STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP000715-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

J.D.B.,

Defendant-Appellant.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

The court of appeals issued a lengthy, thorough, and comprehensive opinion in this matter, presumably to provide some guidance to circuit courts in deciding whether to grant forced medication to restore criminal defendants to competency. The State takes exception to having to meet its burden before forcing medication when instances of forced medication in this context "may be rare." *Sell v. United States*, 539 U.S. 166, 180 (2003).

It is not necessary for this Court to provide guidance simply because the court of appeals publishes a decision with that same goal in mind. *See* Wis. Stats. §§ 809.23(1)(a)1.; 809.62(1r)(c). There is no conflict regarding what factors courts need to consider, and these cases will be largely fact-dependent given the nature of the requirement for an individualized treatment plan.

The State's complaints are primarily with the application of well-settled law to the facts of this case, and what it seeks is error-correction. The State frames the *Sell* issues as novel, ignoring that there is twenty years' worth of federal case law that guides circuit courts. While the court of appeals' decision provided welcome guidance to circuit courts, it did little more than apply the guidance of *Sell,* federal courts, and this Court to these facts. *See, e.g.*, *State v. J.D.B.*, No. 2023AP715-CR, ¶¶33, 40, 50 2024 WL 4127716 (Wis. Ct. App. Sept. 10, 2024); Pet-App. at 15, 18, 23.

ISSUE PRESENTED

Per the petition for review, the issues in this case are whether "the State prove[d] the *Sell* factors by clear and convincing evidence," and whether "the State prove[d] [Jared] incompetent to refuse [medication and] treatment." Pet. for Review at 7.

CRITERIA FOR REVIEW

This case does not meet any established criteria for review, as the State is primarily seeking error-correction.[1]

The State conflates questions that are important to Jared with significant questions of constitutional law. Jared's rights against forcible medication and a decision on the merits of his appeal were sufficient to override concerns underlying mootness, that does not mean there is a "significant question of . . . constitutional law." Pet. for Review at 8. The former are obviously important to Jared as an individual, and, given the length of appellate litigation, a finding of mootness "would effectively nullify a defendant's right to appeal 'questions of clear constitutional importance.'" *J.D.B.*, No. 2023AP715-CR, ¶29 (quoting *Sell*, 539 U.S. at 176); Pet-App. at 14.

[1] The term "error-correction" is used to reference what the State is seeking, not an acknowledgement that the court of appeals did, in fact, err.

However, the greater constitutional questions are: can and under what circumstances may the government forcibly medicate criminal defendants to make them competent to stand trial? These questions have already been answered by the Supreme Court of the United States and the Wisconsin Legislature. The Supreme Court gave us *Sell*, and the Legislature gave us Wis. Stat. § 971.14. There are numerous cases interpreting both *Sell* and Wisconsin's competency to refuse medication requirement.[2]

Thus, the significant constitutional question was answered in *Sell*. This is further evidenced by the Supreme Court denying 23 petitions for review in cases addressing the *Sell* factors in the more than twenty years since the decision. Resp.-App. at 91. If the Supreme Court of the United States does not believe *Sell* needs further clarification, neither should this Court.[3]

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[2] The requirement that an individual be incompetent to refuse medication before it can be ordered to be administered involuntarily is universal in Wisconsin and the standard is nearly identical across case types. *See Outagamie Cnty. v. Melanie L.*, 2013 WI 67, ¶64, 349 Wis. 2d 148, 833 N.W.2d 607; *see also* Wis. Stats. §§ 51.20(1)(a)2.e.; 51.20(7)(d); 51.61(1)(g)2.-3.; 51.67; 55.14(3)(b); 971.14(3)(dm); 971.17(3)(c); *State v. Anthony D.B.*, 2000 WI 94, 237 Wis. 2d 1, 614 N.W.2d 435 (applying the involuntary medication provisions in Chapters 51.61 and 51.20 to individuals committed under Chapter 980).

[3] The issue with *Sell* is that it was ignored by Wisconsin courts until *State v. Fitzgerald*, 2019 WI 69, ¶29, 387 Wis. 2d

A decision by this Court would not meaningfully develop or clarify the law, because the Court will simply be applying already existing law to the particular facts of this case. Notably, the State cites no conflicting case law requiring harmonization—it is simply unhappy with how existing law was applied.[4]

The petition for review manufactures confusion where none exists, bemoaning the use of an objective measure to determine the seriousness of a charge. Pet. for Review at 9; s*ee United States v. Breedlove*, 756 F.3d 1036, 1041 (7th Cir. 2014). It complains about *Sell* directing courts to consider the possibility of a

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384, 929 N.W.2d 165, not that the doctrine is particularly confusing or difficult to analyze. Pet. for Review at 8.

[4] The State references an unpublished per curium decision where a treatment plan was upheld. *State v. Crosby*, Nos. 2022AP924-CR, 2022AP943-CR, 2022AP1109-CR, 2024 WL 4220704 (Wis. Ct. App. Sept. 18, 2024). Pet. for Review at 29-30. In addition to *Crosby* not being citable, Wis. Stat. § 809.23(3)(b), the cases are not similar. *Crosby* discusses how "omission of a basic fact like the defendant's age or weight" is not enough to "sink an otherwise valid order." Pet.-App. at 42. Here, the court of appeals required an explanation of why generic dose ranges were appropriate for Jared. Pet. for Review at 23.

Moreover, Crosby had been "successfully treated in the recent past" with a proposed medication. *Id.* Here, Dr. Illichmann noted "partial response"—not success, R.19:2; Resp.-App. at 4—and Jared continued to swear and spit at staff, urinate and defecate in his room, and exhibit symptoms of schizophrenia while on medication. *Infra* at 16.

To summarize, the petition for review mischaracterizes the facts in order to sew discord in the law where there is none.

future civil commitment in determining the State's interest in prosecution. Pet. for Review at 9; *Sell*, 539 U.S. at 180. It even takes aim at this Court's statements that circuit courts must determine whether a treatment plan is appropriate, rather than deferring to the doctors at Mendota and WRC.[5] Pet. for Review at 9; *Fitzgerald*, 387 Wis. 2d 384, ¶29.

Simply put, the State takes umbrage with the court of appeals requiring that it meet its burden under *Sell*. The petition for review asks this Court to expand the State's ability to forcibly medicate criminal defendants—not for their benefit, but so it may convict them of crimes—beyond the "rare" situations envisioned by *Sell*. It also asks that the Court make that process easier along the way by allowing complete deference to the doctors the State employs without the meaningful oversight that case law requires.

Finally, the court of appeals correctly decided the obvious: that the State's interest in prosecution is lessened when it chooses to not provide the treatment necessary to reach its stated goal of competency restoration. The court of appeals also correctly decided that when the State illegally holds a mentally ill individual in-custody without the opportunity for bond, that illegal detention diminishes the State's interest in future punishment. The first issue is

[5] "Mendota" refers to Mendota Mental Health Institute, and "WRC" refers to the Wisconsin Resource Center, two of the facilities the State uses for inpatient competency restoration.

common sense and the latter due process violation is supported by the plain language of the statute.

This petition for review does not meet either criteria espoused by the State.

STATEMENT OF THE CASE AND FACTS

Jared[6] is a 19-year-old with partial left-side paralysis, a lumbering gait, and compromised speech and cognitive abilities all stemming from a traumatic brain injury as a result of a self-inflicted gunshot wound from when he was 11 years old. R.5:3-4. Subsequent to that injury, he has been diagnosed with schizophrenia and major neurocognitive disorder due to traumatic brain injury. R.5:5.

Prior to his arrest and subsequent detention, Jared resided with his mother and siblings in Milwaukee. According to the one paragraph criminal complaint, police went to his home on August 23, 2022, after Jared's mother called stating that he was making threats about getting a gun and harming people in the residence. R.2:1. While arresting Jared, he allegedly threw two punches at one officer and hit him in the face. R.2:1.

From there, Jared was taken to an Aurora Health Care facility, however he was not

[6] To promote readability and taking guidance from Wis. Stat. § 809.81(8), this brief refers to J.D.B. as "Jared," a pseudonym used in the court of appeals and by the State in its petition for review.

admitted at that time. R.15:3. It is unclear where Jared was held from his arrest on August 23, 2022, until his booking into the jail on August 27, 2022. *See* R.15:3.

Ultimately, the State chose to charge Jared with Battery to a Law Enforcement Officer, contrary to Wis. Stat. § 940.203(2).

Competency Reports

One week after his arrest, Jared appeared in court for the first time where competency was raised and an examination was ordered. R.4. The circuit court did not set bond. Deborah L. Collins, Psy.D. examined Jared and filed a report with the court. R.5.

Dr. Collins' report notes that Jared's speech and cognitive abilities were compromised by a gunshot wound resulting in permanent brain damage. R.5:3. "His medical history is also significant for diabetes and hypertension." R.5:3 Jared stated that he had previously been diagnosed with schizophrenia. *Id.* While at the jail, he was diagnosed with an unspecified mental disorder and secondary malignancy neoplasm brain (i.e. brain cancer). R.5:4.

According to his mother, he was prescribed "Valproic acid (mood stabilizer/anti-convulsant) and Sertraline (anti-depressant)" and had received inpatient psychiatric treatment at three different hospitals. R.5:4. He was also seen at Aurora Health Care "for homicidal thoughts" on August 23, 2022—the date of his arrest. R.5:4; R.2. While in jail, he was

prescribed "Depakote (mood stabilizer), Fluoxetine (anti-depressant) and Hydroxyzine (for side effects)." R.5:4.

Based on the record review, Jared's history, and observations of Jared, Dr. Collins diagnosed Jared with schizophrenia and major neurocognitive disorder due to traumatic brain injury. R.5:5. At the time of the report, Jared was compliant with medications, and Dr. Collins did not evaluate if he was competent to make treatment decisions. R.5:6. Jared was ultimately found not competent to stand trial and committed under Wis. Stat. § 971.14. R.8.

At the time of the 90-day commitment review Sergio Sanchez, Psy.D. stated there was little change and alleged Jared was not medication compliant. R.12:3. Jared was transferred to Mendota on January 25, 2023, after spending at least 152 days in the county jail.

The 180-day competency report was submitted to the circuit court by Ana Garcia, Ph.D. on March 28, 2023. In her report, Dr. Garcia notes that she reviewed records from seven different hospitals (including Mendota), school records, jail records, and Milwaukee County Behavioral Health Division records. In addition, she consulted with his treating physician, Dr. Mitchell Illichmann, and Mendota staff who work with Jared. R.15:1-2.

Dr. Garcia's report contains significantly more details than the two prior reports. She also notes that, in addition to hypertension and diabetes, Jared "is

prescribed medication to prevent seizures that can be resultant from head injuries." R.15:3.

At Mendota he was diagnosed with Major Neurocognitive Disorder and Unspecified Schizophrenia Spectrum and Other Psychotic Disorder. R.15:5. At the time of Dr. Garcia's report, Jared had been at Mendota for just shy of three months and was being treated with antipsychotic and antidepressant medications. *See generally* R.15. Despite the treatment, Jared is alleged to have sworn and spit at staff, urinated and defecated in his room, and continued to exhibit symptoms of schizophrenia. R.15:4-6.

Request for Involuntary Medication Order

Six days after Dr. Garcia filed her report, Jared began refusing medications, prompting Dr. Illichmann's request for involuntary medication. R.37:25, 66; Resp.-App. at 33, 74.

Dr. Illichmann's report stated that Jared was diagnosed with schizophrenia spectrum illness and no physical health conditions. R.19:2; Resp.-App. at 4. The report noted that Jared had previously taken lithium, valproate, paliperidone, and quetiapine "with only partial response." R.19:2; Resp.-App. at 4. Specifically, the report notes that Jared was "offered paliperidone with partial response in agitation, thought organization . . . ." R.19:2; Resp.-App. at 4.

The treatment plan then proposed seven different antipsychotics "either in combination or in succession" to be taken orally. R.19:3; Resp.-App. at 5. Additionally, if Jared was unwilling or unable to take the oral medications, the plan recommended that the antipsychotic haloperidol be administered by injection. R.19:3; Resp.-App. at 5. The plan also recommended one non-antipsychotic, lorazepam, be injected for "agitation." R.19:3; Resp.-App. at 5.

Regarding the medication refusal, Dr. Illichmann testified that Jared told him that he felt he did not need medication. R.37:25-26; Resp.-App. at 33-34. Dr. Illichmann testified that he believed "Jared lacks ability to apply information about medications to himself or his situation" because when Dr. Illichmann "tried to discuss the importance" of medications, Jared gave the repeated answer of not feeling like he needed them. R.37:26; Resp.-App. at 34.

Dr. Illichmann did not consider adjusting Jared's medication or dosage until after he began refusing. R.37:47; Resp.-App. at 55.

After the close of evidence, the court found that the State had met its burden regarding each of the *Sell* factors. *See* R.37:76-79; Resp.-App. at 84-87. While discussing the third factor, whether medication is necessary to further the government interest, the court noted that Dr. Illichmann "talked to the defendant about the advantages and disadvantages to restore the defendant" and that Jared did not understand. R.37:78-79; Resp.-App. at 86-87.

The circuit court then ordered involuntary medication following the hearing on April 24, 2023. R.23; Resp.-App. at 6-8. Jared filed a Notice of Appeal the next day. The court of appeals ordered an emergency temporary stay on April 26, 2023, and ordered further briefing on Jared's request for a stay. That request was ultimately granted on June 8, 2023.

After the parties briefed the case, the court of appeals ordered oral argument, which was held April 10, 2024. The court of appeals ultimately issued a decision finding that the State failed to meet its burden on any of the factors set forth in *Sell v. United States*, 539 U.S. 166 (2003). *J.D.B.*, No. 2023AP715-CR, ¶3; Pet.-App. at 3-4. The court of appeals also found that the circuit court's findings related to Jared's competency to refuse medication were also clearly erroneous, as Jared was not given a sufficient explanation of the medications sought to be administered. *Id.*, ¶¶70-72; Pet.-App.32-34.

The court of appeals' decision was ordered published on October 30, 2024.

The State petitions for review.

ARGUMENT

The court of appeals' decision was the application of existing law to the facts of this case and was correctly decided. There is no reason for this Court to disturb the opinion.

I. The court of appeals relied on an objective measure to determine whether the Legislature believes the crime charged was serious.

The State begins its argument section arguing over a finding in its favor—that Jared was charged with a serious crime. The State argues "it is important to find an objective standard that prevents arbitrary determinations of seriousness." Pet. for Review at 17. It then complains when the court of appeals did exactly that, because it is unhappy with the outcome. This complaint is one for the legislature, not this Court.[7]

"To determine the seriousness of a crime the government, and a majority of the circuits, analogize the Supreme Court's approach in the Sixth Amendment context, which looks to the maximum statutory penalty. . . . There is logic in this approach, as the maximum statutory penalty reflects at least some measure of legislative judgment regarding the seriousness of a crime." *Breedlove*, 756 F.3d at 1041.

The State asks this Court to create "[a] more workable standard that respects the Legislature's judgment about a crime's severity and considers

[7] The State also does not propose what this Court should do other than have courts consider the totality of the circumstances, which is what *Sell* suggests by requiring courts "consider the facts of the individual case." 539 U.S. at 180.

U.S. Supreme Court precedent defining 'serious crime.'" The court of appeals did that.

The court of appeals acknowledged that "Jared's alleged crime involves violence, and it carries a maximum penalty of six years imprisonment." *J.D.B.*, No. 2023AP715-CR, ¶36; Pet.-App. at 17. It also acknowledged that the Legislature has defined a number of crimes as "serious" already.[8] The State does not explain why relying on the Legislature's stated definitions of what crimes it deems serious for various purposes is inappropriate.

Instead, the State lists crimes it believes should be considered serious.[9] Essentially, the State asks the

[8] The court of appeals relied on the bail statute, Wis. Stat. § 969.08(10)(b), but the Legislature has also defined "serious crime" in Wis. Stats. §§ 48.685(1)(c); and 50.065(1)(e)1. &2. Wis. Stat. § 949.165(1)(a) incorporates the definition from § 969.08(10)(b). Similarly, "serious felony" is defined in Wis. Stats. §§ 48.415(9m)(b); 302.11(1g); 939.62(2m)(a)2m.; and 973.0135(1)(b). "Serious child sex offense" is also defined in 939.62(2m)(a)1m.

[9] Two of the statutes cited, use of a computer to facilitate a child sex crime and soliciting a child for prostitution, are "serious felon[ies]" under Wis. Stat. § 973.0135(1)(b). Aggravated battery with intent to cause bodily harm is also a "serious felony" under Wis. Stat. § 48.415(9m)(b). Sexual assault of a child – failure to act is a "serious child sex offense" under Wis. Stat. § 939.62(2m)(a)1m.

The Legislature's decision to not label stalking "serious" is reasonable, given the wide range of conduct and unlimited length of time that can be considered a "course of conduct" under the statue. *See* Wis. Stat. § 940.32(1)(a).

Court to substitute its own judgment for that of the Legislature. *See Davis v. Grover*, 166 Wis. 2d 501, 524, 480 N.W.2d 460 (1992). This Court should not entertain the invitation.

II. The court of appeals properly considered the possibility Jared would be committed.

The State seeks to have this Court disregard *Sell*'s language requiring circuit courts to consider the possibility of a civil commitment if an individual is not restored to competency. *Sell* requires the State have an "*important* governmental interest," which means the defendant must be accused of a "serious crime." *Sell*, 539 U.S. at 180 (emphasis in original). The State's interest in prosecuting a particular case can also be diminished based on the circumstances involved.

"The defendant's failure to take drugs voluntarily, for example, may mean lengthy confinement in an institution for the mentally ill—and that would diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime." *Sell*, 539 U.S. at 180.

First, the State acknowledges, but then complains, that determining whether there is possibility of civil commitment is inherently speculative. Pet. for Review at 18. It claims the court of appeals' decision was flawed because "it doesn't consider and apply the elements required for civil commitment." Pet. for Review at 20. The State does not acknowledge that the court of appeals discussed

"Jared's mental health diagnoses and the fact that he was seen at Aurora Health Care for 'homicidal thoughts' on the date of the alleged offense." *J.D.B.*, No. 2023AP715-CR, ¶41; Pet.-App. at 19.

Nothing requires the court of appeals to explicitly say that Jared may have been appropriate for a commitment under the second standard because he was mentally ill and dangerous due to the threats he allegedly made to others. *See* Wis. Stat. § 51.20(1)(a)2.b. It was obvious from the opinion why the court of appeals believed there was "a significant potential for Jared's future civil commitment." *J.D.B.*, No. 2023AP715-CR, ¶41; Pet.-App. at 19. Jared allegedly threatened to kill multiple people due to his mental illness.

Regarding the possibility of an NGI commitment, the court of appeals rightly recognized that the State's interest in prosecution is lessened by the possibility that a defendant would be found NGI. *Sell* recognized that the State's interest in criminal prosecution is largely related to punishment. *Sell*, 539 U.S. at 180 (noting that civil commitment "would diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime.").

Additionally, the State has some interest in creating a record of conviction. *See, e.g.* Wis. Stat. § 939.62 (establishing increased punishment for repeat offenders). Because an NGI finding does not result in conviction and the State cannot punish

individuals found NGI, the likelihood of such a finding obviously undermines the State's interest in prosecution and is relevant to the first *Sell* factor.[10]

The State's reference to Marsy's Law is little more than an attempt to create a situation where it will always have an interest in prosecution. Notably, the State never mentioned the provision until the petition for review, and now faults the court of appeals for not considering it. *See generally* Resp. Br. The State does not explain how or why Marsy's Law changes the calculus under *Sell*. It is not as if the Supreme Court of the United States was not concerned with victims' issues in 2003. Moreover, the crimes *Sell* mentioned specifically—crimes against person and property—are inherently victim crimes. *Sell*, 539 U.S. at 180.[11]

Finally, Jared can safely say that the State will always argue that victim considerations should trump a defendant's right against forced medication. This is not supported by the language in *Sell*, and the Court should not legitimize an argument that would

[10] The State also notes an interest in deterring others from engaging in the conduct," Pet. for Review at 22, presumably through punishment, which is also not accomplished with an NGI finding.

[11] Moreover, the State incorrectly assumes all victims would have a position that aligns with theirs. The State fails to acknowledge that victims may not want to see someone—especially a friend or family member—forcibly medicated. Additionally, there is no information in the record regarding how this specific victim feels.

effectively dispose of the factor in the State's favor in every case.[12]

The court of appeals' analysis of the first factor was based on an application of the plain language of *Sell* and a fair consideration of the State's interest in prosecution; there is no reason for this Court to grant review.

III. The argument regarding pre-trial credit is plainly seeking error-correction.

The State does not try to argue any reason this Court should accept the case related to the pre-trial credit issue, other than for error-correction. The court of appeals noted that the time Jared spent in-custody as a "first-time, then-nineteen-year-old offender" was significant and undermined the State's interest in prosecution.

The State correctly notes that the court of appeals erred in calculating the credit to include the period after the circuit court ordered involuntary medication.[13] Pet. for Review at 22. What the State

[12] It is also worth reminding the State and the Court that Marsy's Law "is not intended and may not be interpreted to supersede a defendant's federal constitutional rights." Wis. Const. art. I § 9m(6). Arguably, the consideration is not relevant at all when it comes to whether a criminal defendant is to be forcibly medicated.

[13] This error is partially attributable to undersigned counsel as the opening brief cited the 318 days calculation, rather than the 245 days from August 22, 2022 to April 24, 2023. App. Br. at 20. Notably, the State did not correct this—or

fails to address is why the difference between 318 days and 245 days is so significant as to undermine the court of appeals' rationale.

The State also asserts that the court of appeals did not address its other purported interests in analyzing the first factor—asking this Court to weigh it differently. [14] This is error-correction.

IV. Illegal pre-trial detention is a proper consideration under *Sell*.

The court of appeals correctly held that illegal pre-trial detention further lessens the State's interest in prosecution and that individuals are entitled to bond, regardless of competency being raised.

A. The illegality of pre-trial detention undermines the State's interest in prosecution.

The State acknowledges that the denial of pre-trial release is a proper consideration under *Sell*. Pet. for Review at 23. The fact that the detention was illegal is relevant to the State's "concomitant,

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respond to Jared's arguments regarding mitigating circumstances at all—simply relying on the allegations in the complaint to support its interest. Resp. Br. at 26. This Court should not grant review related to arguments the State forfeited by not arguing in the court of appeals.

[14] And again, this was not argued below and is forfeited.

constitutionally essential interest in assuring that the defendant's trial is a fair one." *Sell*, 539 U.S. at 180.[15]

> First. From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), 18 U.S.C.A., federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction.

Stack v. Boyle, 342 U.S. 1, 3 (1951). The Eighth Amendment and Article I, § 6 of the Wisconsin Constitution both prohibit excessive bail.

Inherent in the protections against excessive bail is the constitutional right to bail. *See Carlson v. Landon*, 342 U.S. 524, 556 (1952) (Black, J. dissenting) ("Under this contention, the Eighth Amendment is a limitation upon judges only, for while a judge cannot constitutionally fix excessive bail, Congress can direct that people be held in jail without any right to bail at all. Stated still another way, the Amendment does no more than protect a right to bail which Congress can grant and which Congress can take away.").

The State's interest in prosecution is lessened in situations where denial of the right to bail hampers

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[15] Due to the adversarial nature of the criminal legal system, it is often overlooked that the State has an interest in ensuring a fair trial to the defendant. It is not only defense counsel's responsibility or interest to advocate for those rights.

preparation of the defense and violates the presumption of innocence by inflicting punishment before trial.

B. Individuals are entitled to bond when competency is raised.

The court of appeals correctly interpreted the plain language of Wis. Stats. §§ 969.01 and 971.14 in determining that defendants are entitled to bail, even if competency is raised prior to bond being set. This Court does not need to confirm the plain meaning of the statutes.

Under the bail statute, all defendants are eligible for bail "except as provided in ss. 969.035[16] and 971.14 (1r)." Wis. Stat. § 969.01(1)(a). The State correctly notes that Wis. Stat. § 971.14(1r) has three components. Subsections (b) and (c) set forth the circumstances where courts are and are not required to make a probable cause finding before an individual is evaluated for competency. Wis. Stats. §§ 971.14(1r)(b)&(c).

Subsection (a) states: "The court shall proceed under this section whenever there is reason to doubt a defendant's competency to proceed." Wis. Stat. § 971.14(1r)(a). Thus, the statutory scheme is crystal clear: individuals are entitled to bond unless a provision in Wis. Stat. § 971.14 dictates otherwise.

[16] Establishing the circumstances where bail can be denied entirely.

There are two provisions that would work to prevent a person from remaining out-of-custody on bond. First, when the court or DHS determine that an inpatient examination is needed. Wis. Stats. §§ 971.14(2)(a), (c), (d). Second, once a defendant is found not competent and proceedings are suspended. Wis. Stats. §§ 971.14(4)(d); (5)(a)1. Of course the bail statute would cease to be in effect during the timeframe necessary to conduct an inpatient exam. Similarly, once someone is found incompetent, they are committed to the custody of DHS, which would again necessarily trump the bail statute.[17] The Legislature making this clear by referencing the general provision requiring the courts to follow section 971.14 when competency is an issue does not create the confusion the State claims.

The State's reading of the statute also leads to an unreasonable result—individuals who are released on bail before competency is raised get to remain on bail, Wis. Stat. § 971.14(2)(b), but if competency is raised at the first hearing before bail is set, the individual cannot be released. Pet. for Review at 23-25. The State offers no explanation why the Legislature would desire such an outcome.[18] In fact, Wis. Stat. § 971.14(2)(b)'s existence suggests the

[17] It would also be problematic to expect an incompetent defendant to comply with the conditions of bond.

[18] There is also likely an equal protection issue, as there's no explanation why defendants who begin the case with their competency questioned are any less entitled to release on bail than defendants whose competency is questioned after bail has been set.

Legislature's preference that individuals who can be safely released into the community on bail should be.

Finally, the State claims it would be "absurd" to grant bail to individuals whose competency is raised at the first hearing because those individuals "aren't competent to assist counsel" with bail arguments. Pet. for Review at 25. With all due respect, this argument is ridiculous.

First, competency being raised does not mean a defendant is incompetent, and if the defendant claims to be competent the presumption is that they are. *See* Wis. Stat. § 971.14(4)(b) (establishing a higher burden on the State to disprove a defendant's claim of competence).

Second, whether or not a defendant is competent to stand trial often has little bearing on their ability to assist counsel with a bond hearing. For a bond hearing, a defendant needs to minimally communicate to counsel: whether they have any money to post, any ties to the community, whether they have transportation to and from court, and preferably a way for counsel to contact them upon release.

Third, and most poignantly, the State's argument turns defendants' interests on their head. It is true that defendants who "lack[] the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171 (1975); Wis. Stat. § 971.13(1). This concept is based in a defendant's due

process right to a fair trial. *Drope*, 420 U.S. at 172 (citing *Pate v. Robinson*, 383 U.S. 375 (1966)).

However, nothing about that right diminishes a defendant's right to liberty and to be free from unnecessary imprisonment. Wis. Const. art. I, § 1. In fact, the liberty interest is the immediate concern. Nothing about being released would cause a defendant to be tried while incompetent, it would just force DHS to attempt an outpatient examination. Wis. Stat. § 971.14(2)(b).

That the State believes someone should remain in jail simply because their competency has been raised is an untenable outcome. It in no way justifies this outcome with a reasonable basis for blanket jailing of mentally ill individuals who are diverted into the criminal legal system largely because they were going through a mental health crisis.[19]

The State's argument that the Legislature requires those individuals to be held in jail because their competency is in question is repugnant on its face and contrary to the Legislature's stated policy of treating individuals in the "least restrictive treatment alternative appropriate to their needs, and movement through all treatment components to assure continuity of care . . . ." Wis. Stat. § 51.001(1).

[19] It is safe to assume that cases where competency is raised before bond is set are those where the individual's alleged criminal behavior is related to their mental illness or cognitive impairment.

The court of appeals' correctly interpreted the plain language of the relevant statutes, and the State's arguments are almost nonsensical. There is no issue this Court needs to review.

V. The State's failure to adequately treat Jared to competency demonstrates that it did not have an important interest in his prosecution.

The State's failure to treat Jared in a way that was likely to restore him to competency for five months demonstrates it did not deem his prosecution important. "Due process requires that 'the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.'" *J.D.B.*, No. 2023AP715-CR, ¶48 (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)); Pet.-App. at 12.

Jared languished in the jail receiving inadequate treatment for roughly five months before being transported to Mendota. *Supra* at 15. Most of that time was after he was committed. Pet.-App. at 24.

The first competency report suggested that Jared would "attain competency within the permissible time frame if he is provided with inpatient psychiatric treatment." R.5:6. Even then, the examiner was "by no means 100% that such a goal will be accomplished." R.5:6. The circuit court even ordered that Jared be "transported and admitted to a mental health institution designated by the Department of

Health Services FORTHWITH." R.10 (stylization in original).

The jail specialist stated Jared was "non-adherent with psychotropic medication" and "indicated a notable decline in his ability to engage and respond relevantly." R.12:2.

Despite all of this, the State waited to transport Jared. The petition for review claims the delay "is not attributable to the prosecution." Pet. for Review at 26. At the end of the day: the State is the State is the State. Jared was committed to the custody of the Department of Health Services. Wis. Stat. § 971.14(5)(a)1. DHS is an arm of the State. Nothing prevented the State from providing Jared the appropriate care, and as the court of appeals correctly recognized—the State had a constitutional obligation to do exactly that. *See J.D.B.*, No. 2023AP715-CR, ¶¶47-52.

It does not matter the reason for the State's failure. The record reflects that it was aware inpatient treatment was necessary and the circuit court ordered Jared transported immediately. The State did not meaningfully try restoring Jared to competency from mid-October until the end of January. The State cannot reasonably expect this Court to accept review of a finding that this demonstrated his prosecution was unimportant to them.

VI. The court of appeals correctly applied the case law related to what is required of an individual treatment plan.

The State makes a largely conclusory implication that the court of appeals required too much of it in demonstrating that the proposed involuntary treatment plan complied with *Sell*. Jared has already discussed why this case is different from *Crosby*, and how the differences in Crosby's and Jared's treatment histories justify opposite outcomes. *Supra* at 11n.4.

Notably, the State does not address the merits of the court of appeals' decision. In fact, the State ignores the specific aspects of the treatment plan that concerned the court of appeals. The court of appeals noted that the record demonstrated Jared was "diagnosed with diabetes and was prescribed medication to prevent seizures resultant from his head injury." *J.D.B.*, No. 2023AP715-CR, ¶60; Pet.-App. at 28. Despite this, in his report where it says "The subject is diagnosed with the following physical health conditions," Dr. Illichman wrote "None." *Id.*; Pet.-App. at 28. The court of appeals identified that "the labels for nearly all of the proposed medications call for special precautions for individuals with diabetes or who are at a heightened risk of seizure." *Id.*; Pet.-App. at 28.

The State ignores that the involuntary medication plan was both not sufficiently individualized and possibly medically inappropriate

on the record before the circuit court. The State instead suggests that this Court needs to step in and decide if its doctors need to explain something as "granular" as whether medications might cause hyperglycemia (including the possibility of coma or death) in a diabetic patient.[20] Pet. for Review at 29-30.

Finally, no one has suggested that circuit courts "rewrite individualized treatment plans." Pet. for Review at 30. It is the State's burden to prove that an entire treatment plan is appropriate. *State v. Green*, 2021 WI App 18, ¶16, 396 Wis. 2d 658, 957 N.W.2d 583. If a plan is not appropriate, the request for forcible medication should be denied. Nothing prevents the State from coming back to court and requesting involuntary medication with a sufficiently individualized and medically appropriate plan.

[20] *See, e.g.* ABILIFY (aripiprazole) Label, Food and Drug Administration, https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/021436s041,021713s032,021729s024,021866s026lbl.pdf at 14-15 (last accessed Nov. 21, 2024).

CONCLUSION

The court of appeals' opinion was a comprehensive guide to circuit courts on how to apply *Sell*. However, because it did nothing more than apply existing law to facts, it is not novel and presents no issues meeting the criteria for review. This Court should deny the petition for review.

Dated this 25th day of November, 2024.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 6,089 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 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 s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules 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 or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 25th day of November, 2024.

Signed:
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