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STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT IV

Case No. 2020AP000298-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH G. GREEN,

Defendant-Appellant.

Appeal from Final Orders Regarding a Commitment
for Treatment (Incompetency) Entered in the
Dane County Circuit Court,
the Honorable Valerie Bailey-Rihn, Presiding

BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Was there sufficient evidence to support the circuit court's entry of an order for involuntary medication under *Sell v. U.S.*, 539 U.S. 166 (2003)?

   Circuit court answered: Yes.

2. Was the circuit court the proper venue for a motion to lift the automatic stay of the involuntary medication order?

   Circuit court answered: Yes.

3. Does a circuit court have authority to toll the time period for the commitment to restore a defendant to competency when an automatic stay of an involuntary medication order is entered?

   Circuit court answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication may be warranted under Wis. Stat. § 809.23(1)(a) as this case presents issues of first impression. Mr. Green does not request oral argument, though he would welcome it if the court were to deem it helpful.

STATEMENT OF THE CASE AND FACTS

On December 27, 2019, the state filed a criminal complaint charging Joseph G. Green with first-degree intentional homicide, use of a dangerous weapon. (2:1).

An initial appearance was held the same day. (38). At that time, cash bail was set and the matter was set over for a preliminary hearing. (38:5-6).

On the date of the preliminary hearing, however, defense counsel requested that the court order a competency evaluation. (39:2). An order for competency examination was entered and, pursuant to that order, a competency report was subsequently filed by Dr. Craig Schoenecker. (9; 12).

In his report, Dr. Schoenecker indicated that, in addition to his examination of Mr. Green, he reviewed the criminal complaint and records from the Wisconsin Circuit Court Access Program. (12:1). He concluded that Mr. Green met the criteria for "Other Specified Schizophrenia and other Psychotic Disorder." (12:2). He also concluded that Mr. Green was incompetent, but would regain competency "if treated at one of the state mental health institutes." (12:3). Further, Dr. Schoenecker indicated that it was his belief that medications would be required to restore Mr. Green's competency. (12:3).

Dr. Schoenecker's report was admitted into evidence at the competency hearing held on February 10, 2020. (40:9; App. 115). During his

testimony at that hearing, Dr. Schoenecker explained that his examination of Mr. Green lasted approximately one hour. (40:5; App. 111). He confirmed that, based upon that examination, it was his opinion that Mr. Green was not competent but could be restored to competency within the statutory timeframe if treated at a state mental health institute. (40:5-6; App. 111-112). Dr. Schoenecker further explained that in his opinion, the primary treatment for Mr. Green should consist of "[a]nti-psychotic-type medication." (40:7; App. 113). Finally, Dr. Schoenecker testified that antipsychotic-type medication would be substantially likely to render Mr. Green competent to proceed in the criminal case, would be substantially unlikely to have side effects that undermine the fairness of the trial, and would be medically appropriate. (40:7-8; App. 113-114).

On cross-examination, Dr. Schoenecker admitted that he had not obtained any information about Mr. Green's prior treatment, other than what Mr. Green reported, and that he did not verify whether Mr. Green had ever been treated with medications or had adverse reactions to them. (40:11; App. 117). The doctor also admitted that there are approximately 13 different antipsychotic-type medications and that they have different potential side effects, some of which may interfere with a person's ability to proceed in a criminal case. (40:12; App. 118).

Following the doctor's testimony, and over defense counsel's objection, the circuit court found Mr. Green incompetent and entered an order for the involuntary administration of medication. (40:18-22; App. 124-128). Specifically, the court stated:

> I will order involuntary medication. Why? One, it is necessary to further the important government interests, which is allowing Mr. Green to be treated to competency so he is able to assist in his defense for the trial. The State has no interest in trying people that are incompetent and that are unable to assist with their own defense. This is not that type of country. So I think there is a very important reason to have medication in that it will allow that to occur prior to having a trial in this matter.
>
> I think it is likely to render him competent to be able to stand trial. And I think it is -- the testimony was it's substantially unlikely to have side effects that would undermine the fairness of the trial. Obviously, in three months, if there is concerns about the effect of the medication the defense can raise that with this Court in the next review hearing.
>
> It is necessary because I don't believe there is any alternative, less intrusive treatments that have been -- that can be done. Otherwise, we will be back here in three months with the same results. I do believe it is medically appropriate…

(40:21-22; App. 127-128).

An order of commitment for treatment (incompetency) was entered. (13; App. 101-102). Thereafter, defense counsel filed a notice of appeal and an emergency motion for automatic stay of involuntary medication order. (15; 16). The circuit court set the matter for a hearing.

At the hearing, the state agreed that Mr. Green was entitled to the automatic stay of the involuntary medication order. (41:2; App. 132). It also alerted the circuit court to the fact that it intended to file a motion to lift the automatic stay and wanted an evidentiary hearing to address the issue of irreparable harm. (41:3; App. 133). There was some debate about the proper venue for the motion, but ultimately, the circuit court granted the automatic stay and decided that it would hear the motion to lift that stay. (41:3-5; App. 133-136). An amended order of commitment for treatment, which noted, "[t]he administration of involuntary medication is stayed until further order of the Court," was then filed. (18; App. 103-04).

The state subsequently filed a motion to lift the automatic stay. (19). In it, the state argued that there was a strong likelihood it would succeed on appeal, as the *Sell*[1] factors were met by the court's initial order, and that it wanted to take testimony to establish that Mr. Green would not suffer irreparable harm if the stay was lifted. (19:4-8). The state also filed a motion

[1] *Sell v. U.S.*, 539 U.S. 166 (2003).

to toll statutory time to bring defendant to competence. (26).

Defense counsel filed briefs in opposition to the state's motions, as well as procedural objections. (20; 28; 29). A two-day hearing was held on May 6 and May 19, 2020. (42; 43; App. 144-249).

Despite the state's position that the *Sell* factors had been met at the competency hearing, it attempted to supplement the record with additional evidence on those factors at the motion hearing. (19:4-7). Specifically, the state indicated that it was planning to have the witness address the issues raised in defense counsel's brief opposing the motion to lift the stay – in particular, he intended to have the doctor testify about a specific treatment plan. (42:11-14, 20-25; App. 154-157, 162-168). The circuit court overruled defense counsel's objection to this evidence, finding that it should "make as full of a record as [it could] on this issue of whether the stay should be lifted." (42:14-16; App. 157-159). Ultimately, however, the matter was set over in order to address the state's motion to lift the stay, motion to "order involuntary medications based on additional factors," and motion to toll statutory time limits to bring the defendant to competence. (42:25-28; App. 169-171).

Prior to the next hearing, the state filed a notice of treatment plan which contained the specific medication and dosage that the state was requesting the court to order in Mr. Green's case. (27). The state

did not file any written motion requesting to reopen evidence or supplement the record.

When the hearing resumed on May 19, 2020, the circuit court found that it had the authority to decide the state's motion to lift the stay. (43:3-6; App. 182-185). Further, the circuit court found that, as the state had the burden of proof on the motion to lift the stay, it had the "right to supplement on this motion as to whether or not the factors have been met or not." (43:7; App. 186). Defense counsel then made a record of her continuing objection to the state presenting additional evidence in support of the *Sell* factors. (43:8-9; App. 187-188). In response, the court noted that this was an issue that the court of appeals will have to decide but that the state was "entitled to put on evidence." (43:14; App. 193).

The state's supplemental evidence consisted of one witness, Dr. Schoenecker. Dr. Schoenecker testified about Haldol, a first-generation antipsychotic medication. Specifically, he testified about its potential side effects, as well as ways to try to mitigate those side effects. (43:16-20; App. 195-199). He also testified that, "on paper Haldol would be an appropriate treatment," for Mr. Green, but he was hesitant to say that it would be substantially likely to render him competent to stand trial as "individuals' responses to particular medications can vary." (43:20; App. 199). The doctor also declined to say whether or not Haldol would be unlikely to interfere with Mr. Green's ability to assist counsel at trial. (43:21-22; App. 200-201). Finally, the state

elicited Dr. Schoenecker's testimony about permanent side effects that could be caused by Haldol. (43:30-35; App. 209-215).

Importantly, on cross-examination, Dr. Schoenecker acknowledged that no medications had been prescribed for Mr. Green, that his evaluations of Mr. Green were not for the purpose of prescribing him medications, and that he had not reviewed Mr. Green's treatment records. (43:38-39, 41; App. 217-218, 220). He testified that before a medication, such as Haldol, would be prescribed for Mr. Green, Mr. Green would have a face-to-face evaluation with a psychiatrist and an internist, who would acquire medical history and identify any potential comorbid medical conditions he may have; after that meeting, a treatment plan would be prepared. (43:37-38, 46; App. 216-217, 225). Dr. Schoenecker also stated that it would be outside of professional guidelines for a medical professional to prescribe medications to someone without having done an assessment or having a treatment relationship. (43:38; App. 217).

After arguments, the circuit court admitted that it has struggled with this area of law and went on to make new findings on the *Sell* factors. (43:56; App. 235). Specifically, with respect to the first *Sell* factor, the court found that it was undisputed that the state has shown an important governmental interest. (43:57; App. 236). Turning to the second factor, it noted:

> In this case, it's undisputed, based on the doctor's testimony and expertise, that the administration of drugs would be substantially likely to render the defendant competent to stand trial. It doesn't say automatically 100 percent guaranteed. It says substantially likely, which is what he testified. And then, also, the other second prong in that second factor is unlikely to have side effects that will interfere significantly with defendant's ability to conduct a trial defense thereby rendering the trial unfair. Under ***Sell*** and as ***Fitzgerald*** says, I have to consider would the drug have side effects that would interfere significantly with the ability to assist counsel in conducting a trial making the trial unfair.
>
> I haven't heard any testimony that that would occur. There is [sic] some potential side effects of this drug. But most of those are from long-term use or from -- that can go away if they show up. And so the issue of whether or not this would affect Mr. Green's ability to think, well, it's going to impact it as into him being able to assist the defense, not to the extent of making it unable to assist in his defense.

(43:58-59; App. 237-238). With regard to the third *Sell* factor – less intrusive alternatives – the circuit court stated:

> I would find that before this Court would order involuntary medication, that part of any order requiring involuntary medication would be that the Court would direct in that order that Mr. Green accept the medication first or be found in contempt. And if he does refuse the medication, then he would be entitled then -- or

> Mendota would be entitled to forcibly administer the medication.
>
> I think the testimony here that has been undisputed is that he does not believe he needs medications. And the testimony by the doctor was there is no less intrusive method to help somebody with psychotics [sic], unless they accept medication. So either he's going to have to voluntarily accept the medication, or I would find that the Court would allow involuntary medication.

(43:60; App. 239). Finally, moving to the fourth factor, the court held:

> The fourth factor is that the drug is medically appropriate. It's in the patient's best medical interests in light of the medical condition. I think that has been satisfied here as well because this is a situation where if left untreated, the situation gets worse. I believe that the drug has been adequately explained, that it has minimal side effects on this level of dosage for this limited time frame.

(43:60-61; App. 239-240).

The court then granted the state's motion to lift the stay, discussing the factors set forth in *Scott*[2]. (43:61-62; App. 240-241). Finally, the circuit court granted the state's motion to toll the statutory time limits. It held that if the court of appeals stayed the

[2] *State v. Scott*, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141.

administration of medication, the time limits should be tolled and Mr. Green could appeal so the court of appeals could give "guidance on that issue as well." (43:62-69; App. 241-248).

The circuit court entered an order granting the state's motion to lift stay of involuntary medications and toll statutory time limits to bring a defendant to competency. (35; App. 105-106). That order provides that Mr. Green shall "voluntarily medicate pursuant to the 'Treatment Plan' identified in this order," and if he refuses, he be held in contempt and the "medical providers…involuntarily medicate the Defendant pursuant to the 'Treatment Plan'..." (35; App. 105-106).

Mr. Green subsequently sought reinstatement of the stay pending appeal in this court. On May 20, 2020 this court granted an emergency stay of the involuntary medication order. After further briefing, however, this court subsequently issued a decision denying Mr. Green's motion for relief pending appeal and lifting the temporary stay.

This appeal follows.

ARGUMENT

Individuals have "a 'significant' constitutionally protected 'liberty interest' in 'avoiding the unwanted administration of antipsychotic drugs.'" *Sell v. U.S.*, 539 U.S. 166, 178, 123 S.Ct. 2174 (2003)(quoting *Washington v. Harper*, 494 U.S. 210, 221, 110 S.Ct.

1028 (1990)). The use of antipsychotics "threatens an individual's 'mental, as well as physical, integrity.'" *U.S. v. Watson*, 793 F.3d 416, 419 (4th Cir. 2015).

> On the physical side, there is the "violence inherent in forcible medication," compounded when it comes to antipsychotics by the possibility of "serious, even fatal, side effects,"… But it is the invasion into a person's mental state that truly distinguishes antipsychotics, a class of medications expressly intended "to alter the will and the mind of the subject."

Id. (internal citations omitted).

Due to this substantial liberty interest, the United States Supreme Court has found that the Constitution only allows the government's forcible administration of antipsychotics "in limited circumstances." *Sell v. U.S.*, 539 U.S. at 169. In *Sell*, the Court set forth a standard, consisting of the four *Sell* factors, which must be met before the involuntary administration of drugs to restore a defendant to competency will be permitted. *Id*. at 179-180. It also recognized that the cases in which it will be allowed should be "rare." *Id*. at 179-180. Such cases are the "exception, not the rule." *Watson*, 793 F.3d at 419.

Here, the circuit court failed to acknowledge the significance of its involuntary medication order, misapplied the *Sell* factors, and erroneously found that the state had met its burden in this case. It also erred in finding that it had the authority to hear the

state's motion to lift the automatic stay of the involuntary medication order and in granting the state's motion to toll the statutory time limits for bringing Mr. Green to competency.

I. The state failed to present sufficient evidence to support an order for involuntary medication under *Sell*.

At the competency hearing, the state presented a doctor who testified generally regarding Mr. Green's need for "antipsychotic-type" medication and parroted the language of the *Sell* factors. Despite *Sell's* rigorous requirements, the circuit court found this evidence sufficient to support an involuntary medication order. After its inadequacies were pointed out by defense counsel, however, the state sought to present additional evidence on the *Sell* factors.

The circuit court erroneously exercised its discretion in allowing the state to reopen evidence, and consequently, any additional evidence presented at the May 6 and 19 hearing should not be considered when determining if the *Sell* factors were met.

Even if the court considers that additional evidence, however, the state fell far short of meeting its burden to prove the *Sell* factors by clear and convincing evidence. The circuit court was not presented with an individualized treatment plan, nor did it find that there were no less intrusive means available. Consequently, the circuit court's orders allowing Mr. Green to be involuntarily medicated with antipsychotics must be vacated.

A. Legal standard and standard of review.

A circuit court may order involuntary medication to restore a defendant to competency only if it finds that the following four *Sell* factors are proven by clear and convincing evidence:

> (1) that an important government interest is at stake;
> (2) that involuntary medication will significantly further that important government interest, i.e., the proposed drug is substantially likely to render the defendant competent for trial and unlikely to have side effects which would significantly interfere with his ability to assist counsel;
> (3) that involuntary medication is necessary to further that interest, i.e., that any alternative less intrusive treatments, or less intrusive means for administering the drugs, will not work; and,
> (4) that the specific type of drug to be administered is medically appropriate.

Sell, 539 U.S. at 180-183; *See also State v. Fitzgerald*, 2019 WI 69, ¶¶2, 14-17, 387 Wis. 2d 384, 929 N.W.2d 165; *U.S. v. Debendetto*, 757 F.3d 547, 552 (7th Cir. 2014); Wis. Stat. § 971.14(4)(b).

Essentially, the circuit court in this case was required to decide whether the state, "in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness of *a particular*

course of antipsychotic drug treatment, [had] shown a need for that treatment sufficiently important to overcome the individual's protected interest in refusing it." *Sell*, 539 U.S. at 183 (emphasis added).

Whether the evidence presented satisfies a legal standard poses a question of law which this court reviews de novo. *Langlade County v. D.J.W.*, 2020 WI 41, ¶47, 391 Wis. 2d 231, 942 N.W.2d 277.

B. The circuit court erred in allowing the state to reopen evidence on the *Sell* factors.

The circuit court erroneously exercised its discretion when it allowed the state to present additional evidence on the *Sell* factors at the motion to lift hearing. Specifically, the circuit court applied an incorrect legal standard and, rather than exercising its discretion, deferred to this court. Moreover, allowing the state to reopen evidence and present testimony about a specific medication, under the circumstances of this case, did not advance the interests of equity or justice, and set a bad precedent. As the circuit court erred in allowing the state to present additional evidence at the hearing on May 6 and 19, that evidence should not be considered in determining whether the *Sell* factors were met.

Whether to allow a party to reopen a case for additional testimony is a decision that lies in the discretion of the circuit court. *In re Estate of Javornik*, 35 Wis. 2d 741, 746, 151 N.W.2d 721 (1967). "[A] litigant has no strict right to reopen a case for the purpose of introducing additional evidence, but the discretion of the trial court seems to rest upon general principles of equity and justice." *Id*.

In this case, the circuit court erroneously exercised its discretion when it failed to consider the principles of equity and justice, found that the state had a "right" to present additional evidence, and then deferred to this court.

At the hearing on its motion to lift the automatic stay, the state, having reviewed defense counsels' brief opposing that motion, and recognizing the deficiencies in the record from the competency hearing, sought to introduce evidence supporting a treatment plan. (42:13-14; App. 156-157). Defense counsel objected to the state's attempts to "supplement" the record on several occasions. (29; 42:11-13, 18-21; 43:8-9; App. 154-156, 164-167, 187-188). Initially, the circuit court, misunderstanding what the state was attempting to do, allowed the additional evidence, stating that the parties should "make as full of a record as [they] can on this issue of whether the stay should be lifted." (42:15; App. 158). Later, it held:

> Now the State's moving their motion to lift the stay. So I think that they have the burden of

> proof, and *they have a right to supplement* on this motion as to whether or not the factors have been met or not.
>
> So I will allow their witnesses to testify;
> …
>
> *Well I think this is an issue that the Court of Appeals is going to have to decide*, [defense counsel]. I recognize your standing objection. I understand that your argument is that the ***Sell*** factors had to be met at the initial hearing. But we are here now on a motion to lift the stay, and the State has to make a strong showing that's [sic] likely to succeed on the merits.
>
> And I think as to that aspect, *it is entitled to put on evidence*. The Court of Appeals will be able to decide whether or not that can include additional evidence that wasn't done at the initial appearance.

(43:7-8, 14; App. 186-187, 193)(emphasis added).

Contrary to the court's ruling, the state had no "right" to reopen evidence, nor was it automatically "entitled" to do so. *See Javornik*, 35 Wis. 2d at 746. Rather, the court was required to exercise its discretion and make its decision after considering the equity and justice of doing so. The circuit court failed to do that here. To the extent the court made a decision to allow the state to present additional evidence on the *Sell* factors, that decision rested solely on its mistaken belief that the state was entitled to do so. The circuit court gave no other explanation for allowing the additional evidence;

rather, it stated that whether the state was allowed to introduce additional evidence would be a decision this court would have to make. That decision, however, was a discretionary one for the circuit court.

As the circuit court relied upon a mistake of law, it erroneously exercised its discretion in allowing the state to reopen evidence. Should this court determine that the circuit court did not rely on a misunderstanding of the law, it should nonetheless find that the circuit erroneously exercised its discretion as the principles of equity and justice weighed against reopening evidence in this case.

Unlike cases in which the circuit court's exercise of discretion in reopening evidence was upheld, here, there was no specific motion to reopen evidence and the state's introduction of additional evidence on the *Sell* factors came long after the competency hearing; not directly after the close of evidence. *See State v. Hanson*, 85 Wis. 2d 233, 270 N.W.2d 212 (1978)(approving the circuit court's decision to reopen evidence on its own motion at the conclusion of the trial); *See also State v. Harvey*, 2001 WI App 59, 242 Wis. 2d 189, 625 N.W.2d 892(approving the circuit court's decision to allow the state to reopen evidence during a jury instruction conference in order to a technical omission or oversight). The state's "motion" was anything but timely; the additional evidence was admitted months after the competency hearing, after a transcript and notice of appeal were filed, and after defense counsel

had thoroughly briefed the very errors the state sought to remedy.

Further, the additional evidence was not meant to simply cure a technical omission. Rather, the state sought to introduce critical evidence that was necessary for it to meet its burden under *Sell* in order to correct its failure to present a specific treatment plan appropriate for Mr. Green at the competency hearing.

Moreover, the state gave no explanation for its failure to present this evidence at the competency hearing. Dr. Schoenecker testified at that hearing and could have provided the information regarding Haldol that was provided at the hearing on the motion to lift the stay. This is not a case where the state made diligent efforts to secure the evidence prior to the hearing. Rather, the state's "motion" to reopen was, admittedly, one meant to "shore up a shoddy job." *State v. Wilson,* 41 Wis. 2d 29, 35, 162 N.W.2d 605, 607 (1968) (Heffernan, J., dissenting).

Allowing the state to reopen evidence at that stage of the proceedings was not just or equitable, nor did it promote efficient judicial administration. Just the opposite, it encourages inefficiency and set a bad precedent where, when it becomes apparent that the state did not meet its burden and may lose on appeal, the state simply moves to reopen evidence, resulting in additional and lengthier proceedings. Allowing the state to reopen its case to present substantive evidence which could have easily been presented at

the competency hearing encourages prolonged litigation. What is to prevent the state from deciding not to secure a witness for a hearing in hopes that it can get by with minimal evidence, and then, when it becomes apparent it is about to lose, asking the court to reopen its case so that it can call that witness and make a better record? Allowing the state to reopen evidence as the court did here sends the message that attorneys can show up to motion hearings unprepared, perform deficiently, and then after having their errors pointed out by opposing counsel, simply move to reopen the case and do what they should have done in the first place. Such a precedent is not supported by the principles of equity or justice, nor would it further efficient judicial administration or the interests of finality.

For the foregoing reasons, the circuit court erroneously exercised its discretion when it allowed the state to present additional evidence on the *Sell* factors at the motion to lift hearing. Consequently, this court should disregard that additional evidence and determine whether the evidence from the competency hearing was sufficient to support the court's involuntary medication order.

C. The state failed to present evidence sufficient to satisfy the *Sell* factors.

The evidence presented at Mr. Green's competency hearing fell far short of satisfying the *Sell* factors for one specific reason – the state failed to present any evidence regarding a particular drug or

treatment plan that would be appropriate for Mr. Green. Similarly, after being given the opportunity to present additional evidence on the *Sell* factors at the motion to lift hearing, the state failed to meet its burden. The circuit court was never presented with an individualized treatment plan for Mr. Green, nor did it find that there were no less intrusive means to involuntary administration of medication. Consequently, the court erred in entering an involuntary medication order both after the competency hearing and after the motion to lift hearing, and those orders must be vacated.

1. Important governmental interests (first *Sell* factor).

With respect to the first *Sell* factor, the state asserted, and defense counsel did not dispute, that, in light of the charge, it had an important interest in bringing Mr. Green to trial. The circuit court agreed. (40:21-22; 43:57; App. 127-128, 236).

As the state's evidence failed to satisfy the remaining *Sell* factors, however, the involuntary medication orders must be vacated.

2. The state failed to prove that the medication will significantly further those important interests or that it is medically appropriate (second and fourth *Sell* factors).

If the state establishes an important governmental interest, the second *Sell* factor requires

that it prove "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, thereby rendering the trial unfair." *Sell*, 539 U.S. at 181.

The fourth *Sell* factor requires that the circuit court conclude "that administration of the drugs is medically appropriate, i.e., in the patient's best medical interest in light of his medical condition." *Id*. The *Sell* court noted that, "[t]he 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." *Id*. Further, a finding that the proposed antipsychotic medication is medically appropriate requires that the circuit court "recognize the defendant's diagnosis and personal medical history." *U.S. v. Breedlove*, 756 F.3d 1036, 1043 (7th Cir. 2014).

Other jurisdictions applying *Sell* have held that, in order for the state to meet its burden on, and for a court to assess, these two *Sell* factors, the state must submit an individualized treatment plan. *See U.S. v. Rivera-Guerrero*, 426 F.3d 1130, 1139, n.5 (9th Cir. 2005) (government can't just list possible drugs; it must specify course of treatment); *See also U.S. v. Evans*, 404 F.3d 227, 240 (4th Cir. 2005) (same); *U.S. v. Chavez*, 734 F.3d 1247, 1254 (10th Cir. 2013)(vacating an involuntary medication order for lack of an individualized treatment plan); *U.S. v.*

Watson, 793 F.3d 416, 424-425 (4th Cir. 2015)(same); *U.S. v. Hernandez-Vasquez*, 513 F.3d 908 (9th Cir. 2008)(same); *Warren v. State*, 297 Ga. 810, 778 S.E.2d 749 (2015)(same); *Cotner v. Liwski*, 243 Ariz. 188, 403 P.3d 600, 606 (Ct. App. 2017)(same).

That treatment plan, and the circuit court's involuntary medication order, must specify, at a minimum: 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 the court. *Chavez*, 734 F.3d. at 1252-1253("[A] high level of detail is plainly contemplated by the comprehensive findings *Sell* requires.").

"Specificity as to the medications to be administered is critical." *Rivera-Guerrero*, 426 F.3d at 1140. General testimony about the typical treatment, success rates, and side effects of that treatment, is not sufficient. *See Cotner*, 403 P.3d at ¶19 ("That a certain treatment plan may be generally effective for the defendant's condition is insufficient."). As the court of appeals for the ninth circuit recognized, "the unique nature of involuntary anti-psychotic medication and the attendant liberty interest require that imposition of … [involuntary medication pursuant to *Sell*] occur only on a medically-informed record." *U.S. v. Williams*, 356 F.3d 1045, 1056 (9th Cir. 2004). Such a record must "encompass[] an independent and timely

evaluation of the [defendant] by a medical professional, *including attention to the type of drugs proposed, their dosage, and the expected duration of a person's exposure*…" *Id*. (emphasis added); *See also Evans*, 404 F.3d 227 (vacating an involuntary medication order, in part, because the district court did not receive evidence of which medication the treating staff planned to give the defendant).

Additionally, the record must show that the medical experts proposing the medication actually considered the "defendant's *particular* mental and physical condition" in reaching their conclusions that the medication would significantly further the government's interest and be medically appropriate. *Evans*, 404 F.3d at 240-241; *See also Watson*, 793 F.3d at 424 ("Merely showing a proposed treatment to be 'generally effective' against the defendant's medical condition is insufficient to meet this burden.").

> While it is necessary for the government to set forth the particular medication and dose range of its proposed treatment plan, such a description alone is not sufficient to comply with *Sell*. Rather, the government must also relate the proposed treatment plan to the individual defendant's particular medical conditions. In other words, the government, considering all of the particular characteristics of the individual defendant relevant to such a determination must first show that the treatment plan will "significantly further" its interests. It must do so by demonstrating that the proposed treatment plan, *as applied to this particular defendant*, is

> "substantially likely" to render the defendant competent to stand trial and "substantially unlikely" to produce side effects so significant as to interfere with the defendant's ability to assist counsel in preparing a defense. Second, the government, again considering all of the circumstances relevant to the particular defendant, must show that its proposed treatment plan is "medically appropriate." To do so, the government must spell out why it proposed the particular course of treatment,…, provide the estimated time the proposed treatment plan will take to restore the defendant's competency and the criteria it will apply when deciding when to discontinue the treatment, describe the plan's probable benefits and side effect risks for the defendant's particular medical condition,…, show how it will deal with the plan's probable side effects, and explain why, in its view, the benefits of the treatment plan outweigh the costs of its side effects.

Id., at 241-242 (internal citations omitted)(emphasis added). To require anything less, the court noted, would be to find that the government always meets its burden in every case. *Id.* at 241.

As the state failed to present expert testimony supporting an individualized treatment plan, or even a proposed drug at the competency hearing, it could not prove the second, third, or fourth *Sell* factors and the involuntary medication orders must be vacated. *See e.g. Chavez*, 734 F.33D at 1254; *Watson*, 793 F.3d at 424-425; *Hernandez-Vasquez*, 513 F.3d at 916-917; *Warren*, 297 Ga. at 828; *Cotner*, 403 P.3d at 606.

At the competency hearing, Dr. Schoenecker testified generally that Mr. Green should be forcibly administered an "antipsychotic-type medication" and then parroted the language of the *Sell* factors. (40:7-8; App. 110-111). There was no evidence presented regarding what specific drug would be appropriate for Mr. Green, how likely it is that the drug would restore him to competency without detrimental side effects, or whether that drug was appropriate given Mr. Green's medical condition. The evidence presented was far from the individualized treatment plan required under *Sell*. Consequently, the state failed to meet its burden of establishing that "a particular course of antipsychotic treatment" would significantly further its interests, was necessary to further those interests, or was medically appropriate. *See Sell*, 539 U.S. at 183.

For similar reasons, even with the additional evidence presented at the motion to lift hearing, the state's evidence failed to satisfy the *Sell* factors. Although the state now had a treatment plan, that treatment plan was not specific to Mr. Green – the medication requested had not actually been prescribed, or found to be appropriate, for his particular medical condition.

Dr. Schoenecker neither proposed a specific treatment plan for Mr. Green nor recommended any specific medication for him. While he did testify about the general use and side effects of Haldol, none of his testimony was specific to how that drug would affect Mr. Green or whether it was appropriate in light of

Mr. Green's particular medical condition. This is because Dr. Schoenecker did not evaluate Mr. Green for the purpose of prescribing medication for him and had not reviewed Mr. Green's treatment records or medical history. (43:38-39, 41; App. 217-218, 220). He did not know whether Mr. Green had been previously diagnosed with a mental illness, what medications had been tried, if any, or whether Mr. Green had bad reactions to medications in the past.

In fact, when asked, Dr. Schoenecker stated that he was hesitant to give a professional opinion as to whether the state's treatment plan would be substantially likely to render Mr. Green competent to stand trial because "individuals' responses to particular medications can vary." (43:20; App. 199). He was also unable to state with any certainty that Haldol would be unlikely to have side effects that would interfere with Mr. Green's ability to assist his counsel. (43:21-22; App. 200-201).

Dr. Schoenecker's testimony was exactly the testimony that the fourth circuit noted, if sufficient, would allow the involuntary administration of medication in any case where the state seeks it. *See Evans*, 404 F.3d at 241; *See also Watson*, 793 F.3d 425 ("Permitting the government to meet its burden through generalized evidence alone would effectively allow it to prevail in every case involving the same condition or course of treatment."). The testimony was not specific to Mr. Green and his particular medical condition. It was generic and could be

applied to any defendant diagnosed with Schizophrenia.

The state's request was simply premature as there was no evidence presented that any particular medication had been prescribed or recommended for Mr. Green. This is because Mr. Green had not yet met with the psychiatrist and internist who would evaluate him for purposes of determining which antipsychotic medication would be appropriate for his specific medical condition. The state even conceded that Mr. Green's treatment providers may prescribe something other than Haldol, and agreed that then it would be necessary to have another hearing on the *Sell* factors. (43:48-49; App. 227-228).

In sum, it was both improper and inefficient for the circuit court to enter an involuntary medication order for a treatment plan that was not proposed specifically for Mr. Green by medical professionals. Without specific evidence of a treatment plan taking into consideration Mr. Green's particular condition and medical history, the circuit court could not make the necessary findings under the second and fourth *Sell* factors. For that reason, it erred in entering involuntary medication orders.

3. The circuit court found that less intrusive means were available (third *Sell* factor).

The third *Sell* factor requires the circuit court to find that involuntary medication is necessary to further the state's important interests. To do so,

"[t]he court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results," and "the court must consider less intrusive means, e.g., a court order to the defendant backed by the contempt power, before considering more intrusive methods." *Sell*, 539 U.S. at 181. "[S]uch consideration requires that the court explain [] why less intrusive means would prove ineffectual." *U.S. v. Chatmon*, 718 F.3d 369, 376 (4th Cir. 2013).

As set forth above, because the state failed to present a treatment plan or testimony regarding a specific medication at the competency hearing, it could not meet this third factor. Without knowing what the proposed treatment is, the circuit court could not find whether less intrusive treatments would be unlikely to have substantially the same results as that unknown treatment.

Even with the additional evidence presented at the motion to lift hearing, the record does not support a finding that the third *Sell* factor was satisfied. At the conclusion of evidence, and after hearing arguments, the circuit court made an explicit finding that there are less intrusive means available. Specifically, the court simultaneously ordered both the involuntary administration of medication and that, before medication be involuntarily administered, Mr. Green be given the opportunity to take the medication or be found in contempt. (43:60; App. 239). The circuit court believed that, as suggested in *Sell*, a court order backed by contempt

was a viable alternative to forcible administration of the medication.

Despite the circuit court's finding that the involuntary administration of medication might not be necessary, and that Mr. Green should be given the opportunity to voluntarily take medication or face contempt, it also entered an order allowing the involuntary administration of medication. Thus, the circuit court misapplied *Sell*. Again, the third *Sell* factor requires a finding that there are no less intrusive means available. *Sell*, 539 U.S. at 181; *See Fitzgerald*, 2019 WI 69, ¶¶16, 28 (explaining that the third factor requires the court to consider *and rule out* less intrusive options for administering the drugs). The circuit court made the opposite finding here; rather than rule out less intrusive options, it found that there was one available. As a result, the involuntary medication orders must be vacated.

II. The state's motion to lift the automatic stay was improperly filed in the circuit court.

The circuit court lacked authority to hear the state's motion to lift the automatic stay of the involuntary medication order. As set forth in *Scott*, that motion should have been filed in the court of appeals. *See Scott*, 2018 WI 74, ¶48. Consequently, this court should disregard any evidence presented at the May 6 and 19 hearings when determining whether there was sufficient evidence to support the involuntary medication order.

Over defense counsel's objections, the circuit court found that it was the proper venue for the state's motion to lift the automatic stay pending appeal. Specifically, it noted that the record had not yet gone up to the court of appeals and the matter appeared to "fall within the type of motions that a circuit court would hear." (43:4; App. 183). Further, the circuit court acknowledged the language in *Scott*, but indicated that it could not "find anything that indicated that [it] did not have jurisdiction to [hear the motion]." (43:4-5; 183-184).

The correct interpretation and application of a supreme court rule is a question of law which this court determines independently of the circuit court, while benefiting from its analysis. *Foley-Circcantelli v. Bishop Grove Condominium Ass'n, Inc.*, 2011 WI 36, ¶83, 333 Wis. 2d 402, 797 N.W.2d 789.

Motions for relief pending appeal are governed by Rule 809.12, which provides:

> 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 filed 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

Wis. Stat. § 809.12 (emphasis added).

Normally, the party seeking a stay pending appeal under § 808.07 must: 1) make a strong showing that it is likely to succeed on the merits of the appeal; 2) show that it will suffer irreparable injury if a stay is not granted; 3) show that no substantial harm will come to other interested parties; and, 4) show that a stay will do no harm to the public interest. *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995).

In *Scott*, however, the Wisconsin Supreme Court altered this standard and procedure for cases in which an involuntary medication order is entered for the sole purpose of restoring a defendant's competency. Specifically, the court, recognizing the unique nature of such cases, held that defendants are automatically entitled to a stay of the involuntary medication order pending appeal. *Scott*, 2018 WI 74, ¶¶43-44. The circuit court no longer has discretion in whether to grant or deny a stay under Wis. Stat. § 808.07; rather, the circuit court stay is automatic. *Id*.

As the circuit court is required to grant an automatic stay in these cases, the state, being the aggrieved party, has the option of challenging that automatic stay in the court of appeals. Wis. Stat. § 809.12. According to *Scott*, the state may move to lift the automatic stay, but rather than meeting the

normal criteria set forth above, the state's 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, 2018 WI 74, ¶¶45-47 (emphasis added). Further, the *Scott* court noted that it is the court of appeals, not the circuit court, that decides the state's motion to lift the automatic stay – "[w]hether 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 added).

In sum, in *Scott*, the Wisconsin Supreme Court established a different stay procedure for appeals from involuntary medication orders entered to restore a defendant's competency. In such cases, the circuit court no longer has discretion and must grant an automatic stay pending appeal. Further, the state, being the aggrieved party, may challenge that stay in the court of appeals, but in order to do so it must show that the defendant will not suffer irreparable injury if the stay is lifted.

Accordingly, the state's motion to lift the automatic stay in this case was improperly filed in the circuit court and, as the circuit court was not the proper venue, it erred in deciding that motion.

III. The circuit court erred in granting the state's motion to toll.

The circuit court had no authority to toll the time within which the state could restore Mr. Green to competency. The language of the statute is clear, once Mr. Green was found incompetent, the court was allowed to commit him for a period not to exceed 12 months. Wis. Stat. § 971.14(5). The circuit court exceeded this statutory authority when it granted the state's motion, providing the state with more than 12 months to restore Mr. Green's competency. Consequently, the order tolling the time limits on Mr. Green's commitment must be vacated.

Section 971.14(5)(a)1., Wis. Stats., states, in relevant part:

> 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.

Additional subsections of 971.14 go on to provide the avenues which may be pursued if the circuit court determines that the defendant cannot be restored to competency within that period. Specifically, the circuit court "*shall discharge the defendant from the commitment and release him*," but may order the defendant to appear in court periodically to redetermine his competency or may order that the defendant be taken into custody and that Chapter 51 or 55 proceedings be initiated. Wis. Stat. § 971.14(6)(a)-(b)(emphasis added). The statute provides no means through which the government may commit a defendant for a single period longer than 12 months for purposes of competency restoration.

Here, contrary to the language of the statute, the state invented its own remedy to its perceived problem – the possibility that Mr. Green would not be restored to competency within 12 months – and requested that the time limits on the commitment be tolled while the involuntary medication order was stayed. (26). The circuit court, without citing any authority for its decision to do so, went along with the state's plan. (35; 43:62-69; App. 105-106, 241-248). As set forth above, the legislature, however, already provided the court with an answer to what must be done if a defendant cannot be restored to competency within the statutory time period. If Mr. Green cannot be restored to competency within 12 months, he must be discharged from his commitment and released. Wis. Stat. § 971.14(6)(a). If appropriate, however, the state may take him back into custody and initiate

proceedings under Chapters 51 or 55. Wis. Stat. § 971.14(6)(a)-(b). The statute contains no tolling provision.

Statutory construction is a question of law that this court reviews de novo. *State v. Leitner*, 2002 WI 77, ¶16, 253 Wis. 2d 449, 646 N.W.2d 341. "[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain,'" the inquiry ordinarily stops there. *State ex. Rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. Further, "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd results." *Id.*, ¶46.

The language of § 971.14(5)(a)2. is clear and unambiguous; notwithstanding the charge or maximum penalty he is facing, a defendant may not be committed, for purposes of competency restoration, for a period longer than 12 months. The statute contains no provision for tolling this time period and courts are not to read words into a statute; rather, they "interpret the words the legislature actually enacted into law." *Fitzgerald*, 2019 WI 69, ¶30 ("a matter not covered is to be treated as not covered"). The plain language of the statute sets forth a clear and simple rule – a defendant must be discharged from the commitment if he is not restored to competency within 12 months, or the maximum sentence he faces on his most serious charge,

whichever is less. Wis. Stat. § 971.14(5)-(6). This is so regardless of whether an involuntary medication order is entered as part of the commitment.

A review of the Wisconsin Supreme Court's prior examination of the statute confirms this plain-meaning interpretation. *See Kalal*, 2004 WI 58, ¶51(extrinsic sources may be consulted to confirm or verify a plain-meaning interpretation). In *State v. Moore*, 167 Wis. 2d 491, 498, 481 N.W.2d 633 (1992), the court noted:

> the object to be accomplished by sec. 971.14(5)(a) is to provide treatment to an incompetent person so that he or she may regain competency and face the pending criminal charges. The commitment is no way punitive, for there has been no determination of guilt.

The court went on to conclude that, in light of that purpose, "the legislature did not intend the absurd result that the state may confine an incompetent person awaiting trial, who has neither been convicted of a crime nor found committable pursuant to ch. 51, Stats., longer than it could confine a competent person either convicted or found not guilty by reason of mental disease or defect of the same offense." *Id.*

Reading the statute to permit the state to toll the statutory time limits would lead to a similarly absurd and unreasonable result, contrary to the plain language and purpose of the statute. Allowing the state to toll the time limits while an involuntary medication order is stayed pending appeal would

allow it to commit a defendant during the pendency of that appeal and then, once the appeal is resolved, for the length of the maximum sentence the defendant is facing, or an additional 12 months. This would allow the state to punish defendants for exercising their right to appeal by committing them for far longer than twelve months, and possibly longer than the maximum sentence they could be ordered to serve if convicted, contrary to the language of the statute and contrary to *State ex rel. Deisinger v. Treffert*, 85 Wis. 2d 257, 268-269, 270 N.W.2d 402 (1978)(holding that due process requires a defendant to be released from commitment when it reaches the length of the maximum sentence). *See also State ex rel. Haskins v. County Court of Dodge County*, 62 Wis. 2d 250, 214 N.W.2d 575 (1974).

The plain language of the statute is clear. The circuit court had no authority to grant the state's motion to toll the statutory time limits. Consequently, the order granting that motion must be reversed.

CONCLUSION

For the reasons stated above, Mr. Green respectfully requests that this court vacate the circuit court's orders allowing the involuntary administration of medication and tolling statutory time limits.

Dated and filed by U.S. Mail this 21st day of July, 2020.

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 8,548 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 and filed by U.S. Mail this 21st day of July, 2020.

Signed:

KATHILYNNE A. GROTELUESCHEN
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 and filed by U.S. Mail this 21st day of July, 2020.

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