STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP715-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

J. D. B.,

Defendant-Appellant.

ON REVIEW FROM A COURT OF APPEALS DECISION REVERSING AN ORDER FOR INVOLUNTARY MEDICATION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MILTON L. CHILDS, SR., PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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ISSUES PRESENTED

Under *Sell v. United States*, to obtain an involuntary medication order to restore trial competency, the government must show that (1) important governmental interests are at stake, (2) involuntary medication will significantly further those interests, (3) involuntary medication is necessary to further those interests, and (4) involuntary medication is medically appropriate. Additionally, Wisconsin's trial competency statute requires a finding that the defendant isn't competent to refuse medication.

The State sought an involuntary medication order to restore Defendant-Appellant J.D.B.'s (Jared's)[1] competency to stand trial for battering a law enforcement officer who responded to a complaint that Jared threatened to get a gun and kill everyone inside his family's home. It offered an individualized treatment plan and testimony from Jared's treating psychiatrist, who had met with Jared five times, reviewed Jared's medical records, and observed Jared's responses to medication. The psychiatrist offered unrefuted testimony supporting the *Sell* factors and Jared's incompetency to refuse medication.

1. In this seminal case interpreting and applying the *Sell* factors, did the State meet its burden to constitutionally obtain an involuntary medication order?

The court of appeals answered, "no."

This Court should answer, "yes."

2. Did the State prove Jared incompetent to refuse medication?

The court of appeals answered, "no."

This Court should answer, "yes."

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[1] Pseudonym.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests oral argument and publication.

STATEMENT OF THE CASE

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

On August 24, 2022, the State charged Jared with battery to a law enforcement officer, a Class H felony. (R.2.) The day before, police were dispatched to a residence in response to a reported threat. (R.2:1.) Officers spoke with Jared's mom, who said Jared was threatening to get a gun and kill everyone inside the home. (R.2:1.) Jared then threatened to fight the officers. (R.2:1.) When the officers tried to arrest Jared, he punched an officer in the face, causing pain and a laceration. (R.2:1.) As officers handcuffed Jared, he threatened to kill the officer he struck. (R.2:1.)

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

Jared first appeared in court on August 31, 2022.[2] Defense counsel questioned Jared's competency to proceed, so an initial appearance wasn't held. Instead, following Wisconsin's trial competency statute, the circuit court found probable cause and ordered a competency evaluation. Jared was remanded into the custody of the sheriff's department.

Dr. Collins, a board-certified psychologist and Director of the Wisconsin Forensic Unit, performed a competency assessment and authored a report. (R.5.) She diagnosed 19-year-old Jared with Schizophrenia and "Major neurocognitive

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

disorder," due to a self-inflicted gunshot wound to the head from years earlier. (R.5:3, 5–6.) Dr. Collins concluded that Jared wasn't competent to assist with his defense. (R.5:6.) Per Dr. Collins, Jared was likely to regain competency within the time allotted if provided with inpatient psychiatric treatment. (R.5:6.)

At the competency hearing on October 11, 2022, the circuit court heard testimony from Dr. Collins and found Jared incompetent to proceed but likely to regain competency with treatment. It suspended the proceedings and committed Jared to the Department of Health Services' (DHS) custody for no longer than 12 months. (R.8:2.)

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

Jared started his commitment at the jail, where he participated in four clinical coordination sessions with a specialist through the Outpatient Competency Restoration Program. (R.12:3.) He was "minimally productive" 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 occurred two months later. (R.15.) Jared remained incompetent but likely to regain competency in the time remaining. (R.15:7.) The examiner noted that Jared "expressed an understanding of appropriate courtroom behavior, the roles of pertinent courtroom personnel," "the role of his counsel," and "the concepts of a plea bargain and a misdemeanor." (R.15:7.) However, Jared hadn't "expressed an understanding or appreciation of his charges or plea options." (R.15:7.) "Regarding restorability," the examiner commented that there were "numerous medication changes that [could]

be made in an effort to treat [Jared's] symptoms of psychosis." (R.15:7.)

Though he took some prescribed medication at Mendota, Jared began consistently refusing medication in early April 2023, prompting DHS to seek 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 testified about Jared's condition and his proposed treatment plan. (R.37:14–68.)

In opposing the *Sell* order, defense counsel first contended that the State wasn't prosecuting "a serious crime." (R.37:70.) Counsel did not, however, argue that special circumstances undermined the State's interest in prosecution. (R.37:70.) Next, counsel submitted that Dr. Illichmann's plan was too generic to support an involuntary medication order, citing *State v. Green*, 2021 WI App 18, 396 Wis.2d 658, 957 N.W.2d 583, for support. (R.37:73–74.) Counsel also maintained that the involuntary medication order wasn't necessary or medically appropriate. (R.37:75–76.)

The circuit court found the *Sell* factors satisfied and ordered involuntary medication. (R.23; 37:79.) The court of appeals then stayed the order. (R.30.)

D. The court of appeals reversed the expired involuntary medication order.

Jared appealed, 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.[3] (Pet-App. 4.) Alternatively, it argued that it proved the *Sell* factors, and that Jared was incompetent to refuse medication. (Pet-App. 4.)

Following oral argument, the court of appeals ordered the parties to file simultaneous briefs addressing two new issues: (1) whether a defendant ordered to undergo a competency examination under section 971.14(2) has a constitutional or statutory right to conditional pretrial release or a bail hearing, and if so, whether Jared was denied that right, and (2) whether a defendant committed under section 971.14 has a due process right to receive competency-restoration treatment in a timely manner, and if so, whether Jared was denied that right. (Pet-App. 10.)

In a published opinion, the court of appeals reversed the expired involuntary medication order. It overlooked the mootness doctrine to provide guidance on *Sell*, concluding that the State failed to prove all four factors. (Pet-App. 4–5.) Regarding the first factor, the court of appeals agreed with Jared's argument—raised for the first time on appeal and supplemented with the court of appeals' own raising of new issues—that special circumstances lessened the State's interest in prosecuting Jared for a serious crime. (Pet-App. 16–24.) Specifically, it concluded that "the potential for Jared's future civil commitment and the length and circumstances of his pretrial detention, taken together, undermine the importance of the State's interest in prosecution." (Pet-App. 24.) As for the remaining *Sell* factors, it held that Dr. Illichmann's treatment plan wasn't "adequately individualized" for the State to succeed. (Pet-App. 24–29.)

[3] The involuntary medication order expired while Jared's appeal was pending.

Beyond reversing on the *Sell* factors, the court of appeals held that the State failed to prove Jared incompetent to refuse medication. (Pet-App. 29–34.)

This Court granted the State's petition for review. Additional facts are discussed below.

STANDARDS OF REVIEW

The standard of review in *Sell* cases is unsettled in Wisconsin. *State v. D.E.C.*, 2025 WI App 9, ¶ 35, 415 Wis.2d 161, 17 N.W.3d 67. However, most federal circuits treat the first *Sell* factor as a legal question subject to de novo review (with underlying factual findings reviewed for clear error) and the remaining factors as factual questions subject to clear error review. *United States v. Dillon*, 738 F.3d 284, 291 (D.C. Cir. 2013) (collecting cases).

This Court should join most federal circuits and adopt the above standard of review. Wisconsin courts look to the federal circuits for guidance on *Sell*. *See Green*, 396 Wis.2d 658, ¶¶ 35, 38. The above approach correctly observes that while appellate courts are "well-equipped to review" the first factor "for itself," the remaining factors "typically involve[ ] substantial questions of fact" that are "best left to the [circuit] court and must be accorded deference on appeal." *United States v. Hernandez-Vasquez*, 513 F.3d 908, 915 (9th Cir. 2008).

This case also calls for statutory interpretation, which presents a legal question subject to de novo review. *Green*, 396 Wis.2d 658, ¶ 52.

ARGUMENT

I. The State proved the *Sell* factors.

A. *Sell* provides the standard for involuntary medication to restore trial competency.

Individuals have a significant liberty interest in "avoiding the unwanted administration of antipsychotic drugs." *Sell v. United States*, 539 U.S. 166, 178 (2003) (citation omitted). The government therefore needs an "essential" or "overriding" interest to obtain an involuntary medication order. *Id.* at 179 (citation omitted). Trial competency restoration may constitute such an interest. *Id.* at 169.

Sell provides a four-part standard for obtaining an involuntary medication order to restore trial competency. It asks whether (1) important governmental interests are at stake, (2) involuntary medication will significantly further those interests, (3) involuntary medication is necessary to further those interests, and (4) involuntary medication is medically appropriate. *Id.* at 180–81. The government must "prove the factual components of each of the four factors by clear and convincing evidence." *Green*, 396 Wis.2d 658, ¶ 16.

Aside from stating that involuntary medication orders "may be rare" under its standard, the U.S. Supreme Court offered little guidance on what exactly a government must do to meet its burden. *Sell*, 539 U.S. at 180. As discussed below, this has been left to federal and state courts to flesh out.

1. Important governmental interest

a. Serious crime

Sell says 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.* But "*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). Federal circuits have taken different approaches to assessing seriousness.

The Fourth, Fifth, Sixth, Seventh, and Eighth Circuits have held that the statutory maximum penalty of the charged offense either controls or is the primary factor in determining seriousness.[4] *United States v. Tucker*, 60 F.4th 879, 887 (4th Cir. 2023) (treating the maximum penalty as the "central consideration" (citation omitted)); *United States v. Palmer*, 507 F.3d 300, 303–04 (5th Cir. 2007) (joining other courts in focusing on the maximum penalty); *United States v. Berry*, 911 F.3d 354, 360 (6th Cir. 2018) ("The central part of this review is consideration of 'the maximum penalty authorized by statute.'" (citation omitted)); *United States v. Fieste*, 84 F.4th 713, 720 (7th Cir. 2023) ("We evaluate the seriousness of an offense by looking to its maximum statutory penalty."); *United States v. Mackey*, 717 F.3d 569, 573 (8th Cir. 2013) ("[W]e agree with those circuits that place the greatest weight on the maximum penalty authorized by statute.").

By contrast, in the Ninth Circuit, predicting the defendant's probable sentence via the sentencing guidelines range is "the starting point in determining whether the government has an important interest in prosecution." *United States v. Onuoha*, 820 F.3d 1049, 1055 (9th Cir. 2016). Then courts turn to "the specific facts of the alleged crime as well as the defendant's criminal history" in completing the analysis. *Id.*

The Second and Tenth Circuits take more varied approaches. In the Tenth Circuit, courts consider the statutory maximum penalty, the sentencing guidelines range,

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[4] Courts aggregate charges when evaluating the maximum penalty. *See, e.g.*, *United States v. White*, 620 F.3d 401, 410–11 (4th Cir. 2010).

"the nature or effect of the underlying conduct for which [the defendant] was charged," and the defendant's criminal history. *United States v. Valenzuela-Puentes*, 479 F.3d 1220, 1226 (10th Cir. 2007). No one factor clearly controls. *See id.* The Second Circuit follows suit. *See United States v. Boima*, 114 F.4th 69, 76–78 (2d Cir. 2024).

While most federal circuits find that the maximum statutory penalty either controls or is the primary factor in deciding seriousness, there's still the question of what level of penalty makes a crime sufficiently serious for *Sell* purposes. Here again, courts take varied approaches.

"In most of the cases in which federal courts have considered the constitutionality of *Sell* orders, the crimes charged have been punishable by five or more years in prison, and courts generally have concluded that such crimes are 'serious' under *Sell*." *State v. Lopes*, 322 P.3d 512, 525 (Or. 2014) (collecting cases). "However, some courts have adopted a categorical approach, deciding that crimes carrying a sentence of more than six months' imprisonment are 'serious' under *Sell*." *Id.* (collecting cases). Those discussing or embracing the six-month rule note the U.S. Supreme Court's definition of "serious crime" for purposes of the Sixth Amendment right to a jury trial, which is any crime authorizing imprisonment over six months. *See, e.g.*, *Evans*, 404 F.3d at 237–38 (discussing *Baldwin v. New York*, 399 U.S. 66 (1970)); *United States v. Algere*, 396 F.Supp.2d 734, 739 (E.D. La. 2005); *State ex rel. D.B.*, 214 S.W.3d 209, 212–13 (Tex. App. 2007).

Finally, it appears universally accepted that crimes don't have to be against person or property to qualify as serious under *Sell*. *See Hernandez-Vasquez*, 513 F.3d at 917–18 (illegal entry); *United States v. Green*, 532 F.3d 538, 550 (6th Cir. 2008) (possession with intent); *United States v. Gomes*, 387 F.3d 157, 160 (2d Cir. 2004) (firearms offense); *State v. Davis*, 998 A.2d 1250, 1254 (Conn. App. Ct. 2010) (sex

offender registry). Seriousness therefore doesn't turn on violence. *Green*, 532 F.3d at 548.

b. Special circumstances

A court's "measure of the government's interest" in obtaining an involuntary medication order isn't limited to the prosecution of a serious crime. *Fieste*, 84 F.4th at 720. "Even when a defendant is charged with a serious crime, '[s]pecial circumstances may lessen the importance' of the government's interest in prosecuti[on]." *Id.* (citation omitted). *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." *Sell*, 539 U.S. at 180. Federal and state cases provide guidance on this aspect of *Sell*'s standard.

For starters, the Third, Fourth, Sixth, Seventh, and D.C. Circuits have all stated that the defendant must "come forward with evidence of her special circumstances." *Fieste*, 84 F.4th at 721 (collecting cases); *Dillon*, 738 F.3d at 293; *United States v. Sheikh*, 651 F.App'x 168, 170 n.2 (4th Cir. 2016). As the Seventh Circuit recently reasoned, though the government bears the ultimate burden of proving an important governmental interest, "[a]sking the defendant to come forward with evidence of mitigating special circumstances appropriately 'recognizes the defendant's interest in bringing [those] special circumstances to light.'" *Fieste*, 84 F.4th at 721 (citation omitted).

Second, and relatedly, where defendants don't argue special circumstances at the trial court, their new appellate arguments are likely to fail on the merits. In *Fieste*, for example, the Seventh Circuit quickly dismissed the defendant's contention that, notwithstanding her forfeiture, the record was "replete with evidence" that she "almost

certainly" would be civilly committed. *Id.* at 721–22. "[N]ot one of the experts opined on Fieste's dangerousness under the civil commitment standard," it reasoned. *Id.* at 722; *see also Green*, 532 F.3d at 551.

Third, as *Fieste* demonstrates, uncertainty or speculation about whether the defendant would face a civil commitment won't diminish the government's interest in prosecution. *United States v. Mikulich*, 732 F.3d 692, 699 (6th Cir. 2013) (collecting cases). Courts therefore look for expert testimony and consult the relevant civil commitment standard in evaluating its potential. *See United States v. Gillenwater*, 749 F.3d 1094, 1101 (9th Cir. 2014) (finding no evidence suggesting commitment where "none of the experts who evaluated [defendant] took a position on that issue"); *United States v. Gutierrez*, 704 F.3d 442, 450 (5th Cir. 2013) (consulting the civil commitment standard); *United States v. Bradley*, 417 F.3d 1107, 1116 (10th Cir. 2005) (same).

Fourth, courts heed *Sell*'s language that "*lengthy confinement* in an institution for the mentally ill" may weigh against the government's interest in prosecution. *Sell*, 539 U.S. at 180 (emphasis added); *see United States v. Grigsby*, 712 F.3d 964, 970 (6th Cir. 2013); *Dillon*, 738 F.3d at 292–93. For example, the Montana Supreme Court rejected an argument that the likelihood of commitment diminished the government's interest where the defendant, "if convicted, face[d] a potential life sentence, while under a civil commitment, he face[d] the possibility of release in as little as three months." *Barrus v. Montana First Jud. Dist. Ct., Broadwater Cnty.*, 456 P.3d 577, 583 (Mont. 2020). And in *Dillon*, the D.C. Circuit homed in on *Sell*'s use of the word "confinement," requiring evidence "that Dillon [was] likely to be civilly *confined* (as opposed to committed as an outpatient)" before crediting civil commitment as a special circumstance. *Dillon*, 738 F.3d at 294.

Fifth and similarly, courts considering whether a defendant's pretrial confinement diminishes the government's interest in prosecution recognize that that confinement must be "significant."[5] *Sell*, 539 U.S. at 180; *see Fieste*, 84 F.4th at 725 ("Pretrial confinement almost two times in excess of a defendant's likely sentence undoubtedly qualifies as 'significant.'"); *Bradley*, 417 F.3d at 1117 (stating that "[l]ess than nine months" pretrial confinement "pales in comparison to the fifty years imprisonment Bradley faces if convicted"); *United States v. Ruiz-Gaxiola,* 623 F.3d 684, 695 (9th Cir. 2010) (pretrial confinement insignificant where defendant faced a "substantial period of additional confinement" upon conviction).

Sixth and finally, even where courts have found the potential for a lengthy civil commitment or significant pretrial confinement, they have recognized that such circumstances "affect[ ], but do[ ] not totally undermine, the strength of the need for prosecution." *Sell*, 539 U.S. at 180. For example, in *State v. Davis*, the court deemed a lengthy commitment possible but nevertheless found a strong interest in prosecution, recognizing *Sell*'s admonishment, "We do not mean to suggest that civil commitment is a substitute for a criminal trial." *Davis*, 998 A.2d at 1255 (citing *Sell*, 539 U.S. at 180)). And in *Fieste*, despite identifying significant pretrial confinement, the Seventh Circuit found "particularly strong prosecutorial interests at stake," noting that violent crimes "intensif[y] the government's interest in prosecution" and that various collateral consequences follow convictions. *Fieste*, 84 F.4th at 726.

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[5] Federal courts take different approaches to analyzing significance, with some "comparing the time already served by [the defendant] with the statutory maximum" penalty, while others try to predict the defendant's sentence and compare it to the pretrial confinement. *United States v. Gutierrez*, 704 F.3d 442, 451 (5th Cir. 2013) (collecting cases).

2. Significant furthering of the interest, necessity, and medical appropriateness.

The remaining *Sell* factors ask whether involuntary medication will significantly further the government's interest, whether it's necessary, and whether it's medically appropriate. *Sell*, 539 U.S. at 181.

Under *Sell* factor two, involuntary medication will significantly further the government's interest if (1) "administration of the drugs is substantially likely to render the defendant competent to stand trial," and (2) "administration of the drugs is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist" in his defense. *Id.*

To determine whether involuntary medication is necessary under the third *Sell* factor, there are also two areas of focus: (1) the court "must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results," and (2) "the court must consider less intrusive means for administering the drugs . . . before considering more intrusive methods." *Id.*

As for medical appropriateness under *Sell* factor four, the medication must be "in the patient's best medical interest in light of his medical condition." *Id.*

In Wisconsin and around the country, much of the litigation on these factors has centered on the level of detail necessary to obtain an involuntary medication order. The tension lies with two competing principles. On one hand, courts shouldn't delegate their *Sell* responsibilities to treatment providers. *Green*, 396 Wis.2d 658, ¶ 44. On the other, courts shouldn't "micromanage" medical experts that require flexibility in treating patients. *Hernandez-Vasquez*, 513 F.3d at 917. It's inadvisable to ask a court to "substitute [its] Juris Doctor for a Medical Doctor." *Green*, 532 F.3d at

558; *see Fieste*, 84 F.4th at 729 ("Judges, after all, are not doctors."). And *Sell* doesn't require as much. *Hernadez-Vasquez*, 513 F.3d at 916.

Wisconsin appellate courts first entered the fray in *Green*. There, Green faced a homicide charge and underwent trial competency proceedings. *Green*, 396 Wis.2d 658, ¶ 3. The psychiatrist who testified in support of involuntary medication hadn't "evaluated Green for the purpose of prescribing medication for him," nor had he reviewed "Green's medical history or treatment records." *Id.* ¶ 32. He was only able to say that "on paper," a particular medication would be appropriate for Green. *Id.*

In reversing the involuntary medication order, the court of appeals joined federal circuits in holding that the government cannot meet *Sell* by "simply offer[ing] a generic treatment plan with a medication and dosage that are generally effective for a defendant's condition." *Id.* ¶¶ 34–35 (collecting cases). Rather, as the State conceded, an individualized treatment plan "is the necessary first step to fulfilling the second, third, and fourth *Sell* requirements." *Id.* ¶ 37.

The individualized treatment plan must identify (1) "the specific medication or range of medications that the treating physicians are permitted to use in their treatment of the defendant," (2) "the maximum dosages that may be administered," and (3) "the duration of time that involuntary treatment of the defendant may continue before the treating physicians are required to report back to the court." *Id.* ¶ 38 (citation omitted). Additionally, courts must ensure that the plan was formulated with the "particular defendant" in mind. *Id.* Things like the "defendant's age and weight" and his "past responses to psychotropic medications" might influence whether medication is both substantially likely to restore competency and medically appropriate. *Id.* ¶¶ 38–41.

In short, courts are "obligat[ed] to consider particularized information" about the medication and the defendant before ordering involuntary medication under *Sell*. *Id.* ¶ 51.

Since *Green*, challenges to involuntary medication orders have gone far beyond what *Sell* requires. For example, in *State v. D.E.C.*, the treatment plan identified the medications, dosages, and duration of treatment, and was based on "multiple assessments of D.E.C." and "a review of all available relevant medical records related to D.E.C." *D.E.C.*, 415 Wis.2d 161, ¶¶ 1, 39, 41. But D.E.C. still argued that the plan was too generic "because numerous medications [were] listed and the plan [did] not guarantee which particular medications [would] in fact be administered and in what sequence." *Id.*

"Taking at least some of D.E.C.'s arguments to their logical conclusions," he effectively maintained that *Sell* requires a treatment plan "resembling an exhaustively annotated flowchart":

> Such a hypothetical flowchart would begin with a single medication at a narrow range of dosages, and then trace through each possible subsequent medication and narrow dosage range, explaining step-by-step all permissible medications and the specific anticipated effectiveness and side effects that might be experienced. Or, as a functional alternative, imagine a long list of protocols and procedures that would strictly account for the only allowable sequences of medications and dosages, explaining in detail the risks and benefits of each possible alternative treatment route.

Id. ¶ 51. "Assuming that such an annotated flowchart or list is ever used in the medical world as a feasible treatment plan," the court of appeals opined, "D.E.C. fails to identify authority that such a precise, granular prediction of the alterative sequences of events was necessary, and we do not discern this requirement in *Sell*." *Id.*

Similar granularity-type arguments have been rejected in other courts. In *United States v. Green*, the defendant argued that the district court issued "a 'blank check' for 'carte-blanche' medical treatment" because the testifying physiatrist couldn't commit to an alternative treatment plan "until she had an opportunity to determine whether, after the district court's ruling, Green would agree to take the medication in a pill form or require intravenous injection." *Green*, 532 F.3d at 554. The Sixth Circuit disagreed, reasoning, "A district court is not in the position, and does not possess the requisite knowledge to dictate a precise course of medical action for any defendant. Nor should it in order to avoid the 'blank check' appellate challenge raised here." *Id.* at 557–58; *see also Fieste*, 84 F.4th at 730 ("To be clear, we do not expect district courts to pin down with certainty a specific dose of a medication for a particular defendant.").

Thus, where the specificity of treatment plans is concerned, courts are weary of imposing "a virtually insurmountable obstacle" for *Sell* orders. *Commonwealth v. Sam*, 952 A.2d 565, 581 (Pa. 2008).

B. The State was prosecuting a serious crime, special circumstances didn't lessen its interest, and the treatment plan was adequately individualized.

1. Important governmental interest

a. Serious crime

Per the complaint, Jared threatened to get a gun and kill everyone inside his family's residence. (R.2:1.) His family called police for help. (R.2:1.) After officers arrived, Jared punched one in the face and threatened to kill him. (R.2:1.)

Jared faced a Class H felony carrying six years' imprisonment. (R.2:1.) The crime was violent, and prosecution of such conduct is needed to protect society's

"basic human need for security." *Sell*, 539 U.S. at 180. This is especially true given Jared's violence toward a police officer in the call of duty. Our Legislature has determined that society has a strong interest in preventing such conduct, as evidenced by the different penalty structure for battery versus battery to a law enforcement officer. *Compare* Wis. Stat. § 940.19(1) (Class A misdemeanor), *with* Wis. Stat. § 940.203(2) (Class H felony).

The court of appeals correctly concluded that the State was prosecuting a serious crime. (Pet-App. 16–17.) But its analysis provides little guidance on an issue that has divided courts around the country. Further, the guidance it did provide needs clarification. The State asks this Court to hold as follows.

First, consistent with most federal circuits, the maximum penalty should be the primary consideration in deciding seriousness. *See supra*, 16–17. Those courts correctly observe that the maximum penalty "is the most relevant objective indication of the seriousness with which society regards the offense." *Mackey*, 717 F.3d at 573. "In fixing the maximum penalty for a crime, a legislature 'include[s] within the definition of the crime itself a judgment about the seriousness of the offense.'" *Blanton v. City of North Las Vegas, Nev.*, 489 U.S. 538, 541 (1989) (citation omitted). "The judiciary should not substitute its judgment as to seriousness for that of the legislature, which is 'far better equipped to perform the task.'" *Id.* (citation omitted). The minority approach, where courts predict a defendant's sentence without the benefit of a pretrial investigation report or the victim's input, has rightly been criticized as "unworkable" and "uniquely inappropriate." *Evans*, 404 F.3d at 238; *see Green*, 532 F.3d at 550.

In holding that the maximum penalty should be the primary consideration in deciding seriousness, this Court should make clear that courts may aggregate offenses. *See*

United States v. White, 620 F.3d 401, 410–11 (4th Cir. 2010); *Evans*, 404 F.3d at 238 n.8. And while the State doesn't advocate for "any rigid rule as to what the statutory maximum must be for a crime to be a serious one," courts should at least recognize the six-month benchmark that the U.S. Supreme Court uses to define "serious crime" in another context. *Evans*, 404 F.3d at 238. That may assist courts in deciding whether a crime with a lesser penalty may nonetheless be serious, perhaps because it involves violence.

Second, this Court should hold that secondary considerations like the nature or effect of the underlying conduct and the defendant's criminal history are on the table when assessing seriousness. In most federal circuits, these circumstances play some role in the analysis. *See supra*, 16–17. It appears that only the Sixth and Seventh Circuits limit their analysis to the maximum statutory penalty. *See Berry*, 911 F.3d at 362; *Fieste*, 84 F.4th at 720. But *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, so adopting a more flexible approach is appropriate. *See Onuoha*, 820 F.3d at 1055.

Third, this Court should state that crimes don't have to be against person or property to be serious. *See supra*, 17. Whether so-called "status offenses" or "victimless crimes," these crimes can significantly impact communities such that there's a strong interest in prosecution. *See Mackey*, 717 F.3d at 573–74; *Green*, 532 F.3d at 548–49. It's universally accepted that violence isn't a prerequisite to seriousness, and to the extent that the published decision below suggests otherwise, it should be clarified. (Pet-App. 17.)

Fourth and finally, this Court should clarify that a crime doesn't need to be listed as "serious" in Wisconsin's bail

statute to be serious under *Sell*.[6] (Pet-App. 17.) This was the court of appeals' leading reason for why Jared's crime was serious. (Pet-App. 17.) It offered no authority supporting that method of deciding seriousness, and the State has identified none. (Pet-App. 17.) Whether measured by the maximum penalty or public opinion, there are numerous unquestionably serious crimes that aren't listed in Wis. Stat. § 969.08, including:

- 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); and
- Aggravated battery with intent to cause bodily harm, Wis. Stat. § 940.19(4) (Class H felony).

Thus, there are flaws with an approach that would either require or greatly weigh a crime's listing as "serious" in Wisconsin's bail statute. Whether the court of appeals endorsed such an approach isn't clear; this Court should set the record straight.

b. Special circumstances

At the circuit court, Jared didn't argue that special circumstances lessened the State's interest in prosecution. (R.37:70.) The court therefore didn't consider the matter. (R.37:76–77.) The court of appeals' reversal based on numerous special circumstances—some of which it raised on its own—presents a classic example of "a circuit court . . . being 'blindside[d]' with reversal based on a theory which it was not presented with." *St. Croix Scenic Coalition, Inc. v.*

[6] Wisconsin Stat. § 969.08 defines "serious crime" for purposes of modifying or revoking bail.

Village of Osceola, 2024 WI App 73, ¶ 10, 414 Wis.2d 549, 15 N.W.3d 917.

There are sound reasons behind the forfeiture rule, including that it "enables a 'circuit court to avoid or correct any error as it comes up' and 'gives the parties and the circuit court notice of an issue and a fair opportunity to address the objection.'" *Id.* (citation omitted). Therefore, the State first asks this Court to join the Third, Fourth, Sixth, Seventh, and D.C. Circuits in holding that the defendant must identify special circumstances that lessen the government's interest in prosecution, *see supra*, 18. As the Seventh Circuit aptly observed, "[t]hat approach sensibly balances the defendant's and the government's competing incentives in *Sell* cases." *Fieste*, 84 F.4th at 721. The defendant is both "best incentive[ized]" and "best position[ed]" to make the argument, and comparatively, "it is not uncommon for defendants to bear the burden of raising affirmative defenses they wish to assert." *Id.* at 721–22 & n.2.

Given the published decision below, the State next asks this Court to address the special circumstances held to lessen its interest in prosecuting Jared and hold that the court of appeals erred four times over.

(1) Potential for lengthy civil commitment

At the *Sell* hearing, no expert addressed the potential for civil commitment under Chapter 51.[7] (R.37.) Nor did anyone argue that the known facts would likely satisfy the commitment standard. (R.37.) Nor was there any indication

[7] In the context of the *Sell* order, Dr. Illichmann testified that Jared posed a risk of harm to himself or others if not medicated, noting that he "had episodes of charging at staff, throwing feces, spitting at people." (R.37:25.) But Dr. Illichmann didn't opine on the potential for commitment under Chapter 51, nor did the circuit court make any dangerousness finding. (R.23; 37:76–79.)

that Milwaukee County would pursue a Chapter 51 commitment. (R.37.) Under similar circumstances, courts have refused to credit civil commitment as a special circumstance. *See Fieste*, 84 F.4th at 722; *Green*, 532 F.3d at 551; *Gillenwater*, 749 F.3d at 1101.

The court of appeals nevertheless concluded that the potential for civil commitment lessened the State's interest in prosecution. (Pet-App. 19.) There are numerous flaws with its analysis.

First, the court of appeals reached its conclusion without any expert testimony and without even identifying—let alone applying—Wisconsin's Chapter 51 commitment standard. (Pet-App. 19.) Yet that is how courts analyze whether the potential for civil commitment is speculative or uncertain and thus insufficient to lessen the government's interest. *See supra*, 19; (Pet-App. 18.) Even if this Court chooses not to require expert testimony to credit civil commitment as a special circumstance, it should at least hold that lower courts must consider whether the facts are likely to satisfy the commitment standard before lessening the State's interest.

Perhaps the court of appeals didn't consider the commitment standard because Jared *was* civilly committed when it decided this case, leading to the second problem with its analysis. (Pet-App. 18.) An assessment of the potential for civil commitment must be based on facts that exist at the time of the *Sell* hearing. *See Sell*, 539 U.S. at 180. But here, the court of appeals considered a fact that occurred months later. Specifically, it referenced Jared's "ongoing chapter 51 proceedings" in finding "distinct, non-speculative possibilities for Jared's future commitment." (Pet-App. 19.) No Chapter 51 proceedings were ongoing at the time the State sought an involuntary medication order. They were initiated months later, after the circuit court found Jared not competent and

not likely to regain competency within the time allotted.[8] To say that this fact rendered the potential for civil commitment non-speculative at the time of the *Sell* hearing is irrational. This Court should say so.

Equally illogical was the court of appeals' consideration of the potential for civil commitment "as the result of successfully asserting at trial a defense of not guilty by reason of mental disease or defect (NGI)." (Pet-App. 19.) This third flaw reveals a fundamental misunderstanding of *Sell*'s special-circumstances discussion. The question is whether there's a potential for commitment absent a prosecution, not because of one. *Sell*, 539 U.S. at 180. A court should 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 irrational 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.[9] *See Mikulich*, 732 F.3d at 699–701 (NGI defense is "strikingly different from the two examples of special circumstances announced in *Sell*" as it "relates to the triable

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[8] 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 proceedings.

[9] Even if this consideration is relevant under *Sell*, like the potential for a Chapter 51 commitment, there was no expert testimony supporting an NGI defense before the circuit court. (R.37.) Nor was there any indication that Jared intended to raise an NGI defense. (R.37.) That makes the argument "far too speculative to be persuasive." *United States v. Mikulich*, 732 F.3d 692, 701 (6th Cir. 2013).

merits of the case"); *United States v. Brooks*, 750 F.3d 1090, 1096 (9th Cir. 2014) (rejecting defendant's argument that the potential for NGI commitment is relevant).

A fourth problem with the court of appeals' analysis is that it 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.) The question isn't simply whether there's a "potential for future civil commitment" irrespective of its length compared to the maximum penalty for the crime,[10] and regardless of whether the commitment may be served on an outpatient basis. (Pet-App. 17); *see Sell*, 539 U.S. at 180; *Barrus*, 456 P.3d at 583. It's "lengthy confinement" that may "diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime." *Sell*, 539 U.S. at 180. Given this instruction, the focus should be on the potential for inpatient commitment at a length that lessens the State's need for prosecution. Here, the court of appeals didn't consider that Jared faced six years' imprisonment while an initial commitment under Chapter 51 is at most six months and may be served on an outpatient basis. *See* Wis. Stat. § 51.20(13)(a)3., (g)1., (g)2d.a. (Pet-App. 19.) It should have.

Fifth and finally, the State asks this Court to hold that the court of appeals erred by not considering Marsy's Law before crediting the potential for civil commitment as a special circumstance. *Sell* identified this special circumstance well before States started adopting Marsy's Law, which affords victims constitutional rights to fairness and "timely disposition of the case, free from unreasonable delay." Wis.

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[10] Consistent with its position on how to decide seriousness, as argued above, and how to assess significant pretrial confinement time, as addressed below, the State seeks to eliminate the need for courts to predict sentences at *Sell* hearings.

Const. art. I, § 9m(2)(a), (d). Even so, the *Sell* Court recognized "a substantial interest in timely prosecution," as "it may be difficult or impossible to try a defendant who regains competence after years of commitment during which memories may fade and evidence may be lost." *Sell*, 539 U.S. at 180. Thus, factoring in Marsy's Law before crediting the potential for civil commitment fits neatly within *Sell*'s standard.

In sum, at the *Sell* hearing, no expert testified about the potential for a lengthy, inpatient civil commitment under Chapter 51 (or an NGI commitment, for that matter). No argument was made on this issue, either. The potential was speculative, and the court of appeals erred in concluding otherwise.

(2) Significant pretrial confinement

At the time of the *Sell* hearing, Jared had been confined for 244 days, or eight months. He faced six years' imprisonment for the charged crime.

The court of appeals erroneously calculated Jared's pretrial confinement as 318 days, or ten months, and declared it "significant for a first-time, then-nineteen-year-old offender like Jared." (Pet-App. 24.) It found that the confinement lessened the State's interest in prosecution. (Pet-App. 24.) Though it did not discuss the different approaches toward analyzing this special circumstance, it appears to have compared Jared's pretrial confinement to a predicted sentence and reasoned that there was little interest in prosecution beyond incarceration. (Pet-App. 24.)

In analyzing whether Jared's pretrial confinement was significant enough to lessen the State's interest in prosecution, the State first asks this Court to hold that courts should compare the confinement to the maximum penalty. This is the most workable standard. *See Gutierrez*, 704 F.3d

at 451 (collecting cases). Courts shouldn't be conducting "mock sentencing[s]" at *Sell* hearings. *Id.*

The State further asks this Court to join the Fifth, Seventh, and Tenth Circuits in emphasizing that the government isn't solely concerned with incarceration when prosecuting a serious crime. *See id.*; *Fieste*, 84 F.4th at 726; *Bradley*, 417 F.3d at 1117 n.15. It has numerous important interests, including seeking justice for crime victims,[11] promoting general deterrence, and "express[ing] society's disapproval of such conduct." *Gutierrez*, 704 F.3d at 451. Further, a conviction opens the door to things like supervised release, restitution for crime victims, and firearms prohibitions. *See Fieste*, 84 F.4th at 726. Analysis of this special circumstance shouldn't be a one-sided discussion that disregards these realities.

Finally, given the court of appeals' error in calculating Jared's pretrial confinement, the State asks this Court to clarify that the cut-off is the *Sell* hearing (or whenever the court decides the motion for involuntary medication). *See Bradley*, 417 F.3d at 1117. The court of appeals wrongly used the date that Jared was discharged from the competency commitment, adding a little over two months to the confinement calculus. (Pet-App. 24.)

Applying the above standards here, Jared's pretrial confinement didn't lessen the State's interest in prosecution. Even if eight months' pretrial confinement is significant compared to six years' imprisonment (it isn't), the State's interests went beyond incarceration. Jared assaulted a police officer who was called for help because Jared threatened to kill family members. The State has a strong interest in seeking justice for the officer and in deterring the entire

[11] Here again, Marsy's Law should come into play before crediting this special circumstance. *See supra*, 31–32.

course of conduct. Moreover, a conviction would have led to a firearms prohibition, a significant collateral consequence given the criminal conduct at issue. *See* Wis. Stat. § 941.29(1m)(a). Finally, a conviction would have made supervised release possible, thereby ensuring "appropriate monitoring and allow[ing] the government to protect the public from future crimes." *Fieste*, 84 F.4th at 726.

(3) Bail

On its own initiative, the court of appeals expanded the class of special circumstances that may lessen the government's interest in prosecution to include a violation of Wis. Stat. § 969.01, governing eligibility for conditional pretrial release ("bail"). (Pet-App. 10, 20–22.) Its decision on this point was both unnecessary and incorrect.

The decision was unnecessary because denial of bail is already accounted for under *Sell*. *Sell* instructs courts to consider whether the defendant's pretrial confinement lessens the government's interest in prosecution. Therefore, denial of bail is already held against the government by virtue of courts considering that confinement as a special circumstance. This means that the court of appeals doubly counted pretrial confinement against the State without any explanation why. (Pet-App. 20–22.) The "special circumstances" identified in *Sell* must "undermine" "the strength of the need for prosecution." *Sell*, 539 U.S. at 180. Aside from its relationship to pretrial confinement, why does the denial of bail lessen the need to prosecute a serious crime? There was no need for the court of appeals to reach out and decide whether there was a violation of the bail statute in this *Sell* case.

Moreover, the court of appeals is wrong that there was a violation of section 969.01. The plain language of sections 969.01 and 971.14 establishes that courts don't have authority to order bail after competency is raised. *See State ex*

rel. Kalal v. Cir. Ct. for Dane Cnty., 2004 WI 58, ¶ 46, 271 Wis.2d 633, 681 N.W.2d 110 (courts aren't at liberty to disregard plain statutory language).

Section 969.01(1) 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 reason to doubt a 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 bail.

So far, then, the plain language of these statutes shows that the circuit court had no authority to order bail 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 bail. *See* Wis. Stat. § 969.01(1) (1975–76).

The court of appeals disagreed 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 bail 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 bail. And when that happens, courts no longer have the authority to order bail because it must proceed under section 971.14(1r), which doesn't instruct courts to consider bail.

The court of appeals' contrary interpretation is unreasonable. *See Kalal*, 271 Wis.2d 633, ¶ 46 (statutory language is interpreted reasonably). It believes that the reference to section 971.14 proceedings in the bail statute is to communicate that courts have the authority to order bail up to the point of a competency commitment under section 971.14(5). (Pet-App. 21.) Yet the clearest way of messaging that 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 bail once a defendant is committed for competency restoration. 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 section 971.14 proceedings in the bail statute would be unnecessary.

Even if this Court disagrees with the State's reading of the relevant statutes, it should still hold that a violation of the bail statute isn't an additional circumstance (separate from pretrial confinement) that counts against the State in the *Sell* analysis.

(4) Delay in transfer for inpatient treatment

On its own initiative, the court of appeals declared a due process violation whenever a section 971.14 committee isn't transferred from a jail to an inpatient facility "within a

reasonable amount of time." (Pet-App. 10, 24.) For the court, this is another special circumstance that lessens the government's interest in prosecution. (Pet-App. 22–24.)

The first flaw with this conclusion is that, like its bail discussion, the court of appeals never explained why an unreasonable delay in transfer for inpatient treatment lessens the State's interest in prosecution. (Pet-App. 22–24.) As discussed, *Sell* doesn't direct courts to search for perceived wrongs and declare them "special circumstances" that may defeat a request for involuntary medication. The circumstances must relate to the need for prosecution. *Sell*, 539 U.S. at 180.

Perhaps the suggestion is that the three-and-a-half-month delay in transferring Jared to Mendota says something about how important this prosecution was to the State. But that reasoning is unpersuasive because it overlooks the practical realties that (1) the prosecution doesn't control when a committee in DHS's custody is transferred to an inpatient facility, and (2) there is only so much space available at Wisconsin's inpatient facilities. There is no reason to assume that a delay in transfer is attributable to indifference on the prosecution's part, so the only possible connection between the delay and the strength of the need for prosecution fails. The court of appeals therefore erred in crediting the delay as a special circumstance under *Sell*. Notably, not one of the cases it relied upon in declaring a due process violation involved a *Sell* order. (Pet-App. 22–23.)

The second problem with the court of appeals' decision is factual in nature. 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 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 some competency restoration treatment at the jail. (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, 876 (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 happened here. As it stands, and contrary to the authority cited, 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.) That cannot be right; reasonableness calls for a totality-of-the-circumstances inquiry.

Legally, the court of appeals' due process declaration 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 held that a statute that permits indefinite confinement for competency restoration is unconstitutional. *Id.* at 731.

In response to *Jackson*, our Legislature limited the duration of competency commitments to 12 months or the maximum sentence 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.

As the court of appeals noted, federal courts have cited to *Jackson* when declaring that a defendant's jail custody while awaiting transfer to an inpatient facility violated 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. Yet *Mink* "acknowledged that its holding was broader than *Jackson*'s." *Glendening*, 707 F.Supp.3d at 1108.

If this Court decides that a delay in transfer is a relevant special circumstance under *Sell* (it isn't), and if it believes there's an adequate record to assess the constitutionality of the delay (there's not), it should join those courts that carefully read *Jackson* as forbidding "only irrational pretrial detention." *Id.* at 1109. The limited record shows that Jared participated in four competency-restoration sessions at the jail while awaiting transfer to Mendota, presumably because of capacity issues. (R.12:3.) This isn't

irrational pretrial detention. *See Glendening*, 707 F.Supp.3d at 1109.

* * *

The State was prosecuting a serious crime, and special circumstances didn't lessen its interest. It satisfied the first *Sell* factor.

2. Significant furthering of the interest, necessity, and medical appropriateness.

a. Additional facts

Dr. Illichmann is a board-certified clinical psychiatrist who treated Jared at Mendota. (R.37:14–19.) He's practiced psychiatry for 13 years. (R.37:15.)

Dr. Illichmann personally examined Jared five times before seeking an involuntary medication order. (R.37:20, 38.) He also reviewed Jared's medical records. (R.37:18–19.) He determined that Jared had schizophrenia spectrum illness, which is treatable. (R.37:23.) Dr. Illichmann noted that Jared had been provided antipsychotic medications in the past that seemed to have helped, including paliperidone. (R.37:23.) Before refusing medication at Mendota, Jared was taking paliperidone at a dose of six milligrams, which was never increased. (R.37:48, 54). He also was on valproate (a mood stabilizer) and a blood pressure medication. (R.37:24, 55.)

In Dr. Illichmann's opinion, to a reasonable degree of professional certainty, involuntary medication was substantially likely to render Jared competent. (R.37:27, 36.) He expected to see "more organized behavior and thought processes" upon administering medication characterized as the "cornerstone for the treatment of illnesses like schizophrenia." (R.37:27, 29.) There were no alternative less intrusive treatments that would restore Jared's competency. (R.37:29.) Side effects of the proposed medications—which

Mendota carefully monitors for—would not impair Jared's ability to competently assist with his case. (R.37:27–35.) Dr. Illichmann testified that all the proposed medications were medically appropriate for Jared, taking into account his specific medical conditions. (R.37:25–26, 29.)

Dr. Illichmann's specific plan was to have Jared resume taking paliperidone, a medication that hadn't previously caused him side effects. (R.37:41–43, 53–54, 62.) But the doctor proposed and discussed six other antipsychotic medications as well. (R.19:3; Pet-App. 9.) He explained the need for flexibility because the practice of medicine involves trial and error, and he clarified 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.) All dose ranges were based on the ranges that drug manufacturers submitted to the FDA. (R.37:34.)

b. The circuit court didn't clearly err in finding the remaining *Sell* factors satisfied.

When reviewing *Sell* orders on appeal, it's important to stand in the shoes of the circuit court at the *Sell* hearing. The only evidence presented here was from an expert with 13 years' experience who personally examined Jared five times, reviewed his medical records, and observed his responses to psychotropic medication in combination with other medications. That expert provided unrefuted testimony that involuntary medication was (1) substantially likely to render Jared competent to stand trial and substantially unlikely to have side effects that would significantly interfere with the defense, (2) necessary because there were no less intrusive

treatments that could restore competency, and (3) medically appropriate for Jared.

The proposed treatment plan identified the medications, the maximum dose ranges, and the duration of treatment before check-ins were required. (R.19:3.) The doctor's plan was to start Jared on a medication he'd used in the past (in combination with other medications) with some success and without side effects. Treatment would start with a low dose to monitor for side effects. Because the practice of medicine requires trial and error, additional medications were listed but would be used one at a time, if necessary.

On this record, the circuit court's conclusions on *Sell* factors two through four aren't clearly erroneous.[12] This isn't a *State v. Green* situation, where the doctor seeking medication hadn't met with Green or reviewed his medical records. *See supra*, 22. A treatment plan that identifies medications based on a defendant's current health status, medical history, and prior medication usage and responses isn't in the same playing field as *Green* or the federal cases it relied upon in requiring individualization. *See Green*, 396 Wis.2d 658, ¶¶ 35, 38 (collecting cases).

The court of appeals concluded otherwise through a combination of errors that are important to correct. (Pet-App. 25.)

The first category of errors involves the record. Rather than stepping into the shoes of the circuit court at the *Sell* hearing, the court of appeals altered the evidentiary landscape through both addition and subtraction. In suggesting that the circuit court's conclusions on *Sell* factors two and four are clearly erroneous, the court of appeals

[12] Given the unrefuted testimony of a medical expert, the State maintains that the circuit court's conclusions should be upheld even if not subject to clear-error review.

engaged in improper impeachment by appeal. That is, it relied on information that wasn't presented at the *Sell* hearing to undermine Dr. Illichmann's testimony. (Pet-App. 26.)

The circuit court credited Dr. Illichmann's testimony because it was unrefuted that he'd personally examined Jared numerous times, reviewed his medical records, observed his responses to medications, and understood the medications at issue. This was error, per the court of appeals, because Dr. Illichmann didn't discuss that "Jared has been diagnosed with diabetes and was prescribed medication to prevent seizures resultant from head injury." (Pet-App. 28.) That information apparently comes from competency reports that weren't utilized at the *Sell* hearing (though notably, Dr. Illichmann testified that he reviewed the initial competency report). (R.37:18.) Defense counsel had every opportunity to ask Dr. Illichmann about his opinions on the effectiveness and appropriateness of involuntary medication considering this information but didn't. Nor did counsel use the "labels for nearly all of the proposed medications" to question Dr. Illichmann, yet the court of appeals consulted those labels in discrediting him. (Pet-App. 28.)

The assertion that "the record demonstrates that important aspects of Jared's medical history were not considered" isn't accurate when considering the actual evidence presented at the *Sell* hearing. (Pet-App. 28.) It also pays short shrift to the ethical obligations that doctors owe their patients. When a doctor testifies that he met with and reviewed the patient's medical records, as Dr. Illichmann did here, why should a court reject that testimony if left unrefuted? *See D.E.C.*, 415 Wis.2d 161, ¶ 47 (rejecting an argument because "D.E.C. did not provide the circuit court with good reason to question" the doctor's testimony).

The court of appeals also improperly selectively read the record in reversing the medication order. Its primary objection regarding individualization was that Dr.

Illichmann's report on medications didn't note a "limit on the number of doses Jared can receive in any given period of time, i.e., on a 'per day' or 'per month' basis." (Pet-App. 26.) It thus found the plan to authorize "unfettered discretion" to administer medication at "unrestricted frequencies." (Pet-App. 27.)

Setting aside that Jared didn't object to this at the circuit court (where Dr. Illichmann could have addressed the issue), and that no *Sell* authority explicitly requires a listed dosage in terms of quantity per unit of time, the record shows that Dr. Illichmann wasn't seeking unfettered discretion to treat Jared. A doctor's testimony can provide important context for the written treatment plan. *D.E.C.*, 415 Wis.2d 161, ¶¶ 40, 50. Here, Dr. Illichmann stated that his dose ranges were based on the ranges that drug manufacturers submitted to the FDA. Such submissions obviously have limits for ensuring safe administration of the drugs. Further, the suggestion that Dr. Illichmann would administer unsafe quantities of the drugs is undermined by his never increasing the paliperidone that Jared voluntarily took—not to mention his ethical obligations. Given Dr. Illichmann's testimony, the circuit court didn't clearly err in finding an adequately individualized treatment plan. *C.f. Fieste*, 84 F.4th at 729 (reversing because nothing in the record supported limits on the amount of medication to be administered).

The second category of errors with the court of appeals' opinion is legal in nature. It imposed requirements on treatment plans beyond what *Sell* requires. This is best demonstrated by a how-it-started versus how-it's-going comparison regarding individualized treatment plans.

The individualization requirement was born out of cases like *United States v. Chavez*, where the government sought a medication order without identifying medications, doses, or even having a psychiatrist evaluate the defendant. *United States v. Chavez*, 734 F.3d 1247, 1251 (10th Cir. 2013);

see also Evans, 404 F.3d at 240–41; *Hernandez-Vasquez*, 513 F.3d at 917. *Green* was a similar situation. The consensus from these cases is that treatment plans must identify the medications, dosages, and duration of treatment, and factor in the defendant's personal characteristics. *See Green*, 396 Wis.2d 658, ¶ 38.

Recently, though, the State and its experts have faced a moving target in obtaining *Sell* orders. Even where the treatment plan meets the above requirements, it's challenged for not including things like "an exhaustively annotated flowchart" about how the defendant will be treated. *D.E.C.*, 415 Wis.2d 161, ¶ 51. The court of appeals in *D.E.C.* rightly concluded that *Sell* doesn't require "such a precise, granular prediction" of treatment. *Id.*

But here, the court of appeals required such granularity without any legal support. (Pet-App. 27–28.) Plans must not only identify the proposed medications, it says, but also explain "how an unordered list of potential medications is individually tailored to a particular defendant." (Pet-App. 27.) And if (consistent with the practice of medicine) a doctor provides a broad dose range based on FDA-submissions, there needs to be an explanation of why the defendant "is a generic patient for which the generic dose range" is appropriate. (Pet-App. 28.) In a case where the specific plan was to have Jared resume taking a medication that had some success and produced no side effects,[13] why does the absence of such specific information violate due process?

The State asks this Court to reject the notion that the omission of such specific information can render an otherwise valid involuntary medication order invalid. Otherwise, there are endless ways to challenge these orders, leaving the State

[13] There was evidence that the medications would be tried in a particular order, contrary to the court of appeals' assertion. (Pet-App. 27.)

and its experts guessing what must be done to constitutionally obtain an order. The Sixth Circuit put it best: "We require that the record is clear that physicians exercise their medical judgment and make decisions in accordance with prevailing medical standards, all while taking into account the particular needs and decisions of the individual patient." *Green*, 532 F.3d at 558. Applying that standard here, the involuntary medication order was lawful.

II. The State proved Jared incompetent to refuse medication.

A. Additional facts

Before seeking involuntary medication, Dr. Illichmann went through every medication listed on the treatment plan to discuss the side effects and advantages and disadvantages of each. (R.37:50–52.) Jared responded by saying he didn't need medication. (R.37:51–55.) Given this, Dr. Illichmann opined that Jared wasn't able "to apply information about medications to himself or his situation." (R.37:26.) He therefore concluded that Jared wasn't competent to refuse medication. (R.37:26.) The circuit court explicitly credited Dr. Illichmann's testimony that he "talked to the defendant about the advantages and disadvantages" of medication and felt Jared "did not understand." (R.37:79.)

B. Section 971.14 requires a finding of incompetency to refuse medication.

As this Court has observed, section 971.14 doesn't incorporate the *Sell* factors when it comes to involuntary medication orders. *State v. Fitzgerald*, 2019 WI 69, ¶ 2, 387 Wis.2d 384, 929 N.W.2d 165. Rather, the statutory standard asks whether the defendant is competent to refuse medication. *Id.* ¶ 20. A defendant is incompetent if "because of mental illness . . . and after the advantages and disadvantages of and alternatives to accepting the particular

medication or treatment have been explained to the defendant," he's "substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness . . . to make an informed choice as to whether to accept or refuse medication or treatment." Wis. Stat. § 971.14(3)(dm).

In interpreting identical language in the Chapter 51 context, this Court held that "'applying an understanding' requires a person to *make a connection between* an expressed understanding of the benefits and risks of medication and the person's own mental illness." *In re Melanie L.*, 2013 WI 67, ¶ 71, 349 Wis.2d 148, 833 N.W.2d 607. "It may be true," this Court opined, "that if a person cannot recognize that he . . . has a mental illness, logically [he] cannot establish [such] a connection." *Id.* ¶ 72. Further, "[t]he person's history of noncompliance in taking prescribed medication is clearly relevant, but it is not determinative if the person can reasonably explain the reason for the noncompliance." *Id.* ¶ 75.

C. The "applying an understanding" standard was met here.

Jared has a mental illness. (R.37:23.) He became noncompliant with antipsychotic medication necessary to treat that illness. (R.37:24–25.) "The most he would explain" is that he felt he didn't need medication. (R.37:25.) Yet he exhibited "ongoing" "disorganized thoughts" and aggressive behavior, such as throwing feces. (R.37:25.) Upon receiving an explanation of the advantages and disadvantages and alternatives for each proposed medication, Jared's only response was that he didn't need medication. (R.37:51–55.) For Dr. Illichmann, this showed Jared's inability to apply this information to his mental illness. (R.37:26.)

This unrefuted evidence satisfies the "applying an understanding" standard in section 971.14(3)(dm)2. Evidence

of noncompliance with antipsychotic medication necessary to treat a mental illness is "clearly relevant" and only non-determinative "if the person can reasonably explain the reason for the noncompliance." *Melanie L.*, 349 Wis.2d 148, ¶ 75. The only reason given here is that Jared didn't think he needed medication, despite having a mental illness and displaying ongoing disorganized thoughts and aggressive behavior. This response isn't a reasonable explanation for not taking medication. Indeed, the response suggests that Jared couldn't recognize his mental illness, which further supports the conclusion that the "applying an understanding" standard was met here. *Id.* ¶ 72.

The court of appeals erred in concluding otherwise. (Pet-App. 29–34.) It apparently demanded repeated discussions of the advantages, disadvantages, and alternatives to treatment for the statutory standard to be met. (Pet. App. 32–33.) While that may be "ideal[ ]," the plain language of the statute doesn't require repeated discussions. *Melanie L.*, 349 Wis.2d 148, ¶ 67. The court of appeals also expressed "serious doubts as to the adequacy of the explanation[s] given to Jared" based on perceived deficits with Dr. Illichmann's testimony (Pet-App. 33), which suggests that it reversed the circuit court's credibility determination without concluding, "as a matter of law, that no finder of fact could believe" the testimony. *State v. Garcia*, 195 Wis.2d 68, 75, 535 N.W.2d 124 (Ct. App. 1995). Finally, the court of appeals' skepticism with Dr. Illichmann's testimony was driven by its flawed conclusion on the adequacy of the individualized treatment plan. (Pet-App. 33.)

The court of appeals once again failed to step into the shoes of the circuit court at the evidentiary hearing. The unrefuted evidence satisfied the statutory standard, as interpreted by this Court.

CONCLUSION

This Court should reverse the court of appeals.

Dated this 23rd day of April 2025.

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 11,000 words.

Dated this 23rd day of April 2025.

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

Dated this 23rd day of April 2025.

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