STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Case No. 2020AP160-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIC P. ENGEN,

Defendant-Appellant.

Appeal from Final Orders Regarding a Commitment for Treatment (Incompetency) Entered by the Dane County Circuit Court, Honorable Ellen Berz Presiding, Case No. 2012CF2207

INITIAL BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

COLLEEN D. BALL
Assistant State Public Defender
State Bar No. 1000719

DAVID J. SUSENS
Assistant State Public Defender
State Bar No. 1099463

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

Attorneys for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

ISSUES PRESENTED

1. Whether defense counsel is entitled to receive his client's treatment records without his informed consent, in order to prepare for Chapter 971 proceedings?

   The circuit court answered "no."

2. Whether the State offered sufficient evidence to support an order for involuntary medication under *Sell v. U.S.*, 539 U.S. 166 (2003)?

   The circuit court answered "yes."

3. Whether the circuit court properly interpreted and applied the automatic stay/motion to lift procedure prescribed by *State v. Scott*, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141? If so, then whether the circuit court violated Engen's right to 14th Amendment due process in this case?

   The circuit court assumed that a defendant had to file a motion for an "automatic" stay. It then granted an "automatic" stay, encouraged the State to make an oral motion to lift the stay, and then lifted the stay at the same hearing.

4. Whether Wis. Stat. §971.14(5) permits a circuit court to toll the time period for commitment to restore a defendant's competence to proceed in a case?

   The circuit court answered "yes."

POSITION ON ORAL ARGUMENT AND PUBLICATION

This case presents four issues of first impression that are recurring frequently in the circuit courts. They emanate from *State v. Fitzgerald*, 2019 WI 69, 387 Wis. 3d 384, 929 N.W.2d 165, a case the Wisconsin Supreme Court took on bypass and which declared parts of §971.14 unconstitutional because they do not comport with *Sell v. U.S.*, 539 U.S. 166 (2003). The issues also stem from the Wisconsin Supreme Court's 3-3 split over *State ex rel. Fitzgerald v. Circuit Court for Milwaukee County*, Appeal No. 2018AP1214-W, which sought clarification of the automatic stay/lift procedure announced in *State v. Scott*, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141. Pursuant to §809.23, the court of appeals should publish its decision because the circuit courts, prosecutors and defense lawyers really need guidance on all four of these issues.

Counsel for Engen welcomes oral argument, if the court of appeals would find it helpful for resolving the issues for review. Wis. Stat. §809.22.

STATEMENT OF CASE AND FACTS

On April 11, 2013, a jury convicted Eric Engen of two counts of stalking and two misdemeanor counts of violating a harassment restraining order. (R.124). The court sentenced him to 18 months of initial confinement and 24 months of extended supervision on one count of stalking. It imposed consecutive three-month prison sentences for each misdemeanor. On the remaining count of stalking,

the court placed Engen on probation for 5 years, which ran consecutive to the other three sentences. (R.169). Engen was placed on a probation hold on February 21, 2019, and is currently facing revocation. (R.173:19-20; App. 130-131). At the request of an administrative law judge, the court ordered a competency evaluation on July 18, 2019. (R.139).

Competency Proceeding

Dr. Nancy Elliott examined Engen and prepared a report finding him incompetent for revocation proceedings due to persistent, fixed, delusional beliefs. She also found him incompetent to make medication or treatment decisions. Her report stated that she lacked Engen's medical records and the records of an alleged previous "civil commitment during which he received involuntary medications without benefit." (R.140:2).

> As such, I am unable to offer an opinion on the likelihood of restoration to any reasonable degree of psychological certainty with the information currently available. (R.140:2-3).

At the September 23, 2019 competency hearing, Dr. Elliott testified that she did not review any collateral information before preparing her report because none was available. Thus, she did not know for sure whether Engen had ever been hospitalized, treated, or medicated before. (R.171:16; App. 212). She said that delusional symptoms are not always treatable by psychiatric medication. She needed objective information about prior attempts to treat Engen. She did not have it. She reiterated that she

could not opine that medication would restore Engen to competency. (R.171:14-15; App. 210-211)

When asked whether Engen posed a current risk of harm to himself or others if not medicated, Dr. Elliott replied that she did not evaluate the matter. (R.171:20; App. 216).

The circuit court held Engen incompetent, but found the evidence insufficient to order involuntary medication under *Sell* and *Fitzgerald*. It thus ordered him committed for treatment to competency. (R.142, R.171:24; App. 220).

Involuntary Medication Proceeding

One month later, on October 23, 2019, the State filed a Motion to Compel Production of Health Care Records. It noted that Dr. Elliott had requested, but never received, Engen's health care records so she could not offer an opinion about whether the administration of drugs would satisfy the *Sell* factors. (R.143:1-2; App. 229-230). After the September 23rd hearing, Detective Deb Plantz received an email from a person purporting to be Engen's sister who said he had received unspecified medication at Winnebago in the past and it worked. (*Id.*).

The State requested access to Engen's health treatment records but he would not sign a release. The State then sought the records from DOC and DHS, but they would not provide them without a court order pursuant to HIPPA, 45 CFR §164.512(e)(l)(i) and (f)(l)(ii)(A). (R.143:3; App. 231). Accordingly, the State moved the circuit court for an order to compel the production of Engen's records and

to distribute them "to Dr. Elliott and ***the parties***" for the purpose of "meeting the legal requirement of a basis upon which to order involuntary administration of medication to restore the Defendant to competence." (R.143:4; App. 232). (Emphasis supplied). On November 4, 2019, the court ordered DOC to the produce to it any and all mental health treatment records for Engen. (R.146:1; App. 105). The records were not provided to the parties.

On December 30, 2019, Dr. John Pankiewicz filed a progress report opining that Engen was still not competent to proceed. Pankiewicz repeatedly described Engen as delusional but did not offer a diagnosis. He nevertheless recommended involuntary medication to restore Engen's competency. (R. 147).

The court held an involuntary medication hearing on January 16, 2020. Engen was angry to be there. He said to the court: "Take that fucking shit. Fuck you bitch. You fucking cunt. Die, you miserable bitch. You die. You can't even answer my mail?" (R. 172:3; App. 161). The court removed him from the hearing and considered his appearance waived. (R.172:3-4; App. 161-162).

At the hearing defense counsel brought two matters to the court's attention: (1) Dr. Pankiewicz had not cited any medical evidence to support his recommendation for involuntary medication, and (2) the court had ordered Engen's medical records to be produced, but they had not been provided to counsel. (R.172:6-7; App. 164-165).

Counsel explained that the court could not order involuntary medication to restore Engen's

competency without finding clear and convincing evidence of the four *Sell* factors, some of which require medical evidence. Without Engen's treatment records, counsel could not assess Engen's condition or whether medication was in his best medical interests. Nor could he effectively cross-examine Dr. Pankiewicz on the *Sell* factors. (R.172:6; App. 164).

The court replied: "I don't think you want me to violate your client's HIPPA [rights] by releasing medical documentation that your client does not want released." (R.172:7; App. 165). The court said that if Engen, who had been declared incompetent to make treatment decisions, decided not to release his treatment records, his defense would be "hamstrung," and it was his own fault. (R.172:7; App. 165). It proceeded with the hearing.

The State first called Dr. Pankiewicz, who testified that:

- He reviewed only Engen's records for his most recent admission at WRC and Dr. Elliott's competency assessment. He did not review any other medical records for Engen. (R.172:11-12; App. 169-170).[1]

- He noted that WRC records referenced a possible Chapter 51 commitment but did not know which medication, if any, was given to

[1] In other words, Dr. Pankiewicz lacked the mental health treatment records that both Dr. Elliott and the State said were necessary for applying *Sell*. (R.143:1-4; App. 229-232).

Engen or its effects on Engen. (R.172:12; App. 170).

- Engen's "most likely specific diagnosis would be delusional disorder." (R.172:13; App. 171).
- He did not have a specific medication in mind for Engen. (*Id.*).
- He did not know whether Engen would experience any side effects from medication (R.172:14; App. 172). DHS doctors would try one drug. If it had adverse side effects they would stop and try a second one and so forth until they found one that worked and did not interfere with Engen's ability to engage in his defense or with counsel. (R.172:14-16; App. 172-174).
- He did not communicate with Engen's sister or see any information from her about how Engen allegedly responded to medication in the past. (R.172:15; App. 173).

Dr. Pankiewicz's report did not opine that Engen posed any risk of harm to himself or others. (R.172:10-18; App. 168-176). And the State did not ask him about this subject at the hearing.

The State then called detective sergeant Deb Plantz, who testified that she received an email from someone claiming to be Engen's sister, who wrote that Engen had benefitted from medication in the past. (R.172:20-21; App. 178-179). The State did not call this woman to the stand, and no one read the email into the record.

The State requested involuntary medication, and the defense opposed because the State had not presented evidence satisfying the *Sell* factors. (R.172:22-30, 33-36; App. 180-188, 191-194). The court sided with the State. (R.153:1-2; App. 103-104). Here is its entire rationale:

> I do find that all of the factors have been satisfied. I'm utilizing not only the evidence presented today, but also the fact that I sat through a trial of this case and am very familiar with the danger Mr. Engen posed to his victim. Then, of course, we have his conduct today which is rather self-evident.
>
> So I'm going to make the findings indicated on the order of commitment for treatment, involuntary administration of medication. No. 3B[2], and it is granted. (R.172:36-37; App. 194-195).

Automatic Stay/Lift/Toll Proceeding

Immediately after the January 16th hearing, defense counsel filed an Emergency Motion for Automatic Stay of Involuntary Medication and a Notice of Appeal. (R.154, 155). The motion alerted the court to the fact that Engen was entitled to an automatic stay of involuntary medication pending his appeal as a matter of right under *Scott*.[3]

On January 17th, the State filed a Motion to Toll Statutory Time to Bring Defendant to Competence.

---

[2] Paragraph No. 3B lists the *Sell* factors.

[3] Engen does not concede that he was required to move for an "automatic" stay. Counsel took all necessary measures to protect his client's rights.

(R.156:1-7; App. 222-228). The State explained that it was not moving to lift the stay at that time because doing so would "take more time off the competency clock and the State believes it doesn't have that much time left given the Defendant's level of psychosis and the amount of time, after the medication is administered, it will take to restore the Defendant to competence." (R.156; App. 227).

The court held another hearing on January 21, 2020, where the State conceded that Engen had a right to appeal and a right to an automatic stay. (R.173:4-5; App. 115-116). The State also explained that it did not file a motion to lift the stay because *Scott* at ¶47 appears to indicate that the motion must be filed in the court of appeals. (R.173:9-10; App. 120-121).

The State noted that as of January 21st it had lost 4 months of the 12 month period for competency restoration. If Engen was not brought to competency within the next 8 months it was "empowered" to file a Chapter 51 petition under §971.14(6)(c). However, if Engen insisted on appealing then it preferred to have the statutory period to restore competence tolled. (R.173:14-16; App. 125-127).

The State said:

> [L]et him have his appeal, let them all say we did fine in what I'm confident will be a per curiam unpublished opinion, and then we can administer medications and then we can bring him to competence and then we can have our revocation hearing. (R.173:17; App. 128).

The court and the parties then examined Engen's sentence and the timeline of revocation proceedings and agreed that:

- If the court were to revoke Engen on Count 2, his potential sentence would be 3.5 years, with a maximum initial incarceration of 18 months and a maximum extended supervision of 2 years. (R.173:18-19; App. 129-130).

- Engen's arrest date for allegedly violating probation conditions was February 21, 2019. (R.173:20; App. 131).

- As of January 21, 2020, Engen was entitled to 344 days of sentence credit toward his ultimate sentence. (*Id*.).

- Assuming that Engen received the maximum sentence, by the end of his appeal he could only serve the extended supervision portion of it. (*Id*.).

The court asked the State if it wanted to make a motion to lift the stay. The State replied that it wasn't sure that it could due to §808.075 and *Scott*. (R.173:21; App. 132). After receiving the court's blessing, the State made an extended argument that Engen required medication under *State v. Dennis H*., 2002 WI 104, 255 Wis. 2d 359, 647 N.W.2d 851, because of the potential for "self-harm," meaning that he could not control his thoughts and actions and

then would treat others as he treated the court. (R.173:22-24; App. 133-135).[4]

The State argued that Engen failed to prove through medical testimony that Engen could "self-repair" or "be repaired by the system." (R.173:25; App. 136). It argued that Engen would not suffer irreparable harm because involuntary medication would stop his psychotic thinking. (R.173:26; App. 137). If the medication caused side effects, the doctors would stop and try a new one. (R.173:26-27; App. 137-138). Because no one else—the State, the public or the victim—would be injured by a lift of the stay, the court should lift it. (R.173:26-28; App. 137-139).

Defense counsel asked the court to deny the State's motion to toll. Neither the statute nor *Scott* made any exceptions to the periods for restoring a defendant's competence. Only the legislature could change the statute to add a tolling mechanism. (R.173:29-30; App. 140-141). Counsel also pointed out that the State had not addressed whether treatment other than medication would help Engen. The State sought involuntary medication in *Fitzgerald* and *Sell*, and yet both defendants ultimately became competent without antipsychotic medication. (R.173:31; App. 142).

Defense counsel also argued that the State's surprise oral motion to lift the stay violated Engen's right to procedural due process. He had no notice of the State's arguments and no opportunity to prepare

[4] *Dennis H.* addressed the constitutionality of §51.20(2)(e), which applies to Chapter 51 proceedings not Chapter 971 proceedings.

a defense to them. (R.173:33-36; App. 144-147). In fact, the State's motion indicated that it was not requesting a lift of the automatic stay at that time. (R.173:35-36; App. 146-147).

The circuit court granted the State's motion to toll because:

> [T]he whole point of commitment is to get proper treatment. If a defendant takes steps to ensure that he does not get the proper treatment—and by the way, it's unrefuted that the only treatment that could possibly bring him to competence would be medication. If that proper treatment is withheld based on ***legal machinations*** used to delay and use up the commitment period, it makes no sense for the time of commitment period to continue running. (R.173:41-42; App. 152-153). (Emphasis supplied).

The circuit court called Engen's appeal a "sham," "granted" the "automatic" stay and then immediately lifted it because the State's argument was "unrefuted and extremely, extremely strong." (R.173:42-44; App. 153-155).

The court also held that Engen would not suffer irreparable harm. "The worst that will happen is that he will not be haunted by these psychotic beliefs and terrors that he faces, clearly every moment." (R.173:44; App. 155-156). The court said that lifting the stay would harm no one else either. (R.173:45; 156). Accordingly, immediately after ordering the stay, the court lifted it. (R.158:1-2; App. 101-102). Engen filed an Amended Notice of Appeal to include

the order lifting the stay and granting the motion to toll. (R.159).

Engen also filed a Motion for Emergency Temporary Relief and Motion for Stay Pending Appeal with the court of appeals. The court of appeals temporarily stayed involuntary medication so the parties could file briefs on the matter. On March 2, 2020, it granted Engen's motion and reinstated the automatic stay pending Engen's appeal of the circuit court's involuntary medication order. (App. 106-111). Contrary to the circuit court, the court of appeals held that the State failed to show that it was likely to succeed on the first *Sell* factor or that Engen would not suffer irreparable harm without a stay. *(Id.)*.

ARGUMENT

I. The *Sell* factors.

Sell has been binding on Wisconsin courts since it was decided in 2003. However, §971.14(3)(dm) and (4)(b) do not comport with *Sell*. Thus, last term the Wisconsin Supreme Court declared these provisions unconstitutional to the extent that they allow circuit courts to order the involuntary administration of antipsychotic medication to restore a defendant's competency in violation of *Sell*. *Fitzgerald*, ¶2. The legislature has not repealed or amended §971.14. However, Wisconsin must still comply with *Sell*. *Fitzgerald,* ¶¶31-32.

Resolution of all four issues for review requires an understanding of what the State must show and

the circuit court must find under *Sell*. Thus, this brief begins with an exposition of *Sell*'s stringent test.

> This standard will permit involuntary administration of drugs for trial competence purposes in certain instances. ***But those instances may be rare***. That is because the standard fairly implies the following:
>
> First, a ***court must find that important interests are at stake.*** The Government's interest in bringing to trial an individual accused of a serious crime is important. That is so whether the offense is a serious crime against the person or a serious crime against property. In both instances the Government seeks to protect through application of the criminal law the basic human need for security. *See Riggins, supra,* at 135–136, 112 S.Ct. 1810 ("'[P]ower to bring an accused to trial is fundamental to a scheme of "ordered liberty" and prerequisite to social justice and peace' " (quoting *Illinois v. Allen,* 397 U.S. 337, 347, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) (Brennan, J., concurring)).
>
> ***Courts, however, must consider the facts of the individual case in evaluating the Government's interest in prosecution***. Special circumstances may lessen the importance of that interest. ***The defendant's failure to take drugs voluntarily, for example, may mean lengthy confinement in an institution for the mentally ill—and that would diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime***. We do not mean to suggest that civil commitment is a substitute for a criminal trial. The Government has a substantial interest in timely prosecution. And it

may be difficult or impossible to try a defendant who regains competence after years of commitment during which memories may fade and evidence may be lost. The potential for future confinement affects, but does not totally undermine, the strength of the need for prosecution. ***The same is true of the possibility that the defendant has already been confined for a significant amount of time (for which he would receive credit toward any sentence ultimately imposed***, *see* 18 U.S.C. § 3585(b)). Moreover, the Government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one.

Second, the court must conclude that involuntary medication will significantly further those concomitant state interests. It must find that administration of the drugs is ***substantially likely to render the defendant competent to stand trial***. At the same time, it must find that administration of the drugs is ***substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense***, thereby rendering the trial unfair. *See Riggins,* 504 U.S., at 142–145, 112 S.Ct. 1810 (Kennedy, J., concurring in judgment).

Third, the court must conclude that involuntary medication is necessary to further those interests. The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results. *Cf*. Brief for American Psychological Association as *Amicus Curiae* 10–14 (nondrug therapies may be effective in restoring psychotic defendants to competence);

> but cf. Brief for American Psychiatric Association et al. as *Amici Curiae* 13–22 (alternative treatments for psychosis commonly not as effective as medication). And ***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.
>
> Fourth, as we have said, ***the court 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. The specific kinds of drugs at issue may matter here as elsewhere. Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success***. *Sell*, 539 U.S. at 180-181 (quoting *Riggins v. Nevada*, 504 U.S. 127 (1992)).(Underlined emphasis in original; bolded emphasis supplied).

Fitzgerald is the only published Wisconsin case applying *Sell*. Because "the State conceded at oral argument that the circuit court did not consider the side effects of the proposed medication or whether those side effects would interfere significantly with Fitzgerald's ability to assist in his defense," the supreme court had no need to expound on the *Sell* factors. *Fitzgerald*, ¶33.

Other jurisdictions have substantial experience applying *Sell*. They require the State to submit an individualized treatment plan for the defendant so that the court can assess at a minimum, the second and fourth *Sell* factors. *See U.S. v. Chavez*, 734 F.3d 1247, 1250-1254 (10th Cir. 2013); *U.S. v. Rivera-Guerrero*, 426 F.3d 1130, 1139-1140, n.5 (9th Cir.

2005) (government can't just list possible drugs; it must specify course of treatment); *U.S. v. Evans*, 404 F.3d 227, 240 (4th Cir. 2005) (same); *U.S. v. Watson*, 793 F.3d 416, 424-425 (4th Cir. 2015)(same); *U.S. Hernandez-Vasquez*, 513 F.3d 908, 916-917 (9th Cir, 2008)(same); *Warren v. State,* 297 Ga. 810, 778 S.E.2d 749, 765 (2015)(same); *Cotner v. Liwski,* 243 Ariz. 188, 403 P.3d 600, 606-607 (Ct. App. 2017)(same). This is particularly important where the psychiatrist who evaluated the defendant for involuntary medication is not the one who will be treating him. *Chavez,* 734 F.3d at 1253.

The State's plan and the trial court's order must specify: (1) the medication or range of medications the treating physicians are permitted to use; (2) the maximum dosages that may be administered; and (3) the duration of time that involuntary treatment may continue before the treating physician must report back to court. *Id.*

A rigorous review of the State's proposed antipsychotic medications is necessary partly because of their potential side effects. There are two generations of antipsychotics drugs. The first generation includes Thorazine, Haldol, Mellaril, Serentil, and Prolixin. The second generation includes Risperdol, Geodon, Abilify, Olanzapine, Zyprexa and Seroquel. Both types of antipsychotics are sedatives and can have serious health effects like neuroleptic malignant brain syndrome (sudden muscular rigidity, cognitive impairment, high fever, coma), tardive (irreversible) psychosis; dystonias (shuffling legs and cogwheeling arms); tardive dyskinesia (permanent involuntary movements like

grimacing, tics, random movements of tongue, lips, fingers, toes or eyes); akathisia (inability to sit still); and parkinsonism. First-generation antipsychotics carry a greater risk of these side effects. Doctors try to minimize them by prescribing drugs that have their own side effects. Second-generation antipsychotics can cause or exacerbate diabetes and metabolic syndrome.[5]

After reviewing all of the evidence required by *Sell*, including the State's proposed medication, the court decides: "Has the Government, in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness of ***a particular course of antipsychotic treatment***, shown a need for that treatment sufficiently important to overcome the individual's protected interest in refusing it?" *Sell* at 183. (Emphasis supplied).

II. The circuit court erroneously denied defense counsel access to Engen's treatment records.

The State moved to compel production of Engen's health care records. It stated that Engen declined to sign a release and DHS and DOC refused to provide the records without a court order pursuant to HIPPA 45 C.F.R. §164.512(e)(1)(i) and (f)(l)(ii)(A). (R.143:3-4; App. 231-232). On November 4, 2019, the

[5] *See* D. L. Elm and D. Passon, "Forced Medication after *United States v. Sell*: Fighting a Client's War on Drugs," 32 *The Champion* 26 (2008). *See also State ex rel. Jones v. Gerhardstein*, 141 Wis. 2d 710, 727, 416 N.W.2d 710 (1987) (describing the same and other "substantial" side effects).

court signed an order that required the records to be produced to the court. (R.146; App. 105).

At the outset of the January 16, 2020 involuntary medication hearing, defense counsel objected to proceeding because he had not received Engen's records and could not effectively cross-examine Dr. Pankiewicz without them. The court replied that "you take your client as your client comes," and if he refuses to release his records then the defense is hamstrung. It held that it could not turn over Engen's records without violating HIPPA. (R.172:6-8; App. 164-166).

This issue requires the court of appeals to construe §51.30(4)(b)11 and HIPPA. An appellate court reviews the proper interpretation of a statute de novo. It begins with the plain language of the statute. If the meaning of the statute is plain, the court may end its inquiry. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

A. Defense counsel requires his client's treatment records in order to prepare for Chapter 971 proceedings.

Chapter 971 governs pre-trial competency and involuntary medication proceedings. When the court orders a competency examination §971.14(2)(e) provides that the examiner "shall have access to [the defendant's] past or present treatment records, as defined under s. 51.30(1)(b)." Examiners review, summarize and cite these treatment records in the reports they file with the court and serve on the

parties, as Dr. Elliott and Dr. Pankiewicz did in Engen's case.

If defense counsel does not receive the treatment records, he cannot effectively represent his client's position at the hearing. He cannot know, for example, whether the examiner's report failed to consider important parts of his client's medical or treatment history or perhaps described them inaccurately. Without seeing the evidence supporting the examiner's report, counsel cannot challenge its conclusion on the issue of competency. Nor can he tell whether it would be prudent to hire a defense expert.

Likewise, without his client's treatment records, defense counsel cannot cross-examine the examiner on the *Sell* factors—namely: (1) whether the State's proposed medication is substantially likely to render his client competent for trial and substantially likely to have side effects that will interfere with his ability to understand what's happening at trial and assist counsel; (2) whether antipsychotic medication is even necessary to restore the defendant's competency or whether less intrusive treatments or measures can accomplish the same result; and (3) whether the proposed drugs and dosages are medically appropriate for him given his medical condition.

The State cannot seriously dispute this point. It sought production of Engen's records because its own examiners needed them in order to offer an opinion on whether involuntary medication was warranted under *Sell*. The State specifically sought the records on behalf of "the parties." (R.143:1; App. 229).

B. The circuit court could have released Engen's treatment records to defense counsel pursuant to §51.30(4)(b)11 and HIPPA.

Section 51.30 governs access to records for persons who have been treated for mental illness, developmental disabilities, alcoholism, or drug dependence. It explicitly applies to persons committed under Chapter 971. *See* Wis. Stat. §51.30(7)("Except as otherwise specifically provided, this section applies to treatment records of persons who are committed under chs. 971 and 975.")

Section 51.30(4)(b) establishes that all "treatment records"[6] maintained by a "treatment facility"[7] shall be confidential unless an exception applies. One exception is for defense lawyers representing clients in Chapter 971 proceedings. In this situation, defense counsel need not obtain his client's informed consent. Section 51.30(4)(b)11 grants access to a person's registration and treatment records:

---

[6] The term "treatment records" is defined in §51.30(1)(b)). It includes all records created in the course of providing treatment to a person with mental illness that are maintained by DHS, counties, treatment facilities and mental health professionals not affiliated with a department or treatment facility.

[7] The term "treatment facility" is defined in §51.01(19) to include any public or private facility providing treatment for mental illness on either an inpatient or outpatient basis and thus would include the Wisconsin Resource Center and Winnebago.

> ***To the subject individual's counsel*** or guardian ad litem and the corporation counsel, without modification, ***at any time in order to prepare for involuntary commitment or recommitment proceedings***, reexaminations, appeals, or other actions relating to detention, admission, commitment, or patients' rights ***under*** this chapter or ***ch***. 48, ***971***, 975, 980. (Emphasis supplied).

Furthermore, HIPPA did not preclude the circuit court from releasing Engen's treatment records to defense counsel. On the contrary, it authorizes courts to order the disclosure of these records for judicial and administrative proceedings. Regulation 45 CFR §164.512(e)(l)(i) of HIPPA, provides:

> (e) Standard: Disclosure for judicial and administrative proceedings.
>
> (1) Permitted disclosures. A covered entity[8] may disclose protected health information in the course of any judicial or administrative proceeding:
>
> (i) ***In response to an order of a court*** or administrative tribunal provided that the covered entity discloses only the protected health information expressly authorized by such order; (Emphasis supplied).

The State's motion to compel cited the above provision (along with 45 C.F.R. §164.512(f)(l)(ii)(A) governing law enforcement access) to the circuit

[8] The State's motion to compel states that it consulted with General Counsel for DHS and DOC and they invoked HIPPA. (R.143:3; App. 231).

court. The circuit court either did not read the regulation or misinterpreted it.

Under the plain language of §51.30(4)(b)11, defense counsel was entitled to his client's treatment records without informed consent in order to prepare for Chapter 971 proceedings. HIPPA gave a court authority to order WRC (which is managed by both DOC and DHS)[9] to release protected health information. The circuit court erred in denying defense counsel access by refusing to release Engen's treatment records.

III. The circuit court erroneously held that there was sufficient evidence to order involuntary medication based on the four the *Sell* factors.

The circuit court ordered involuntary medication based on Paragraph No. 3B of the form order of commitment for involuntary treatment. That paragraph lists the four *Sell* factors. (R.153:1-2; R.172:36-37; App. 103-104; 194-195). The evidence required to support the order had to be clear and convincing. *See* Wis. Stat. §971.14(4)(b) and *U.S. v. Debendetto*, 757 F.3d 547, 552 (7th Cir. 2014). Whether proffered evidence satisfies a legal standard poses a question of law, which an appellate court decides de novo. *Langlade County v. D.J.W.*, 2020 WI 41, ¶47, __Wis. 2d__, __N.W.2d__.

[9] *See* https://www.dhs.wisconsin.gov/wrc/index.htm (last visited 5/17/20).

A. The State failed to prove the first *Sell* factor.

The first *Sell* factor required the circuit court to find that an important government interest was at stake in Engen's revocation proceeding. This is a two-step inquiry. The court must determine whether Engen's crime is sufficiently serious to establish an important government interest. If so, the court must consider whether special circumstances mitigate that interest. *Sell*, 539 U.S. at 180; *Fitzgerald*, ¶26; *U.S. v. Onuoha*, 820 F.3d 1049, 1054 (9th Cir. 2016).

Engen was convicted of 4 crimes in 2012. He has already served 2.5 years in prison and jail and 24 months on extended supervision in full compliance with his sentences for Counts 1, 3 and 4. He had completed 3.5 years of his 5-year term of probation on Count 2 when he was detained for an alleged probation violation. (R.172:25-26; App. 183-184).

The only "charge" the State arguably has an interest in prosecuting is Engen's alleged probation violation. For that charge the State assured the circuit court: "the potential, ***not that you would impose it***, but the potential sentence would be three and half years." (R.173:18; App. 129). (Emphasis supplied). The maximum term of initial confinement would be 18 months followed by two years of extended supervision. (R.173:18-19; App. 129-130).

The State failed to prove that it has an important interest in medicating Engen for revocation proceedings. First, the State did not offer any evidence whatsoever of Engen's alleged probation violation. Consider *U.S. v. Armstrong*, No. 12-CR-36,

2014 WL 1257020 (W.D. Ky. Mar. 25, 2014) (unpublished)(App. 233-234) where the defendant violated the terms of his supervised release by failing to properly notify his probation officer of his change of residence. In assessing the government's interest, the court focused on the alleged violation of supervised release. It held:

> [T]he Court concludes that the Grade C violation of which the defendant stands accused does not rise to the level which would justify the involuntary administration of medication over the defendant's strong objections . . . [T]he Court believes the heavy hand of government, which would be exemplified by the involuntary administration of medication at FMC Butler, is simply not authorized under Supreme Court precedent unless the mentally ill defendant faces serious criminal charges such that important government interests in resolving those charges must be recognized. Here, with an important but nonetheless low level and singular supervised release violation in issue, the Court finds that the involuntary administration of medication is inappropriate. *Id.* at *3. *See also U.S. v. Jones*, No. 15-CR-184, 2016 WL 3962776 (D. Conn. Jul. 21, 2016) (unpublished) (App. 236-239).

Did Engen allegedly violate the terms of his probation by drinking one beer or something more serious? The information is not in the record. Due to the State's failure of proof, the court of appeals cannot determine whether the State has an important government interest in pursuing revocation proceedings against Engen.

Second, even assuming that Engen's alleged violation qualified as a "serious" crime, the circuit

court still had to consider his individual circumstances, such as whether he had already been confined for a significant period of time and whether his refusal to take medication could result in a lengthy commitment. *Sell*, 539 U.S. at 180. The circuit court made no findings on these matters in Engen's case. (R.172:36; App. 194). When a trial court fails to analyze whether special circumstances lessen the government's interest in prosecuting a defendant, an appellate court will vacate the involuntary medication order—even if the defendant is charged with a brutal crime. *See Carter v. Superior Court*, 141 Cal.App.4th 992, 46 Cal.Rptr.3d 507, 513-514 (Ct. App. 2006)(defendant charged with rape, assault with a deadly weapon, false imprisonment); *see also Debendetto*, 757 F.3d at 549, 553 (defendant charged with 5 counts of threats to injure).

Third, the State's interest in prosecuting Engen has largely been achieved. He successfully completed 3.5 years of his 5-year probation period. If he were revoked, his maximum initial confinement would be 1.5 years. He has been in custody since February 21, 2019—over one year—and he is entitled to sentence credit for that time under §971.14(5)(a)3. (R.173:20; App. 131). By the time this appeal is resolved, and he is restored to competence (assuming that is possible), he could only serve part of his extended supervision. *Sell*, 539 U.S. at 180 (a lengthy pre-trial confinement for which the defendant receives sentence credit may lessen the State's interest in prosecution).

Fourth, Engen's refusal to take medication could subject him to a lengthy stay in a mental hospital. If he is not restored to competence within

the statutorily prescribed, 12-month period the State may petition for a civil commitment under §971.14(6)(c) and Chapter 51. (R.173:13; App. 124). *See Sell*, 539 U.S. at 180 (a mental commitment diminishes the risks associated with freeing someone who has committed a serious crime).

The State failed to carry its burden of proving that it has an important interest in pursuing revocation proceedings against Engen. The court of appeals could vacate the circuit court's involuntary medication order for this reason alone.

B. The State failed to submit a treatment plan.

When conducting *Sell* hearings federal courts require the government to submit an individualized treatment plan for the defendant's competency restoration. While they do not "micromanage" the decisions of medical professionals, they also do not give them unfettered discretion to experiment on the defendant. *Hernandez-Vasquez*, 513 F.3d at 916. *See* Argument I above (incorporated here by reference).

"[A] high level of detail is plainly contemplated by the comprehensive findings *Sell* requires." *Chavez*, 734 F.3d at 1252. Testimony about "typical" treatments, success rates, and side effects is not enough. Specificity is essential for a proper analysis of the second and fourth *Sell* factors—*i.e.* whether a proposed drug will restore the defendant's competence without side effects that will interfere with his ability to understand and assist his lawyer, whether less intrusive alternative could achieve the same result, and whether the proposed drug is

medically appropriate in light of the defendant's medical condition. *Id.* at 1253.

Again, the State must propose (1) the range of medications that treating physicians are permitted to use, (2) the maximum dose that may be administered, and (3) the duration of treatment. *Hernandez-Vasquez*, 513 F.3d at 916-917. Without this information a court cannot answer 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 treatment***, shown a need for that treatment sufficiently important to overcome the individual's protected interest in refusing it?" *Sell* at 183. (Emphasis supplied).

In Engen's case, the State's evidence fell far short of these requirements. Dr. Pankiewicz:

- Did not submit a diagnosis and treatment plan for the court's consideration. (R.172:10-17; App. 168-175).

- Did not specify a medication or medications, their efficacy rates for Engen's illness, their effects on Engen's ability to understand court proceedings and assist his lawyer, or their effects on Engen's health. (*Id.*)

- Did not know Engen's past diagnosis or what medications might have been tried. He assumed they were antipsychotic medications, but did not know what reactions Engen may have had to them. (R.172:12; App. 170).

- Did not address Engen's personal health or whether he had medical conditions like diabetes that certain medications might make worse. (R.172:10-17; App. 168-175).

When the State fails to provide an individualized treatment plan for restoring a defendant's competence, or the trial court fails to specify the allowable medication, dosages and duration of treatments, an appellate court must vacate the involuntary medication order. *See e.g. Chavez*, 734 F.3d at 1254 (vacating an involuntary medication order for lack of an individualized treatment plan); *Watson*, 793 F.3d at 424-425 (same); *Hernandez-Vasquez*, 513 F.3d at 916-917 (same); *Warren*, 297 Ga. at 828 (same); *Cotner*, 403 P.3d at 606 (same).

Under the authorities above, the court of appeals should vacate the circuit court's order for involuntary medication because the State never submitted an individualized treatment plan for Engen, and the circuit court made no findings about which drugs the State could administer in which dosages and for what length of time. *See Warren*, 297 Ga. at 828 (vacating an involuntary medication order which simply recited that the *Sell* standard had been met).

C. The State failed to offer sufficient evidence of the second, third and fourth *Sell* factors.

Dr. Elliott diagnosed Engen with fixed delusional beliefs. (R.140:1). She testified that they are not always treatable with psychiatric

medications. (R.171:15; App. 211). Dr. Pankiewicz diagnosed Engen with a psychotic disorder, most likely delusional disorder. (R.172:13; App. 171). He did not recommend any specific medication to treat it. Furthermore, the State offered no studies or scientific evidence that any antipsychotic medication is effective in restoring any person with delusional disorder to competence.

Federal appellate courts have vacated *Sell* orders for defendants diagnosed with delusional disorder where the government failed to offer scientific studies showing that antipsychotic medications effectively treat this type of mental illness. *See U.S. v. Ruiz-Gaxiola*, 623 F.3d 684 (19th Cir. 2010); *U.S. v. Watson*, 793 F.3d at 428; *U.S. v. Ghane*, 392 F.3d 317, 319 (8th Cir. 2004).

In *Ruiz-Gaxiola*, the government sought to treat a defendant suffering from delusional disorder with Haldol Decanoate. The government's two examiners testified that Haldol was substantially likely to restore the defendant to competence without intolerable side effects and that it was in his best medical interest. A defense expert testified that involuntarily medicating the defendant would exacerbate his delusional thinking and that there is no consensus on how to treat delusional disorder and particularly as regards to medication. *Ruiz-Gaxiola,* 623 F.3d at 690-697.

The court took the government to task for the lack of scientific studies or medical evidence to support its recommendation. *Id.* at 700. The government experts simply relied on the syllogism

that: (1) antipsychotic medications generally reduce a mentally ill person's delusional thought processes; (2) the government will administer an antipsychotic medication; (3) therefore the medication will be effective. *Id.* The court held that generalized statements are insufficient under *Sell*. *Id*. at 701-702. The government has to show that antipsychotic medications would restore a defendant with delusional disorder to competence. Because the government failed to prove the second *Sell* factor, it also could not prove the third or fourth factors. *Id.* at 701, 705.

Watson also vacated a *Sell* order because the government failed to show that antipsychotic medications treat delusional disorder. In fact, one study cited by the government's expert showed a less than 15% positive response to medication. Another showed a "poor" 50% improvement rate with no reported complete recovery. Furthermore, the government made no attempt to apply these any scientific findings to the defendant's individual situation. *Watson*, 793 F.3d at 425-426. *See also Ghane*, 392 F.3d at 320 (a 5-10% chance that medication will restore the competence of a defendant having delusional disorder does not satisfy *Sell*).

Here, the State offered no studies or other scientific evidence to show that antipsychotic medications can successfully treat delusional disorder, let alone the type that Engen's has. On the State's direct examination, Dr. Elliott freely acknowledged that these drugs might not work on Engen. Dr. Pankiewicz offered only the general syllogism rejected by *Ruiz-Gaxiola* and *Watson*.

Because the State failed to prove that ***any*** antipsychotic medications are substantially likely to render Engen competent without intolerable side effects (the second *Sell* factor), it also failed to prove the third and fourth *Sell* factors.

Considering the State's failure to (1) articulate an important government interest, (2) present a treatment plan that was even remotely specific or individualized, and (3) prove that antipsychotic medications are at all likely to render Engen competent; the circuit court's error could not be more evident. The court of appeals should therefore vacate the involuntary medication order.

IV. The circuit court misapplied *Scott* and the rules of appellate procedure and denied Engen's right to due process.

The correct interpretation of a supreme court rule poses a question of law that an appellate court determines independently while benefiting from the circuit court's analysis. *Foley-Ciccantelli v. Bishop Grove Condominium Ass'n, Inc.*, 2011 WI 36, ¶83, 333 Wis. 2d 402, 797 N.W.2d 789.

A. The general procedure for motions for stay pending appeal.

In general, the party who loses in the circuit court may file a motion for stay of the order pursuant to §808.07, which provides:

> During the pendency of an appeal, a trial court or an appellate court may: (1) Stay execution or enforcement of a judgment or order; (2) Suspend, modify, restore or grant an injunction; or (3)

> Make any order appropriate to preserve the existing state of affairs or the effectiveness of the judgment subsequently to be entered. Wis. Stat. §808.07(2)(a).

Rule 809.12 prescribes the procedure for requesting the stay. The moving party must first "file a motion" in the circuit court unless that is impractical. If it loses, it may "file a motion" for stay in the court of appeals.

> 809.12 Rule (Motion for relief pending appeal). A person seeking relief under s. 808.07 shall file a motion in the trial court unless it is impractical to seek relief in the trial court. A motion in the court must show why it was impractical to seek relief in the trial court or, if a motion had been trial in the trial court, the reasons given by the trial court for its action. **A *person aggrieved by an order of the trial court granting the relief requested may file a motion for relief from the order with the court.*** A judge of the court may issue an ex parte order granting temporary relief pending a ruling by the court on a motion filed pursuant to this rule. A motion filed in the court under this section must be filed in accordance with s. 809.14. (Emphasis supplied).

To obtain a stay in either the circuit court or the court of appeals, the movant must satisfy *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995), which holds:

> A stay pending appeal is appropriate where the moving party:
>
> (1) Makes a strong showing that it is likely to succeed on the merits of the appeal;

> (2) Shows that, unless a stay is granted, it will suffer irreparable injury;
>
> (3) Shows that no substantial harm will come to other interested parties; and
>
> (4) Shows that a stay will do no harm to the public interest.

Gudenschwager explains that a circuit court's decision to grant a stay is an exercise of discretion. Therefore, when the motion for stay is filed in the court of appeals, the appellate court reviews the circuit court decision for an erroneous exercise of discretion. *Gudenschwager*, 191 Wis. 2d at 440.

B. *Scott*'s procedure for motions for stay pending appeal of an involuntary medication order.

Scott held that a competency proceeding is not part of the defendant's underlying criminal case. *Scott*, ¶33. While the two proceedings are "connected" or "related," the competency proceeding is "treated as being commenced independently of any other action or proceeding." *Id*. (citation omitted). *Scott* thus concluded that an order determining incompetency and mandating involuntary medication or treatment to restore competency "is a final order issued in a special proceeding and is appealable as a matter of right pursuant to Wis. Stat. §808.03(1)." *Id*., ¶34.

Recognizing that a defendant has a significant, constitutionally-protected liberty interest in avoiding the unwanted administration of anti-psychotic medication and that an appeal from an order for

involuntary medication would be rendered a nullity if not stayed, the Court designed a special rule for this situation. Under *Scott,* the circuit court no longer has the discretion to grant or deny a stay under §808.07. The circuit court stay is "***automatic***" pending appeal. *Scott*, ¶44. (Emphasis supplied).

Like the party opposing a circuit court motion for a stay in the ordinary case, the State has the option of seeking relief in the court of appeals under Rule 809.12. According to *Scott*, the State may move to lift the automatic stay, but its motion must:

> (1) Make a strong showing that it is likely to succeed on the merits of the appeal;
>
> (2) Show that the defendant will not suffer irreparable harm if the stay is lifted;
>
> (3) Show that no substantial harm will come to other interested parties if the stay is lifted; and
>
> (4) Show that lifting the stay will do no harm to the public interest. *Scott*, ¶47.

Scott made clear that the court of appeals (not the circuit court) decides the State's motion to lift the automatic stay:

> Whether to grant ***the State's motion*** is a discretionary decision, and as we explained above, ***the court of appeals must explain its discretionary decision to grant or deny the State's motion.*** *Id.,* ¶48. (Emphasis supplied).

Scott changed the stay procedure for appeals from orders determining incompetency and

mandating involuntary medication in three respects. First, it removed the circuit court's discretion to grant or deny a stay pending appeal. It made that stay "automatic." Like any other party aggrieved by a circuit court stay motion, the State may seek relief pending appeal in the court of appeals by a motion. The motion is called a "motion to lift the stay." *Scott*, ¶45.

Second, *Scott* required the court of appeals to decide the State's motion to lift the stay. *Scott*, ¶48.

Third, *Scott* altered the second *Gudenschwager* factor. Normally the party moving for relief in the court of appeals is required to prove that "unless the stay is granted, it will suffer irreparable injury." *Gudenschwager*, 191 Wis. 2d at 440. Because *Scott* presumes that an erroneous involuntary medication order will cause a defendant irreparable harm, it required the State's motion to lift to show that "the defendant will not suffer irreparable harm if the stay is lifted." *Scott*, ¶47.

Scott did not change the requirement that motions for relief pending appeal be in writing. The plain language of Rule 809.12 mandates that the moving party "shall file a motion in the trial court," and "may file a motion for relief" in the court of appeals. Obviously, it is not possible to "file" an oral motion for relief pending appeal.

C. The circuit court violated *Scott*'s automatic stay/lift procedure.

The circuit court ordered involuntary medication on Thursday, January 16, 2020. That

same day, Engen filed an Emergency Motion for Automatic Stay Involuntary Medication, which noted that he was not conceding that he was required to file such a motion. (R.154).

On Friday, January 17, 2020, the State filed a Motion to Toll the Statutory Time to Bring the Defendant to Competence. (R.156; App. 222-228).

On January 21, 2020, the circuit court held a hearing on these motions. The State twice told the court that Paragraph 48 of *Scott* indicated that the court of appeals was to decide a motion to lift the stay. (R.173:9, 21; App. 120, 132).

The State reads Paragraph 48 correctly. Under *Scott* a circuit court has no discretion to grant or deny a stay of the involuntary medication order. The stay is "automatic." To obtain relief from the automatic stay, the State must file a motion in the court of appeals. As *Scott* holds: "***the court of appeals*** must explain its discretionary decision to grant or deny the State's motion." *Scott*, ¶48. (Emphasis supplied). Not one sentence of *Scott* authorizes a circuit court to decide a motion to lift the automatic stay.

Furthermore, *Scott* does not relieve the State of its obligations under Rules 809.12 and 809.14. If the State seeks relief pending appeal or relief from a circuit court stay order, it "shall ***file*** a motion." The State did not file a motion. It made the motion orally at the circuit court's invitation.

In the context of an appeal from an involuntary medication order, the written motion requirement is not a trivial matter. In this case and in *Fitzgerald* the

circuit courts entered automatic stays, invited the State to move to lift the stay, and lifted the stay all within minutes of each other. *Fitzgerald*, ¶9.[10] That procedure defeats *Scott*'s whole purpose. The supreme court imposed an automatic stay because without it "the defendant's 'significant' constitutionally protected 'liberty interest' in 'avoiding the unwanted administration of antipsychotic drugs' is rendered a nullity." *Scott*, ¶44.

D. The circuit court violated Engen's 14th Amendment right to due process.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)(quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews* at 334. To determine what due process requires, a court must consider three distinct factors:

> First, the private interest that will be affected by the official action; second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

[10] *State ex rel. Fitzgerald v. Circuit Court for Milwaukee County*, Appeal No. 2018AP1214-W challenged the appropriateness of this procedure. The supreme court split 3-3 on the matter.

> *Id*. at 335 (citing *Goldberg v. Kelly*, 397 U.S. 254, 263-271 (1974).

Under *Matthews*, the procedure the circuit court used to decide the State's motion to lift violated due process. First, the private interest at stake was Engen's liberty interest in avoiding the unwanted administration of antipsychotic medication. *Scott*, ¶44.

Second, when defense counsel has no notice of the State's motion and no opportunity to do research, consult pleadings, review a transcript or prepare a thoughtful response, the risk of an erroneous deprivation of the defendant's liberty interest in avoiding antipsychotic medication is high. That is especially true now because this is a developing area of law in Wisconsin. The proof is in Engen's own Supplemental Motion for Stay Pending Appeal. The court of appeals granted it, reversed the lift, and re-imposed the automatic stay, thereby proving that giving the defense notice and time to research, review a transcript and prepare a written response makes a difference.

Third, the State has two interests at stake in a lift proceeding. One is to ensure that it is not violating a defendant's substantial liberty interest in avoiding antipsychotic medication. In cases where it can satisfy the first *Sell* factor (which it failed here) it also has an interest in ensuring that the defendant is competent for court proceedings. Requiring the State to file a written motion for stay supported by legal research and record cites is not unduly burdensome. The supreme court already made that calculation and imposed that burden on any party that moves for

relief pending appeal when it adopted Rules 809.12 and 809.14.

In summary, the circuit court erred in deciding the State's motion to lift because *Scott* and the rules of appellate procedure require the motion to be filed in the court of appeals. Alternatively, if the court of appeals holds that a circuit court may decide a motion to lift, then the procedure used in this case violated 14th Amendment due process. Either way, the court of appeals should reverse the circuit court's decision on this point.

V. The circuit court erroneously granted the State's motion to toll.

The State moved to toll the 12-month period for competency restoration arguing that a defendant is not required to appeal. He could choose to take medication and become competent instead. If he chooses to refuse medication, the 12-month period should be tolled. The circuit court agreed. It called the appeal a "sham" (R.173:44; App. 155). "If proper treatment is withheld based on legal machinations used to delay and use up the commitment period, it makes no sense for the time of commitment period to continue running." (R.273:42; App. 153).

A. The applicable portions of § 971.14(5).

Section 971.14(5) governs the period of commitment for competency restoration. Again, the interpretation of a statute poses a question of law, which an appellate court decides de novo. *Kalal*, ¶45.

The subsections relevant to the State's motion to toll the competency periods are sections 971.14(5)(a)1, 3, and (6)(a). The relevant parts of those statutes are:

> If the court determines that the defendant is not competent but is 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 serious offense with which the defendant is charged, whichever is less*** . . . Wis. Stats. §971.14(5)(a)1. (Emphasis supplied).
>
> Days spent in custody under this paragraph are considered days spent in custody under s. 973.155. Wis. Stats. §971.14(5)(a)3.
>
> If the court determines that it is unlikely that the defendant will become competent within the remaining commitment period, ***it shall discharge the defendant from commitment and release him*** or her, except as provided in par. (b) The court may order the defendant to appear in court at specified intervals for redetermination of his or her competency to proceed. Wis. Stats. §971.14(6)(a). (Emphasis supplied).

Thus, under the statutes above, once the circuit court determined Engen to be incompetent for revocation proceedings and likely to become competent with appropriate treatment, it was required to suspend proceedings and commit him to DHS "for treatment" for a period "not to exceed 12

months." (Engen's maximum potential sentence is greater than 12 months).

B. The circuit court's errors.

There are five reasons why the circuit court erred in adopting the State's new-fangled tolling mechanism.

First, Engen's appeal is not a sham. As the preceding arguments sections show, the circuit court did not follow *Sell*, *Fitzgerald* or *Scott*. The court of appeals' March 2nd order reversed the circuit court's lift and reimposed the stay partly because the State failed to show that is was substantially likely to succeed in proving the first *Sell* factor—that it had an important governmental interest in pursuing revocation proceedings against Engen. (App. 110). Contrary to the circuit court's opinion, Engen has a strong appeal.

Second, despite *Sell* and *Fitzgerald*, the circuit court and the State are operating on the assumption that when a defendant is declared incompetent, the default is to forcibly administer antipsychotic medication to restore his competence for court proceedings as quickly as possible. *Sell* reversed the presumption. The default is that the defendant's liberty interest in avoiding unwanted antipsychotic medication must be protected and the instances where the State can override this interest will be "rare" because the *Sell* factors are rigorous. *Sell*, 539 U.S. at 180. *See also Fitzgerald*, ¶2 (the State may involuntarily medicate a defendant to restore competency for trial in "limited circumstances.") If circuit courts apply *Sell* correctly, there will be very

few involuntary medication orders based on *Sell*, very few appeals, and very few instances where the 12-month competency restoration period is an issue.

Third, in addition to exercising the right to appeal under *Scott,* there are many reasons that a defendant may not become competent within 12 months. For example, following *Sell* DHS might begin with less intrusive treatments, like cognitive behavioral therapy, that consume the bulk of the 12-month competency period. The defendant could fall sick, requiring medication to cease for several months until he recovered. Administered medications might simply fail to work.

Section 971.14(5) contains no tolling mechanism for any of these circumstances. The State cannot invent, and a court cannot add a tolling mechanism to achieve its desired result. As *Fitzgerald* itself held:

> We do not read words into a statute regardless of how persuasive the source may be; rather we interpret the words the legislature actually enacted into law. "Under the omitted-case canon of statutory interpretation, '[n]othing is to be added to what the text states or reasonably implies (casus omissus pro omisso habendus est). That is, a matter not covered is to be treated as not covered.'" *Lopez-Quintero v. Dittman*, 2019 WI 58, ¶18, 387 Wis. 2d 50, 928 N.W.2d 480 (quoting Anotnin Scalia & Bryan A. Garner, *Reading the Law: The Interpretation of Legal Texts* 93 (2012)). "One of the maxims of statutory construction is that courts should not add words to a statute to give it a certain meaning." *Fond Du Lac Cty v. Town of*

> *Rosendale*, 149 Wis. 2d 326, 334, 440 N.W.2d 818 (Ct. App. 1989). *Fitzgerald*, ¶30.

If the circuit court and the State do not like how §971.14(5) interacts with *Sell*, *Fitzgerald* and *Scott*, they cannot rewrite the statute. Their recourse is with the legislature.

Fourth, a court must read a statute reasonably to "avoid absurd or unreasonable results." *Kalal,* ¶46. Under the State's proposed tolling mechanism if the defendant exercised his right to appeal, the State could keep him confined at a state psychiatric hospital for longer than 12 months (and possibly longer than his maximum sentence) in order to render him competent. That would violate his right to due process by allowing the State to achieve an indefinite civil commitment of a person "without the procedural safeguards or a jury trial and a finding of dangerousness" as required by Chapter 51, contrary to *State ex rel. Deisinger v. Treffert*, 85 Wis. 2d 257, 268-269, 270 N.W.2d 402 (1978)(applying an earlier version of §971.14(5)).

Section 971.14(6)(a) provides the mechanism for avoiding this absurd result. If the State cannot restore a defendant's competence within the prescribed commitment period the court must "discharge and release" the defendant, unless the State initiates a Chapter 51 proceeding. *See Deisinger*, 81 Wis. 2d at 268-270 (approving this procedure).

Fifth, a defendant in Engen's situation cannot voluntarily accept antipsychotic medication. A committed person has the right to exercise informed

consent regarding treatment and medication decisions. *See State ex rel. Jones v. Gerhardstein*, 141 Wis. 2d 710, 735, 416 N.W.2d 710 (1987). Defendants who are incompetent to proceed in court have the same right. *See* Wis. Stat. §971.14(3)(dm).

The State's own examiners—Dr. Elliott and Dr. Pankiewicz—opined that Engen was incompetent to make medication or treatment decision. (R.140:2; R. 147:3). That means he is incompetent to refuse medication and treatment, but he is also incompetent to make an informed choice to accept them. *See e.g. Zinermon v. Burch*, 494 U.S. 113, 134 (1990)(person incapable of giving informed consent cannot agree to voluntary commitment for treatment).

Any result where the State is permitted to punish a person whom it has deemed incompetent to make medication and treatment decisions with a commitment to a mental hospital in excess of the statutory maximum for refusing to make the State's preferred medication decision is absurd. *Kalal*, ¶46 (courts construe statutes to avoid absurd or unreasonable results).

Section 971.14(5) does not include a tolling mechanism for any delay in competency restoration. A court cannot amend the statute to add one. Doing so would lead to absurd results. The circuit court erred in granting the State's motion to toll.

CONCLUSION

For the reasons stated above, Defendant Eric P. Engen respectfully requests that the court of appeals vacate the circuit court's January 16, 2020 Amended Order of Commitment for Treatment (Incompetency) and the portions of the January 21, 2020 order that lifted the automatic stay granted the State's motion to toll.

Dated this 22nd day of May, 2020.

Respectfully submitted,

COLLEEN D. BALL
Assistant State Public Defender
State Bar No. 1000719

DAVID J. SUSENS
Assistant State Public Defender
State Bar No. 1099463

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

Attorneys 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 10, 015 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 May, 2020.

Signed:

COLLEN 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 May, 2020.

Signed:

COLLEEN D. BALL
Assistant State Public Defender

APPENDIX

INDEX TO APPENDIX