STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP1296-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAYTRELL K.
FITZGERALD,

Defendant-Appellant.

ON APPEAL FROM AMENDED ORDER FOR COMMITMENT FOR TREATMENT (INCOMPETENCY) ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE DENNIS R. CIMPL, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

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INTRODUCTION

Defendant-Appellant Raytrell Fitzgerald is charged with possession of a firearm contrary to a harassment injunction. He suffers from schizoaffective disorder and is not competent to stand trial. At a hearing at which a psychologist who had examined Fitzgerald and submitted an examiner's report testified, the circuit court signed and filed an order ordering that Fitzgerald be involuntarily medicated to restore him to competency to stand trial.

Fitzgerald does not want to be involuntarily medicated but none of his appellate issues have merit. First, he argues that the procedural statute that provides the structure through which the State may obtain an involuntary medication order is unconstitutional on its face. As the State will show, it is not. Second, he argues that the circuit court's order and the State's evidence did not meet the constitutional standard enunciated by the United States Supreme Court in *Sell v. United States*, 539 U.S. 166 (2003). As the State will show, they did. Third, he argues that his procedural due process rights were violated because he did not have the opportunity to counter evidence about his alleged dangerousness. As the State will show, Fitzgerald did not preserve that issue, and it doesn't matter anyhow because the involuntary medication order did not rely on his alleged dangerousness.

The State asks this Court to reject Fitzgerald's arguments and affirm the involuntary medication order.

ISSUES PRESENTED

1. Is Wis. Stat. § 971.14 unconstitutional on its face because, as Fitzgerald alleges, it fails to comport with *Sell v. United States*, 539 U.S. 166 (2003)?

This question was not presented to the circuit court.

This Court should conclude that the statute is facially constitutional.

2. Does the involuntary medication order comport with *Sell* or does it not comport with *Sell* and therefore violate Fitzgerald's substantive due process rights?

The circuit court found that the order comported with *Sell* and does not violate Fitzgerald's due process rights.

This Court should affirm the circuit court's order.

3. Were Fitzgerald's procedural due process rights violated because he did not have the opportunity to counter evidence about his alleged dangerousness?

This question was not presented to the circuit court.

This Court should not address this issue because Fitzgerald did not preserve it for review and because the involuntary medication order did not mention anything about Fitzgerald's dangerousness.

4. If this Court finds that the involuntary medication order is inadequate for any of the reasons Fitzgerald asserts, what is the correct remedy?

The correct remedy is remand for further proceedings.

5. Was the circuit court's statement that Fitzgerald is entitled to 45 days of sentence credit erroneous?

This issue is not ripe for review because the calculation of sentence credit does not become final after an offender has been convicted and sentenced.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the briefs fully address the issues presented.

Publication is requested because the question of Wis. Stat. § 971.14's facial constitutionality has been raised

several times recently by defendants. Additionally, the circuit courts' analysis of whether incompetent individuals should be medicated involuntarily has arisen in several recent cases. Both the State and incompetent individuals would benefit from a published opinion affirming the statute's constitutionality.

STATEMENT OF THE CASE

The Milwaukee County Circuit Court issued a harassment injunction[1] against Fitzgerald on April 8, 2016. (R. 1:5.) The court found "clear and convincing evidence that the respondent may use a firearm to cause physical harm to another or to endanger public safety." (R. 1:4.) Pursuant to the injunction, Fitzgerald was ordered to surrender any firearms he owned or possessed. (R. 1:4, 10–11.) In a Respondent's Statement of Possession of Firearms form, Fitzgerald informed the court that he had not owned or possessed any firearms for the previous six months. (R. 1:9.)

On October 1, 2016, Fitzgerald was found in possession of a .40 caliber semi-automatic handgun. (R. 1:1.) In an Information filed on October 13, Fitzgerald was charged with one count of possession of a firearm contrary to a harassment injunction in violation of Wis. Stat. § 941.29(1m)(g), a Class G felony.[2] (R. 3.)

The court found probable cause and bound Fitzgerald over for trial. (R. 35:10.) On October 30, 2017, defense counsel

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[1] The petitioner was Harbor Freight Tools, Fitzgerald's former employer. (R. 1:3–4.)

[2] The Information noted that the injunction had been ordered pursuant to Wis. Stat. §§ 813.123(5m) and 813.125(4m), both of which require "clear and convincing evidence presented at the hearing on the issuance of the injunction, that the respondent may use a firearm to cause physical harm to another or to endanger public safety."

formally questioned whether Fitzgerald "is able to assist in his defense and understands all of the principles in this matter." (R. 37:2.) That day, the court signed and filed an Order for Competency Examination by Department of Health Services. (R. 9.)

Pursuant to the order, Deborah L. Collins, Psy. D., filed an examiner's report pursuant to Wis. Stat. § 971.14(3). (R. 11.) She reported that Fitzgerald had a long-term documented history of mental illness, "conceptualized here as . . . Schizoaffective disorder." (R. 11:5.) At the time of this evaluation, Fitzgerald was prescribed the antipsychotic agent Seroquel and Cogentin (for side effects). (R. 11:3.) Fitzgerald denied that he had any mental illness. (R. 11:2–3.) Dr. Collins concluded to a reasonable degree of professional certainty that Fitzgerald "presently . . . lacks[s] substantial mental capacity to understand factually or rationally the pending proceedings or to be of meaningful assistance in his defense." (R. 11:5.) She also concluded that he was "more likely than not to become competent within the permissible timeframe if provided with a period of psychiatric treatment." (R. 11:5.) Assuming Fitzgerald's amenability to outpatient treatment, Dr. Collins recommended a referral to "the Outpatient Competency Restoration Program (OCRP) to determine his possible eligibility for restoration services through that venue." (R. 11:5.)

On December 13, 2017, the court held a hearing on Dr. Collins' report. (R. 38.) After discussing the matter with counsel and Fitzgerald, the court signed and filed a Form CR-206 Order of Commitment for Treatment (Incompetency), with the notation "[r]equest assessment for OCRP." (R. 12:2.) That Order did not include an order for involuntary medication. (R. 12:1.) DHS was ordered to periodically re-examine Fitzgerald and furnish written reports to the court every three months. (R. 12:2.)

Brooke E. Lundbohm, Psy. D., filed an OCRP assessment letter with the court on February 9, 2018. (R. 14.) Dr. Lundbohm expressed concern that Fitzgerald had "a history of treatment non-compliance, including failure to take his prescribed psychotropic medications," and that he "may have been in possession of a loaded firearm at the time of the index offense." (R. 14:2.) On the other hand, she noted that Fitzgerald has been successfully "connected to Outreach case management" for several years, regularly sees a psychiatrist, reports compliance with his medication regimen, and is motivated to comply with "OCRP rules and expectations." (R. 14:2.) Therefore, despite her other reservations, Dr. Lundbohm decided that Fitzgerald "***is clinically appropriate*** for the [OCRP] at this time and has been admitted to the Program for remediation." (R. 14:2.)

On March 9, within the first three months of Fitzgerald's commitment, Robert Rawski, M.D. submitted a re-examination report to the court. (R. 16.) Building on much of Dr. Collins' original opinion, Dr. Rawski concluded that Fitzgerald "remains not competent to stand trial and . . . continues to lack the substantial capacity to understand the proceedings and assist in his defense." (R. 16:4.) He concluded that Fitzgerald was "less disorganized in thought compared to the description of his presentation two months ago with Dr. Collins." (R. 16:4.) Dr. Rawski believed that Fitzgerald's "competency to stand trial can be restored within the statutory period of time." (R. 16:4.) Dr. Rawski "strongly recommend[ed] that he remain compliant with the currently recommended psychotropic treatment [i.e., Seroquel] to keep his mental illness from interfering with his competency any further." (R. 16:4.)

Less than a month later, on April 5, Dr. Lundbohm informed the court that Fitzgerald "***is no longer clinically appropriate*** for participation in [OCRP] as we can no longer make reasonable efforts to assure the safety of the defendant

or of the community." (R. 17:1.) Since being admitted to OCRP, Fitzgerald displayed a lack of motivation, including missing six appointments. (R. 17:1.)

After Dr. Lundbohm's letter, the court held a status conference hearing on May 7. (R. 40.) Defense counsel asked the court to give Fitzgerald another chance to comply with OCRP rules and expectations, and the assistant district attorney agreed "it's worth giving it one more try." (R. 40:4.) The court disagreed, concluding that Fitzgerald should be returned to the Department of Health Services for an evaluation and placement. (R. 40:5–6, 11–12.) That day, the court signed and filed an Order for Competency Examination by Department of Health Services pursuant to Wis. Stat. § 971.14. (R. 18.) In addition to the finding of "reason to doubt the defendant's competency to proceed," the court noted that Fitzgerald is "deemed no longer clinically appropriate for OCRP." (R. 18:1.)

On May 23, 2018, Ana Garcia, Ph.D., a licensed psychologist, filed an examiner's report. She noted that Fitzgerald was admitted to Mendota Mental Health Institute on May 17 "for treatment and evaluation of his competence to proceed to trial." (R. 20:1; *accord* 20:3.)

After summarizing Fitzgerald's history, Dr. Garcia described some troubling behaviors since his admission to Mendota. Fitzgerald has a long-term diagnosis of schizoaffective disorder, which is treated with the antipsychotic Seroquel and Benztropine (to treat the side effects of Seroquel). (R. 20:3.) She reported that on May 21, Fitzgerald was found to be "'cheeking' his medications by pretending to take his medications but holding it in his cheek until he was able to spit them out." (R. 20:3.) Without "an order to treat an injectable version of the medication could not be forced upon him." (R. 20:3.) While at Mendota in May, Fitzgerald behaved inappropriately towards staff, other patients, and facility property. (R. 20:3.) In her interactions

with him, Dr. Garcia found that Fitzgerald's "thought processes were disorganized . . . [and] . . . he frequently appeared to be internally preoccupied." (R. 20:4.)

Dr. Garcia set out her clinical findings, opinion, and recommendations. She diagnosed Fitzgerald with schizoaffective disorder. (R. 20:5.) On the trial competency issue, her opinion was that Fitzgerald "lacks substantial mental capacity to understand the proceedings and assist in his own defense." (R. 20:5.) But, if provided treatment, she opined that he "is likely to be restored to competency within the statutory period." (R. 20:5.) As the basis for that opinion, Dr. Garcia stated: "[t]reatment with antipsychotic medication is known to be effective in treating symptoms of psychosis, which is precluding his competence to proceed." (R. 20:5.) On the issue of Fitzgerald's competency to refuse medication, Fitzgerald "is incapable of expressing a rational understanding of the benefits and risks of medication or treatment. Accordingly, it is this writer's opinion that he is not competent to refuse medication or treatment at this time." (R. 20:5.) Dr. Garcia recommended that the court find Fitzgerald incompetent to stand trial and to refuse medication for his mental condition. (R. 20:5.)

The court held a hearing on Dr. Garcia's report on June 18, 2018. (R. 41.) The parties did not contest Fitzgerald's competency to stand trial, so the only issue was whether the court should issue an involuntary medication order. (R. 41:3–4.)

Dr. Garcia testified. She stated that "for treating . . . schizoaffective disorder, the primary treatment is antipsychotic medication." (R. 41:8.) She noted that "at this time he is refusing his medication." (R. 41:8; *accord* 41:5.) In addition to "cheeking," Dr. Garcia reported that, when Fitzgerald moved from the forensic unit (where she evaluated him) to the maximum security unit, staff found "pills that he had obviously not taken hidden in his room." (R. 41:6.) Since

his move to the maximum security unit, Fitzgerald "has not taken any psychotropic medications . . . and has expressed to the unit psychiatrist that he does not need them." (R. 41:6.)

Dr. Garcia stated that Fitzgerald's record with other providers indicates that his behavior changes when he is not medicated. (R. 41:9.) Off his medication, Fitzgerald "continued to exhibit indications of psychotic symptoms, including responding to internal preoccupation, presumably that he was hearing voices and is distracted by them. He has expressed disorganization of his thoughts and behavior. He has appeared paranoid, and he's been unable to discuss his charges in any reasonable way." (R. 41:5.) His case manager described Fitzgerald as "increasingly bizarre and talking to himself" in recent months. (R. 41:9.)

At the end of the hearing, the court ordered that antipsychotic medication be administered to Fitzgerald involuntarily. (R. 41:26.) The court began by finding that there was an important governmental interest at stake because Fitzgerald is charged with a serious felony. (R. 41:25.) Second, the court concluded that involuntary medication will significantly further that interest because his current refusal to take his prescribed medicine "is not facilitating him to be restored to competency," which is necessary "so he can stand trial on whether or not he is guilty of this very serious offense." (R. 41:25.) Finally, it concluded that the medications Fitzgerald has been prescribed are appropriate. (R. 41:26.)

On June 18, 2018, the court signed an Amended[3] Order of Commitment. (R. 21–22, A-App. 101–03.) The court used the form order, Form CR-206.

The court checked off the following relevant boxes:

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[3] Fitzgerald's first name was misspelled on the original order. (R. 21:1.)

THE COURT FINDS:

1. The defendant was

X charged and a probable cause determination was made as to the following crime(s):

. . . .

Possession of a Firearm Contrary to Harassment [Wis. Stat. § 941.29(1m)(g)]

. . .

X 3. Involuntary administration of medication

. . .

X B. The defendant is mentally ill and is charged with at least one serious crime. The involuntary administration of medication(s) or treatment is

1) necessary to significantly further important government interests, and

2) substantially likely to render the defendant competent to stand trial, and

3) substantially unlikely to have side effects that undermine the fairness of the trial by interfering significantly with the defendant's ability to assist counsel in conducting a trial defense, and

4) necessary because alternative, less intrusive treatments are unlikely to achieve substantially the same results, and

5) medically appropriate, that is, in the defendant's best medical interests in light of the defendant's medical condition.

. . .

X 7. If box #3 under the findings on Page 1 is checked, DHS is authorized to administer

medication(s) or treatment to the defendant and shall observe appropriate medical standards in doing so.

(R. 21–22, A-App. 101–03.)

Fitzgerald appeals.

STANDARD OF REVIEW

A party may challenge the constitutionality of a statute by bringing a facial challenge. *See In Matter of Mental Commitment of Christopher S.*, 2016 WI 1, ¶ 34, 366 Wis. 2d 1, 878 N.W.2d 109. To prevail, the challenger "must show that the law cannot be enforced 'under any circumstances.'" *Id.* (quoting *State v. Wood*, 2010 WI 17, ¶ 13, 323 Wis. 2d 321, 780 N.W.2d 63). And, because statutes are presumptively constitutional,[4] the challenger must prove

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[4] Citing *Mayo v. Wis. Injured Patients & Families Comp. Fund*, 2018 WI 78, 383 Wis. 2d 1, 914 N.W.2d 678, Fitzgerald suggests that the principle of a statute's presumptive constitutionality is open to question. (Fitzgerald's Br. 12–13.) Fitzgerald's argument is misleading. Our supreme court is not on the verge of jettisoning this basic principle of statutory review.

In *Mayo*, five justices concluded that the statute under review was constitutional and voted to reverse the court of appeals' decision on the merits. *Mayo*, 2018 WI 78, ¶¶ 2, 66. Two justices (A.W. Bradley and Abrahamson) concluded that the statute is unconstitutional and voted to affirm. *Id.* ¶¶ 102, 112 (A.W. Bradley, J., dissenting).

The majority opinion stated that "we presume that the statute is constitutional." *Mayo*, 2018 WI 78, ¶ 25, *accord id.* ¶¶ 26–27. The dissent did not address the issue, focusing on the merits only. *Id.* ¶¶ 98–113 (A.W. Bradley, J., dissenting). In a concurrence that wholeheartedly joined the majority opinion's merits reasoning, Justices R.G. Bradley and Kelly wrote separately to explain why they believe the presumption of constitutionality rule is wrong and should be abandoned. *Id.* ¶¶ 68–95 (R.G. Bradley, J., concurring).

beyond a reasonable doubt that the statute is unconstitutional. *Id.* ¶ 33.

Federal courts reviewing *Sell* challenges to involuntary medication orders have applied the following standard of review: "We review a district court's determinations with respect to the first *Sell* factor de novo. And we review a district court's determinations with respect to the remaining three *Sell* factors for clear error." *U.S. v. Gillenwater*, 749 F.3d 1094, 1100-01 (9th Cir. 2014).

Whether a defendant is entitled to sentence credit is a question of law that appellate courts review de novo. *State v. Johnson*, 2007 WI 107, ¶ 27, 304 Wis. 2d 318, 735 N.W.2d 505.

From this, Fitzgerald concludes that "[o]nly three justices (Roggensack, Ziegler, Gableman) endorsed the tougher presumption of constitutionality." (Fitzgerald's Br. 13.) The more accurate characterization is that only two justices endorse abandoning the "tougher presumption." The two dissenters were silent on the issue; their silence did not imply any sympathy for the analysis of the concurrence.

In fact, the dissenters declared their adherence to the presumption of constitutionality rule the very same day *Mayo* was issued. That day, the court also issued *Porter v. State of Wisconsin, et al.*, 2018 WI 79, 382 Wis. 2d 697, 913 N.W.2d 842. In *Porter*, Justice Abrahamson (a *Mayo* dissenter), writing for five members of the court, stated in no uncertain terms that the court presumes statutory constitutionality. "This strong presumption of statutory constitutionality 'is the product of our recognition that the judiciary is not positioned to make the economic, social, and political decision that fall within the province of the legislature.'" *Porter*, 382 Wis. 2d 697, ¶ 29 (citation omitted). Justices R.G. Bradley and Kelly dissented on the merits, but opened their opinion by reiterating their opposition to the presumption of constitutionality. *Id.* ¶¶ 52–54, 57 (R.G. Bradley, J., dissenting). *Porter* makes it clear that only these two justices favor abandoning the presumption of statutory constitutionality.

ARGUMENT

I. On its face, Wis. Stat. § 971.14 comports with *Sell v. United States*, and is constitutional.

A. *Sell v. United States.*

As a matter of due process, an individual has a "significant" constitutionally protected "liberty" interest in "avoiding the unwanted administration of antipsychotic drugs." *Sell v. United States*, 539 U.S. 166, 178 (2003) (quoting *Washington v. Harper*, 494 U.S. 210, 221 (1990)). Nevertheless, "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 governmental trial-related interests." *Id.* at 179.

Sell set out a four-part test for determining whether an order to involuntarily medicate a mentally ill defendant to competency satisfies due process.

First, the court must find that "*important* governmental interests are at stake." 539 U.S. at 180. This step is satisfied where the defendant has been accused of "a serious crime against the person or a serious crime against property." 539 U.S. at 180. "[T]he facts of the individual case" must be considered "in evaluating the Government's interest in prosecution." *Id.*

Second, the court must conclude that "involuntary medication will *significantly further* those concomitant state interests." *Id.* at 181. Specifically, the court must find that administration of the drugs is "substantially likely to render the defendant competent to stand trial," and "substantially

unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense." *Id.*

Third, the court must conclude that "involuntary medication is *necessary* to further [the important governmental] interests." *Id.* To satisfy this criterion, the court must find that "any alternative, less intrusive treatments are unlikely to achieve substantially the same results." *Id.* As part of this inquiry, the court must consider "less intrusive means for administering the 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 particular drugs prescribed are "*medically appropriate*, *i.e.*, in the patient's best medical interest in light of his medical condition. . . . Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success." *Id.*

Notably, the *Sell* analysis is geared to assessing the constitutional rigor of a court order for involuntary medication, not the facial constitutionality of a state statute.

B. Wisconsin law.

1. Wisconsin Stat. § 971.14.

Pretrial competency proceedings are governed by Wis. Stat. § 971.14.

The statutory framework is as follows. If, after finding probable cause that the defendant committed the crime of which he stands accused, the court has "reason to doubt a defendant's competency to proceed," the court shall order a competency examination of the defendant. Wis. Stat. § 971.14(1r)(a). The court shall appoint one or more examiners to assess the defendant's competency. *Id.* at (2)(a).

These examiners must have "the specialized knowledge determined by the court to be appropriate to examine and report upon the condition of the defendant." *Id.* at (2)(a).

The examiner shall prepare a written report, and submit that report to the court. *Id.* at (3). Among other things, the report shall include "[t]he examiner's opinion regarding the defendant's present mental capacity to understand the proceedings and assist in his or her defense." *Id.* at (3)(c). If the examiner reports that the defendant lacks competency, the report shall also include "the examiner's opinion regarding the likelihood that the defendant, if provided treatment, may be restored to competency within the time period permitted under sub. (5)(a)."[5] *Id.* at (3)(d). If the examiner has sufficient information, his "opinion on whether the defendant needs medication or treatment and whether the defendant is not competent to refuse[6] medication or treatment." *Id.* at (3)(dm).

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[5] The defendant may be committed "to the custody of the department 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.

[6] A person is not competent to refuse medication or treatment if, "because of mental illness, developmental disability, alcoholism or drug dependence, and after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to [him]," the defendant either cannot "express[] an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives," or cannot "apply[] an understanding of the advantages, disadvantages 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." Wis. Stat. § 971.14(3)(dm).

The court shall then hold a hearing. *Id.* at (4). "At the commencement of the hearing, the judge shall ask the defendant whether he or she claims to be competent or incompetent." *Id.* at (4)(b). The defendant's answer will determine the applicable burden of proof. *Id.*[7]

The parties may waive their opportunity to present evidence in addition to the written report. If they do, "the court shall promptly determine the defendant's competency and, if at issue, competency to refuse medication or treatment." Wis. Stat. § 971.14(4)(b). Otherwise, the court shall hold an evidentiary hearing. If the defendant is found incompetent and "the state proves by evidence that is clear and convincing that the defendant is not competent to refuse medication or treatment," the court shall "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." *Id.*

The actual commitment of an incompetent defendant is governed by section 971.14(5). "If the court determines that the defendant is not competent but likely to become competent within the period specified in this paragraph if provided with appropriate treatment, the court shall suspend the proceedings and commit the defendant to the custody of the department for treatment for a period not to exceed 12 months, or the maximum sentence specified for the most

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[7] "If the defendant stands mute or claims to be incompetent, the defendant shall be found incompetent unless the state proves by the greater weight of the credible evidence that the defendant is competent. If the defendant claims to be competent, the defendant shall be found competent unless the state proves by evidence that is clear and convincing that the defendant is incompetent." Wis. Stat. § 971.14(4)(b).

serious offense with which the defendant is charged, whichever is less." Wis. Stat. § 971.14(5)(a)1.

If the Department of Health Services concludes that a defendant not subject to an involuntary medication order should be, it may move for a hearing under the standards of section 971.14(3), and the court shall conduct a hearing under the standards of section 971.14(4). *See* Wis. Stat. § 971.14(5)(am).

A committed defendant shall be periodically reexamined by examiners of the Department of Health Services. Wis. Stat. § 971.14(5)(b). The outcome of such reexamination may lead to the defendant's continued commitment, resumption of criminal proceedings, or discharge. *Id.* at (c). If the criminal proceeding of a defendant receiving medication is resumed, "the court may make appropriate orders for the continued administration of . . . proceedings." *Id.* at (d).

2. Form CR-206: "Order of Commitment for Treatment (Incompetency)."

On October 5, 1999, in Supreme Court Order 98-01, the supreme court created Wis. Stat. § 758.18(1), which ordered the Wisconsin Judicial Conference to "adopt standard court forms for use by parties and court officials in all civil and criminal actions in the circuit court." *See also* S.C.R. 70.153 (Judicial Conference is required to adopt forms under section 748.18). Order 98-01 also created Wis. Stat. § 971.025, which provided that in all criminal actions and proceedings, "the parties and court officials shall use the standard court forms adopted by the judicial conference under s. 758.18(1)."

Pursuant to this mandate, the Judicial Conference created CR-206, "Order for Commitment for Treatment (Incompetency)." (R-App. 101–102.) The CR-206 form is used for ordering involuntary medication of incompetent defendants. (*E.g.*, A-App. 101–03.) The form indicates that its

purpose is to implement Wis. Stat. § 971.14(5), the involuntary commitment provision.

The CR-206 form requires the court to make a number of specific findings before it may find a defendant incompetent. (R-App. 101.)

Additional findings are required to support a court's order that a defendant to be involuntarily medicated. (R-App. 101.) A defendant who "poses a current risk of harm to self or others if not medicated or treated" may be ordered involuntarily medicated. (R-App. 101.) A non-dangerous incompetent defendant may be involuntarily medicated to make him competent to stand trial provided certain specific findings are made. (R-App. 101–102.)

The CR-206 form directs and requires the court to make the following findings before ordering involuntary medication in order to render an incompetent defendant competent to stand trial:

First, the court must find that the defendant is charged with at least one serious crime, and that his involuntary medication is "necessary to significantly further important government interests." (R-App. 102.) *Cf. Sell*, 539 U.S. at 180.

Second, the court must find that involuntary medication is "substantially likely to render the defendant competent to stand trial," and "substantially unlikely to have side effects that undermine the fairness of the trial by interfering significantly with the defendant's ability to assist counsel in conducting a trial defense." (R-App. 102.) *Cf. Sell*, 539 U.S. at 181.

Third, the court must find that involuntary medication is "necessary because alternative, less intrusive treatments are unlikely to achieve substantially the same results." (R-App. 102.) *Cf. Sell*, 539 U.S. at 181.

Fourth, the court must find that involuntary medication is "medically appropriate, that is, in the defendant's best medical interests in light of the defendant's medical condition." (R-App. 102.) *Cf. Sell*, 539 U.S. at 181.

The findings required by the CR-206 form track the four-part *Sell* test.

3. The Wisconsin Judicial Benchbook and the Wisconsin Jury Instructions—Criminal (Special Materials).

The Wisconsin Judicial Benchbooks are the work of the Wisconsin Supreme Court's Office of Judicial Education and specific Benchbook Committees. Since the mid-1980s, the Benchbooks "have provided Wisconsin's judges with a practical, everyday working tool for judging cases fairly, correctly, and efficiently. The Benchbooks are a comprehensive guide, a distillation of the law as well as the experience, practice, and thought of many outstanding Wisconsin judges and attorneys." I Wis. Office of Judicial Educ., *Wisconsin Judicial Benchbook: Criminal and Traffic,* vii (5th ed. 2016). The Benchbooks are "not intended to stand as independent legal authority for any proposition of law," but are cited by our appellate courts as persuasive authority because they provide "an informed and insightful discussion of practice." *Hefty v. Strickhouser*, 2008 WI 96, ¶ 33 n.11, 312 Wis. 2d 530, 752 N.W.2d 820; *accord Franke v. Franke*, 2004 WI 8, ¶ 117 n.21, 268 Wis. 2d 360, 674 N.W.2d 832.

The section of the Criminal & Traffic Benchbook outlining "Competency to Proceed" gives the following guidance to a circuit court ruling on a motion for involuntary medication to bring an incompetent defendant to competency:

> **Ct may order involuntary administration of medication to render Def competent to stand trial if:**
>
> 1) Charges are "serious"

2) Medically appropriate

3) Substantially likely to render Def competent

4) Substantially unlikely to have side effects that undermine fairness of the trial

5) Less intrusive alternatives will not achieve same results

6) Necessary to significantly further important governmental trial-related interests

I Wis. Office of Judicial Educ., *Wisconsin Judicial Benchbook: Criminal and Traffic,* sec. 5.B., CR 12-11. As authority for this section, the Benchbook cites *Sell v. US*, 123 S. Ct. 2174 (2003).

The Wisconsin Jury Instructions—Criminal is the product of a decades-long cooperative effort between the University of Wisconsin Law School and the Wisconsin Judicial Conference. Wis. JI-Criminal, Introduction iv (2018). The work of the Wisconsin Jury Instructions Committee is respected as "the product of painstaking effort of an eminently qualified committee of trial judges, lawyers, and legal scholars," and therefore persuasive. *State v. Gilbert*, 115 Wis. 2d 371, 379, 340 N.W.2d 511 (1983) (citation omitted). A "Special Materials" section offers suggested procedures for handling special issues in criminal litigation, including guilty pleas, lesser included offenses, and trial competency. Like the rest of the Jury Instructions, these Special Materials are considered persuasive authority. *See Gilbert*, 115 Wis. 2d at 379. "While all portions of those special materials [regarding guilty pleas] have not been tested in this court, it is apparent that they are a work which evinces superior scholarship and an in-depth understanding of constitutional law and criminal procedures." *State v. Bartelt*, 112 Wis. 2d 467, 483 n.3, 334 N.W.2d 91 (1983). The court later noted that "[t]his statement constituted a recognition by

the court of the quality of the special material which is the product of the Criminal Jury Instructions Committee, composed of eleven experienced trial judges, with assistance from a law school professor, an educator, a member of the attorney general's office, and a practicing attorney." *State v. Minniecheske*, 127 Wis. 2d 234, 245, 378 N.W.2d 283 (1985).

In a Special Materials section called "Competency to Proceed," the Committee explained that an order for involuntary medication must meet the constitutional standards set out in *Sell* (and its predecessor case, *Riggins v. Nevada*, 504 U.S. 127 (1992)). The Committee quoted *Sell*'s holding 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 governmental trial-related interests." Wis. JI-Criminal, SM-50 at 16 (quoting *Sell*, 539 U.S. at 179).

The section went on to summarize *Sell*'s four-part test. First, "a court must find that **important** governmental interests are at stake." Second, it "must conclude that involuntary medication will **significantly further** those concomitant state interests." Third, it "must conclude that involuntary medication is **necessary** to further those interests[, and] that any alternative, less intrusive treatments are unlikely to achieve substantially the same results." Fourth, "must conclude that administration of the drugs is **medically appropriate**, i.e., in the patient's best medical interest in light of his medical condition." Wis. JI-Criminal, SM-50 at 16 (quoting *Sell*, 539 U.S. at 180–81).

C. Analysis.

Fitzgerald argues that Wis. Stat. § 971.14 is facially unconstitutional because it does not comport with the four-part *Sell* test. Fitzgerald's argument fails for several reasons. First, the argument is based on an incoherent premise. *Sell* was not concerned with the constitutionality of a statute; it was concerned with the constitutionality of a court order. Therefore, to say that a statute is facially unconstitutional because it doesn't satisfy *Sell* is simply a non sequitur. Second, because the teaching of *Sell* is that involuntary medication orders must accord with substantive due process protections, the fact that Wisconsin circuit courts are instructed to adhere by the *Sell* standards when entering such orders demonstrates that, as a general matter, these orders will adhere to *Sell*. Third, Wis. Stat. § 971.14 is primarily a procedural statute, not a substantive one, and does not purport to address all the substantive due process requirements that might be imposed by constitutional case law. Nevertheless, the statute does address several of the substantive concerns identified in *Sell*. Fourth, Fitzgerald makes no attempt to prove (as he must) that the statute cannot be constitutionally enforced under any circumstances. Given that the Wisconsin circuit courts have been instructed that involuntary medication orders must comport with *Sell*, it is hard to imagine how Fitzgerald could ever meet that burden of proof.

First, Fitzgerald's facial challenge is dead on arrival because it rests on an incoherent premise. *Sell* was not concerned with a procedural *statute* directing how the government may obtain an involuntary medication order; it was concerned with the substantive basis for an involuntary medication *order* issued by a court. *See* 539 U.S. at 173–75. Indeed, the majority opinion did not even mention the applicable statutory or regulatory authority. We know that the procedural means the government had to use to obtain the

order was 28 C.F.R. § 549.43 (1995), because the dissent[8] tells us so. *See* 539 U.S. at 187 n.1 (Scalia, J., dissenting). The fact that the majority did not consider whether section 549.43 sufficiently protected a defendant's substantive due process rights (either facially or as applied) demonstrates that the Court was not making any constitutional judgments about the procedural regulation and was not concerned about its constitutionality. It was evaluating the constitutional sufficiency of the court order only.[9]

Second, Fitzgerald's argument fails because the circuit courts of the State of Wisconsin have been directed to comply with the *Sell* test when issuing orders for commitment and involuntary medication to render an incompetent defendant competent for trial. There are three applicable directives. The first is Form CR-206, "Order of Commitment for Treatment (Incompetency)." (R-App. 101–102.) This form was created for courts to use when ordering commitment pursuant to Wis. Stat. § 971.14(5). Its use is mandatory. *See* Wis. Stat. § 971.025. A court using the form correctly must comply with *Sell* before it may order an incompetent defendant to be involuntarily medicated. *See supra* at 17–18. The second directive is the Judicial Benchbook, which, citing *Sell*, explains to judges that they may order involuntary medication in incompetency cases only when the *Sell* factors are satisfied. (R-App. 101–102.) *See supra* at 19. The last directive is SM-50 of the Wisconsin Jury Instructions, which

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[8] Three justices dissented on jurisdictional grounds. They concluded that the Court of Appeals and Supreme Court did not have jurisdiction over the case because there was no final order. *Sell*, 539 U.S. at 186–93 (Scalia, J., dissenting).

[9] *But see State v. Wood*, 2010 WI 17, ¶ 24, 323 Wis. 2d 321, 780 N.W.2d 63 (erroneously stating that "the constitutionality of a law permitting a court to order forcible antipsychotic medication to a defendant in order to restore him to competency to stand trial" was "[a]t issue in *Sell*").

explains that involuntary medication orders must satisfy the constitutional criteria of *Sell*. *See supra* at 20. This collective guidance guarantees that Wisconsin circuit courts have been instructed that the *Sell* criteria are mandatory when a court orders involuntary medication in order to render an incompetent defendant competent for trial.

The third reason Fitzgerald's argument for facial invalidity fails is that Wis. Stat. § 971.14 is a procedural statute; it does not purport to be a substantive statute. Thus, it is neither surprising nor significant that is may not explicitly meet all the substantive due process standards set by *Sell*.

Section 971.14 governs "[c]ompetency proceedings," according to its title. It instructs that after a probable cause finding, a court shall order a competency examination of the defendant if it has reason to doubt the defendant's competency. Wis. Stat. § 971.14(1r)(a). It directs further that the court shall appoint an examiner, and details where and under what conditions the examination shall take place. *Id.* at (2). At any point in the competency proceedings, "experts chosen by the defendant or by the district attorney" may examine the defendant for competency purposes. *Id.*at (2)(g). The statute details what must be included in the examiner's report, including an opinion of the defendant's competency and whether he may be restored to competency. *Id.* at (3)(d). The report must also include the examiner's opinion about the defendant's competency to refuse medication or treatment in accordance with Wis. Stat. § 971.14(3)(dm). *See supra* n.6. The report must contain the "facts and reasoning" upon which "the[se] findings and opinions" are based. *Id.* at (3)(e).

The statute then directs how a hearing on the competency report must proceed. *Id.* at (4). At the opening of the hearing, the defendant will be asked whether he considers himself competent or not; his answer will determine the

burden of proof. *Id.* at (4)(b). As the parties choose, the court may enter a competency order either summarily or after an evidentiary hearing. *Id.* at (4)(b). A defendant's incompetence to stand trial and incompetence to refuse medication must be proved by clear and convincing evidence. *Id.* If the court orders involuntary medication, the order shall provide that "whoever administers the medication or treatment to the defendant shall observe appropriate medical standards." *Id.* Subsection (5)(a) explains that the court shall suspend the criminal proceedings and order an incompetent defendant committed if it determines that he is likely to become competent either within 12 months or the period of the maximum sentence faced by the defendant.

Despite the fact that section 971.14 is a procedural statute, it nevertheless protects a defendant's substantive rights in several significant ways. First, competency proceedings may not be initiated until after the court has "found that it is probable that the defendant committed the offense charged," which narrows the class of individuals subject to the proceedings. Wis. Stat. § 971.14(1r)(c). Second, the defendant shall be examined by "examiners having the specialized knowledge . . . to examine and report on the condition of the defendant," which assures that the examination and report will be conducted by a person professionally qualified for the job. *Id.* at (2)(a). Third, the defendant may have his competency examined by his own examiner, which gives him the opportunity to rebut the conclusions of the court-appointed examiner. *Id.* at (2)(g). Fourth, the report must include an opinion by the examiner regarding the likelihood that the defendant, if treated, may be timely restored to competency, which partially addresses the second ("significantly further") *Sell* factor. *Id.* at (3)(d); *see Sell*, 539 U.S. at 181. Fifth, the report must include an opinion (provided there is sufficient information) about the defendant's competency to refuse medication, which

partially addresses the third ("necessary") *Sell* factor. Wis. Stat. § 971.14(3)(dm); *see Sell*, 539 U.S. at 181. Both of these opinions must be supported by facts and reasoning set out in the examiner's report. Wis. Stat. § 971.14(3)(e). If the court determines that the defendant is incompetent in both respects, the court shall order that the person administering medication shall observe "appropriate medical standards," which partly addresses the fourth ("medically appropriate") *Sell* standard. *Id.* at (4)(b); *see Sell*, 539 U.S. at 181.

While section 971.14 provides many substantive protections to a defendant whose competency is questioned, it is primarily a procedural statute, not a substantive one. Just as the *Sell* court did not subject the procedural regulation 28 C.F.R. § 549.43 to a substantive constitutional analysis, focusing instead on the merits of the court's order and analysis, this Court should not subject the procedural statute Wis. Stat. § 971.14 to a substantive constitutional analysis.

The final reason that Fitzgerald's facial challenge fails is that he does not even try to meet the essential burden of proof. He does not prove that the statute cannot be constitutionally enforced in any circumstances. *See Christopher S.*, 366 Wis. 2d 1, ¶ 34. How could he? Section 971.14 is a procedural statute governing competency proceedings. A court ruling on whether an incompetent defendant may be involuntarily medicated in order to restore him to competency is subject to the substantive due process criteria set out in *Sell*. The Wisconsin circuit courts are instructed by the applicable Wisconsin Judicial Benchbook and Wisconsin Jury Instructions that *Sell* applies to these proceedings. A court may, of course, make an error in its *Sell* analysis. But the mandatory use of Form CR-206, with its clear instructions to follow *Sell*, means that circuit courts will employ the *Sell* analysis in most cases. *See Allmond v. Dep't of Health & Mental Hygiene*, 141 A.3d 57, 72 (Md. 2016) (rejecting *Sell*-based facial challenge to involuntary

medication statute because statute can be constitutionally applied provided trial court follows *Sell* standards).

For all these reasons, Fitzgerald's facial challenge to Wis. Stat. § 971.14 should be rejected by this Court.

II. The involuntary medication order comports with *Sell* and does not violate Fitzgerald's substantive due process rights.

A. The involuntary medication order in this case comports with *Sell*.

The circuit court signed and filed Form CR-206, Order of Commitment for Treatment (Incompetency) (R. 21–22), indicating that Fitzgerald's involuntary medication was constitutionally authorized under Sell. *See supra* at 17–18. Fitzgerald argues that this involuntary medication order did not satisfy any of the *Sell* criteria. On the contrary, all of the criteria were satisfied.

The first *Sell* requirement looks to the crime the defendant is charged with. If the defendant is accused of "a serious crime against the person or a serious crime against property," the court may conclude that "*important* governmental interests are at stake." *Sell*, 539 U.S. at 180.

Fitzgerald is charged with one count of possession of a firearm contrary to a harassment injunction, in violation of Wis. Stat. § 941.29(1m)(g). (R. 3.) The harassment injunction included firearms restrictions under Wis. Stat. §§ 813.123(5m) and 813.125(4m). (R. 1:1.) Under both sections, a court may prohibit a respondent from possessing a firearm if, "based on clear and convincing evidence presented at the hearing on the issuance of the injunction, that the respondent may use a firearm to cause physical harm to another or to endanger public safety."

The harassment injunction specifically required Fitzgerald to surrender any firearms he owned or possessed.

(R. 1:4, 10–11.) He informed the court in a Statement of Firearms form filed on April 11, 2016, that he had not owned or possessed any firearms for the previous six months. (R. 1:9.) Then, six months later, while the harassment injunction and firearms restriction was still in effect, Fitzgerald was found with a .40 caliber semi-automatic handgun in his possession. (R. 1:1.)

The court concluded that "there is an important government interest at stake here and that is the fact that he's 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 I recall the motion hearing that we had in this matter when the police approached and searched him . . . ." (R. 41:25.) This finding is supported by the record. The court entered the firearms restriction on the basis of "clear and convincing evidence" that Fitzgerald "may use a firearm to cause physical harm to another or to endanger public safety." Six months later, Fitzgerald was carrying a firearm. Under these circumstances, the offense was "very serious" and the State's interest in prosecution of this crime was very important. (R. 41:25.) The first *Sell* criterion is satisfied.

Second, the court must conclude that involuntary medication will "*significantly further*" these important state interests. *Sell*, 539 U.S. at 181. The court must both find that the medication is "substantially likely to render the competent to stand trial," and "substantially unlikely to have side effects that will interfere with the defendant's ability to assist counsel." *Id.*

Fitzgerald cites case law from other jurisdictions suggesting that, to satisfy the second *Sell* criterion, the State must produce evidence about dosages, duration of treatment, and definitive forecast of results. (Fitzgerald's Br. 23–24.) These cases are not controlling; *Sell* does not impose these

precise requirements to support its second criterion. *See Sell*, 539 U.S. at 181.

The court concluded that giving Fitzgerald his medication involuntarily furthers the important government interest in prosecuting this crime because his ongoing refusal to take his medications as prescribed "is not facilitating him to be restored to competency." (R. 41:25.) This conclusion was supported by Dr. Garcia's testimony that antipsychotic medication (Fitzgerald had been prescribed Seroquel) is the primary treatment for Fitzgerald's condition, schizoaffective disorder. (R. 41:8.) In her written opinion, Dr. Garcia specifically wrote that, for this reason, treatment with antipsychotic medication would likely restore Fitzgerald to competency. (R. 20:5.) "[W]e find psychotropic medication to help him better organize his thoughts, reduce the auditory hallucinations, and reduce the delusional beliefs." (R. 41:5.) Because Fitzgerald had been secreting his medicine instead of taking it as directed, his mental state had noticeably declined. (R. 41:5–6, 8–9.) *See supra* at 6–8. Therefore, the part of the second *Sell* criterion that involuntary medication is substantially like to render Fitzgerald competent to stand trial is satisfied.

The other part of the second criterion is that the involuntary medication is unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel. Here, the circuit court did not explicitly address this question. Dr. Garcia did not directly address the issue either. However, she did state in her examiner's report that the prescribed antipsychotic treatment for Fitzgerald included Benztropine, a medication used to treat the side effects of psychotropic medications. (R. 20:3.) Therefore, although the court did not directly address this question, the record implicitly shows that the prescribing physician built the mitigation of side effects into Fitzgerald's prescription.

Third, the court must conclude that "involuntary medication is *necessary* to further [the important governmental interests]." *Sell*, 539 U.S. at 181. That analysis must include a finding that there are no alternative, less intrusive treatments available likely to achieve the same results as drug therapy. *Id.* As part of the analysis, the court must also consider less intrusive means for administering the drugs, such as a court order backed up by the contempt power. *Id.*

The court concluded that the involuntary medication of Fitzgerald is necessary to further the State's important interest in this prosecution. (R. 41:25.) The court noted earlier in its remarks that Fitzgerald had been removed from the alternative OCRP program for failure to cooperate. (R. 41:22.) Aside from his OCRP absences, Dr. Garcia noted in her report that "[d]uring remediation sessions Mr. Fitzgerald was described as minimally engaged." (R. 20:3.) The court also noted that, while at Mendota, Fitzgerald "refused to attend competency groups," as Dr. Garcia reported in her examiner's report. (R. 41:24; 20:3.) Therefore, treatment without medication was not a realistic alternative for Fitzgerald. As for a less intrusive means for administering antipsychotic medication to Fitzgerald, voluntary medication had been attempted. But, because of Fitzgerald's refusal to take the medication voluntarily, this less intrusive means of administering the medication had failed. (R. 41:25.)

Fourth, the court must conclude that the drugs prescribed are "*medically appropriate, i.e.*, in the patient's best medical interest in light of his medical condition." *Sell*, 539 U.S. at 181.

The court concluded that the medications Fitzgerald had been prescribed, the antipsychotic Seroquel and Benztropine, were medically appropriate. (R. 41:26.) The court noted that Dr. Garcia had reviewed the prescriptions prescribed by the psychiatrist, and said they were

appropriate. (R. 41:26.) Dr. Garcia testified that antipsychotic drugs such as Seroquel provide the primary treatment for schizoaffective disorder. (R. 41:8.) The "psychotropic medication . . . help[s] him better organize his thoughts, reduce the auditory hallucinations, and reduce the delusional beliefs." (R. 41:5.)

The involuntary medication order should be affirmed because it met the *Sell* test.

B. Wisconsin Stat. § 971.14(5)(am), requiring a statement by "a licensed physician," does not apply here.

Fitzgerald argues that the involuntary medication order did not comport with the statute because the statute requires an expert report from "a licensed physician," i.e., a psychiatrist, and Dr. Garcia was a non-physician psychologist. (Fitzgerald's Br. 26–27.) Fitzgerald is wrong because he is looking at the wrong part of the statute.

On May 7, 2018, the circuit court signed and filed an Order for Competency Examination by Department of Health Services. (R. 18.) Such an examination is governed by Wis. Stat. § 971.14(2). Section 971.14(2) requires examination by an "examiner," but does not require that the "examiner" be a psychiatrist or licensed physician. Dr. Garcia conducted the examination of Fitzgerald between May 17 and May 22. (R. 20:1–2.) At the conclusion of the competency examination, the examiner submits a written report. *See* Wis. Stat. § 971.14(3). Dr. Garcia submitted her written report on May 23. (R. 20.) After the written report is filed, the court shall hold a hearing on the report. *See* Wis. Stat. § 971.14(4). The court held the hearing on June 18. (R. 41) This set of procedures, which governed Fitzgerald's competency examination and hearing, do not require the participation of a psychiatrist or licensed physician.

Instead of these controlling provisions from section 971.14(4), Fitzgerald looks to Wis. Stat. § 971.14(5)(am). But that subsection has nothing to do with Fitzgerald's competency examination. Subsection (5)(am) does not come into play until after an incompetent defendant has been committed following the court's determination at a section 971.14(4) hearing that he "is not competent but is likely to become competent within the period specified[10] in this paragraph." Wis. Stat. § 971.14(5)(a). After an incompetent defendant has been committed under subsection (5)(a), subsection (5)(am) allows the Department of Health Services to ask the court for a medication order. Such a medication request has nothing to do with the committed defendant's competency for trial, and is not initiated by either the court or the prosecution.

Subsection (am) provides in pertinent part as follows:

> If the defendant is not subject to a court order determining the defendant to be not competent to refuse medication or treatment for the defendant's mental condition and if the department determines that the defendant should be subject to such a court order, the department may file with the court, with notice to the counsel for the defendant, the defendant, and the district attorney, a motion for a hearing . . . on whether the defendant is not competent to refuse medication or treatment. A report on which the motion is based shall accompany the motion and notice of motion and shall include a statement signed by *a licensed physician* that asserts that the defendant needs medication or treatment and that the defendant is not competent to refuse medication or treatment, based on an examination of the defendant by *a licensed physician*."

Wis. Stat. § 971.14(5)(am). A request by the Department under this subsection does require the participation of a

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[10] *See supra* note 5.

licensed physician. That fact is irrelevant to this case, because Dr. Garcia's report was conducted pursuant to Wis. Stat. § 971.14(3), not § 971.14(5)(am).

III. Fitzgerald's procedural due process rights were not violated in this case.

The circuit court entered an order for the involuntary medication of Fitzgerald on the ground that he was mentally ill, charged with at least one serious crime, and that the involuntary administration of medication would help him regain competency for trial. (R. 22:1.) As shown above, this order was supported by the State's evidence at the competency hearing and in Dr. Garcia's expert report. (R. 20; 41.) At the hearing, the court stated that it was imposing the involuntary medication order to restore Fitzgerald to competency for trial. (R. 41:25.) There can be no question that the State's evidence was all directed towards this result. (R. 20; 41.)

Prior to stating that the purpose of the involuntary medication order was the restoration of Fitzgerald's trial competency, the court said that his involuntary medication would also be justified by his dangerousness to himself and others. (R. 41:25.) However, the court did not include this ground in the written order. (R. 22:1.)

Fitzgerald complains on appeal that his procedural due process rights were violated because he was not given an opportunity to contest the court's finding that he was dangerous. (Fitzgerald's Br. 27–29.) Fitzgerald did not preserve this issue for appellate review so it should not be considered by this Court. *See State v. Caban*, 210 Wis. 2d 597, 604–06, 563 N.W.2d 501 (1997). It also fails on the merits.

Where a court's oral order is ambiguous and its written order is clear, the written order prevails. *See Jackson v. Gray*, 212 Wis. 2d 436, 442, 446, 569 N.W.2d 467 (1997). Here, the written order, which limits the justification for the

involuntary medication to trial competency, prevails over the court's oral remarks. Importantly, the Department of Health Services, which is the entity that will put the order into effect, is to base its actions on the order alone, not the circuit court's oral remarks. (R. 21:2.) The fact that the circuit court talked about Fitzgerald's dangerousness at the hearing has absolutely no effect on Fitzgerald's treatment henceforth or the constitutionality of the order being challenged.

This Court should not consider Fitzgerald's procedural due process argument because he has suffered no injury from the circuit court's statement about his dangerousness.

IV. Any remedy is limited to remand for new *Sell* hearing.

For relief in this case, Fitzgerald asks this Court to vacate the June 18, 2018, Order of Commitment for Treatment (Incompetency). (Fitzgerald's Br. 31.) If this Court rules for Fitzgerald on one or more of the issues presented, the correct remedy is remand for further proceedings consistent with this Court's decision and opinion in this case. *See Sell*, 539 U.S. at 186; *State v. Scott*, 2018 WI 74, ¶ 49, 382 Wis. 2d 476, 914 N.W.2d 141.

V. Fitzgerald's complaint about the circuit court's sentencing credit determination is not ripe for review.

The defendant bears the burden of demonstrating that he is entitled to any sentence credit he might seek. *State v. Carter*, 2010 WI 77, ¶ 11, 327 Wis. 2d 1, 785 N.W.2d 516.

Wisconsin's sentence credit statute provides that "[a] convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed." Wis. Stat. § 973.155(1)(a). Where, as here, a court determines that a defendant is not competent but is likely with treatment

to become competent, it must suspend proceedings and commit the defendant to DHS custody for up to 12 months. Wis. Stat. § 971.14(5)(a)1. The days the defendant spends in commitment "are considered days spent in custody" for purposes of the sentence credit statute. Wis. Stat. § 971.14(5)(a)3. The days spent in an inpatient facility while undergoing a competency examination are also credited to the defendant. Wis. Stat. § 971.14(2)(a). Thus, if a defendant committed under section 971.14 is subsequently convicted and sentenced, the sentence imposed shall be reduced by all the time spent in commitment.

The circuit court indicated in its June 18, 2018 medication order that Fitzgerald was due 45 days' sentence credit. (R. 21:2.) Fitzgerald argues that this determination was erroneous because he was committed to DHS custody on December 13, 2017, and had therefore spent at least 188 creditable days in commitment prior to June 18, 2018. (Fitzgerald's Br. 29–30.) He requests a remand for "the proper calculation" of his sentence credit. (Fitzgerald's Br. 30.)

Fitzgerald has yet to be convicted or sentenced, but remains committed pursuant to section 971.14(5). (R. 44:2.) Therefore, the order for sentence credit is not ripe for review.

If and when Fitzgerald is tried and sentenced, any sentence credit calculation made prior to his trial will have to be recalculated. Assuming that he is convicted, Fitzgerald may well be entitled to sentence credit not only for the 188 days he claims to be due so far, but for additional time as well. *See* Wis. Stat. § 973.155(1)(a)1.–3. (sentence credit available for time spent in custody while awaiting trial, being tried, and awaiting imposition of sentence); Wis. Stat. § 971.14(2)(a) (sentence credit available for time spent committed to a mental health facility for an inpatient mental examination). If he is not convicted, the sentence credit question will be moot. Further, if Fitzgerald never becomes competent to stand trial, it is possible that Fitzgerald will never be tried at

all. *See State v. Garfoot*, 207 Wis. 2d 214, 229, 558 N.W.2d 626 (1997) (defendant shall not be subjected to criminal trial if State fails to prove his competence by greater weight of credible evidence).

Because the sentence credit issue is not ripe for adjudication, this Court should decline to address it. *State v. Armstead*, 220 Wis. 2d 626, 628, 583 N.W.2d 444 (Ct. App. 1998). Fitzgerald does not articulate what hardship he will suffer if he waits for the sentence credit issue to be resolved when it has ripened, i.e., if and when he is sentenced after conviction.

CONCLUSION

For the reasons stated, the State of Wisconsin respectfully requests that this Court affirm the order from which this appeal is taken.

Dated this 24th 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 9,821 words.

Dated this 24th day of October, 2018.

MAURA FJ WHELAN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

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Dated this 24th day of October, 2018.

MAURA FJ WHELAN
Assistant Attorney General

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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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, 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.

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