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OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS

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

REPLY BRIEF OF
DEFENDANT-APPELLANT

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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.

Throughout its brief the state suggests that the question here is controlled by the decision in *State v. Schertz*, 2002 WI App 289, 258 Wis. 2d 351, 655 N.W.2d 175. Respondent's Brief at 5-7. The claim is that because *Schertz* sometimes spoke of the statute generally without identifying the particular provision it was interpreting—the 30-day time limit—it was supplying a binding construction of all of Wis. Stat. § 971.17(3)(e): it's all directory. This argument proves far too much, since para. (3)(e) sets out quite a lot of rules: notifications of local law enforcement for release; the probable cause requirement for detention; where a person may be detained; where a revoked person may be placed. Of course, *Schertz* did not declare these rules "directory" because *Schertz* wasn't about these rules, just like it wasn't about the 72-hour time limit.

The state also relies on the statement from *Schertz* about the two purposes of the statute: to protect the public while preventing delay by the court or the state. Respondent's Brief at 5-6. Mr. Olson agrees that these are the statute's two purposes. But

the state's argument exaggerates the public risk that would come of holding it to the statutory time limits. And its reading of the statute would completely thwart the second purpose.

First, as Mr. Olson pointed out in his opening brief, the public has many safeguards against a person on NGI release who has violated a condition. If the violations are crimes, the person can be charged with crimes (and thus incarcerated). Even if they are not, a person whose mental illness makes them dangerous can be the subject of a Wis. Stat. ch. 51 commitment. And, if the department has reason to believe "that the safety of the person or others" is at risk, it can simply file a new petition. Appellant's Brief at 10. The state does not respond to these points.

Second, the state argues that courts need not enforce the 72-hour rule—a rule that it concedes is intended to prevent delay—because a person who is detained in violation of that rule can file, for example, a petition for habeas corpus. Respondent's Brief at 9. But as Mr. Olson's opening brief also noted, before the department files its petition, the person it has detained is locked in the jail *without access to counsel*. So, per the state, the mechanism by which para. (3)(e) "prevents delay" is that the illegally detained person files a *pro se* petition for an extraordinary writ, sometime after the statute has been violated. This is a strange way for a 72-hour time limit to work.

The state also asserts that the violation of the 72-hour rule doesn't matter because the court complied with the 30-day rule. But as the state notes, it's the filing of the petition that *starts the clock* on the 30-day rule. Respondent's Brief at 8. So obviously, if the state delays filing the petition, like it did here, that does have a "real effect" on how long somebody stays locked up before resolution—it'll be 30 days plus 72 hours plus however many days the state blows the deadline by. The state's claim to the contrary makes no sense.

CONCLUSION

The state says eight times in its brief that violating the 72-hour rule imposes only "nominal" delays on proceedings. But its proposed rule—that there is no consequence if it delays filing by *any* amount of time (at least until its *pro se* detainee manages to petition for habeas corpus)—doesn't distinguish between "nominal" and substantial

delays. The rule the state is seeking is, practically, that it can deprive a person of freedom, indefinitely, and without court approval. This court should hold the state to the rules, just as it would any other litigant. 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 5th day of November, 2018.

Respectfully submitted,

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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 707 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 5th day of November, 2018.

Signed:

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