STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP1296-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAYTRELL K. FITZGERALD,

Defendant-Appellant.

Appeal from an Amended Order of Commitment for Treatment (Incompetency) Entered by the Milwaukee County Circuit Court, the Honorable Dennis R. Cimpl Presiding, Case No. 2016CF4475

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

COLLEEN D. BALL
Assistant State Public Defender
State Bar No. 1000729

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
ballc@opd.wi.gov

Attorney for Defendant-Appellant

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ISSUES PRESENTED

1. Whether the involuntary medication provisions of Wis. Stat. §971.14 are unconstitutional because they do not comport with *Sell v. United States*, 539 U.S. 166 (2003)?

The circuit court was not asked to address this issue and did not decide it.[1]

2. Whether the circuit court's June 18th Order of Commitment for Involuntary Treatment violated Fitzgerald's constitutional right to substantive and procedural due process of law?

The circuit court held that the administration of involuntary medication was warranted under *Sell*. It was not asked, and did not decide, whether its order further violated Fitzgerald's right to procedural due process.

3. Whether the circuit court erred in ordering that Fitzgerald is entitled to only 45 days of sentence credit for the time he has spent in custody?

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[1] A facial challenge to the constitutionality of a statute is an issue of subject matter jurisdiction and cannot be waived. *Winnebago County v. Christopher S.*, 2016 WI 1, ¶4 n.6, 366 Wis. 2d 1, 878 N.W.2d 109.

The circuit court did not address this subject at the June 18th competency hearing, so the basis for its calculation is unknown.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Wisconsin appellate courts have not yet addressed the first two issues for review.[2] The resolution of them could dramatically change how circuit courts conduct pretrial competency proceedings. Pursuant to §809.22(2)(b) and §809.23, oral argument will be helpful for sorting through the ramifications of the decision, and publication will provide guidance to litigants, the bench, and the bar.

STATEMENT OF THE CASE AND FACTS

On October 5, 2016, the State charged Raytrell K. Fitzgerald with one count of possession of a firearm contrary to a harassment injunction in violation of §941.29(1m)g and §939.50(3)(g). The complaint alleged that Harbor Freight Tools had obtained a harassment injunction against Fitzgerald,

[2] The first issue for review was also raised in a petition for supervisory writ that has been pending in the Wisconsin Supreme Court since November 2017. *See State ex rel. Latisha Craig v. Milwaukee County Circuit Court*, Appeal No. 2017AP2110.

its former employee in Case No. 2016CV2114 (R1:3).[3] It did not allege that Fitzgerald had access to a weapon or used a weapon in the incident at issue. But the injunction prohibited Fitzgerald from possessing a firearm until it expired and required him to surrender any firearms that he had, which was none. (R.1:4). The court set bail, which Fitzgerald paid, and he was released. (R.2-3).

First Competency Examination

On October 30, 2017, the court ordered a competency evaluation, and Dr. Deborah Collins filed a report finding Fitzgerald not competent to proceed. (R.9-11). She opined that he has schizoaffective disorder and that he lacked the capacity to understand the proceedings and to meaningfully assist in his defense. (R.11:3). She further opined that he could become competent within the permissible time frame "if provided with psychiatric treatment," and he should be referred for possible restoration through the Outpatient Competency Restoration Program ("OCRP"). (R.11:5).

Dr. Collins concluded: "Due to his symptoms of thought disorder, Mr. Fitzgerald is presently rendered substantially incapable of expressing or applying an understanding of the advantages or disadvantages of medication or treatment to his mental illness, a condition into which he lacks insight

[3] The record for *Harbor Freight Tools v. Raytrell K. Fitzgerald*, Milwaukee County Case No. 2016CV2114, is attached to the State's Complaint at R.1.

and does not acknowledge." (R.11:5-6). But she did not recommend any medication for him.

The court conducted a competency hearing on December 13, 2017. (R.38). Fitzgerald stipulated that he was not competent to proceed. He did not agree that he has schizophrenia. However, his doctor said that he did, so he was taking medication for it. (R.38:4-5). The court told Fitzgerald that Dr. Collins had recommended that he "undergo some tutoring." (R.38:3). It entered an order committing Fitzgerald to DHS's custody and requesting that he be assessed for OCRP. (R.12).

Second Competency Examination

Fitzgerald was admitted to OCRP on February 9, 2018. (R.14). On March 12, 2018, Dr. Robert Rawski filed a new report with the court. He noted that Fitzgerald had a history of schizoaffective disorder and that Fitzgerald said that he took medications for it daily. Dr. Rawski noted that "[t]here was no evidence of hallucinations, suicidal, or homicidal ideation. Cognition featured lapses in attention and concentration to questions at first pass. Intelligence appears to be below average." (R.16:3). Dr. Rawski further explained that Fitzgerald "does not appear to be acutely psychotic or manic at the current time, but exhibits cognitive deficits that may be the manifestation of his psychotic disorder, insufficiently treated symptoms of his psychotic disorder and/or side effects of medication, all of which

may be superimposed upon below average intelligence." (R.16:3-4).

Dr. Rawski concluded that Fitzgerald was "less disorganized in thought compared to the description of his presentation two months ago with Dr. Collins" but he was still not competent to stand trial. He opined that Fitzgerald could become competent within the statutory period of time. (R.16:4). He agreed that Fitzgerald did not require inpatient hospitalization but recommended that he faithfully comply with OCRP and "remain compliant with currently recommended psychotropic treatment to keep his mental illness from interfering with his competency any further." (R.16:4).

On March 19, 2018, the court conducted a hearing on the report. Fitzgerald did not contest Dr. Rawski's report, so the court ordered him to continue with OCRP. (R.39:2).

Third Competency Exam

Two weeks later—April 5, 2018—OCRP wrote the court saying that Fitzgerald had missed numerous appointments, and he was no longer clinically appropriate for OCRP. (R.17).

On May 7th, the court held a status conference. Defense counsel explained that Fitzgerald had been scrambling due to a sudden cut in his Social Security disability benefits which jeopardized his living arrangement. He nevertheless remained in contact with his case manager, and he always called to say

that he could not make his appointments. (R.40:2-3; App.141-142). He had resolved the disability benefits problems and had become financially stable, so defense counsel asked the court to allow him to continue with OCRP. The State agreed with this proposal. (R.40:4; App.143).

The court, however, did not. It said: "I can't just let some guy run around that may or may not be all there and suggest that, well, because he had this problem or that problem, that's okay." (R.40:6; App.145). "We're not going to play games with you, mister." (R.40:8; App.147). Fitzgerald, who is indigent, tried to explain his financial troubles. He had needed funds for bus fare to get to his appointments, but he had spent them on groceries. (R.40:7-10; App.146-149). The court told him he could walk. (R.40:9; App.148). He explained that he couldn't walk to the appointments. He assured the court that he had resolved his financial difficulties. (R.40:10-11; App.149-150). But the court held:

> You know, it may be perfect for you but not for me. I'm remanding him back to the Department of Health and Family Services for determination of whether or not he should be put into institutional care or whether or not he would be a candidate for community service knowing well that if the latter is the case, there will be no misses. There will be no excuses. (R.40:11-12; App.150-151).

Fitzgerald was remanded to Mendota on May 7th. (R.18; App.138). At that point, he was not under a

medication order, but staff at Mendota began trying to medicate him, and he was declining the medication. (R.20:3; App.134). On May 23rd, Dr. Ana Garcia, a psychologist at Mendota, filed her competency report, and concluded that Fitzgerald was not competent to proceed to trial, he was not competent to refuse medication, and he should be treated at an inpatient facility. (R.20:5; App.136).

Unlike Dr. Collins' and Dr. Rawski's reports, Dr. Garcia's report summarized third-party records from Milwaukee County Behavioral Health Division and Aurora Hospital relating to treatment that Fitzgerald had received in 2010-2013, including allegations that he had behaved dangerously during that time period. (R.20:2-3; App.133-134). She did not say that Fitzgerald required involuntary medication because he poses a current risk of harm to himself or others. She opined that he "lacks substantial mental capacity to understand the proceedings and assist in his own defense." (R.20:5; App.136). She also wrote: "treatment with antipsychotic medication is known to be effective in treating symptoms of psychosis, which is precluding his competence to proceed." (R.20:5; App.136).

Finally, Dr. Garcia acknowledged that "Mr. Fitzgerald demonstrated an understanding of the roles of courtroom personnel and the adversarial nature of criminal court proceedings, which will serve as a strong foundation for his understanding of court procedure." (R.20:5; App.136).

Involuntary Medication Proceedings

On June 18, 2018, the court held an involuntary medication hearing. The State called Dr. Garcia to testify and elicited the following facts from her. Fitzgerald had continued to exhibit indications of psychotic symptoms like responding to internal preoccupations, expressing disorganized thoughts, appearing paranoid and displaying an inability to discuss his charges in a reasonable way. When he stopped taking medication, these symptoms allegedly worsened. (R.41:5-6; App.108-109). She also said that he does not understand the need for medication, does not cooperate with taking medication, and has hidden medications in his cheek to avoid taking them. (R.41:6; App.109). She clarified that Mendota sought the ability to administer medication intramuscularly as needed. (R.41:6; App.109).

On cross-examination, Dr. Garcia admitted that she had no contact with Fitzgerald after May 23rd. Her interactions with him (including the competency evaluation) totaled about two and a half hours. She said that as a psychologist she cannot prescribe medication but that he had been prescribed the antipsychotic Seroquel during his admission. (R.41:7-8; App.110-111). When asked if she had ever in fact seen Fitzgerald on medication, she could not answer yes. In fact, she could not speak with certainty to a history of compliance or noncompliance with taking medication. (R.41:9; App.112).

Dr. Garcia did not testify that Fitzgerald was dangerous and did not opine that he needed medication due to dangerousness.

Fitzgerald also testified. He stated that he has been misdiagnosed and expressed concern about the dosage of medication that Mendota tries to give him. In his opinion, it is too much. (R.41:11-12; App.114-115).

Then the court heard argument on the need for medication. The State urged the circuit court to order involuntary medication because Fitzgerald's symptoms allegedly had become worse, and he had been cheeking pills. (R.41:14; App.117). Defense counsel responded that the State could medicate Fitzgerald against his will only if he is dangerous or to restore competency to stand trial after proving the four factors required by *Sell v. United States*, 539 U.S. 166 (2003): (1) an important government interest is at stake; (2) involuntary medication will significantly further that interest; (3) involuntary medication is necessary to further those interests; (4) the administration of drugs is medically appropriate for Fitzgerald. (R.41:14-18; App.117-121).

The State had not requested the administration of involuntary medication based on Fitzgerald's alleged dangerousness, and Dr. Garcia had not testified that he was dangerous. Nevertheless, the court noted that her report had summarized third-party reports of dangerous and violent behavior by Fitzgerald back in 2010, 2011, and 2013. (R.41:23;

App.126-127). As to his current behavior, the court noted that staff at Mendota described Fitzgerald as grossly disorganized, laughing to himself, agitated, calling peers names, pushing a staff person resulting in seclusion, and once flushing large amounts of toilet paper down the toilet. (R.41:24; App.127). The court held:

> All of those things that I've read into the record I think exhibit that Mr. Fitzgerald is dangerous, while not on prescribed medications, is dangerous to himself or others. There is physical violence; however . . . so I think the State prevailed on that prong, but I think they've also prevailed on the second prong with regard to *Sell*, and that is that there is an important government interest at stake here and that is the fact that he is charged with a serious felony. It may be a status offense, but the fact is he is alleged to be carrying a gun while under a prohibition for carrying a gun . . . And so, therefore, that is in my opinion an important government interest, the furtherance of this felony.
>
> The fact that he does not take his medication is not facilitating him to be restored to competency. That is what this is all about so he can stand trial on whether or not he is guilty of this very serious offense; therefore, the fact that he's not taking his meds and has to be given them involuntarily does further that interest and I think it's also a necessary reason to further that interest. (R.41:24-25; App.127-128).

The court then signed a form Order of Commitment for Treatment (Incompetency) and an Amended Order of Commitment for Treatment to Competency. (R.21-22; App.101-102).[4] This form Order permits the circuit court to order involuntary treatment based either on the defendant's "current risk of harm to self or others" or on the *Sell* factors. The circuit court authorized the involuntary administration of medication based upon the *Sell* factors, not on Fitzgerald's current risk of harm to self or others. (R.21; App.102). It also granted Fitzgerald "45 days of credit for pre-commitment incarceration." (R.21:1, App.103).

Thereafter, the circuit court held multiple hearings relating to the "automatic stay" of involuntary medication mandated by *Scott*, including a stay order. (R.42, R.43, R.44; R.24:13; App.153). Those proceedings generated a petition for supervisory writ and an opinion denying it, which is the subject of a pending petition for review. *See* Appeal No. 2018AP1214-W. (R.25, R.28). They do not address the June 18, 2018 Order or the issues raised in this appeal.

On July 17th, Dr. Ana Garcia filed a new request to treat Fitzgerald to competency with psychotropic medication. (R.30). The circuit court has not yet scheduled a hearing on the request.

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[4] The caption on the original Order misspelled Fitzgerald's name. The circuit court entered an Amended Order (just page 1) which corrected the caption.

ARGUMENT

I. Section 971.14's involuntary medication provisions do not comport with *Sell* and are thus unconstitutional.

A. Standard of review.

Wisconsin law presumes that a statute is constitutional. The party challenging the statute must prove that it is unconstitutional beyond a reasonable doubt and that it cannot be enforced under any circumstance. *State v. Wood*, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63. The United States Supreme Court, however, employs a more lenient standard. It requires the challenger to make only a "plain showing" or a "clear demonstration" that a statute is unconstitutional. *See United States v. Morrison*, 529 U.S. 598, 607 (2000); *National Federation of Independent Business et al. v. Sebelius*, 567 U.S. 519, 538 (2012).

The judiciary and the legislature are co-equal branches of government. One problem with the tougher presumption of constitutionality is that it "gives the legislature both the pen and the gavel over their own laws." *Mayo v. WI Injured Patients and Families Comp. Fund*, 2018 WI 78, ¶87, __ Wis. 2d__, 914 N.W.2d 678 (R.G. Bradley, J. concurring)(citing David M. Burke, *The Presumption of Constitutionality Doctrine and the Rehnquist Court: A Lethal Combination for Individual Liberty*, 18 Harv. J. L. & Pub. Pol'y 73, 90 (1994-15)). The weaker presumption restores the proper balance of

constitutional power, "conserving the legislature's constitutional lawmaking function while reinstating the courts' roles as the "bulwarks of a limited Constitution against legislative encroachments . . ." *Id*., ¶90 (citing The Federalist No. 78 ¶17 at 469 (Alexander Hamilton)).

Mayo was a split opinion. Only three justices (Roggensack, Ziegler, Gableman) endorsed the tougher presumption of constitutionality. Two Justices (R.G. Bradley, Kelly) endorsed the weaker presumption. Justices A.W. Bradley and Abrahamson took no position on the issue. This Court should follow United States Supreme Court precedent and apply the weaker presumption, which requires only a "plain showing" or "clear demonstration" that a statute is unconstitutional—especially since Fitzgerald is arguing that §971.14 violates *Sell* and the federal constitution. *See State v. Jennings*, 2002 WI 44, ¶19, 252 Wis. 2d 228, 647 N.W.2d 142 (when decisions from the federal and state supreme courts conflict, the court of appeals should follow the former).

B. The plain language of §971.14 does not comport with *Sell*.

All citizens have a protected liberty interest in avoiding the unwanted administration of antipsychotic drugs under the 14th Amendment of the United States Constitution and Article I, §1 of the Wisconsin Constitution. *Washington v. Harper*, 494 U.S. 210, 221-222 (1990); *State v. Scott*, 2018 WI

74,¶44, 382 Wis. 2d, 914 N.W.2d 141; *Wood*, ¶17. While these drugs can have therapeutic benefits, they can also cause serious side effects such as potentially irreversible neurological disorders that cause involuntary spasms of the body, especially around the face, an inability to sit still, and neuroleptic malignant syndrome, which can lead to cardiac dysfunction and death. *Harper*, 494 U.S. at 229-230. Consequently, the State may not treat an inmate with antipsychotic drugs against his will unless there is an "essential" or "overriding" state interest to do so. Otherwise, the State violates the inmate's right to substantive due process. *Riggins v. Nevada,* 504 U.S. 127, 135 (1992).

The State has an "essential" or "overriding" state interest in subjecting an inmate to involuntary treatment where he poses a significant danger to himself or others and the medication is in his medical interest. *Harper*, 494 U.S. at 1039-1040; *Riggins*, 504 U.S. at 135. In limited circumstances, the State may also have an "essential" or "overriding" state interest in medicating an inmate to competency so that he can stand trial. The United States Supreme Court explained:

> These two cases, *Harper* and *Riggins*, indicate that the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, *but only if* the treatment is medically appropriate, is substantially unlikely to have side effects that

> may undermine the fairness of the trial, and taking account of less intrusive alternatives, is necessary significantly to further important trial-related interests.
>
> This standard will permit involuntary administration of drugs solely for trial competence purposes in certain instances. *But those instances may be rare*.

Sell, 539 U.S. 166, 179-180 (2003). (Emphasis supplied). *See also Winnebago* County *v. Christopher S.*, 2016 WI 1, ¶¶68-71, 366 Wis. 2d 1, 878 N.W.2d 109 (acknowledging *Harper*, *Riggins*, and *Sell*); *Wood*, ¶¶24-25 (same).

Sell lists four factors a court must consider before ordering a defendant to be treated to competency for trial, and it describes in detail the information a court must weigh in applying the factors:

"First, a court must find that *important* governmental interests are at stake." *Sell*, 539 U.S. at 180. (Emphasis in original). The court must consider whether the person is accused of a serious crime. If so, it must consider the State's interest in prosecuting the crime. "The defendant's failure to take drugs voluntarily may mean, for example, that he will be confined in an institution for the mentally ill, which would diminish the risks that he would be freed without punishment." The court should also consider the length of time the defendant has already

served and its interest in assuring the defendant a fair trial. *Id*.

"Second, the court must conclude that involuntary medication will *significantly further* those concomitant state interests." *Id*. at 181. (Emphasis in original). It must find that administering drugs is "substantially likely to render the defendant competent to stand trial" and "substantially unlikely to have side effects that will interfere significantly with his ability to assist counsel in conducting a defense." *Id*.

"Third, the court must conclude that involuntary medication is *necessary* to further those interests." *Id*. (Emphasis in original). This requires further findings that "alternative, less intrusive treatments are unlikely to achieve substantially the same results." *Id.* "And the court must consider less intrusive means for administering drugs, *e.g*. a court order to the defendant backed by the contempt power, before considering more intrusive methods." *Id*.

"Fourth . . . the court must conclude that the administration of drugs is *medically appropriate i.e.* in the patient's best medical interest in light of his medical condition." *Id*. (Emphasis in original). This factor requires the court to consider the specific kinds of drugs the State wants to administer. "Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success." *Id*.

According to *Sell*, consideration of the four factors above should help a court decide the

constitutional question: "Has the Government, in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness of a particular course of antipsychotic drug treatment, shown a need for that treatment sufficiently important to overcome the individual's protected interest in refusing it?" *Id*. at 183.

Now, compare *Sell*'s requirements with §971.14's involuntary medication provisions. Section 971.14(4)(b) provides in part:

> . . . *If the defendant is found incompetent and if the state proves by evidence that is clear and convincing that the defendant is not competent to refuse medication or treatment, under the standard specified in (3)(dm), the court shall* make a determination without a jury and issue an *order that the defendant is not competent to refuse medication or treatment* for the defendant's mental condition and that whoever administers the medication or treatment to the defendant shall observe appropriate medical standards. (Emphasis supplied).

Section 971.14(3), in turn, provides in part:

> Report. The examiner shall submit to the court a written report which shall include all of the following: . . .
>
> (dm) If sufficient information is available to the examiner to reach an opinion, the examiner's opinion on whether the defendant needs medication or treatment and whether the defendant is not competent to refuse medication

> or treatment. *The defendant is not competent to refuse medication or treatment if*, because of mental illness, developmental disability, alcoholism, or drug dependence, and after the advantages, disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the defendant, *one of the following is true*:
>
> 1. The defendant is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.
>
> 2. The defendant is substantially incapable of applying an understanding of the advantages, disadvantages of and alternatives to his or her mental illness, developmental disability, alcoholism, or drug dependence in order to make an informed choice as to whether to accept or refuse medication or treatment. (Emphasis supplied).

Once the circuit court makes one of the findings above, it "shall suspend the proceedings and commit the defendant to the custody of the department [DHS] for treatment for a period not to exceed 12 months, or the maximum sentence specified for the most serious offense with which the defendant is charged, whichever is less." Wis. Stat. §971.14(5)(a)1.

Section 971.14(4)(b) thus permits a court to commit a person accused of a crime for involuntary treatment (including medication) to restore competency based on his inability to understand, express or apply the advantages, disadvantages and

alternatives to treatment or medication. The statute does not require the circuit court to find that either the accused is dangerous or that the State has satisfied the *Sell* factors. An order for involuntary medication based upon the plain language of §971.14 results in a violation of the accused's right to substantive due process. The statute is therefore unconstitutional under either the "plain showing" or the "beyond a reasonable doubt" standard.

II. The circuit court's involuntary medication order violated Fitzgerald's right to substantive due process.

A. The standard of review.

The State bears the burden of proving the need for an involuntary medication by clear and convincing evidence. Wis. Stat. §971.14(4)(b). An appellate court then reviews the trial court's findings of law *de novo* and its findings of fact for clear error. *United States v. Debendetto*, 757 F.3d 547, 552-553 (7th Cir. 2014).

B. The circuit court ordered involuntary medication in violation of *Harper* and Wis. Stat. §51.61(1)(g)1.

The State may obtain an involuntary medication order for a Chapter 971 pre-trial detainee in one of two ways. It must either prove that the defendant is dangerous under *Harper* and or it must prove the *Sell* factors. Under *Harper*, the State may overcome an individual's liberty interest in avoiding

forced medication where his mental illness causes him to be a danger to himself or others in the prison or hospital environment. *Harper*, 494 U.S. at 225-226. In Wisconsin, the dangerousness test is stricter. Patients detained under Chapter 971, have the right to refuse all medication and treatment except "in a situation in which the medication or treatment is necessary to prevent *serious* physical harm to the patient or others." Wis. Stat. §51.61(1)(g)1. (Emphasis supplied). *See also* Wis. Stat. §51.61(1) (a "patient" includes a person who is detained under chapter 971).

The State did not request an involuntary medication order on the grounds that Fitzgerald posed a risk of serious physical harm to himself or others at Mendota. Dr. Garcia did not testify that, in her professional opinion, Fitzgerald met this standard. She last met with him on May 23rd and she did not personally observe him to be dangerous. (R.20; App.132; R.41:7; App.110). Furthermore, the State did not offer Dr. Garcia's report into evidence. Even if it had done so, the report merely summarized unsubstantiated hearsay allegations of dangerousness. While an expert may give an opinion based on hearsay, this does not transform the hearsay into admissible evidence. Wis. Stat. §907.03; *Walworth County v. Therese B.*, 2003 WI App 223, ¶8, 267 Wis. 2d 310, 671 N.W.2d 377. Because the State offered no evidence of Fitzgerald's alleged dangerousness, the circuit court erred when it orally held that he could be involuntarily medicated on this basis.

C. The circuit court ordered involuntary medication in violation of *Sell*.

1. The first *Sell* factor.

Sell requires the State to prove first that an important government interest is at stake. The State has such an interest where the defendant is "charged with a serious crime against the person or a serious crime against property." *Sell*, 539 U.S. at 180. But even when the crime is serious, the court must further consider the facts of the individual case.

There is no established rule for gauging whether a crime is "serious." Consistent with *Sell*'s emphasis on the "individual circumstances" of a case, the court should note the maximum sentence for the crime, but focus on the expected sentence because it reflects the defendant's individual circumstances, such as his criminal history. *See e.g. United States v. Onuoha*, 820 F.3d 1049, 1055 (9th Cir. 2016); *United States v. Hernandez-Vasquez*, 513 F.3d 908, 919 (9th Cir. 2008); *United States v. Thrasher*, 503 F. Supp.2d 1233, 1237 (W.D. Mo. 2007); *United States v. Valenzuela-Puentes*, 479 F.3d 1220, 1226 (10th Cir. 2007); and *State v. Lopes*, 355 Or. 72, 94, 322 P.3d 512 (2014). *See also* Susan A. McMahon, *It Doesn't Pass the Sell Test: Focusing on the Facts of the Individual Case in Involuntary Medication Inquiries*, 50 Am. Crim. L. Rev. 387 (Spring 2013).

Assuming the crime qualifies as "serious," the court must then consider individual circumstances such as whether the defendant has already been

confined for a significant period, whether his refusal to take medication could result in a lengthy commitment to a mental hospital, and whether the crime was a violent offense. *See Sell*, 539 U.S. at 180 (length of commitment); *United States v. White*, 620 F.3d 401, 419-421 (4th Cir. 2010)(finding fraud and theft to be serious crimes but government's interest mitigated by lack of violence).

In Fitzgerald's case, the State made no attempt to prove that an important government interest was at stake. It did not mention the charged crime, the fact that it is a status offense, the maximum sentence, the expected sentence, the length of time Fitzgerald had been detained, or the length of time he might be committed if he continued to refuse medication. The circuit court stated that Fitzgerald was charged with a serious crime, but it did not address any of the other criteria of an important government interest. Due to the State's failure of proof, the circuit court failed to make the findings required by the first *Sell* factor. This Court should thus vacate the June 18th Order. *See e.g. Carter v. Superior Court*, 141 Cal.App.4th 992, 1003, 46 Cal.Rptr.3d 507 (Ct. App. 2006)(involuntary medication order vacated because State failed to address individual circumstances of defendant charged with rape, assault with a deadly weapon, and false imprisonment). *See also Debendetto*, 757 F.3d at 553 (vacating an involuntary medication order in part because the government failed to address these aspects of an "important governmental interest.")

2. The second *Sell* factor.

The second *Sell* factor requires the State to prove that involuntary medication will "significantly further" its important interest. *Sell*, 539 U.S. at 181. The State must offer detailed evidence, including a treatment plan specifying the proposed drugs that may be administered, dosages, and the duration of treatment. *See United States v. Chavez*, 734 F.3d 1247, 1254 (10th Cir. 2013)(vacating an involuntary medication order for lack of an individualized treatment plan); *United States v. Watson*, 793 F.3d 416, 424-425 (4th Cir. 2015)(same); *United States v. Hernandez-Vasquez*, 513 F.3d at 916-917 (same); *Warren v. State*, 297 Ga. 810, 778 S.E.2d 749 (2015)(same); *Cotner v. Liwski*, 243 Ariz. 188, 403 P.3d 600, 606 (Ct. App. 2017)(same).

The State must also show that the drugs are "substantially likely" to render the defendant competent and "substantially unlikely" to produce side effects that might interfere with the defendant's ability to understand and assist his counsel at trial. *Sell*, 539 U.S. at 181. The State cannot simply explain what the proposed drug is designed to do; it must show what it *will* do. *See United States v. Ruiz-Gaxiola*, 623 F.3d 684, 696 (9th Cir. 2010)(order vacated because expert testified about what the antipsychotic drug is designed to do, not what it is substantially likely to do or not do and because court failed to make required findings on this factor).

In Fitzgerald's case the State did not elicit any of the required information. It did not offer a treatment plan. Dr. Garcia, a psychologist, recited that Mendota had prescribed Seroquel for Fitzgerald. She did not testify to the dosage. Fitzgerald objected to the amount and said that it was higher than the amount he was used to taking. (R41:12). Dr. Garcia did not testify what Seroquel does, whether it was "substantially likely" to render Fitzgerald competent, and whether it was "substantially unlikely" to have side effects that might interfere with his ability to understand his case and assist his trial lawyer. She did not mention any side effects at all.

Given the State's failure of proof on the second *Sell* factor, the circuit court could not and did not make any of the required findings. This Court should thus vacate the June 18th Order. *Hernandez-Vasquez*, 513 F.3d at 916-917 (order vacated because government failed to show specific medications, maximum dosages, duration of treatment); *Debendetto*, 757 F.3d at 554; *United States v. Evans*, 404 F.3d 227, 240-241 (4th Cir. 2005)(order vacated due to lack of evidence of side effects and their potential negative effects on defendant's ability to assist with his defense).

3. The third *Sell* factor.

The State must also prove that involuntary medication is "necessary" to further its important interest—*i.e.* less intrusive treatments or means are unlikely to achieve substantially the same results.

Sell, 539 U.S. at 181. Less intrusive *treatments* include intensive education, individual therapy, stress management, and so forth. *State v. Holden*, 110 A.3d 1237, 1251 (Conn. Super. Ct. 2014). An example of a less intrusive *means* is a court order for medication backed by a contempt sanction. *Sell*, 539 U.S. at 181.

In Fitzgerald's case, the State essentially agreed that a less intrusive means (intensive OCRP classes) might restore Fitzgerald to competency. After learning that a reduction in his disability benefits caused him to miss several appointments, the State agreed that he should be given a second chance at OCRP. (R.40:4). The circuit court disagreed, but not based upon on evidence that classes would not work. Otherwise, the State offered no proof that individual therapy or a court order could not accomplish competency restoration. Because the circuit court failed to make the findings required by the third *Sell* factor, this Court should vacate the June 18th Order. *See Debendetto*, 757 F.3d at 554 (order vacated because court failed to make required findings regarding less intrusive treatments); *United States v. Chatmon*, 718 F.3d 369, 376 (4th Cir. 2013)(order vacated because court summarily concluded, without explanation, that less intrusive alternatives would not work).

4. The fourth *Sell* factor.

The fourth *Sell* factor requires the State to prove that the proposed involuntary medication is

medically appropriate for the defendant himself. As with the second *Sell* factor, the State must identify the proposed drug, dosages, whether it is likely to work for this person and what side effects it might have on his personal health. Even if the proposed medication is substantially likely to restore the defendant to competency, the treatment is legally impermissible if it is not in the defendant's best medical interests. *See Watson*, 793 F.3d at 425-426 (government failed to address specifics of involuntary treatment plan and effects on defendant's particular medical condition).

Once again, in Fitzgerald's case the State offered no evidence on this factor, and the circuit court made none of the required findings. The record is barren on this subject. This Court should therefore vacate the June 18th Order. *See Ruiz-Gaxiola*, 623 F.3d at 705-706 (government failed to prove, and court failed to find that proposed antipsychotic medication would do more than control symptom or that its likely benefits would outweigh its potential harm for this defendant); *United States v. Evans*, 404 F.3d at 241-242 (4th Cir. 2005)(order vacated because court can't give prison staff carte blanche to decide drugs and dosages; they must offer details about drugs, their efficacy and their effects on the defendant's particular medical condition).

5. The medical evidence requirement.

To obtain an involuntary medication order under §971.14(5)(am), DHS must submit the report of

a licensed physician. Likewise, an involuntary medication order entered pursuant to *Sell* requires detailed *medical* evidence. A psychologist's testimony is not enough. *Chavez*, 734 F.3d at 1253 (the record should contain evidence that a psychiatrist who will be treating the defendant evaluated him and determined the appropriateness of involuntarily medicating him); *State v. Robert S.,* 213 Ill.2d 30, 820 N.E.2d 424, 437 (2004)(*Harper* requires that a psychiatrist evaluate and prescribe medications for involuntary administration).

Dr. Garcia testified that she is a psychologist, not a doctor. She admitted that she could not prescribe antipsychotic medication for Fitzgerald. (R.41:8). As a matter of law, her report and testimony cannot support an involuntary medication order. This Court should vacate the June 18th Order for this reason too.

III. The circuit court ordered involuntary medication in violation of procedural due process.

A. The standard of review.

The State sought to administer involuntary medication to Fitzgerald in order to render him competent to proceed in this case. However, the circuit court orally authorized involuntary medication based in part on Fitzgerald's alleged dangerousness. (R.41:25; App.127). Defense counsel did not object to this sudden switch on procedural due process grounds. The court of appeals thus reviews this

circuit court decision for plain error. *State v. Jorgenson*, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77.

B. The circuit court denied Fitzgerald notice and an opportunity to be heard regarding dangerousness.

The 14th Amendment to the United States Constitution and Article I, § 1 of the Wisconsin Constitution guarantee all persons the right to procedural due process. *State v. Wood*, ¶17. Procedural due process requires that the deprivation of life, liberty or property be done in a fair manner. *Id*. It requires that "an individual whose rights will be affected by a judicial decree be given notice reasonably calculated to inform the person of the proceeding and to afford that person an opportunity to object and defend his or her rights." *Wengerd v. Rinehart*, 114 Wis. 2d 575, 587, 338 N.W.2d 861 (1983)(citation omitted). It includes the right to present a complete defense, including the right to offer the testimony of witnesses. *Brown County v. Shannon R.,* 2005 WI 160, ¶65, 286 Wis. 2d 278, 706 N.W.2d 269.

When, after the close of evidence, the circuit court began citing parts of Dr. Garcia's report as proof of Fitzgerald's dangerousness, it denied him the right to present a defense on this issue. Had defense counsel known that he had to defend against allegations of dangerousness, he could have obtained Fitzgerald's old treatment records to assess the

accuracy of Dr. Garcia's assertions. *See* Wis. Stat. §51.30(4)(b)(11)(authorizing counsel access to §51.30 treatment records to defend in Chapter 971 proceedings). He could have retained an independent medical evaluation of Fitzgerald. He might have called witnesses from Mendota. Or he might have called Fitzgerald's stepmother to testify given that the old allegations of dangerousness concerned his interactions with her. The circuit court's last-second decision to order involuntary medication based on Fitzgerald's alleged dangerousness violated his right to procedural due process. Thus, the court of appeals should vacate the June 18th involuntary medication order for that reason as well.

IV. The circuit court erroneously awarded Fitzgerald only 45 days of sentence credit for days spent in DHS custody.

The circuit court's June 18th Order states: "3. The defendant is granted 45 days of credit for pre-commitment incarceration." (R.21-2; App.103). Neither the State nor Fitzgerald requested a sentence credit calculation, and the circuit court said nothing about it at the June 18th hearing. It is unknown how the court arrived at "45 days" or why that number was entered into the order. When a result turns on a mathematic calculation, an appellate court need not defer to a circuit court's decision. *Soo Line R. Co. v. Wisconsin Dep't of Revenue*, 97 Wis. 2d 56, 60, 292 N.W.2d 869. So this Court should review the issue de novo.

The circuit court's calculation is incorrect. Pursuant to §971.14(5)(a)1, the circuit court committed Fitzgerald to DHS's custody on December 13, 2017. (R.12). The "days spent in commitment under this paragraph are considered days spent in custody under s. 973.155." *See* Wis. Stat. §971.14(5)(a)3. If, for example, Fitzgerald's commitment to DHS custody ran from December 13, 2017 through June 18, 2018, then he would be entitled to 188 days of sentence credit. This Court should vacate the entire June 18th Order based on Arguments I, II and III above. But if it does not, then it should at least vacate Paragraph 3 of the Order and remand this case for proceedings to determine the proper calculation.

CONCLUSION

For the reasons stated above, Raytrell K. Fitzgerald respectfully requests that this Court vacate the circuit court's June 18th Order of Commitment for Treatment, which authorized the involuntary administration of antipsychotic medication.

Dated this 22nd day of August, 2018.

Respectfully submitted,

COLLEEN D. BALL
Assistant State Public Defender
State Bar No. 1000729

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
ballc@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 6,196 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 22nd day of August, 2018.

Signed:

_____

COLLEEN D. BALL
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.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 22nd day of August, 2018.

Signed:

COLLEEN D. BALL
Assistant State Public Defender

APPENDIX

INDE X
TO
APPENDIX

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