to

commence actions. So, in both *Schertz* and *R.R.E.*, when a time limit elapsed, the judicial procedure had already begun: the committed person was before a neutral arbiter, and simple failings of procedure or paperwork caused the proceedings to take longer than the statute permitted.

On the other hand, in a case like this one, before the Department goes to court it is detaining a person at its complete discretion. Each day the Department delays filing, the person is locked up without court oversight—the court has no way of even knowing the person has been taken into custody.

Moreover, the petition is the means by which the Department notifies the public defender that the person has been detained. Wis. Stat. § 971.17(3)(e). So, if the Department delays, it also obstructs the person's access to counsel. Before the petition was filed, Mr. Olson was simply being detained, unilaterally, by the state. There was no finding of probable cause; there was no judicial oversight at all. After the 72 hours had expired, the Department was holding Mr. Olson unlawfully; it did so for three days.

Why did the Department do this? We don't know, because it didn't even attempt to explain its actions. It simply pointed to *Schertz* and claimed its failure to come before the court for eight days has no consequences. This cannot have been the legislature's aim when it set a 72-hour deadline.

2. The third factor: "the consequences which would follow from … alternative interpretations".

So, unlike in *R.R.E.* and *Schertz*, the "consequences which would follow" from declaring the statute directory are grave: rather than a "nominal procedural delay[] of the court" we have indefinite detention without due process or access to counsel. 162 Wis. 2d at 708-09. This type of injury justifies the conclusion that the legislature intended the statute to be mandatory:

> The supreme court has held that the statutory time limit for holding a hearing on the forfeiture of a car under the Uniform Controlled Substances Act was mandatory because the car owner's interest in the use of his vehicle is jeopardized. The supreme court has also determined that the statutory time limit for holding a hearing on the charges against a public employee suspended without pay has to be mandatory because the employee is suffering injury to both his livelihood and his reputation. Certainly an individual such as Lockman, who is incarcerated and deprived of her liberty until the holding of a final commitment hearing, is injured to an even greater degree.

State ex rel. Lockman v. Gerhardstein, 107 Wis. 2d 325, 329–30, 320 N.W.2d 27 (Ct. App. 1982).

On the other side of the scale, this court must consider the consequences that would follow if it should hold the 72-hour time limit mandatory. It is

true that such a holding would have precluded the Department from pursuing revocation of Mr. Olson's conditional release based on *these particular violations*: Mr. Olson's use of methamphetamine. This does not mean, though, that the Department was without recourse. For one thing, if, on Mr. Olson's release, the Department—which, recall, has Mr. Olson under supervision even when he is not in physical custody—either learned of other violations or simply found reason to believe "the safety of [Mr. Olson] or others" required revocation, it would be free to file a new petition—it would just have to comply with the rules when it did so. Wis. Stat. § 971.17(3)(e). Nor would holding the Department to the rules here preclude either criminal charges or a commitment under Wis. Stat. ch. 51, if those actions were merited.

The availability of these alternatives mitigates any danger to the public that might arise from holding the Department to the same rules other litigants must follow. On the other hand, failing to do so gives the Department the ability to detain a person indefinitely, without due process or access to counsel. This factor weighs in favor of finding the time limit mandatory.

3. The final factor: whether a penalty is imposed.

The language of Wis. Stat. § 971.17(3)(e) does not say, one way or the other, what happens if the 72-hour time limit is disobeyed. "However, the

omission of a prohibition or a penalty is only one factor to be considered in the analysis of whether the legislature intended the provision to be mandatory or directory." *Lockman*, 107 Wis. 2d at 329. The lack of an explicit directive that an untimely petition should be dismissed is not surprising, or especially significant. This is because, as discussed above, the 72-hour rule is not a case-processing rule for the court, but a filing deadline for a litigant. Statutes setting out the time for a party to commence an action often do not include an explicit penalty; it is just implicit that a tardy filing is dismissed. Indeed, look at the criminal statute of limitations: it contains no "penalty" and doesn't explicitly say dismissal is the remedy. Wis. Stat. § 939.74. Just like § 971.17(3)(e), it only says actions must be commenced within a particular time. It's left implicit that if they're *not* commenced on time, they can't be commenced at all. The "penalty"—or remedy—is inherent in the rule.

CONCLUSION

Mr. Olson submits that the remedy here is also clear from the rule. The Department has 72 hours in which the petition "shall" be filed. If the Department fails to follow the rule, it hasn't filed a lawful petition, and so it hasn't properly begun revocation proceedings. The Department, on the other hand, maintains that revocation simply proceeds as usual, whether it follows the law or not. If this is really the case, then the deadline becomes "merely

discretionary and permissive," *R.R.E.*, 162 Wis. 2d at 715. A rule without a remedy is no rule at all. For these reasons, Mr. Olson respectfully requests that this court reverse the order revoking his conditional release and remand to the circuit court with directions that the petition be dismissed with prejudice.

Dated this 4th day of September, 2018.

Respectfully submitted,

ANDREW R. HINKEL
Assistant State Public Defender
State Bar No. 1058128

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-1779
hinkela@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,396 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 4th day of September, 2018.

Signed:

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ANDREW R. HINKEL
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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Dated this 4th day of September, 2018.

Signed:

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ANDREW R. HINKEL
Assistant State Public Defender

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