STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case Nos. 2018AP1075-CR and 2018AP1076-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LARRY W. OLSON,

Defendant-Appellant.

APPEAL FROM AN ORDER ENTERED IN
MARATHON COUNTY CIRCUIT COURT,
THE HONORABLE GREG GRAU, PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## ISSUE PRESENTED

If the Department of Health Services (DHS) fails to timely submit a statement of probable cause and a petition to revoke conditional release under Wis. Stat. § 971.17(3)(e), does the circuit court lose competency to hear the revocation?

The circuit court answered: No.

This Court should answer: No.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests publication because this case presents a novel legal question. And, while the briefs adequately address the legal issue before the Court, the State is happy to participate in oral argument if it would benefit the Court.

## INTRODUCTION

Olson is in DHS custody because he committed several crimes, and he was found not guilty by reason of a mental disease or defect. Olson was placed on conditional release, but he violated his rules of release, causing DHS to initiate revocation procedures. As part of those procedures, DHS was directed by statute to submit its statement and petition for revocation within 72 hours of detaining Olson. DHS's statement and petition were submitted three days late. The circuit court determined that the 72-hour requirement is directory, not mandatory. The court then held a hearing, and it revoked Olson from conditional release.

In light of DHS's delay in submitting a statement and petition, Olson filed this appeal challenging the circuit court's competency to hear his revocation. But his claim fails because there is no evidence that the Legislature intended the 72-hour requirement in section 971.17(3)(e) to be mandatory, such that nominal delays could result in dangerous individuals

being released without court oversight. The circuit court correctly determined that it had competency to hear Olson's revocation. This Court should affirm.

## STATEMENT OF THE CASE

In the two cases before the Court, Olson was committed to DHS after pleading not guilty by reason of mental disease or defect to first-degree sexual assault, felony bail jumping, and misdemeanor battery. (R. 75:14; 77:9.)[1] The circuit court committed Olson for 19 years and ordered that he be put on conditional release. (R. 53, 78:6–7.)

On October 18, 2017, Olson was taken into custody for violations of his conditional release. (R. 79:4.) On October 19, 2017, DHS completed a statement of probable cause and petition for revocation of Olson's conditional release, alleging that Olson had been using drugs and not taking his medications. (R. 55:1) That document was filed with the circuit court on October 26, 2017. (R. 55.)

On November 10, 2017, Olson filed a motion to dismiss the revocation petition, alleging that the circuit court lacked competency to proceed because DHS's petition was untimely. (R. 60.) Specifically, Olson argued that Wis. Stat. § 971.17(3)(e) required DHS to file its petition for revocation within 72 hours of Olson being detained. (R. 60:2.)

On November 14, 2017, the circuit court held a hearing on the revocation petition and the motion. (R. 79.) The circuit court found that the 72-hour time limit in Wis. Stat. § 971.17(3)(e) is directory, not mandatory, and the court did not lose competency to proceed with the revocation due to a three-day delay in submitting the petition. (R. 79:10.) The

[1] Citations to "R" reference the appeals record in 2018AP1075.

court then held the revocation hearing, and it ordered Olson's conditional release revoked. (R. 79:30–31.)

Olson appeals.

## STANDARD OF REVIEW

Whether a trial court has lost competency to act presents a question of law, which this Court reviews de novo. *State v. Schertz*, 2002 WI App 289, ¶ 5, 258 Wis. 2d 351, 354, 655 N.W.2d 175. And, more specifically, whether a statute is mandatory or directory is a matter of statutory construction, and a question of law, which this Court reviews without deference to the trial court. *Id.* ¶ 6.

## ARGUMENT

### The circuit court had competency to hear Olson's revocation.

### A. Applicable law

Wisconsin Stat. § 971.17(3)(e) addresses revocation of conditional release status, and the pertinent part of the statute states:

> 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 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.

Wis. Stat. § 971.17(3)(e).

Competency "means the court's power to adjudicate the specific type of controversy before it, and the court loses competency when it fails to comply with the requirements necessary for the valid exercise of that power." *Schertz*, 258 Wis. 2d 351, ¶ 5.

"Only when a statutory time limit is mandatory does the circuit court generally lose competence to proceed if that time limit is not met." *Schertz*, 258 Wis. 2d 351, ¶ 6. "Statutory time limits are often held to be directory despite the word 'shall.'" *Id.* ¶ 7 (citing *Eby v. Kozarek*, 153 Wis. 2d 75, 79–80, 450 N.W.2d 249 (1990)). In deciding whether a statute's use of the word "shall" is mandatory or directory, the court attempts to determine the legislative intent. *State v. R.R.E.*, 162 Wis. 2d 698, 708, 470 N.W.2d 283 (1991). And in so doing, the court looks at "the objectives sought to be accomplished by the statute, the statute's history, the consequences that would flow from the alternative interpretations, and whether a penalty is imposed by its violation." *Schertz*, 258 Wis. 2d 351, ¶ 7 (quoting *State v. Perry*, 181 Wis. 2d 43, 53–54, 510 N.W.2d 722 (Ct. App. 1993).

### B. The circuit court had competency to hear the revocation because the Legislature intended the 72-hour time limit to be directory, not mandatory.

Olson's challenge fails because the 72-hour time limit for submitting a petition for revocation does not affect the circuit court's competency to hear the revocation. The 72-hour time limit is directory, not mandatory.

As the court in *R.R.E.* explained, whether the term "shall" is directory or mandatory depends on what the

Legislature intended. 162 Wis. 2d at 708. And determining legislative intent requires the court to look at the statute's objectives and history, as well as the consequences that flow from the various interpretations, and whether the statute imposes a penalty for violations. *Id.*

Here, there is no question that the statute does not prescribe a penalty. *See R.R.E.*, 162 Wis. 2d at 708. Olson does not argue that it imposes one; he focuses on the remaining factors from *R.R.E.* (*See* Olson's Br. 10–11.)

In *Schertz*, this Court found that the remaining factors relevant to legislative intent support a conclusion that the requirements of Wis. Stat. § 971.17(3)(e) are directory, not mandatory. *See Schertz*, 258 Wis. 2d 351, ¶¶ 8–11. This Court should follow the logic of *Schertz*.

### 1. The statute's purpose and history suggest it is directory.

This Court has already found in *Schertz* that the purpose and history of Wis. Stat. § 971.17(3)(e) suggest it is a directory statute, not a mandatory one.

Wisconsin Stat. § 971.17(3)(e) addresses revocation of conditional release status for individuals in DHS custody. Subsection (3)(e) identifies two time limits. It directs that DHS "shall submit a statement showing probable cause of the detention and a petition to revoke the order for conditional release" within 72 hours after the detention. Wis. Stat. § 971.17(3)(e). It also directs that the revocation hearing shall be held within 30 days. *Id.*

In *Schertz*, this Court interpreted the language of Wis. Stat. § 971.17 and found that "[t]he legislature did not intend the release of criminally committed individuals without a court determination that the individual may be safely released." 258 Wis. 2d 351, ¶ 9. The Court noted that the purpose of the statute is to protect the public, while still

preventing delay by the court or the State. *Id.* But the Court found that "[t]here is nothing in Wis. Stat. § 971.17's legislative history to suggest it should be mandatory, nor does the statute prescribe any penalty for its violation. In fact, the absence of a penalty provision within a statute suggests that a statutory provision is directory." *Id.* ¶¶ 9–10.

Olson argues that *Schertz* does not control this case because it addressed a different time limit within the same statutory subsection. (Olson's Br. 6–7.) And he argues that the legislative history suggests that the 72-hour requirement was meant to be mandatory. (Olson's Br. 7.) As support for this argument, Olson notes that, in 2007, the 72-hour time limit was increased from 48 to 72 hours. (Olson's Br. 7.) Olson then tries to argue that that change shows the 72-hour requirement is mandatory because, otherwise, the change from 48 to 72 hours would be meaningless. (Olson's Br. 7.)

But this argument ignores this Court's decision in *Schertz*, where it explained that, although a "provision is directory rather than mandatory, this does not mean that it is merely discretionary or permissive." 258 Wis. 2d 351, ¶ 13. In other words, whether the time limit is 48 or 72 hours, DHS still must take action and submit a statement and a revocation petition. But the circuit court's competency to hear and dispose of the petition is not negated by the fact that the petition is submitted late, regardless if the deadline was increased to 72 hours.

And although *Schertz* specifically addressed the 30-day requirement for a hearing, this Court analyzed the whole subsection (3)(e) generally, making its analysis controlling as to many of the relevant factors. *See Schertz*, 258 Wis. 2d 351, ¶¶ 9–10.

Nothing in the design, purpose, or history of Wis. Stat. § 971.17 suggests it was meant to be mandatory,

such that nominal delays would result in dangerous individuals being released without circuit court oversight.

### 2. The potentially dangerous consequences of interpreting the 72-hour requirement as mandatory support a finding that it is, instead, directory.

This Court should find that the 72-hour requirement is directory, not mandatory, because the consequences of releasing dangerous individuals into the public without circuit court oversight is far worse than nominal delays caused by DHS submitting a petition a few days late.

*Schertz* is both informative and controlling as to this point, as well. In *Schertz,* this Court analyzed Wis. Stat. § 971.17 to determine whether the 30-day hearing requirement was mandatory or directory. *Schertz*, 258 Wis. 2d 351, ¶¶ 8–11. In so doing, the Court addressed the consequences of the alternate interpretations. The Court explained that making the time limits mandatory would risk releasing dangerous individuals without court oversight. *Schertz*, 258 Wis. 2d 351, ¶¶ 9–11. And the Court noted that dangerous individuals should not be released for "nominal procedural delays." *Id.* ¶ 11.

Even considering the nominal procedural delay that occurred due to DHS's late submission here, section 971.17(3)(e) operated correctly and provided Olson—and the public—with significant procedural protection. There is no dispute that Olson's revocation hearing was held within 30 days of the statement and petition being submitted, as section 971.17(3)(e) directs. (R. 79:8.) The only thing Olson takes issue with is that the petition was submitted three days after the 72-hour limit. But since that nominal delay had no bearing on the timeliness of his hearing, Olson was not actually been harmed by DHS's delay.

Similarly, since the 72-hour requirement only directs DHS to submit the statement and petition within that time, that deadline did not actually ensure speedy review of Olson's detention. In other words, DHS's submission was not the potential bottleneck to a court reviewing Olson's detention. Section 971.17(3)(e), by its plain language, gave the circuit court up to 30 days to hold a hearing.

Thus, even if DHS had timely submitted its statement and petition, the circuit court could have taken up to 30 days to hear it, while Olson remained detained. The 30-day time-limit is what ultimately controlled when Olson's detention was reviewed. And while the 30-day time limit begins to run when the petition is filed, the filing of the petition does not actually result in any review. So, a nominal delay in submitting the petition had little to no real effect on the length of Olson's detention. And such minimal consequences do not justify releasing a potentially dangerous individual without a circuit court's determination as to whether it is safe to do so.

### 3. Olson's arguments fail.

Olson argues that the Court should find that the 72-hour requirement is mandatory because the consequences of the alternative are too grave. (Olson's Br. 9.) Specifically, Olson cites *State ex rel. Lockman v. Gerhardstein*, 107 Wis. 2d 325, 329–30, 320 N.W.2d 27 (Ct. App. 1982), for the proposition that statutory limits should be found mandatory where the individual is suffering an injury pending a hearing. But *Lockman,* and the examples it cites, all involve time limits for holding a hearing. (Olson's Br. 9.) And this Court has already held that the time limit for holding a hearing under Wis. Stat. § 971.17 is directory, not mandatory. *Schertz*, 258 Wis. 2d 351, ¶ 14. Likewise, the instant case relates to the time limit for submitting the petition and statement, not the timing of the hearing on the petition.

*Lockman* is also inapposite because Lockman was not a criminal. *Lockman* dealt with a time limit for holding a final commitment hearing. 107 Wis. 2d at 329–30. Lockman had not committed a crime, and he was not in the custody of DHS on conditional release prior to detainment. *Id.* Olson was. Wisconsin Stat. § 971.17 is part of the criminal code, and Olson's commitment is criminal. *See Schertz*, 258 Wis. 2d 351, ¶ 12. Therefore, even before he was detained pending revocation proceedings, Olson's freedom was restricted because of his crimes. (R. 75:14; 77:9.) This is a critical difference.

Finally, Olson argues that, if the 72-hour requirement is directory, the result is indefinite detention without due process or access to counsel. (Olson's Br. 9.) But Olson's argument overstates the potential harm, and it ignores the alternate means by which a defendant can gain court review or challenge an illegal detention. Chapter 51 provides mechanisms for gaining court review, *see* Wis. Stat. § 51.20(16)(i), and defendants can also use writs of mandamus or habeas corpus to compel review or challenge an illegal detention. *See R.R.E.*, 162 Wis. 2d at 704; *State ex rel. Matalik v. Schubert*, 57 Wis. 2d 315, 327, 204 N.W.2d 13 (1973). So, even though a violation of the 72-hour requirement does not deprive the circuit court of competency to hear a revocation, defendants have alternate ways to challenge undue delay or unlawful detainment.

In summary, *Schertz* is controlling as to much of the analysis in this case. And to the extent that the issue here differs from *Schertz*, the reasoning behind *Schertz* applies with equal or greater force to the question before this Court. There is no evidence that the Legislature intended the 72-hour requirement in section 971.17(3)(e) to be mandatory, such that nominal delays would result in dangerous individuals being released without court oversight. The

circuit court had competency to hear Olson's revocation, and its decision should be affirmed.

## CONCLUSION

This Court should affirm the circuit court's order.

Dated this 18th day of October, 2018.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,482 words.

Dated this 18th day of October, 2018.

_____
ABIGAIL C. S. POTTS
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## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 18th day of October, 2018.

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