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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP715-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

J. D. B.,

Defendant-Appellant.

PETITION FOR REVIEW

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The State of Wisconsin petitions this Court to review the court of appeals' decision in *State v. J.D.B.*, No. 2023AP715-CR, 2024 WL 4127716 (Wis. Ct. App. Sept. 10, 2024) (recommended for publication). The court of appeals reversed and vacated the circuit court's involuntary medication order to restore trial competency. It reasoned that the State failed to prove the *Sell*[1] factors and that the defendant was incompetent to refuse medication.

ISSUES PRESENTED FOR REVIEW

Sell sets forth the standard for the government to obtain an involuntary medication order to restore trial competency. To comport with due process, a court must find that (1) an important governmental interest is at stake, (2) involuntary medication will significantly further that interest, (3) involuntary medication is necessary, and (4) involuntary medication is medically appropriate. On top of the *Sell* factors, to obtain a medication order, the State must establish that the defendant is incompetent to refuse medication.

1. Did the State prove the *Sell* factors by clear and convincing evidence?

2. Did the State prove the defendant incompetent to refuse treatment?

STATEMENT OF CRITERIA SUPPORTING REVIEW

This case involves an expired involuntary medication order. But the court of appeals declined to dismiss Jared's[2] appeal as moot because it "raises significant constitutional issues" and "there are few binding cases in Wisconsin

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

[2] Pseudonym.

interpreting and applying the *Sell* factors." (Pet-App. 4, 13.) Jared had asked the court of appeals to overlook any mootness concerns for these reasons. (Pet-App. 13–14; Jared's Reply Br. 7–9.) Thus, in the court of appeals' and Jared's own words, review is warranted because (1) this case presents "[a] real and significant question of federal or state constitutional law," and (2) this Court's decision "will help develop, clarify or harmonize the law, and" resolution of the novel issues presented will have statewide impact. Wis. Stat. § (Rule) 809.62(1r)(a), (c)2.

It's time for this Court to weigh in on the *Sell* factors. Outside of declaring that circuit courts must consider the *Sell* factors before ordering involuntary medication to restore trial competency, *see State v. Fitzgerald*, 2019 WI 69, ¶ 2, 387 Wis. 2d 384, 929 N.W.2d 165, this Court hasn't addressed *Sell*. While "the *Sell* decision is over two decades old," Wisconsin has just one published decision from the court of appeals addressing three of the four *Sell* factors. (Pet-App. 13.) As for the remaining factor (whether the government has an important interest in seeking an involuntary medication order), this case marks the first time that a court has endeavored to provide guidance to the bench and bar. (Pet-App. 13, 16–24.)

Given that the U.S. Supreme Court has offered little guidance on what exactly a government must do to meet its burden under *Sell*, and because litigants frequently debate the import of Wisconsin's only published case on the matter, this Court should step in to interpret and apply the *Sell* factors. Not to mention, the decision recommended for publication in this case—which reaches well beyond the issues raised by the parties—is flawed and raises more questions than it answers.

Briefly, the decision below narrows the cases for which the State may obtain an involuntary medication order without regard for victims' constitutional rights, relevant

authorities, and at times, logic. It offers an unclear method for deciding whether the State is prosecuting a serious crime, one that would seemingly exclude crimes not listed in Wisconsin's bail statute (of which there are many). It invites courts to undermine the State's interest in prosecuting a serious crime through speculation about a civil commitment. It directs circuit courts to second-guess the conclusions and unrefuted testimony of medical experts. And it imposes a more onerous standard than *Sell* reasonably suggests, requiring medical professionals to provide exhaustive details about their treatment plans.

That's just regarding the issues that were presented to the court of appeals for review. The decision also unnecessarily and incorrectly holds that courts have the authority to order conditional pretrial release after a defendant's competency is questioned. Further, the decision gratuitously and wrongly declares a due process violation whenever a Chapter 971.14 committee isn't transported from a jail to an inpatient treatment facility "within a reasonable amount of time." (Pet-App. 24.) Under the court of appeals' reasoning, and contrary to the authority it cites, the reasons for the delay are irrelevant, as are the circumstances of confinement at the jail.

Review is warranted.

STATEMENT OF THE CASE

A. The State charged Jared with battery to a law enforcement officer.

In August 2022, the State charged Jared with battery to a law enforcement officer, a Class H felony. (R. 2.) According to the complaint, Milwaukee police were dispatched to a residence in response to a reported threat. (R. 2:1.) Officers spoke with a woman who stated that her son, Jared, was threatening to get a gun and kill everyone inside

the home. (R. 2:1.) The officers spoke with Jared, and he made statements about fighting the officers. (R. 2:1.) When the officers tried to arrest him, Jared threw two punches at one officer, striking the officer in the left side of his face, which caused pain and a laceration. (R. 2:1.) As officers handcuffed Jared, Jared threatened to kill the officer he struck. (R. 2:1.)

B. The circuit court found Jared incompetent to proceed and committed him for treatment.

When Jared appeared in court for the first time, defense counsel questioned Jared's competency to proceed. (Pet-App. 6.) Following Wisconsin's trial competency statute, Wis. Stat. § 971.14, the circuit court found probable cause and ordered a competency evaluation.[3]

Dr. Collins, a board-certified psychologist and Director of the Wisconsin Forensic Unit, performed a competency assessment and authored a report. (R. 5.) Dr. Collins diagnosed Jared with Schizophrenia and Major neurocognitive disorder, due to a self-inflicted gunshot wound to the head. (R. 5:5–6.) She opined that Jared lacked "substantial mental capacity to understand the proceedings or assist in his defense." (R. 5:6.)

In an order signed October 11, 2022, the court ordered Jared committed to DHS's custody. (R. 8.) The court did not order involuntary medication at that time. Jared did not appeal his commitment order.

Jared started his commitment at the jail, where he participated in four clinical coordination sessions with a Jail Specialist at the Outpatient Competency Restoration Program (OCRP). (R. 12:3.) He was "minimally productive"

[3] Unless otherwise noted, citations are to CCAP records for Milwaukee County case number 2022CF3407.

during those sessions given his non-compliance with medication. (R. 12:2–3; 15:4.)

Jared arrived at Mendota Mental Health Institute (Mendota) on January 25, 2023. (R. 15:1.) His six-month competency reexamination concluded that he remained incompetent but was likely to be restored to competency within the time remaining. (R. 15:7.)

C. Roughly six months into the commitment, the circuit court ordered involuntary medication.

On April 11, 2023, DHS moved for an involuntary medication order. (R. 18; 19.) The motion included a report and individual treatment plan from clinical psychiatrist Dr. Mitchell Illichmann. (R. 19:2–3.) The circuit court held a hearing on the matter, where Dr. Illichmann provided lengthy testimony as to Jared's condition and his proposed treatment plan. (R. 37:14–68.)

Dr. Illichmann personally examined Jared five times before DHS filed the request for the involuntary medication order. (R. 37:20, 38.) During each of these meetings, Dr. Illichmann personally reviewed Jared's medications. (R. 37:40.) Based on these examinations and a review of Jared's records, Dr. Illichmann determined that Jared had schizophrenia spectrum illness, which is treatable, but not curable. (R. 37:23.) Dr. Illichmann noted that Jared had been provided antipsychotic medications in the past that seemed to have helped. (R. 37:23.)

The doctor noted that when Jared arrived at Mendota in January 2023, he was initially taking his medications, particularly paliperidone, voluntarily. (R. 37:24–25, 45.) Jared began refusing his medications on April 3, stating that he felt he didn't need them. (R. 37:25.)

In Dr. Illichmann's opinion, to a reasonable degree of professional certainty, involuntary medication was substantially likely to render Jared competent to stand trial. (R. 37:27, 36.) There were no alternative less intrusive treatments that would restore Jared to competency. (R. 37:29.) Side effects of the proposed medications would not impair Jared's ability to competently assist in his case or undermine his trial's fairness. (R. 37:27, 28–29.) Dr. Illichmann testified that all the medicines he proposed were medically appropriate for Jared, taking into account his specific medical conditions. (R. 37:29.)

Dr. Illichmann's specific plan was to have Jared resume taking paliperidone, a medication that hadn't caused him side effects in the past. (R. 37:41–42, 53–54, 62.) But the doctor proposed and discussed six other antipsychotic medications as well. (R. 19:3; Pet-App. 9.) He explained why and made clear that the seven medications would not be taken together; rather, they would be administered in "sequential trials." (R. 37:30, 62.) Dr. Illichmann stated what specific dose he would start Jared on for nearly every medication listed on the treatment plan. (R. 37:52–55.) The proposed doses were at the low end of the range so that medical staff could monitor for side effects. (R. 37:34–35, 52–55.)

Prior to filing the request for an order of involuntary medication and treatment plan, Dr. Illichmann sat down with Jared and went through every medication listed on the treatment plan to discuss the side effects and advantages and disadvantages of each. (R. 37:50–52.) After explaining each medication's risks and benefits, Jared told Dr. Illichmann that he did not need medication. (R. 37:51–55.) Based on Jared's responses, Dr. Illichmann concluded that Jared was incompetent to refuse medication because he couldn't apply an understanding of the advantages and disadvantages of medication to his mental illness. (R. 19:2; 37:61–62.)

At the conclusion of that hearing, the circuit court found that the State satisfied all four *Sell* factors. (R. 37:79.) The court approved the treatment plan and granted the request for involuntary medication. (R. 37:79.)

D. The court of appeals reversed Jared's expired involuntary medication order.

Jared appealed the (stayed) involuntary medication order, arguing that the State failed to prove both the *Sell* factors and that he was incompetent to refuse medication. (Pet-App. 4.) The State argued that this case was moot. (Pet-App. 4.) Alternatively, the State argued that it proved the *Sell* factors, and that Jared was incompetent to refuse medication. (Pet-App. 4.)

The court of appeals held oral argument in this matter. It then sua sponte raised additional issues for review, ordering the parties to file simultaneous briefs limited to ten pages.

In a decision recommended for publication, the court of appeals reversed and vacated the expired involuntary medication order. (Pet-App. 34.) As noted, it overlooked the mootness doctrine to provide guidance on *Sell*. (Pet-App. 4, 13–14.) The court of appeals concluded that the State failed to prove all four *Sell* factors, and that Jared was incompetent to refuse medication. (Pet-App. 4–5.)

The State petitions this Court for review.

ARGUMENT

This Court should grant review to interpret and apply the *Sell* factors.

No published decision in Wisconsin addresses the first *Sell* factor, asking whether the government has an important interest in seeking an involuntary medication order. Courts are split on how to define "serious crime" for purposes of this

factor, and this case presents this Court with an opportunity to provide a workable standard. There's also been little instruction on what "special circumstances" may lessen the State's interest in prosecution, and the decision below tacks on to the circumstances identified in *Sell* in a way that has significant and far-reaching implications. Finally, the required specificity of treatment plans has been the subject of much litigation in recent years, and the court of appeals has taken different stances on the issue. This Court should grant review to provide guidance on the proper interpretation and application of the *Sell* factors.

A. How do courts decide if the State has an important interest in seeking an involuntary medication order?

1. Defining "serious crime"

The first *Sell* factor asks whether the government has an important interest at stake in seeking an involuntary medication order. *Sell v. United States*, 539 U.S. 166, 180 (2003). *Sell* instructs that 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." *Id.* However, "*Sell* offered no guidance on how to determine the seriousness of an offense." *United States v. Evans*, 404 F.3d 227, 237 (4th Cir. 2005). Therefore, "courts are left to fashion appropriate, and presumably objective parameters by which to assess seriousness." *United States v. Green*, 532 F.3d 538, 547 (6th Cir. 2008).

There hasn't been a consensus on how to define "serious crime." Some courts applying *Sell* have considered the U.S. Supreme Court's definition of "serious crime" for Sixth Amendment purposes. *See, e.g.*, *Evans*, 404 F.3d at 237; *United States v. Palmer*, 507 F.3d 300, 304 (5th Cir. 2007); *State ex rel. D.B.*, 214 S.W.3d 209, 212–13 (Tex. Ct. App.

2007); *United States v. Algere*, 396 F. Supp. 2d 734, 739 (E.D. La. 2005); *United States v. Leveck-Amirmokri*, No. EP-04-CR-0961, 2005 WL 1009791, at *4 (W.D. Tex. Mar. 10, 2005). In that context, "offenses for which a defendant may be sentenced to more than six months imprisonment are considered serious enough to invoke the right to a jury trial." *Algere*, 396 F. Supp. 2d at 739 (citing *Baldwin v. New York*, 399 U.S. 66, 71 (1970)).

Other courts have declined to utilize the jury trial standard to define "serious crime" for *Sell* purposes. *See, e.g.*, *United States v. Jaramillo-Ayala*, 526 F. Supp. 2d 1094, 1101–02 (S.D. Cal. 2007). Without a six-month benchmark for sorting serious crimes from minor ones, some courts focus on "the maximum statutory penalty" that the defendant faces, *Green*, 532 F.3d at 549, while others consider federal sentencing guidelines, *United States v. Hernandez-Vasquez*, 513 F.3d 908, 918 (9th Cir. 2008) (collecting cases).

While there may be no clear consensus for defining "serious crime" under *Sell*, courts agree that crimes don't have to be against person or property to be serious. *See Hernandez-Vasquez*, 513 F.3d at 917–18; *Green*, 532 F.3d at 550. And seriousness doesn't turn on violence. *See Hernandez-Vasquez*, 513 F.3d at 918; *Green*, 532 F.3d at 548–49.

Here, the court of appeals recognized that "*Sell* did not define 'serious crime' and the federal circuit courts do not agree on a method for determining whether a crime is 'serious' for purposes of *Sell*." (Pet-App. 16–17.) Without further discussion, it suggested a model for defining "serious crime" that would ask (1) whether the crime is listed in Wisconsin's bail statute, (2) if it involves violence, and (3) what the maximum penalty is. (Pet-App. 17.) Because Jared's crime is listed in Wisconsin's bail statute, involves violence, and carries a maximum punishment of six years' imprisonment, the court deemed it serious. (Pet-App. 17.)

There are a number of problems with this proposed model for defining "serious crime." For starters, it's unclear whether the decision sets forth any conditions precedent to seriousness for *Sell* purposes. Does a crime need to be listed in Wisconsin's bail statute *and* involve violence? Does one out of the two suffice? What if the crime is neither listed in the bail statute nor violent in nature but carries a maximum punishment of at least six years' imprisonment? How about if the crime isn't listed in the bail statute but involves violence and has a maximum penalty of three-and-one-half years' imprisonment? The decision below gives no guidance on how to answer these questions, leaving circuit courts guessing on what to do with circumstances different from the case at bar.

Further, to the extent that lower courts will read the decision below as imposing conditions precedent to seriousness for *Sell* purposes, it will lead to arbitrary and unjust results. Limiting "serious crimes" to those listed in the bail statute would exclude many crimes that should be considered serious by other metrics. To take just a few examples, the following crimes aren't listed as serious in Wis. Stat. § 969.08:

- Use of a computer to facilitate a child sex crime, Wis. Stat. § 948.075 (Class C felony);
- Soliciting a child for prostitution, Wis. Stat. § 948.08 (Class D felony);
- Sexual assault of a child – Failure to act, Wis. Stat. § 948.02(3) (Class F felony);
- Aggravated battery with intent to cause bodily harm, Wis. Stat. § 940.19(4) (Class H felony); and
- Stalking, Wis. Stat. § 940.32 (Class H or I felony).

Whether measured by the statutory maximum penalty or public opinion, the above crimes are serious. Yet, depending on how a lower court reads the decision below, the

State might not be able to obtain a medication order to prosecute such crimes because they aren't listed in the bail statute. And even if their absence from the bail statute isn't considered dispositive of seriousness, some of the above crimes might be deemed minor under the court of appeals' methodology for want of violence. Relevant authorities do not support these potential outcomes. *See Duncan v. Louisiana,* 391 U.S. 145, 159 (1968) ("[T]he penalty authorized for a particular crime is of major relevance in determining whether it is serious or not . . . ."); *Hernandez-Vasquez*, 513 F.3d at 918 (seriousness doesn't turn on violence); *Green*, 532 F.3d at 548–49 (same).

No doubt that defining "serious crime" for *Sell* purposes is difficult. But it is important to find an objective standard that prevents arbitrary determinations of seriousness. *See Green*, 532 F.3d at 548. After all, the U.S. Supreme Court has "caution[ed] the judiciary against" intruding "into the legislative process" when defining "serious crime." *Id.* Heeding that instruction, courts have concluded that "the maximum statutory penalty is the most objective means of determining the seriousness of a crime." *Id.* at 549. And U.S. Supreme Court decisions in other contexts can help specify a length of sentence that makes a crime serious. *See Algere*, 396 F. Supp. 2d at 739.

In short, the court of appeals' proposed methodology for defining "serious crime" is unclear and may lead to arbitrary and unjust results. A more workable standard that respects the Legislature's judgment about a crime's severity and considers U.S. Supreme Court precedent defining "serious crime" is possible. This Court should explore it.

2. Special circumstances lessening the governmental interest.

Sell instructs courts to "consider the facts of the individual case in evaluating the Government's interest in

prosecution." *Sell*, 539 U.S. at 180. "Special circumstances may lessen the importance of that interest." *Id. Sell* identifies two: (1) the possibility that the defendant's "failure to take drugs voluntarily . . . may mean *lengthy confinement* in an institution for the mentally ill," and (2) the "possibility that the defendant has already been confined for a *significant amount of time*." *Id.* (emphasis added). Here, the court of appeals considered these two special circumstances and created two of its own.[4]

a. Potential for civil commitment

Should the defendant be civilly confined if he isn't restored to competency, that may lessen the government's interest in prosecution because the confinement "would diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime." *Sell*, 539 U.S. at 180. However, *Sell* was quick to clarify, "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." *Id.* "The potential for future confinement affects, but does not totally undermine, the strength of the need for prosecution." *Id.*

The court of appeals acknowledged that federal courts "analyzing this issue have largely focused on the likelihood of civil commitment, often finding that when the possibility of future civil commitment is uncertain and speculative, the State's interest in prosecution is not lessened." (Pet-App. 18.) It went on to hold that in "this case, there are distinct, non-speculative possibilities for Jared's future commitment through the ongoing Chapter 51 proceedings or following a

[4] Jared didn't argue any special circumstances at the circuit court. (R. 37:70–76.) Courts have applied forfeiture in this situation. *See United States v. Cruz*, 757 F.3d 372, 380 (3d Cir. 2014) (collecting cases).

successful NGI defense, and as a consequence, the State's interest in bringing Jared to trial is lessened." (Pet-App. 19.)

The court of appeals misunderstands *Sell* in two respects. First, asking whether there's a potential for an NGI[5] commitment has no place in the *Sell* analysis. The question is whether there's a potential for civil commitment absent a prosecution, not because of one. *Sell*, 539 U.S. at 180. A court is supposed to ask whether, if it denies a medication order and effectively stalls the prosecution, there's a possibility that the defendant will be civilly confined. *Id.* That possibility might lessen the government's interest in prosecution because it would provide some measure of public protection while the prosecution sits dormant. *Id.* Unlike a Chapter 51 commitment, an NGI commitment can't possibly provide such protection because it's only obtained *if the defendant is restored to competency and tried for his crime*. Thus, it's illogical to use the potential for an NGI commitment as a reason to deny the State a medication order, and the State isn't alone in this opinion. *See United States v. Brooks*, 750 F.3d 1090, 1096 (9th Cir. 2014) (rejecting argument that potential for NGI commitment should be considered).[6]

The court of appeals' second misunderstanding relates to timing. An assessment of the potential for civil commitment must be based on facts that exist at the time the State seeks the medication order. *See Sell*, 539 U.S. at 180. But here, the court of appeals considered a fact that occurred months after the *Sell* hearing. Specifically, it referenced Jared's "ongoing

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[5] Not guilty by reason of mental disease or defect.

[6] As noted, when discussing this special circumstance, the *Sell* Court said that it didn't mean to suggest that a civil commitment is a substitute for a criminal trial. This is further evidence that *Sell* wasn't instructing courts to consider the potential for an NGI commitment, as an NGI commitment can't possibly be a substitute for a criminal trial.

Chapter 51 proceedings" in finding that the potential for civil commitment lessened the State's interest in prosecution. (Pet-App. 19.) No Chapter 51 proceedings were ongoing at the time the State sought the involuntary medication order in this case. They were initiated months later, after the circuit court found Jared not competent and not likely to regain competency within the time allotted.[7] To say that this fact rendered the potential for a civil commitment non-speculative at the time of the *Sell* hearing is irrational.

The decision below is flawed in other ways. To start, it doesn't consider and apply the elements required for civil commitment in assessing the likelihood that one will occur. (Pet-App. 18–19.) That's how federal courts have analyzed this issue, as the authorities cited in the court of appeals' opinion demonstrate. (Pet-App. 18.) Declaring that "the record reflects a significant potential for Jared's future civil commitment . . . through chapter 51 proceedings" without ever discussing the standard for a Chapter 51 commitment amounts to speculation. (Pet-App. 19.) And if all that's required are facts demonstrating that the alleged offense resulted from a mental health crisis, many involuntary medication cases will fit that mold and, under the decision's logic, lessen the State's interest in prosecuting a serious crime. (Pet-App. 19.)

The decision below also doesn't acknowledge *Sell*'s language that "*lengthy confinement* in an institution for the mentally ill" may weigh against the government's interest. *Sell*, 539 U.S. at 180 (emphasis added); (Pet-App. 18.). Federal courts have consistently required evidence that a lengthy civil commitment is possible before it can impact the disposition of

[7] Under Wis. Stat. § 971.14(6)(b), when a court discharges a defendant from a competency commitment, it "may order that the defendant be taken immediately into custody" for purposes of initiating Chapter 51 or 55 proceedings.

Sell factor one. *See United States v. Grigsby*, 712 F.3d 964, 970 (6th Cir. 2013); *United States v. Dillon*, 738 F.3d 284, 292–93 (D.C. Cir. 2013); *United States v. Tucker*, 60 F.4th 879, 888 (4th Cir. 2023). Evidence that a defendant would likely be committed on an inpatient basis has also been required. *See Dillon*, 738 F.3d at 294–95. Considering that the maximum term of initial commitment under Chapter 51 is six months and may be served on an outpatient basis, *see* Wis. Stat. § 51.20(13)(a)3.–4., (g)1., (g)2d.a., evidence of a potential *lengthy* civil *confinement* should be required before undermining the State's interest. But it's not per the decision below.

Finally, an overarching consideration here should be that *Sell* identified this special circumstance before States started adopting Marsy's Law. Crime victims in Wisconsin have constitutional rights to fairness and to "timely disposition of the case, free from unreasonable delay." Wis. Const. art. I, § 9m(2)(a), (d). Considering Marsy's Law, this Court has recently said that the "State also has a constitutional duty to provide timely justice to crime victims by bringing competent defendants to trial." *State v. Green*, 2022 WI 30, ¶ 35, 401 Wis. 2d 542, 973 N.W.2d 770. Should victims' constitutional rights play a role in analyzing this first *Sell* factor? The court of appeals doesn't seem to think so. (Pet-App. 18–19.)

b. Pretrial custody

Per *Sell*, pretrial confinement "for a significant amount of time" might weigh against the government's interest. *Sell*, 539 U.S. at 180. Federal courts take different approaches to analyzing this, with some "comparing the time already served by [the defendant] with the statutory maximum authorized for his" crimes, while others try to predict the defendant's sentence and compare it to the pretrial confinement. *See United States v. Gutierrez*, 704 F.3d 442, 451 (5th Cir. 2013)

(collecting cases). The latter approach has been criticized as unworkable, either because it requires a court to predict the sentence without the benefit of a presentence report (not to mention the victim's wishes) or it would lead a court "to conduct a mock sentencing hearing and select a provisional sentence at a *Sell* hearing." *Id.*

The decision below doesn't discuss the different approaches for analyzing this special circumstance. (Pet-App. 20–24.) It neither compares Jared's pretrial confinement to the maximum sentenced he faced nor to a predicted sentence. (Pet-App. 24.) Instead, it erroneously calculates Jared's pretrial confinement and declares the confinement "significant for a first-time, then-nineteen-year-old offender like Jared."[8] (Pet-App. 24.)

Beyond suffering from a lack of guidance on how to analyze this special circumstance, the decision below incorrectly suggests that the government's interest in prosecution is eliminated if Jared "would serve little or no prison time if tried and convicted." *Gutierrez*, 704 F.3d at 451. The State has numerous interests in prosecuting a defendant for a serious crime, including seeking justice for crime victims and "express[ing] society's disapproval of such conduct" and possibly deterring "others from engaging in it." *Id.* Further, a conviction opens the door to things like supervised release and restitution for crime victims. Analysis of this special circumstance shouldn't be a one-sided discussion that disregards these realties. *See id.*

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[8] Pretrial confinement is based on the date the defendant is first taken into custody up to the court's decision on involuntary medication, wherein it analyzes this special circumstance. *See United States v. Bradley*, 417 F.3d 1107, 1117 (10th Cir. 2005). The court of appeals used the date that Jared was discharged from the competency commitment as the cut off, adding a little over two months to the confinement calculus. (Pet-App. 24.)

c. Conditional pretrial release

On its own initiative, the court of appeals declared that a violation of Wis. Stat. § 969.01, governing eligibility for conditional pretrial release, is a special circumstance that lessens the government's interest in prosecution. (Pet-App. 10, 20–22.) The court's decision on this point is both unnecessary and incorrect.

The decision is unnecessary because denial of conditional pretrial release is already accounted for under *Sell*. As discussed, *Sell* instructs courts to consider whether the defendant's pretrial confinement lessens the government's interest in prosecution. Therefore, denial of conditional pretrial release is already held against the government by virtue of courts considering that confinement as a special circumstance. If there's an additional reason why the denial of conditional pretrial release should undermine the State's interest in prosecuting a serious crime, the court of appeals doesn't offer one. (Pet-App. 20–22.)

More importantly, the court of appeals is wrong that there was a violation of section 969.01 here. The plain language of sections 969.01 and 971.14 establishes that courts don't have authority to order conditional pretrial release after competency is raised.

Section 969.01(1) governs eligibility for release before conviction. It states, "Before conviction, except as provided in . . . 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 courts to "proceed under this section whenever there is a reason to doubt the defendant's competency to proceed." Section 971.14(1r) next tells courts to make a probable cause determination if one hasn't been made, and then to order a competency evaluation. It doesn't instruct courts to consider conditional pretrial release.

So far, then, the plain language of these statutes shows that the circuit court had no authority to order conditional pretrial release after Jared's competency was questioned. This Court's decision in *State ex rel. Porter v. Wolke*, 80 Wis. 2d 197, 257 N.W.2d 881 (1977), supports this interpretation. There, after ordering a reexamination of the defendant's competency to proceed, the circuit court set bail. *Porter*, 80 Wis. 2d at 208. Finding error, this Court said that "[w]hen an accused is ordered confined in a suitable facility for the examination or for the reexamination of his competency to stand trial," the "right to release on bail is suspended." *Id.* at 208–09. Although this Court did not discuss section 969.01, the statute then—as now—excepted section 971.14 competency proceedings from its general rule of eligibility for conditional pretrial release. *See* Wis. Stat. § 969.01(1) (1975–76).

The decision below disagrees with the State's reading of the statutes because section 971.14(2)(b) says that if "the defendant has been released on bail, the court may not order an involuntary inpatient examination unless the defendant fails to cooperate." (Pet-App. 21.) In the court of appeals' view, section 971.14(2)(b) "would cease to operate" under the State's interpretation of the statutes. (Pet-App. 21.) Not so. Competency can be raised at any time in the proceedings, including after the defendant has obtained conditional pretrial release under section 969.01. If that happens, courts can't interfere with release unless it's "necessary for an adequate [competency] examination." Wis. Stat. § 971.14(2)(b). But competency can also be questioned before a court orders conditional pretrial release. And when that happens, courts no longer have the authority to order conditional pretrial release because it must proceed under section 971.14(1r), which doesn't instruct courts to consider conditional pretrial release.

The court of appeals' contrary interpretation is unreasonable. It believes that the reference to Chapter 971.14 proceedings in the conditional pretrial release statute is to communicate that courts have the authority to order conditional pretrial release up to the point of a competency commitment under section 971.14(5). (Pet-App. 21.) Of course, if that was the intent, the clearest way of messaging it would have been to reference section 971.14(5) in section 969.01, not section 971.14(1r). Not to mention, section 971.14(5) already makes clear that courts lose the authority to order conditional pretrial release once a defendant is committed for treatment to competency. Wis. Stat. § 971.14(5) ("[T]he court shall suspend the proceedings and commit the defendant to the custody of the department . . . ."). Thus, a reference to Chapter 971.14 proceedings in the conditional pretrial release statute would be unnecessary.

Moreover, the court of appeals' interpretation leads to the absurd result of requiring circuit courts to hold conditional pretrial release hearings with defendants who aren't competent to assist counsel in violation of section 971.14(1r)'s clear mandate to "proceed under this section whenever there is a reason to doubt a defendant's competency to proceed."

The court of appeals went beyond the issues raised by the parties to unnecessarily and incorrectly hold that "defendants proceeding under Wis. Stat. § 971.14(1r) remain eligible for bail until the circuit court orders the defendant committed for treatment." (Pet-App. 21.) Review is warranted.

d. Delay in transfer

There's more. On its own initiative, the court of appeals declared a due process violation whenever a Chapter 971.14 committee isn't transferred from a jail to an inpatient treatment facility "within a reasonable amount of time." (Pet-

App. 10, 24.) For the court, this is another special circumstance to consider under *Sell*'s first factor, though the decision never explains why the delay (which is not attributable to the prosecution) undermines the State's interest in prosecuting a serious crime. (Pet-App. 22–24.)

This is a significant issue that has potentially far-reaching implications for competency commitments. The decision below suffers from both factual and legal deficits.

Factually, because this issue wasn't raised at the circuit court, there's an inadequate record to assess whether a constitutional violation occurred. For example, the record reveals no reasons for the delay in transferring Jared from the jail to Mendota. Yet, in all seven of the cases that the court of appeals cites to on this issue, the reasons for delay are fully explored. *See, e.g.*, *Terry ex rel. Terry v. Hill*, 232 F. Supp. 2d 934, 937–38 (E.D. Ark. 2002). In those cases, the circumstances of confinement while awaiting transfer are also fleshed out. *See, e.g.*, *Oregon Advoc. Ctr. v. Mink*, 322 F.3d 1101, 1106–07 (9th Cir. 2003). But here, all we know is that Jared *did* receive competency restoration treatment at the jail, though he was "minimally productive" during those sessions given his non-compliance with medication. (R. 12:2–3; 15:4.)

Courts confronting this issue have observed the imprudence of declaring a constitutional violation without a "detailed record." *Powell v. Maryland Dept. of Health*, 168 A.3d 857, 552 (Md. 2017). As *Powell* put it, "courts . . . have come to varying conclusions as to what constitutes an acceptable delay based on the particular circumstances. . . . One cannot simply compare the delays permitted or proscribed in those cases and attempt to decide whether" a different delay violates due process. *Id.* But that's exactly what the court of appeals did in this case. As it stands, the reasons for the delay and the circumstances of the defendant's

confinement in the jail are irrelevant to whether the delay violates due process. (Pet-App. 22–24.)

Legally, the decision fares no better. It reads *Jackson v. Indiana*, 406 U.S. 715 (1972), far too broadly. *Jackson* holds that a criminal defendant "committed solely on account of his incapacity to proceed to trial cannot be held more than the *reasonable period of time necessary* to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." *Jackson*, 406 U.S. at 738 (emphasis added). It declined to impose "arbitrary time limits" for a competency commitment but concluded that Jackson's three-and-a-half-year commitment violated due process. *Id.* at 718–19, 731, 737–38. *Jackson* 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.

As the decision below notes, federal courts have cited to *Jackson* when declaring that a defendant's jail custody while awaiting transfer to an inpatient treatment facility violates due process. (Pet-App. 22–23.) Others, though, have declined to apply *Jackson* to similar circumstances. *See, e.g.*, *Glendening as Next Friend of G.W. v. Howard*, 707 F. Supp. 3d 1089, 1107–10 (D. Kan. 2023); *Indiana Prot. and Advoc. Servs. Comm'n v. Indiana Fam. and Soc. Servs. Admin.*, 630 F. Supp. 3d 1022, 1032 (S.D. Ind. 2022). Those decisions pay careful attention to the teachings of *Jackson*—it prohibits indefinite confinement and otherwise "counsels

reasonableness and rejects 'arbitrary time limits'"—and recognize that governments should be afforded some latitude in treating to competency. *Id.* Quite the opposite, the *Mink* decision (favored by the court of appeals here) reads *Jackson* as prohibiting a mere seven-day delay in transfer. *Mink*, 322 F.3d at 1122. Review is necessary.

B. How specific must individual treatment plans be to satisfy *Sell*?

The remaining *Sell* factors ask whether medication will significantly further the government's interest, whether it's necessary, and whether it's medically appropriate. *Sell*, 539 U.S. at 181. *Green* holds that to satisfy those factors, the State must offer an individual treatment plan. *State v. Green*, 2021 WI App 18, ¶ 37, 396 Wis. 2d 658, 957 N.W.2d 583. The goal is to provide the circuit court with particularized information about the medication and the defendant to avoid reducing "orders for involuntary medication to a generic exercise." *Id.* ¶¶ 34, 51.

Consistent with federal authorities, *Green* requires a treatment plan to list (1) the specific medication or range of medications, (2) the maximum dosages that may be administered, and (3) the duration of time that treatment may continue before reporting back to the court. *Green*, 396 Wis. 2d 658, ¶ 38. *Green* was also correct to say that a "court must consider the individualized treatment plan as applied to the particular defendant," noting that things like a "defendant's age and weight" might influence whether a drug is medically appropriate and likely to restore competency. *Id.* ¶¶ 38–39.

Since *Green*, litigants have frequently debated just how specific a treatment plan needs to be to satisfy *Sell*. Defendants have argued that "the constitutional validity of the involuntary medication order turns on the treatment plan setting forth exhaustive details about the defendant, such

that the omission of a basic fact like the defendant's age or weight could sink an otherwise valid order." *State v. Crosby*, Nos. 2022AP924-CR, 2022AP943-CR, 2022AP1109-CR, 2024 WL 4220704, ¶ 23 (Wis. Ct. App. Sept. 18, 2024) (unpublished) (per curiam).[9] This case is no different. For example, Jared argued that a treatment plan is unconstitutionally generic if it proposes dose ranges based on what has been submitted to the Food and Drug Administration as safe without an explanation of why "the generic dose range is appropriate for a particular defendant." (Pet-App. 28.)

The court of appeals has treated these arguments differently. In this case, the court of appeals embraced the notion that a treatment plan must set forth exhaustive details to be "adequately individualized," regardless of whether the defendant has received antipsychotic medication in the past. (Pet. App. 25.) Although the doctor testified that his plan was to start treating Jared with a medication that had been partially successful in the past (with no side effects), the decision below says that the doctor was required to "explain why any particular order of medication, or no order at all, was appropriate as applied to Jared." (Pet-App. 27.) The court of appeals offered no authority supporting this demand. (Pet-App. 27.)

By contrast, in *Crosby*, the absence of authority showing that such "legal granularity" is needed led the court of appeals to reject the defendant's arguments. *Crosby*, 2024 WL 4220704, ¶ 23. Unlike the decision in this case, the court of appeals in *Crosby* reasoned that the requisite level of specificity depends on the facts of the case: "More may be

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[9] Consistent with Wis. Stat. § (Rule) 809.23(3), the State does not cite to *Crosby* for persuasive authority but to show the arguments made and that the decision exists. *See State v. Smith*, 2018 WI 2, ¶ 28 n.16, 379 Wis. 2d 86, 905 N.W.2d 353.

required if the defendant has never received medication; less in a case like this, where Crosby has been successfully treated in the recent past." *Id.*

It's true that courts "cannot delegate" their responsibility under *Sell* to a treatment provider. *Green*, 396 Wis. 2d 658, ¶ 44. But it's equally true that courts aren't supposed to micromanage medical experts. *Hernandez-Vasquez*, 513 F.3d at 917. It's important to avoid standards that would require judges to "substitute [their] Juris Doctor for a Medical Doctor" and rewrite individualized treatment plans. *Green*, 532 F.3d at 558. This Court should grant review to help strike the right balance.

* * *

Any one of the above issues warrants this Court's review. Surely, they do in the aggregate. While the issue of whether the State proved Jared incompetent to refuse medication might not warrant this Court's review on its own, the State will demonstrate that it satisfied this requirement if this Court grants review. The court of appeals' decision on this issue improperly adds a requirement to the relevant statute and does not correctly apply the standard of review.

CONCLUSION

This Court should grant review.

Dated this 10th day of October 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 6,826 words.

Dated this 10th day of October 2024.

Electronically signed by:

Kara L. Janson
KARA L. JANSON

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 Supreme Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 10th day of October 2024.

Electronically signed by:

Kara L. Janson
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