STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP1296-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAYTRELL K. FITZGERALD,

Defendant-Appellant-Petitioner.

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

REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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INTRODUCTION

Wisconsin courts used §971.14 to order the involuntary administration of psychotropic medication to restore a defendant's competency for trial long before *Sell v. United States*, 539 U.S. 166 (2003), and they have continued to do so after. *Sell* raised the minimum constitutional requirements for ordering forced medication, but the Wisconsin legislature has never updated the statute. The current version conflicts with *Sell*. But whether §971.14 is unconstitutional or not, the important point is that the State has been relying on it and ignoring *Sell* for 15 years. As in Fitzgerald's case, prosecutors do not attempt the evidentiary showing that *Sell* requires, and circuit courts do not make the legal and factual findings that *Sell* requires.

Forced medication orders implicate several of a defendant's constitutional rights: his right to freedom from government intrusion into his body and mind, his right to freedom of thought, his right to counsel and a fair trial, if the medication affects his thinking, his ability to communicate, or how he appears before the jury.[1] To protect the defendant, *Sell* established that involuntary antipsychotic medication should be the exception not the rule. *Sell*, 539 U.S. at 180.

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[1] Donna Lee Elm and Doug Passon, *Forced Medication After United States v. Sell*, 32 Champion 26, 27 (May/June 2008).

Section 971.4 and the circuit court's involuntary medication order violate *Sell*. This Court should declare the statute unconstitutional, vacate the order, and detail what the State must prove and the circuit court must find before ordering the involuntary administration of antipsychotic medication to restore a defendant's competency for trial.

ARGUMENT

I. Section 971.14's involuntary medication provisions are unconstitutional.

A. The standard of review.

Under Wisconsin law, the party challenging the constitutionality of a statute must prove that it is unconstitutional "beyond a reasonable doubt." *State v. Wood*, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63. The United States Supreme Court requires the challenger to make a lesser, "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). Fitzgerald asks this Court to follow United States Supreme Court precedent.

The State responds that the majority opinions in two decisions issued the same day prove that this Court has rejected the "plain showing" or clear demonstration" standard. (Response, 10 n. 4) (citing

Mayo v. WI Injured Patients and Families Comp. Fund, 2018 WI 78, ¶27, 383 Wis. 2d 1, 914 N.W.2d 678*; Porter v. State*, 2018 WI 79, 382 Wis. 2d 697, 913 N.W.2d 842). In *Mayo*, only three justices endorsed the "beyond a reasonable doubt" standard. In *Porter*, the majority opinion did *not* invoke the "beyond a reasonable doubt" standard. It is mentioned only in the dissenting opinion. *Porter*, ¶57 (R.G. Bradley, J. and Kelly, J., dissenting). The State fails to address Fitzgerald's arguments and authorities for adopting the lower standard. (Initial Brief at 12-13; Response 10-11). This Court should follow United States Supreme Court precedent and require only a "plain showing" or "clear demonstration" that a statute is unconstitutional.

B. Every involuntary medication order based on the plain language of §971.14 will violate *Sell* and substantive due process.

The State's lead argument—that *Sell* applies to court orders not statutes—makes no sense. (Response 21). *Sell* established the minimum constitutional requirements that the government must satisfy before it may involuntarily administer antipsychotic medication to a defendant awaiting trial. The requirements apply to all government actors. So, if a court orders involuntary medication in violation of *Sell*, then the order violates the constitution. If a statute authorizes involuntary medication in violation of *Sell*, then the statute violates the constitution.

The State tries to save §971.14 by calling it a "procedural" statute, that "does not purport to address all the substantive due process requirements that might be imposed by constitutional case law." (Response, 21).[2] A close look at §971.14 reveals that it authorizes a court order for the involuntary administration of antipsychotic medication in violation of *Sell*.

Once doubt about a defendant's competency to stand trial is raised, the circuit court must find probable cause that the defendant committed the offense charged. Wis. Stat. §971.14(1r)(b) and (c). The statute does not require a finding that the offense charged is serious or that an important government interest is at stake. *Sell*, 539 U.S. at 180.

The court then appoints an examiner who must prepare a report for the court and the parties. Wis. Stat. §971.14(1r), (2), and (3).[3] If the examiner concludes that the defendant is not competent to proceed, then she must give an opinion on "the likelihood that the defendant, if provided treatment, may be restored to competency within the time period

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[2] Contrary to the State's Response at 25, §971.14 and 28 C.F.R. §549.43 are very different. The former requires examiners and the court to make certain findings before involuntary medication can be administered. The latter simply says the Bureau of Prisons may transfer an inmate to a facility to determine whether psychiatric care or treatment is needed.

[3] *See* Mandatory Circuit Court Form CR-205 for what the examiner must address in her report. (Reply App. 101).

permitted under sub. 5(a).” Wis. Stat. §971.14 (3)(d). If possible, she gives an opinion on the defendant’s competency to refuse medication. Wis. Stat. §971.14 (3)(dm). The statute does not require the examiner to identify the antipsychotic drugs and dosages that will be used on the defendant, or to opine that they are “substantially likely” to render him competent and “substantially unlikely” to cause side effects that will interfere with his ability to assist his lawyer. *Sell*, 539 U.S. at 181. Nor does the statute require the examiner to consider treatments short of involuntary medication or to state how the proposed drugs and dosages will affect the defendant’s personal health.

The examiner then files her report with the circuit court, which holds a competency hearing where the State bears the burden of proving the defendant’s competency for trial and competency to refuse medication. Wis. Stat. §971.14(4)(b). If the court determines that the defendant is not competent for trial “but is *likely* to become competent with appropriate treatment,” the court suspends proceedings and commits the defendant to DHS “for treatment.” Wis. Stat. §971.14(5)(a)1. (Emphasis supplied). *Sell*, in contrast, permits involuntary medication only if the court finds that it is “*substantially* likely” to render the defendant competent and “substantially unlikely” to cause constitutionally impermissible side effects. *Sell*, 539 U.S. at 180.

If the defendant has been committed without a finding regarding his competency to refuse

treatment, DHS may move for such a finding based on a physician's report asserting that the defendant needs medication or treatment and is incompetent to refuse it. Wis. Stat. §971.14(5)(am). The statute does not require the physician or the court to address the *Sell* factors. It merely directs the court to make the findings required by §971.14(4)(b) (*i.e.* the defendant's competency to refuse treatment or medication).

Whether the circuit court finds the defendant incompetent to refuse medication at the (4)(b) stage or the (5)(am) stage, the result is the same. It enters an Order of Commitment for Treatment (Incompetency). It does so based upon a report that does not address the second, third and fourth *Sell* factors. It does so after making a finding that conflicts with the second *Sell* factor. Contrary to *Sell*, DHS (not the court) chooses the type and dosage of antipsychotic medication to administer as well as the manner and duration of its administration without judicial oversight. DHS then begins filing periodic reports regarding the defendant's progress toward competency. Wis. Stat. §971.14(5)(b).

The plain language of §971.14 allows involuntary treatment to competency to occur based on an examiner's report and court findings that do not address *Sell* and indeed conflict with it. Every involuntary medication order based on the plain language of §971.14 will violate the defendant's right to substantive due process.

The State counters that this will never happen 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 competent for trial." (Response 22). It cites Mandatory Circuit Court Form CR-206, the *Wisconsin Judicial Benchbook: Criminal and Traffic*, vii (5th ed. 2016), and the Wisconsin Jury Instructions—Criminal, SM-50 (2018). These nonbinding authorities cannot render §971.14 constitutional. And circuit courts disregard them. Consider the following:

On August 20, 2012, in *State v. Jeffrey J. Milbee*, Case No. 2011CF266, the Eau Claire County Circuit Court declared a defendant incompetent to stand trial and ordered involuntary medication and treatment without applying *Sell*. (Reply App. 103-110).[4]

On February 5, 2015, in *State v. Kyle A. Schaefer*, Case. 2014CF385, the Marathon County Circuit Court ordered the involuntary administration of medication and treatment based on the defendant's incompetence to refuse them. It did not address dangerousness or the *Sell* factors. (Reply App.111-115).[5]

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[4] *See Brandt v. LIRC,* 160 Wis. 2d 353, 361, 466 N.W.2d 673 (Ct. App. 1991)(authorizing citation to circuit court decisions).

[5] Mandatory Circuit Court Form CR-206 indicates that a circuit court's involuntary medication order may be based on a finding of dangerousness or the *Sell* factors. (App.101).

On January 15, 2016, in *State v. Moeun Mao*, Case No. 2013CF2592, the Rock County Circuit Court ordered the involuntary administration of medication and treatment without taking evidence on the *Sell* factors or dangerousness. (Reply App.116-122).

On November 28, 2016, in *State v. Robert L. Stokes,* Case No. 2016CF834, the Kenosha County Circuit Court ordered involuntary medication after finding the defendant incompetent to refuse medication but without addressing dangerousness or the *Sell* factors. (Reply App. 123-130).

On August 24, 2017, in *State v. Silvia G. Lopez*, Case No. 1997CF434, the Manitowoc County Circuit Court authorized the involuntary administration of medication based on the defendant's incompetence to refuse medication or treatment. The court did not address dangerousness or the *Sell* factors. (Reply App.131-137).

On August 30, 2017, in *State v. Sebastian Phillips*, Case No. 2017CF204, the Shawano County Circuit Court ordered the involuntary administration of medication, but it did not address dangerousness or the *Sell* factors. (Reply App.138-147).

On August 2, 2018, in *State v. Marcel Kudzin*, 2015CF1074 the Kenosha County Circuit Court ordered the involuntary administration of medication based on *Sell* without addressing any of the *Sell* factors. (Reply App.148-154).

Section 971.14 prescribes Wisconsin's standard for ordering involuntary treatment and medication to restore competency for trial. Applying this statute, circuit courts simply find the defendant incompetent to proceed, incompetent to refuse medication, or both. Section 971.14 conflicts with *Sell*, so every involuntary medication order based on it will violate substantive due process.

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

A. The State concedes that Fitzgerald could not be medicated based on dangerousness.

The circuit court orally ordered involuntary medication based in part on Fitzgerald's alleged dangerousness. (R.41:21-24; App.124-127). Its written order is based solely on the *Sell* factors. (R.21:1; App.102). The State argues that the written order controls, so dangerousness is not at issue in this case. (Response 32-33). This court should accept the State's concession for Fitzgerald's sake but also because the law regarding when the government may medicate a pre-trial detainee against his will based on dangerousness is unclear. *Washington v. Harper*, 494 U.S. 210 (1990) may apply only to convicted prisoners who pose a risk of harm to themselves or others in the institutional setting. The Court should reserve this issue for a case where a pre-trial detainee's

dangerousness is at issue and both parties have briefed the law.

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

The State defends the circuit court's decision by noting that it ticked off the labels of some of the *Sell* factors before ordering involuntary medication for Fitzgerald. *Sell* did not simply list 4 factors. It detailed the evidence required to establish each one. And in the 15 years since it was decided, courts around the country have further explained the evidentiary requirements. (Initial Brief 21-27). The State ignores the evidentiary requirements for the *Sell* factors and recent case law explicating them. By not refuting Fitzgerald's analysis of the law, the State concedes it. *Charolais Breeding Ranches v. FPC Securities*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

The State's evidence and arguments for involuntary medication appear in the Appendix to the Initial Brief at 107-117, 121-122 (R.41:4-14; 18-19). Regarding the first *Sell* factor, at the circuit court level, the State never claimed that an important government interest was at stake or that the charged status offense (possession of a firearm) was a serious crime against person or property. *Sell*, 539 U.S. at 180. It did not identify the maximum sentence, the expected sentence, or whether Fitzgerald's refusal to take medication could result in a lengthy commitment. Because the State failed to make the

required showing, there is insufficient evidence to support the circuit court's blanket statement that "an important government interest" was at stake.

As for the second *Sell* factor, the State offered no evidence to support a finding that involuntary medication would "significantly further" an important government interest (assuming that one exists). It offered no evidence that the administration of antipsychotic drugs was "*substantially* likely" to render Fitzgerald competent for trial and "substantially unlikely" to have side effects that would significantly interfere with his ability to assist his lawyer. *Sell*, 539 U.S. at 180. Nor did the State indicate a treatment plan, including proposed drugs, dosages, or duration of treatment. Thus, the record contains insufficient evidence of the second *Sell* factor.

For the third *Sell* factor, the State had to show that less intrusive means are substantially unlikely to achieve the same results as forced medication. *Sell*, 539 U.S. at 181. Not only did the State fail to offer evidence of other less intrusive means, it conceded that Fitzgerald should have been given a second chance at one particular less intrusive means—OCRP. As it turns out, Fitzgerald ultimately regained competency to proceed in this case without antipsychotic medication. *See* November 28, 2018 docket entry for *State v. Fitzgerald*, Milwaukee County Case No. 2016CF4475. Clearly, involuntary medication was not "necessary" to further an

important government interest (assuming that one exists).

Fourth, the State and the circuit court also stumbled on the fourth *Sell* factor. Dr. Garcia testified that Fitzgerald had been prescribed Seroquel. As a psychologist, she could not (and did not) testify to the efficacy and side effects of Seroquel or any other antipsychotic drug. *Sell*, 539 U.S. at 181. She did not testify to the dosage prescribed for Fitzgerald or what effect it might have on his personal health. In contrast, Fitzgerald testified that he objected to Mendota's dosage in part because it was more than he had been prescribed in the past. (App.115-116; R.41:12-13). Was it twice as much? Did it exceed the recommended dosage? Why was a higher dose necessary and how would it effect his personal health? The record is silent on these points and thus insufficient to support a finding that involuntary medication was in Fitzgerald's "best medical interest in light of his personal medical condition." *Id*.

Finally, the State appears to argue that a §971.14(4)(b) involuntary medication order does not require a report by a licensed physician. (Response at 30-31). If so, then the statute is unconstitutional on its face. Again, *Sell* requires the State to prove and the court to find that the "administration of drugs is *medically appropriate, i.e.* in [the defendant's] best medical interest in light of his medical condition." *Sell*, 539 U.S. at 181. (Emphasis in original). A

psychologist is not a medical doctor, so a psychologist's opinion cannot satisfy *Sell*.

III. The appropriate remedy is to vacate the circuit court's order.

A defendant's competency can fluctuate. Also, some incompetent defendants can attain competency through education or therapy. Thus, contrary to the State's Response at 33, when an appellate court reverses an involuntary medication order months after the fact, it cannot simply remand the case for a *Sell* hearing. The defendant may have become competent in the interim. That is what happened with Fitzgerald and Sell himself.[6] Both stood by their constitutional right to refuse antipsychotic medication and eventually became competent to proceed without it. The appropriate remedy is for the Court to vacate the circuit court's order.

IV. The circuit court erroneously awarded Fitzgerald only 45 days of sentence credit.

The State concedes that the circuit court erred on this point. The Court should accept its concession.

[6] *See* Elm, 32 Champion at 26-27.

CONCLUSION

For the reasons stated above, this Court should vacate the circuit court's June 18, 2018 Order of Commitment for Treatment (Incompetency), which authorized the involuntary administration of medication to Raytrell K. Fitzgerald.

Dated this 7th day of January, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,795 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 7th day of January, 2019.

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.

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REPLY APPENDIX

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