STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2023AP715-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

J.D.B.,

Defendant-Appellant.

ON APPEAL FROM AN ORDER OF COMMITMENT FOR TREATMENT (INCOMPETENCY), ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MILTON L. CHILDS, SR., PRESIDNG

SUPPLEMENTAL BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

J.D.B. challenges an expired order for involuntary medication to restore trial competency. He has attacked the involuntary medication order on two grounds: (1) the State failed to prove the *Sell* factors by clear and convincing evidence, and (2) the circuit court failed to make necessary findings regarding his competency to refuse medication. (J.D.B.'s Br. 16–41.)

J.D.B. has never challenged his confinement during the competency evaluation stage, nor has he attacked the validity of his competency commitment. Nevertheless, following oral argument, this Court ordered the parties to brief two new issues. First, this Court asks, "Does a defendant ordered to submit to a competency examination under Wis. Stat. § 971.14(2) have a constitutional or statutory right to conditional pretrial release or a bail hearing, and if so, was that right violated as to J.D.B.?" (April 26, 2024, Order). Second, this Court questions, "Does a defendant ordered to submit to competency restoration treatment under Wis. Stat. § 971.14(5) have a due process right to receive that care in a timely manner, and if so, was that right violated as to J.D.B.?" (April 26, 2024, Order).

While the State will address each question, this Court should not decide either one, for the reasons discussed below.

Regarding the first question, the short answer is that a defendant isn't eligible for conditional pretrial release during section 971.14 competency proceedings. Thus, J.D.B.—who never sought conditional release during the competency proceedings—wasn't denied any right in that regard. Concerning the second question, U.S. Supreme Court precedent requires that competency commitments last a reasonable amount of time. Based on the governing standards and the limited record available, J.D.B.'s confinement passes the reasonableness test.

ARGUMENT

I. A defendant isn't eligible for conditional pretrial release during section 971.14 competency proceedings.

This Court first asks, "Does a defendant ordered to submit to a competency examination under Wis. Stat. § 971.14(2) have a constitutional or statutory right to conditional pretrial release or a bail hearing, and if so, was that right violated as to J.D.B.?" (April 26, 2024, Order).

As a preliminary matter, J.D.B. has never asked for relief on the basis that he was denied a right to conditional pretrial release during his competency proceedings. To be sure, this Court has "the power to raise an argument sua sponte." *Oddsen v. Henry*, 2016 WI App 30, ¶ 42, 368 Wis. 2d 318, 878 N.W.2d 720. But notably, "it is a power" that this Court "exercise[s] sparingly, and for good reason." *Id.* Specifically, this practice violates the principle of party presentation—a defining feature of our adversarial system. *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring). As the U.S. Supreme Court has explained, "in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008).

Party presentation rule aside, a defendant ordered to submit to a competency examination under section 971.14(2) isn't eligible for conditional pretrial release. Wisconsin Stat. § 969.01 specifically excepts section 971.14 competency proceedings from its general rule of eligibility for conditional pretrial release. It says, "Before conviction, except as provided in ss. 969.035 and 971.14(1r), a defendant arrested for a criminal offense is eligible for release under reasonable

conditions." Wis. Stat. § 969.01(1)(a). Section 971.14(1r), in turn, requires a court to "proceed under this section whenever there is reason to doubt a defendant's competency to proceed." Although section 971.14(1r) doesn't specifically address conditional pretrial release, the most reasonable construction of the two statutes is that a defendant is no longer eligible for such release once there's a reason to doubt his competency to proceed.[1] A contrary interpretation would render section 969.01's explicit reference to section 971.14 meaningless, and "[s]tatutory language is read where possible to give reasonable effect to every word, to avoid surplusage." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110.

Precedent further supports the proposition that a defendant isn't eligible for conditional pretrial release when ordered to undergo a competency examination. *See State ex rel. Porter v. Wolke*, 80 Wis. 2d 197, 208–09, 257 N.W.2d 881 (1977). In *Porter*, our supreme court held that "[w]hen an accused is ordered confined in a suitable facility for the examination or reexamination of his competency to stand trial, confinement for this limited purpose and this limited period of time is not to be ended or interrupted by the posting of bail." *Id.* at 208. The court said that during the competency examination stage, "the right to release on bail is suspended." *Id.* at 208–09. While the decision doesn't explicitly reference section 969.01, the statute then—as now—excepted section 971.14 competency proceedings from its general rule of

[1] But if the defendant has obtained conditional pretrial release *before* there's a reason to doubt his competency to proceed, Wis. Stat. § 971.14 permits such release during the competency examination stage "unless the defendant fails to cooperate in the examination or the examiner informs the court that inpatient examination is necessary." Wis. Stat. § 971.14(2)(b).

eligibility for conditional pretrial release. *See* Wis. Stat. § 969.01(1) (1975–76).

In short, a defendant ordered to undergo a competency examination under section 971.14(2) doesn't have a right to conditional pretrial release or a bail hearing, nor has J.D.B. ever claimed as much.[2] He was denied no right this regard.

II. Due process requires that competency commitments last a reasonable amount of time.

This Court also questions, "Does a defendant ordered to submit to competency restoration treatment under Wis. Stat. § 971.14(5) have a due process right to receive that care in a timely manner, and if so, was that right violated as to J.D.B.?" (April 26, 2024, Order).

Similar to question one, J.D.B. has never challenged the validity of his competency commitment under section 971.14(5), so the party presentation rule is once again implicated. *See Greenlaw*, 554 U.S. at 243. The party presentation rule is especially notable here because there's an incomplete record to adequately assess the new issue presented, as the State will demonstrate below.

Setting that rule aside, U.S. Supreme Court precedent governs this Court's second question. In *Jackson v. Indiana*, the U.S. Supreme Court held that a defendant "charged by a [s]tate with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the *reasonable period of time necessary* to

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[2] With respect to a bail hearing, it should also be noted that the plain language of Wis. Stat. § 969.01(1)(b) requires bail to be imposed "at or after the initial appearance." Thus, even if section 969.01(1)(a) didn't explicitly except section 971.14 competency proceedings from the general rule of eligibility for conditional pretrial release, J.D.B. wouldn't have been entitled to a bail hearing because competency was raised before he ever had an initial appearance, per CCAP.

determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (emphasis added). It declined to impose "arbitrary time limits" for a competency commitment but concluded that Jackson's three-and-a-half-year commitment (where there was no expectation that he would attain competency) violated due process. *Id.* at 718–19, 731, 737–38. The U.S. Supreme Court also made clear that a statute that permits indefinite confinement for competency restoration purposes is unconstitutional. *Id.* at 731.

In response to *Jackson*, our Legislature has limited the duration of a competency commitment to 12 months or the maximum sentence that the defendant faces on the most serious charge, whichever is less. *See* Wis. Stat. § 971.14(5)(a)1.; 1981 Judicial Committee Note, § 971.14; *see also State v. Moore*, 167 Wis. 2d 491, 501–02, 481 N.W.2d 633 (1992). Thus, section 971.14(5)(a)1. has built-in due process protection for defendants held in competency commitments.

Notably, the federal standard isn't so limited, providing only that a defendant be confined for a reasonable amount of time to restore trial competency.[3] *See* 18 U.S.C. § 4241(d)(2). And that federal system has withstood numerous due process challenges. *See United States v. McKown*, 930 F.3d 721, 728 & n.7 (5th Cir. 2019).

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[3] In the federal system, once the defendant is found incompetent to proceed, he is committed for up to four months for an evaluation of whether he can be restored to competency in the foreseeable future. 18 U.S.C. § 4241(d)(1). If the answer is yes, then he is committed "for an additional reasonable period of time" to restore trial competency. 18 U.S.C. § 4241(d)(2). By contrast, in Wisconsin, the State has at most 30 days to evaluate whether the defendant can be restored to competency. *See* Wis. Stat. § 971.14(2)(c), (3)(d). And again, it has at most 12 months to restore trial competency. *See* Wis. Stat. § 971.14(5)(a)1.

Importantly, federal courts have applied *Jackson*'s rule of reasonableness when considering challenges to a defendant's jail custody while awaiting a bed at a competency restoration treatment facility. *See, e.g.*, *United States v. Lara*, 671 F. Supp. 3d 1257, 1261–64 (D. N.M. 2023). In *Lara*, after surveying several cases, the district court held that jail custody while awaiting a spot at a treatment facility "should not ordinarily extend beyond 'the maximum time Congress permitted for the period of hospitalization itself.'" *Id.* at 1264 (citation omitted). Because the defendant had been sitting in jail eight months ("without access to treatment of any kind") while awaiting a bed for the four-month competency evaluation process, the district court held that the defendant's due process rights were violated. *Id.* at 1260, 1262–64.

The Ninth Circuit hasn't so carefully stayed within the bounds of *Jackson* on this issue. *See Oregon Advoc. Ctr. v. Mink*, 322 F.3d 1101 (9th Cir. 2003). *Mink* addressed a situation where incompetent defendants in Oregon were waiting weeks or months in county jails before they were transferred to a state hospital for evaluation as to whether they could be restored to competency and if so, for treatment to competency. *Id.* at 1106. Based on an extensive record about the "harms suffered by defendants who are relegated to wait-list status and remain in jail until [the hospital] has room for them," the Ninth Circuit held that the delay in admissions violated the substantive due process rights of criminal defendants. *Id.* at 1106–07, 1119–22. Though it recognized clear distinctions between its case and *Jackson*, the Ninth Circuit nevertheless reasoned that "the principles enunciated in *Jackson*" required Oregen to admit incompetent defendants within *seven days* of a judicial determination of incompetency. *Id.* at 1122.

Mink has been criticized for not heeding *Jackson*'s instruction that "only irrational pretrial detention" violates due process. *Glendening as Next Friend of G.W. v. Howard,*

No. 22-CV-04032, 2023 WL 8715814, at *10–11 (D. Kan. Dec. 18, 2023). In *Glendening*—again, based on a fully informed record—the district court considered a due process challenge to Kansas's waitlist for admission into its only facility for competency restoration. *Id.* at *1–3. In concluding that the plaintiffs hadn't made a strong showing that the waitlist (264 to 336 days) violated their substantive due process rights, the district court reasoned, "The waitlist, although substantial, does not clearly transgress *Jackson*'s prohibition on indefinite commitment, nor does it approach *Jackson*'s presumptive limit on confinement." *Id.* at *10.

Further, drawing on *Jackson*'s language that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed," *Jackson*, 406 U.S. at 738, the *Glendening* court found a reasonable relationship between Kansas's waitlist and its goal of competency restoration:

> State hospitals lack infinite capacity. Sometimes, a detainee must wait. The State has a continued interest in evaluating and restoring the competency of each detainee so that he or she may be tried. The State has a further interest in providing adequate care at Larned to accomplish that purpose, which obliges detainees to wait in line until services are available. . . . In other words, KDADS maintains the waitlist in order to facilitate its process for competency evaluation and restoration. The resulting delay and the State's purpose appear "reasonably related," because KDADS only delays as a way to triage care.

Glendening, 2023 WL 8715814, at *10–11; *accord Indiana Prot. and Advoc. Services Comm'n v. Indiana Fam. and Soc. Services Admin.*, 630 F. Supp. 3d 1022, 1032 (S.D. Ind. 2022).

The takeaway for this Court's purposes is that *Jackson*'s rule of reasonableness governs whether confinement for competency restoration purposes violates due process. Courts faithfully applying *Jackson* focus on whether

the pretrial detention is rational. Where there is a delay in admission to a treatment facility, one way of measuring the rationality of the confinement is to ask whether it exceeds "the maximum time Congress permitted for the period of hospitalization itself." *Lara*, 671 F. Supp. 3d at 1264 (citation omitted). It's also plainly relevant whether there's a persuasive justification for the delay in admission. *See Glendening*, 2023 WL 8715814, at *10–12. After all, the government "must be afforded some latitude" in attempting to restore a defendant's trial competency. *Lara*, 671 F. Supp. 3d at 1264. Further, and perhaps most importantly, "*Jackson* discourages courts from interceding to impose arbitrary limits" like the seven-day limit in *Mink*. *Glendening*, 2023 WL 8715814, at *10–12.

Here, as flagged above, this Court doesn't have a fully informed record to decide whether J.D.B.'s due process rights were violated during his competency commitment because J.D.B. has never raised this issue. This case isn't like *Mink* and *Glendening*, where the lower courts took evidence on the length of the delay for admission to a treatment facility, the reasons for the delay, and the limitations of county jails in properly caring for incompetent criminal defendants.

But from what little we do know, J.D.B.'s competency commitment passes *Jackson*'s reasonableness test. Of course, there can be no argument that J.D.B.'s commitment violated *Jackson*'s proscription against indefinite confinement because of section 971.14(5)(a)1.'s limitations on competency commitments. For the same reason, it cannot be persuasively argued that J.D.B.'s commitment was a presumptively unreasonable period like the three-and-a-half-year period at issue in *Jackson*.

Regarding any delay in treatment, according to a competency report, after J.D.B. was found incompetent and likely to regain competency if provided with appropriate treatment, he waited three and a half months in jail for

admission to Mendota Mental Health Institute. (R. 15:1.) The record reveals no reason for this delay, though it was likely because Mendota lacked capacity to immediately admit him. During his wait in the county jail, J.D.B. was prescribed antipsychotic medication but often refused to take it. (R. 12:2–3; 15:4.) He was admitted to the Jail Based Competency Restoration Program and participated in at least four clinical coordination sessions with a jail specialist. (R. 12:2–3; 15:4.) He was "minimally productive" during these sessions given his non-compliance with medication. (R. 12:2–3; 15:4.)

These limited facts don't show that J.D.B.'s pretrial detention was irrational under the standards discussed above. The three and a half months confinement in the county jail while awaiting admission to Mendota didn't exceed the maximum time the Legislature permitted for a competency commitment. *See Lara*, 671 F. Supp. 3d at 1264. Assuming that the delay was because J.D.B. was on a waitlist due to capacity issues at Mendota, this is a persuasive justification for the delay. *See Glendening*, 2023 WL 8715814, at *10–12. And notably, J.D.B. was provided competency restoration services during his wait in the jail. *C.f. Lara*, 671 F. Supp. 3d at 1260; *Mink*, 322 F. 3d at 1106.

In short, the circumstances here don't remotely approach the due process violation at issue in *Jackson*. To say that a due process violation occurred is to place an arbitrary limit on the competency commitment, contrary to U.S. Supreme Court precedent.

CONCLUSION

This Court should affirm the now defunct order for involuntary medication.

Dated this 10th day of May 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,663 words.

Dated this 10th day of May 2024.

Electronically signed by:

Kara L. Janson
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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 10th day of May 2024.

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