STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP000715-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

J.D.B.,

Defendant-Appellant.

On Review of a Decision of The Court of Appeals, District I, Reversing an Order of Commitment for Treatment (Incompetency) Entered in the Milwaukee County Circuit Court, the Honorable Milton L. Childs, Sr., Presiding

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RESPONSE BRIEF OF DEFENDANT-APPELLANT

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Oral argument and publication are customary for this Court.

INTRODUCTION

Jared was nineteen with no criminal history when his mother called law enforcement to deescalate Jared's mental health crisis. He has a traumatic brain injury and schizophrenia. Jared's mother said he threatened to get a gun and kill everyone in the house. When police arrived, they tried arresting Jared, and he allegedly punched one officer. He was charged with battery to law enforcement. Competency was raised at Jared's first appearance, and he was remanded into custody without bail. The State eventually moved to forcibly medicate Jared to restore his competency.

Before it can forcibly medicate defendants to competency, the State must satisfy four factors set forth in *Sell v. U.S.*, 539 U.S. 166 (2003). Broadly speaking, this requires the State to demonstrate an important interest in prosecution and to provide an individualized treatment plan that is medically appropriate and likely to restore a defendant's competency. *Id.* at 180-81.

Jared does not contest he was charged with a serious crime; however, Jared's lack of history and need for mental health intervention diminish the State's interest in prosecution.

The State's treatment plan was inadequate. It failed to explain how frequently Jared would be medicated or how the nine medications in the plan would be administered. Concerningly, the treatment plan did not consider the interactions of the medications with Jared's diabetes or seizure medications—despite warnings on the medications' labels regarding both. The State also failed to prove Jared incompetent to refuse medication.

The State asks this Court to lower the high burden established by the U.S. Supreme Court for forcibly medicating individuals. This Court should affirm the Court of Appeals' decision that the State did not have an important interest in prosecuting Jared, failed to provide an adequate treatment plan, and did not prove him incompetent to refuse medications.

ISSUES PRESENTED

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 treatment." Pet. for Review at 7.

The circuit court found the State proved all four *Sell* factors and that Jared was incompetent to refuse medication.

The Court of Appeals reversed, finding the State did not prove the *Sell* factors or that Jared was incompetent to refuse treatment.

STATEMENT OF THE CASE AND FACTS

Jared is a 19-year-old with partial left-side paralysis, a lumbering gait, and compromised speech and cognitive abilities all stemming from a self-inflicted gunshot wound from when he was eleven. (R.5:3-4). He is diagnosed with major neurocognitive disorder due to traumatic brain injury and schizophrenia. (R.5:5).

Prior to his arrest and detention, Jared resided with his mother and siblings in Milwaukee. According to the complaint, Jared's mother stated Jared made statements about getting a gun and harming people in the residence. (R.2:1). While police arrested Jared, he allegedly threw two punches at one officer and hit him in the face. (R.2:1).

Jared was taken to a hospital, but was seemingly not 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).

The State charged Jared with Battery to a Law Enforcement Officer. Wis. Stat. § 940.203(2).

One week after his arrest, Jared appeared in court for the first time and after competency was raised an examination was ordered. (R.4). Jared was not given bail. Deborah L. Collins, Psy.D. examined Jared and filed a report. (R.5).

Dr. Collins' report noted 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 had previously been diagnosed with schizophrenia. (R.5:3). 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 Jared's 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 "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 records, Jared's history, and her 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 medication compliant, and Dr. Collins did not evaluate if he was competent to refuse treatment. (R.5:6). Jared was found not competent and committed under section 971.14. (R.8)

At the time of the 90-day commitment review Sergio Sanchez, Psy.D. reported there was little change in Jared's condition and stated Jared was not medication compliant. (R.12:3). Jared was transferred to Mendota Mental Health Institute ("Medota") on January 25, 2023, after spending five months in jail. (R.15:4).

The 180-day competency report was submitted to the circuit court by Ana Garcia, Ph.D. ("Dr. Garcia") on March 28, 2023. Dr. Garcia reported 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 Jared's treating physician, Dr. Mitchell Illichmann, and Mendota staff who worked with Jared. (R.15:1-2).

In addition to his diagnoses of hypertension and diabetes, Dr. Garcia noted that Jared "is prescribed medication to prevent seizures that can be resultant from head injuries." (R.15:3).

At the time of Dr. Garcia's report, Jared had been at Mendota for about three months and was being treated with antipsychotic and antidepressant medications. *See generally* (R.15). Despite treatment, Jared allegedly swore and spit at staff, urinated and defecated in his room, and exhibited symptoms of schizophrenia. (R.15:4-6).

Six days after Dr. Garcia filed her report, Jared began refusing medications, prompting Dr. Illichmann's request for involuntary medication. (R.37:25, 66). Dr. Illichmann did not consider adjusting Jared's medication or dosage until after he began refusing. (R.37:47).

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

The treatment plan accompanying the report proposed seven different antipsychotics "either in combination or in succession" to be taken orally. (R.19:3). 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). The plan also recommended one non-antipsychotic, lorazepam, be injected for "agitation." (R.19:3).

At the involuntary medication hearing, Dr. Illichmann testified that Jared told him that he felt he did not need medication. (R.37:25-26). 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).

The circuit court found that the State had met its burden regarding each of the *Sell* factors. *See* (R.37:76-79). 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).

The court ordered involuntary medication. (R.23; Pet.-App.36-38). The Court of Appeals stayed the medication order and ultimately reversed. *See State v. J.D.B.*, 2024 WI App 61, 414 Wis. 2d 108, 13 N.W.3d 525; Pet.-App.3-35.

STANDARD OF REVIEW

Before forcibly medicating an individual to restore competency, the State must establish four factors: 1) that "*important* governmental interests are at stake," 2) that "involuntary medication will *significantly further* the government's interest in prosecuting the offense," 3) "that involuntary medication is *necessary* to further those interests," and 4) "that administration of the drugs is *medically appropriate*, *i.e.*, in the patient's best medical interest in light of his [or her] medical condition." *Sell*, 539 U.S. at 180-81 (emphases in original). The State bears the burden to prove

each of the four *Sell* factors by clear and convincing evidence. *State v. Green*, 2021 WI App 18, ¶16, 396 Wis. 2d 658, 957 N.W.2d 583.

While the Constitution may permit forcible medication in some cases, "[t]hose instances may be rare." *Id.* at 180. Given the serious deprivation of liberty at stake, "a high level of detail is plainly contemplated by the comprehensive findings *Sell* requires." *U.S. v. Chavez*, 734 F.3d 1247, 1252 (10th Cir. 2013). If the State does not prove the *Sell* factors, involuntary medication is unconstitutional. *State v. Fitzgerald*, 2019 WI 69, ¶32, 387 Wis. 2d 384, 929 N.W.2d 165.

Because involuntary medication implicates Jared's due process rights, this Court reviews the circuit court's order under the two-part standard for questions of constitutional fact. *See State v. Woods*, 117 Wis. 2d 701, 715, 345 N.W.2d 457 (1984); *see also*, *Langlade Cnty. v. D.J.W.*, 2020 WI 41, ¶¶23-24, 391 Wis. 2d 231, 942 N.W.2d 277. This Court upholds the circuit court's factual findings unless they are clearly erroneous or against the great weight and clear preponderance of the evidence. *D.J.W.*, 391 Wis. 2d 231, ¶24. Whether those facts meet the legal standard is a question of law reviewed *de novo*. *Woods*, 117 Wis. 2d at 716; *D.J.W.*, 391 Wis. 2d 231, ¶25.

This Court has held the mixed standard applies in a parallel context—treatability under Chapter 51. *Waukesha Cnty. v. J.W.J.*, 2017 WI 57, ¶15, 375 Wis. 2d 542, 895 N.W.2d 783. Like with treatability, the *Sell* factors require courts to apply facts found by the circuit court to a legal standard. *K.N.K. v. Buhler*, 139 Wis. 2d 190, 198, 407 N.W.2d 281 (Ct. App. 1987).

The State, relying on the federal courts, asserts the last three factors should be reviewed for clear error. Resp.-App. Br. at 14. However, there is little analysis underlying the federal decisions the State cites. The first court to address the issue simply said, "the other *Sell* factors are factual in nature and are therefore subject to review for clear error." *U.S. v. Gomes*, 387 F.3d 157, 160 (2nd Cir. 2004). The conclusory statement of the Second Circuit pervades the rest of the circuits adopting that standard. *U.S. v. Evans*, 404 F.3d 227, 240 (4th Cir. 2005) (citing *Gomes*); *U.S. v. Palmer*, 507 F.3d 300, 303 (5th Cir. 2007) (agreeing with *Gomes*); *U.S. v. Hernandez-Vasquez*, 513 F.3d 908, 915 (9th Cir. 2008) (agreeing with *Gomes*); *U.S. v. Green*, 532 F.3d 538, 552 (6th Cir. 2008) (citing *Hernandez-Vasquez*, *Evans*, and *Gomes*); *U.S. v. Fazio*, 599 F.3d 835, 839-40 (8th Cir. 2010) (agreeing with the majority of other circuits); *U.S. v. Diaz*, 630 F.3d 1314, 1330-31 (11th Cir. 2011) (collecting the other opinions and agreeing).

ARGUMENT

I. The first *Sell* factor requires a two-step analysis, and the State did not meet its burden on the second step.

Review of the first *Sell* factor is a two-step analysis. First, the court determines the seriousness of the offense based on an objective analysis.[1] *Sell*, 539 U.S. at 180. Once a court determines whether a crime is serious, it must then consider the

[1] Jared does not contest that Battery to Law Enforcement is a serious crime. As such, it is not necessary for this Court to decide what crimes are serious under *Sell*. *Maryland Arms Ltd. P'ship v. Connell,* 2010 WI 64, ¶48, 326 Wis. 2d 300, 786 N.W.2d 15 ("Typically, an appellate court should decide cases on the narrowest possible grounds.").

facts of the case, as "[s]pecial circumstances may lessen the importance of [the State's] interest." *Id.*

A. Determining the seriousness of a charge is an objective inquiry.

Whether someone is charged with a serious crime is an objective inquiry. The State invites the Court to make a subjective inquiry into "secondary considerations like the nature or effect of the underlying conduct and the defendant's criminal history." Rep.-App. Br. at 26. However, federal courts agree that determining whether a charged crime is serious is meant to be objective. *U.S. v. Breedlove*, 756 F.3d 1036, 1041 (7th Cir. 2014) ("[W]hen we are analyzing the objective seriousness of a crime for the purposes of *Sell,* we are not as concerned with the various factors that shape a reduced sentence, which are after the fact, subjective considerations."); *Green*, 532 F.3d at 548 (citing *Evans*, 404 F.3d at 237 and noting "an effort to find some objective standard by which to analyze the first *Sell* factor").[2]

1. The Court should adopt a categorical approach to determining seriousness.

To ensure objectivity, the Court should adopt a categorical approach to determining which crimes are serious. The categorical approach is a framework of analysis assessing "how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Johnson v. U.S.*, 576 U.S. 591, 596 (2015). It is typically associated with determining which crimes qualify as "violent felonies" for sentence enhancement under the Armed

[2] The courts do not agree on what that objective measure should be. *Infra* at 32.

Career Criminal Act. *Id.* at 595-96. The categorical approach provides the most objective means by which to evaluate whether a crime is serious.

The categorical approach was first adopted for three reasons: 1) the language of the statute suggested courts should only consider conviction for certain crimes, not their underlying facts; 2) "Congress generally took a categorical approach to predicate offenses;" and 3) "the practical difficulties and potential unfairness of a factual approach are daunting." *Taylor v. U.S.*, 495 U.S. 575, 600-02 (1990).

Those same reasons support adopting a categorical approach for the first *Sell* factor. Again, whether a crime is serious is meant to be an objective inquiry, *supra* at 21, which is the reason for focusing only on the crime of conviction, rather than the underlying facts.

More importantly, however, are the "practical difficulties and potential unfairness" of the State's proposed analysis. *Taylor,* 495 U.S. at 601. The State does not suggest what evidence courts could rely on to determine the "secondary considerations like the nature or effect of the underlying conduct." Resp.-App. Br. at 26. Nor does the State acknowledge that these are defendants who have not been convicted of an offense. *Taylor* was concerned with these proof issues for defendants who had been convicted, 495 U.S. at 601, those concerns are greater for those still presumed innocent.

This is more poignant in Jared's case where competency was raised immediately and defense counsel is unlikely to have received discovery or done any investigation. If the Court adopts a standard allowing in subjective criteria, one factor that must be considered is the likelihood of conviction, as the State's interest in prosecution is lessened if it is not likely to

succeed. The State essentially invites mini-trials where the defense is severely disadvantaged.

The categorical approach ensures objective and consistent determination of which crimes are serious.

2. The Legislature has designated certain crimes as serious.

This Court should adopt the crimes designated "serious" by the Legislature as the measure for determining seriousness under *Sell*. Federal courts generally determine seriousness by looking to the maximum statutory penalty, as it "reflects at least some measure of legislative judgment regarding the seriousness of a crime." *Breedlove*, 756 F.3d at 1041; *see also Green*, 532 F.3d at 548.

The State argues this Court should adopt the federal courts' approach of the maximum penalty being the primary factor in determining seriousness but does not acknowledge those courts' reason for adopting that standard—it is the most objective standard Congress has provided. *Breedlove*, 756 F.3d at 1041; *Green*, 532 F.3d at 549. However, Wisconsin courts have better guidance, as the Legislature has explicitly classified offenses as "serious."[3] While the Court of Appeals

[3] "Serious crime" is defined in Wis. Stat. §§ 48.685(1)(c); 48.686(1)(c); 50.065(1)(e)1. &2.; 969.08(10)(b). "Serious felony" is defined in Wis. Stat. §§ 48.415(9m)(b); 302.11(1g); 939.62(2m)(a)2m.; 973.0135(1)(b). "Serious sex offense" is defined in Wis. Stat. §§ 302.116(1)(a); 304.06(2m)(a); 939.615(1)(b). "Serious child sex offense" is defined in Wis. Stat. §§ 301.48(1)(e); 939.62(2m)(a)1m.; 948.13(1). "Serious sex crime" is defined in Wis. Stat. § 973.017(4)(a)2. "Serious violent crime" is defined in Wis. Stat. § 939.619(1). Other statutes incorporate definitions from these statutes. *See, e.g.* Wis. Stat.

only referenced the bail statute, *J.D.B.*, 414 Wis. 2d 108, ¶36; Pet.App.16-17, there are additional statutes classifying crimes as "serious."

The crimes not covered by the bail statute, which the State believes are serious, Resp.-App. Br. at 27, are designated as "serious" under other statutes.[4] Since first arguing the same offenses were serious in the petition for review, PFR at 16, the State has not asserted additional crimes are serious that are not covered.

This Court should defer to the Legislature's judgment and hold that for the purposes of *Sell*, "serious crimes" are those that are already defined that way. This is an objective measure, which reflects the determination of the Legislature.

Were this Court to adopt the State's "maximum penalty plus" analysis, objectivity would be lost. Rather than focus on the charges and the Legislature's judgment of their seriousness, circuit courts would engage in sentencing-like pronouncements regarding criminal history and "effect" of an unproven crime where defense counsel is forced to argue on behalf of a client who cannot assist, often without discovery.

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§§ 120.13(14)(b)1.; 949.165(1)(a). A compilation of these statutes is found in the appendix. (Resp.-App.3-9).

[4] Use of a computer to facilitate a child sex crime is a "serious felony." Wis. Stat. §§ 939.62(2m)(a)2.; 973.0135(1)(b). Soliciting a child for prostitution is a "serious crime," "serious felony," and "serious child sex offense." Wis. Stat. §§ 48.685(1)(c)3.; 973.0135(1)(b); 939.62(2m)(a)1m.a. Sexual assault of a child – failure to act is a "serious crime" and "serious child sex offense." Wis. Stat. §§ 48.686(1)(c); 939.62(2m)(a)1m.a. Aggravated battery with intent to cause bodily harm is a "serious crime" and "serious felony." Wis. Stat. §§ 48.685(1)(c); 48.415(9m)(b).

B. Subjective factors are only relevant if they lessen the State's interest in prosecution.

Once the State establishes an important interest in prosecution, the question becomes: are there circumstances that lessen that interest? *Sell*, 539 U.S. at 180. *Sell* only references case-specific information as lessening the State's interest once a serious crime is established. *Id.*[5]

Sell also only references subjective considerations once the government establishes someone is charged with a serious crime. 539 U.S. at 180. This Court should reaffirm the two-step analysis in *Sell* and hold that mitigating circumstances are only relevant to lessening the State's interest in prosecuting an already-established serious crime.

C. Defense attorneys do not need to present mitigating circumstances.

The Court should require circuit courts to consider mitigating factors introduced by defense as well as those independently available in the record. *Sell* requires **courts** to "consider the facts of the individual case in evaluating the Government's interest in prosecution." *Sell*, 539 U.S. at 180. It places no burden on defense counsel. Still, the State asks the Court to require defense counsel to raise mitigating circumstances. Resp.-App. Br. at 27-28.

It is unreasonable to place a burden on incompetent defendants to present mitigating information. First, in these cases, the defendants have been found incompetent. While

[5] Presumably, the Supreme Court could have made even a passing reference to the State having a greater interest in prosecuting someone with a lengthy criminal history, but it did not. The Court focused on lessening the interest of prosecuting an objectively serious crime.

some information is available to counsel, other important information requires input from the defendant. Yet, their inability to assist counsel is why it is improper to try and sentence an incompetent defendant to begin with. Wis. Stat. § 971.13(1); *State v. Garfoot*, 207 Wis. 2d 214, 221, 558 N.W.2d 626 (1997).

Whether an individual is likely subject to "lengthy confinement in an institution for the mentally ill," *Sell*, 539 U.S. at 180, will often be influenced by their treatment history. To the extent this history includes confidential proceedings such as involuntary commitments, guardianships, and protective placements, these records may be inaccessible to counsel. Wis. Stat. §§ 51.30(3)(a); 54.75; 55.22.

Furthermore, the defendant will often be unable to provide an alternate version of the offense to defense counsel, diminishing the ability for counsel to assert that the State's interest may not be what the complaint suggests,[6] or that there are reasons to believe commitment is likely. Here, the State expects Jared to have produced information, despite Jared being "unable to sustain attention" and presenting with "thought blocking" while also impaired by his cognitive limitations. (R.12:2).

Second, assigning the burden to the defense is not necessary because all of the information the Court of Appeals relied on was also available to the circuit court.[7] As such, the

[6] Especially if the Court holds that "nature or effect of the underlying conduct" is a valid consideration for seriousness.

[7] While it complained Jared did not make certain arguments in the circuit court, Resp. Br. at 32, 33, the State did not affirmatively argue forfeiture in the Court of Appeals. *See generally* Resp. Br.

circuit court was capable of meeting its obligation under *Sell* to evaluate the State's interest based on the facts of record.

Rather than place a burden on the defendant, the Court should guide the lower courts by providing factors for the courts to consider in determining whether the State's interest in prosecution is lessened. *J.D.B.*, 414 Wis. 2d 108, ¶¶40-53; Pet.-App.18-24.

D. Aggregating offenses is contrary to the competency statute and leads to untenable results.

Whether a crime is serious should be based on the severity of the charges, not the number. Adding to the list of issues for the Court to decide that are not before it, the State asks the Court to hold that courts can aggregate offenses in determining the seriousness of the offense. Resp.-App. Br. at 25-26. This issue is not before the Court, as Jared was charged with one count. (R.2:1). Even if it were, there are multiple reasons courts should not aggregate offenses to determine seriousness.

First, the Legislature has already signaled that it does not believe it is appropriate to aggregate offenses for this purpose. The maximum period of a competency commitment is "not to exceed 12 months, or the maximum sentence specified for the most serious offense with which the defendant is charged, whichever is less." Wis. Stat. § 971.14(5)(a)1. Rather than allow the State more time to restore individuals with multiple charges, the Legislature has decided to only consider the most serious offense. Presumably, if the Legislature believed that more charges meant a greater interest in prosecution, it would allow the commitment period to be extended based on the aggregate total penalty.

Second, holding that aggregating offenses impermissibly incentivizes overcharging. Prosecutors are given near-total discretion on how to charge cases. *State v. Krueger*, 224 Wis. 2d 59, 67-68, 588 N.W.2d 921 (1999). There is an ongoing crisis of overcharging. Holding that the number of charges can make otherwise not serious crimes, serious would worsen the crisis.

Bail jumping is the most charged offense in Wisconsin, and easiest to charge. In 2024, 39,862 felony cases were filed in Wisconsin, more than one-quarter—10,240—involved felony bail jumping.[8] Of the 41,331 misdemeanor cases filed, almost 15%—6,188—involved bail jumping.[9] This Court allowing the aggregation of offenses in this context further incentivizes prosecutors to charge every instance of bail jumping against an especially vulnerable population.[10]

Instead, it is in the public interest to incentivize long-term treatment for the mentally ill. A significant number of incompetent defendants are charged due in-part to struggles with their mental illness, and as such, the goal should be long-term treatment. Mentally ill individuals being brought to jail, charged, forcibly medicated, convicted, and ultimately released are not positioned to succeed. Rather than being focused on treating an individual to make them less dangerous, competency restoration is focused solely on getting a defendant through the case. *Sell*, 539 U.S. at 181-82 (noting the

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[8] https://www.wicourts.gov/publications/statistics/circuit/docs/felonystate24.pdf (last accessed Jun. 8, 2025).

[9] https://www.wicourts.gov/publications/statistics/circuit/docs/misdemeanorstate24.pdf (last accessed Jun. 8, 2025).

[10] If accepted, the State's argument that individuals can be denied bail would exaggerate the problem further when untreated mentally ill individuals are charged for conduct while in jail.

purpose of medications is "to render the defendant competent to stand trial," and that dangerousness is a separate consideration). Regardless of how a case resolves, once the criminal proceeding is over, there is no ability to ensure ongoing treatment.[11]

Unfortunately, individuals charged with crimes are not likely to receive longer-term treatment. Jared's case is an example of this. Jared went to the hospital and, though he would appear to meet the criteria for commitment, *see* Wis. Stat. § 51.20(1)(a), he was instead released to jail. (R.15:3).[12] Presumably, counties prefer not to use resources on a commitment, if an individual can be safely managed in the jail. Relying on the criminal system for mental health treatment creates a revolving door whereby individuals are not properly treated, released without ongoing support, charged with further offenses, and again funneled into competency proceedings. *See State v. W.R.B.*, 140 Wis. 2d 347, 351, 411 N.W.2d 142 (Ct. App. 1987).

These choices by government actors—counties and the State—caution against relying on the State's argument that there was no evidence Milwaukee County was pursuing a

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[11] Even individuals on supervision are not forcibly medicated without a commitment. *See* Division of Adult Institutions Policy and Procedures, 500.30.20 Involuntary Administration of Psychotropic Medications, 1, available at https://doc.wi.gov/DepartmentPoliciesDAI/5003020.pdf (last accessed Jun. 8, 2025) ("The Division of Adult Institutions shall refer mentally ill PIOC to a state court for mental health commitment and involuntary administration of psychotropic medication when clinically appropriate and when the PIOC cannot be treated adequately on a voluntary basis.").

[12] The complaint was filed in the time period between arrest and booking at the jail—supporting that a commitment was not pursued because of charges being filed.

commitment. Resp.-App. Br. at 28-29. Adopting that reasoning would completely remove *Sell*'s language about civil commitments diminishing the State's interest in prosecution. 539 U.S. at 180. Essentially, the government would be incentivized and given sole discretion to continue using the criminal legal system as the primary method of addressing mental illness in our communities.

The language of the competency statute does not support aggregation of offenses. Moreover, allowing the aggregation of offenses incentivizes prosecutors to overcharge to secure forcible medication. Whether the overcharging is directed at the mentally ill to secure some sort of treatment,[13] or used broadly to ensure the ability to medicate those who need it, both are untenable. This Court should determine that courts may not aggregate offenses to transform non-serious crimes into serious ones.

II. The State failed to show an important interest in prosecuting Jared.

Because Jared's mental health precipitated his charge, the State's interest in prosecuting Jared is minimal. Courts "must consider the facts of the individual case in evaluating the Government's interest in prosecution. Special circumstances may lessen the importance of that interest." *Sell*, 539 U.S. at 180. The Court of Appeals noted several factors that lessened the State's interest in prosecution: Jared's age and lack of criminal history, the likelihood of civil commitment, and the circumstances and length of his pretrial detention. *J.D.B.*, 414 Wis. 2d 108, ¶53; Pet.-App.24.

[13] Raising equal protection concerns of mentally ill individuals being charged more harshly.

A. The State has a limited interest in prosecuting individuals like Jared whose crimes are the result of mental health crisis.

Jared was experiencing a mental health crisis when he was arrested. (R.2:1). Jared's schizophrenia and traumatic brain injury were immediately recognized, and competency was raised at the first hearing. The Court of Appeals held that "there are distinct, non-speculative possibilities for Jared's future commitment through the ongoing chapter 51 proceedings or following a successful NGI defense." *J.D.B.*, 414 Wis. 2d 108, ¶41; Pet.-App.19.

The State's interest in prosecuting Jared is further lessened by the fact he was nineteen at the time of this incident and has no criminal history. (R.5:3);(R.15:3). He also was in-custody from the date of the incident until the date involuntary medication was ordered—245 days.[14] Spending over 8 months in-custody—five months of that in the county jail[15]—is significant for a first-time offender and lessens the need for prosecution or any interest the State has in additional punishment. *See Sell*, 539 U.S. at 180.[16]

The State argues that the Court should compare the pretrial credit to the maximum penalty—rather than the likely sentence, arguing "[c]ourts shouldn't be conducting mock sentencings." Resp.-App. Br. at 33 (internal quotation omitted). As noted, the State seeks exactly this by having

[14] August 22, 2022, (R.2:1), through April 24, 2023. (R.21).

[15] August 27, 2022, (R.5:4) through January 25, 2023 (R.15:4).

[16] As Jared argued at oral argument in the Court of Appeals, despite the maximum penalty, this is not a case where Jared would reasonably be sentenced to prison. Assuming a maximum jail sentence, with good time, Jared would only have spent nine months in-custody. Wis. Stat. § 302.43.

courts consider criminal history and facts alleged in the complaint when determining seriousness. *Supra* at 21-22. However, while federal courts agree that the seriousness of the crimes is an objective inquiry, *see supra* at 21, whether to use the maximum sentence, the guidelines recommendation, or likely sentence is still disputed. *State v. Lopes*, 322 P.3d 512, 525 (Or. 2014) (collecting cases).

Very few defendants receive a maximum sentence. Courts should not assume a maximum sentence will be imposed.[17] The Legislature has vested courts with wide discretion in determining appropriate sentences for specific cases. *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Because the Legislature provides courts with this discretion, a judge's opinion on a likely sentence is an appropriate consideration in the State's interest in prosecution. *See Hernandez-Vasquez*, 513 F.3d at 918-19; *U.S. v. Valenzuela-Puentes*, 479 F.3d 1220, 1226 (10th Cir. 2007) (both considering the likely sentence under the federal sentencing guidelines).

The State does not have a sufficiently important governmental interest in prosecuting Jared for alleged conduct occurring during a mental health crisis, especially when that conduct could have been addressed through commitment

[17] If the Court does hold that pretrial detention should be compared to the maximum penalty—that comparison should be to the maximum confinement, excluding extended supervision. The sentences referenced in the federal court cases are the confinement available, as supervised release is dealt with separately. *See, e.g. U.S. v. Fieste*, 84 F.4th 713, 720 (7th Cir. 2023) (referencing maximum penalty of 10 years under 18 U.S.C. § 115(a)(1)(b)(ii)); *see also* 18 U.S.C. § 3583 (establishing that supervised release is optional and the length that can be ordered among penalty classifications).

proceedings. *See generally* Wis. Stat. § 51.20.[18] The existence of alternative means of addressing the underlying concerns lessens the State's interest in prosecution. *See Sell*, 539 U.S. at 180. Jared's lengthy pre-trial confinement and likelihood of a sentence approaching time served further lessen that interest.

B. Not providing timely or adequate treatment diminishes the State's interest in prosecution.

The State's interest in prosecution is diminished when it fails to provide timely or adequate treatment. The Court of Appeals correctly recognized the Due Process considerations at play.

> It has long been the case that a criminal defendant "who is committed solely on account of his [or her] 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 [or she] will attain that capacity in the foreseeable future."

J.D.B., 414 Wis. 2d 108, ¶47 (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)); Pet.-App.22. The statutes take the same consideration into account by requiring that individuals being treated outside a DHS facility are transported to an appropriate facility "as soon as possible." Wis. Stat. § 971.14(5)(a)2.

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[18] The State complains that no expert testified that Jared would be fit for a civil commitment. Resp.-App. Br. at 19, 28-19. Jared never contested that he meets the criteria for which expert testimony is required in those cases: that he is mentally ill and a proper subject for treatment. Wis. Stat. § 51.20(1)(a)1. However, dangerousness is largely supported by testimony from fact witnesses. The State does not explain why an expert would be useful in proving that Jared's threats and punching a police officer, if true, meet the second standard—substantial probability of physical harm to others. Wis. Stat. § 51.20(1)(a)2.b.

The State claims the Court of Appeals reads *Jackson* "far too broadly." Resp.-Ap. Br. at 38. However, the Supreme Court did not focus its holding on competency commitments. Instead, it stated that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." 406 U.S. at 738 (1972). This language was later quoted in a different commitment context—that of an insanity acquittee—it is not the narrow holding the State asserts. *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992).

Furthermore, the State cherrypicked from the more specific holdings from *Jackson*, ignoring that "even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal." *Id.* The Supreme Court did not give the State carte blanche to hold someone in-custody and not treat them until it saw fit up to the 12 months set forth by statute. Individuals may only be committed so long as they receive adequate treatment.

The State correctly identifies that by not providing adequate or timely treatment it signals that it does not have an important interest in prosecution. Resp.-App. Br. at 37. Still, the State argues that prosecutors are not responsible for the violation of defendant rights—ignoring that the State as a whole is depriving individuals of Due Process. DHS—a state actor—is responsible for competency committees. Resp.-App. Br. at 37; Wis. Stat. § 971.14(5)(a)1. Thus, the complaint about DHS not transferring individuals timely or providing adequate treatment is still the State's failure.

Similarly, complaining that "there is only so much space available at Wisconsin's inpatient facilities" is unavailing. Resp.-App. Br. at 37. The Legislature—another

state actor—not funding enough inpatient beds[19] is still a policy choice reflecting the State's interest in prosecution. As is how those beds are allocated. If Wisconsin had an important interest in prosecuting the number of individuals for the wide-range of conduct it asserts, it would adequately fund the systems necessary to do that in a way that comports with Due Process.

The State also asserts that there is an inadequate factual record to assess whether a constitutional violation occurred. Resp.-App. Br. at 37. To the contrary, the record reflects, and the State acknowledges that Jared was not receiving adequate treatment. Resp.-App. Br. at 39; (R.12:2-3). Specifically, while in jail, Jared met with the jail specialist only four times (once every two weeks), and those sessions were "significantly hindered" by Jared's "cognitive impairments" and non-adherence with psychotropic medication. (R.12:2).

Despite the inability to make progress for months, Jared was not transported to an inpatient facility sooner. Even when Jared was transported, the records suggest he was not being adequately treated. When he arrived at Mendota, Jared willingly took medication for the first three months. *See generally* (R.15). Still, Jared allegedly swore and spit at staff, urinated and defecated in his room, and continued to exhibit symptoms of schizophrenia. (R.15:4-6). Thus, the record demonstrates that for the first eight months[20] under commitment Jared was not being adequately treated back to competency. Treatment must be reasonably designed to restore competency. Languishing in jail and inadequate medication

[19] Or not allocating sufficient funds for contracts with other entities. *See* Wis. Stat. § 971.14(5)(a)1.

[20] October 12, 2022, (R.8), to April 3, 2023. (R.37:25).

management do not progress that goal and undermine the State's interest in prosecution.

C. The possibility of an NGI commitment diminishes the State's interest in prosecution.

Because NGI commitments are civil commitments that result in neither conviction nor punishment, the State's interest in prosecution is diminished. *Sell* is not concerned with the type of civil commitment a defendant might face. Instead, it directs courts to consider any circumstance that lessens the State's interest prosecution. *Sell*, 539 U.S. at 180. The possibility of a civil commitment was simply one example. *Id.* ("The defendant's failure to take drugs voluntarily, **for example**, may mean lengthy confinement in an institution for the mentally ill.") (emphasis added).

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 individuals found NGI are not punished, the likelihood of such a finding undermines the State's interest in prosecution and is relevant to the first *Sell* factor.[21]

The State relies on *U.S. v. Mikulich*, a case whose analysis is not relevant to Wisconsin, and whose reasoning is

[21] The State also notes an interest in deterring others from engaging in the conduct. Resp.-App. Br. at 33. However, you cannot deter conduct for which individuals are not responsible.

suspect regardless. 732 F.3d 692 (6th Cir. 2013). *Mikulich* asserts that the "shifted burden of proof for insanity acquittees in civil commitment proceedings" preserves the government's interest. *Id.* at 700 (quoting *U.S. v. Gutierrez*, 704 F.3d 442, 452 (5th Cir. 2013)). However, unlike the federal statute referenced by *Gutierrez*, in Wisconsin, the State always bears the burden to prove a defendant requires institutional placement by clear and convincing evidence. *Compare* 18 U.S.C. § 4243(d) *with* Wis. Stat. §§ 971.17(3)(a), (3)(e), (4)(d).

Additionally, *Mikulich*'s independent logic is unpersuasive. It relies heavily on the finding of guilt being a precondition to a determination of responsibility. 732 F.3d at 700-01. It does not satisfactorily explain why this matters. Regardless of who bears the burden or if the State has to prove guilt before responsibility is determined, if the likely outcome is that a defendant is neither convicted nor punished, the State's interest in prosecution is diminished. *Mikulich*, *Gutierrez*, and the State emphasize pedantic procedures rather than the ultimate effect of an NGI commitment, which is *Sell*'s focus. *See* 539 U.S. at 180.

The State argues that it has an interest in forcibly medicating and prosecuting a person who is unlikely to be punished for their conduct. Per *Sell*, this is not true. *Id.* Because an NGI commitment does not lead to conviction or punishment, the likelihood of it diminishes the State's interest in prosecution.[22]

[22] The State argues an interest in certain collateral consequences. Resp.-App. Br. at 33-34. First, *Sell* was explicit in only being concerned about the State's interest in prosecuting a serious crime. 539 U.S. at 180. Even so, everything the State referenced is available through either type of civil commitment. Individuals under commitment are supervised either by the State or a county. Wis. Stat. §§ 51.20(13)(a)3.; 971.17(3)(e).

As applied to this case, even if Jared is rendered competent in the future, he would have had a strong NGI claim. This is supported by the circumstances surrounding the alleged punch and Jared's documented mental health history and traumatic brain injury. *See generally* (R.2); (R.5); (R.15). A strong NGI claim in cases with less time available for incarceration significantly diminishes the State's interest in prosecution. It is safe to say that defendants who forego an NGI defense often do so when offered a favorable plea deal—likely with minimal additional time in custody or possibly even time served. Under either scenario, the State's interest in prosecution is lessened—either due to a lack of additional punishment, or a civil commitment substituting a criminal sentence.

D. Violating a defendant's right to bail lessens the State's interest in prosecution.

The improper denial of bail to a defendant whose competency has been raised is a special circumstance that lessens the State's interest in prosecution. According to the State this improperly "doubly counted" the pretrial detention factor. Resp.-App. Br. at 34. However, the length and conditions of pretrial detention are distinct from the legality of that detention. Presumably, *Sell*'s reference to pre-trial detention contemplated that detention being lawful. *See* 539 U.S. at 180. The Court of Appeals specifically focused on the illegal nature of Jared's pretrial detention. *J.D.B.*, 414 Wis. 2d 108, ¶43 n.10 ("Whether a portion of Jared's

Victims can obtain relief in civil proceedings. Wis. Stat. § 973.20(8). Individuals who are committed are prohibited from possessing a firearm, though some may petition for reinstatement of the right. Wis. Stat. §§ 51.20(13)(cv), 941.29(1m)(d)-(em), 971.17(1g); 18 U.S.C. 922(g)(4).

pretrial detention was contrary to law is directly relevant to [the State's interest in prosecution]."); Pet.-App.20.

1. Illegal detention undermines the State's interest in prosecution.

The State's interest in prosecution is not limited to convicting the defendant. Instead, the State "has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one." *Sell*, 539 U.S. at 180.

> 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. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

Stack v. Boyle, 342 U.S. 1, 3 (1951) (internal citation omitted). The Eighth Amendment and Article I, §§ 6, 8(2) 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) (stating that if the Eighth Amendment does not necessarily include the right to bail, then legislatures control whether bail is available at all).

Denying the right to bail violates the presumption of innocence and hampers preparation of the defense. Just as the State has an interest in assuring a fair trial; the converse is true.

The State does not have an interest in an unfair trial. As such the State's interest in prosecution is lessened when a defendant's right to a fair trial is infringed by unconstitutionally denying them bail.

Moreover, if defendants are illegally denied bail, that incarceration significantly hinders their ability to receive outpatient competency restoration ("OCRP"). By not being in the community, individuals are disconnected from housing, already-established mental health services, and natural supports—all of which are considered when deciding if an individual receives OCRP.[23] Resp.-App.15, 17-18. Given the State's complaints regarding a bed shortage, unnecessarily forcing people to receive inpatient treatment lessens the interest in prosecution as those individuals could have received appropriate treatment sooner and in a less-restrictive manner.

2. Defendants are entitled to bail until found incompetent, and Jared's constitutional right to bail was violated.

The Court of Appeals correctly interpreted the plain language of Wis. Stat. §§ 969.01 and 971.14 in determining that defendants whose competency is raised are entitled to bail. *J.D.B.*, 414 Wis. 2d 108, ¶¶44-45; Pet.-App.21.

[23] This information is contained in a presentation by DHS employees at a recent training hosted by the State Public Defender. Those slides are contained in the appendix. Resp.-App.10-22. Jared asks the Court take judicial notice of them, as their source cannot reasonably be questioned, and Jared has supplied the slides. Wis. Stat. §§ 902.01(2)(b)&(4).

Under the bail statute, defendants are eligible for bail "except as provided in ss. 969.035[24] and 971.14(1r)." Wis. Stat. § 969.01(1)(a). Wis. Stat. § 971.14(1r) has three components. Subsections (b) and (c) are not relevant, as they 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. Stat. §§ 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). The language of the statutes is plain: individuals are entitled to bail unless a provision in Wis. Stat. § 971.14 dictates otherwise.

There are two provisions that prevent a person from remaining out-of-custody on bail. First, when the court or DHS determine that an inpatient examination is needed. Wis. Stat. §§ 971.14(2)(a), (c), (d). Second, once a defendant is found not competent and proceedings are suspended. Wis. Stat. §§ 971.14(4)(d); (5)(a)1. Obviously, 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. 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

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

before bail is set, the individual cannot be released. Resp.-App. Br. at 36. The State offers no explanation why the Legislature would desire such an outcome.[25] *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. In fact, Wis. Stat. § 971.14(2)(b)'s existence suggests the Legislature's preference that individuals who can be safely released into the community on bail should be.

The existence of Wis. Stat. § 971.14(2)(b) also dooms the State's reliance on *State ex rel. Porter v. Wolke*, 80 Wis. 2d 197, 257 N.W.2d 881 (1977). The State cites *Porter* to suggest that courts can suspend bail while a competency determination is pending. Resp.-App. Br. at 35; 80 Wis. 2d at 208. However, the statute at issue in *Porter* was not the same. Then, courts—without limitation—could "order the defendant committed to [a facility] for the purpose of examination for a specified period not to exceed 60 days." Wis. Stat. § 971.14(2) (1975).

The Legislature limiting courts' ability to order inpatient examinations once bail is set undermines the State's contention that bail need not be set at all. Instead, it reflects an intent that all defendants who can be examined outpatient, should be. *See also* Wis. Stat. § 51.001 (stating the legislative policy of using the least restrictive treatment and not treating individuals in a facility who can be treated outpatient). Thus, defendants are entitled to bail, until committed pursuant to Wis. Stat. § 971.14(5)(a)1.

[25] There is also likely an equal protection issue, as there is 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.

III. The proposed treatment plan was unconstitutionally generic.

To satisfy *Sell*, the State must present "an individualized treatment plan applied to the particular defendant." *Green*, 396 Wis. 2d 658, ¶38. "[I]t is not enough for the for the State to simply offer a generic treatment plan." *Id.*, ¶34. Whether a treatment plan is sufficiently individualized relates to the second *Sell* factor—whether the drugs are "substantially likely" to render Jared competent. *See id.*, ¶33.

"*Sell* requires an individualized treatment plan that, at a minimum, identifies (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 (internal citations omitted).

In addition, the plan must be "*medically appropriate*, *i.e.,* in the patient's best medical interest in light of his medical condition." *Sell*, 539 U.S. at 181 (emphasis in original).

The State defends a generic treatment plan with no proposed dosages, dose ranges not individualized to Jared, no discussion of Jared's medical conditions, and no meaningful restriction on length of treatment.

A. Treatment plans must include dosages.

The treatment plan does not provide dosages as is required, only dose ranges. Dose and dosage are distinct concepts, and *Sell* requires specific findings regarding **dosages** of medications, not doses. Dosage describes the amount and frequency with which individual doses are administered:

> A dose is the quantity to be administered at one time or the total quantity administered during a specified period. Dosage implies a regimen; it is the regulated administration of individual doses and is usually expressed as a quantity per unit of time.

Tracy Frey & Roxanne K. Young, Correct and Preferred Usage, AMA Manual of Style: A Guide for Authors and Editors (online ed. 2020), https://doi.org/10.1093/jama/9780190246556.003.0011 (last accessed Jun. 18, 2025); *see J.D.B.*, 414 Wis. 2d 108, ¶56; Pet.-App.26; *see also State v. D.E.C.*, 2025 WI App 9, ¶38, 415 Wis. 2d 161, 17 N.W.3d 67. "Without this information, it is impossible for a circuit court to know how much of any proposed drug will ultimately be administered to the defendant." *J.D.B.*, 414 Wis. 2d 108, ¶57; Pet.-App.26-27.

The *Sell* standard requires specific findings about *dosages* of medications, not doses. *Chavez,* 734 F.3d at 1253; *Green,* 396 Wis. 2d 658, ¶38. Without identifying the frequency of doses, the State may "administer otherwise safe drugs at dangerously high dosages." *Chavez*, 734 F.3d at 1252. As a result, the treatment plan is insufficient under *Sell* because it delegates "unfettered discretion" to physicians to treat Jared with the maximum dose of several medications at unrestricted frequencies. *See Hernandez-Vasquez*, 513 F.3d at 916. Additionally, "*Sell* requires the *circuit court* to conclude that the administration of medication is medically appropriate, not merely that the medical personnel administering the drugs observe appropriate medical standards in the dispensation thereof." *Fitzgerald*, 387 Wis. 2d 384, ¶29 (emphasis in original).

The State tacitly concedes the plan's failure to meet the dosage requirement by stating that the plan contains "the

maximum dose ranges." Resp.-App. Br. at 42. The effectiveness of the dose range cannot be evaluated without knowing the frequency of administration. Having no information on how often a dose is administered makes it impossible to evaluate whether it is substantially unlikely to have side effects that would interfere with a trial or if it is medically appropriate. *See Chavez*, 734 F.3d at 1253.

B. The dose ranges are unexplained and not individualized.

On top of failing to identify frequency of doses, the State offered no explanation for the proposed doses as applied to Jared in particular. The State cannot "offer a generic treatment plan with a medication and dosage that are generally effective for a defendant's condition." *Green*, 396 Wis. 2d 658, ¶34. "Such a practice would reduce orders for involuntary medication to a generic exercise," which is constitutionally insufficient. *Id.*

In total, eight different medications were proposed; seven of those eight were antipsychotics proposed for oral administration; one antipsychotic and one sedative were proposed to be given by injection. (R.19:3).

Dr. Illichmann testified that the dose ranges were based on the ranges submitted by the manufacturer to the Food and Drug Administration ("FDA"). (R.37:34). Listing the dose range that has been studied and shown to be effective is no better than listing "a medication and dosage that are generally effective for [Jared's] condition." *Green*, 396 Wis. 2d 658, ¶34. As the Court of Appeals said:

> there needs to be evidence explaining how an unordered list of potential medications is individually tailored to a

> particular defendant. That is, if a specific order of medications is appropriate for a particular defendant, that needs to be explained to the circuit court, and if *no* order is appropriate, *that* needs to be explained to the circuit court.

J.D.B., 414 Wis. 2d 108, ¶59 (emphasis in original); Pet.-App.27-28.

Also missing is meaningful discussion of how the dose ranges relate to Jared's prior mental health treatment,[26] which dates back to at least 2020 and includes treatment with olanzapine (a medication recommended by Dr. Illichmann). (R.15:3-4); (R.19:3). A single reference to paliperidone without further discussion about why that or any of the seven other proposed medications were appropriate—taking into account Jared's age, weight, duration of illness, past responses to all psychotropic medications, his cognitive abilities, and medical record—does not provide the circuit court the information it needs under *Sell*. *Green*, 396 Wis. 2d 658, ¶¶38-39.

"[I]t is not enough that the State merely present a treatment plan that identifies the medication, dosage, and duration of treatment." *Green*, 396 Wis. 2d 658, ¶38. This is exactly what the State has attempted to do. There has been no consideration of Jared's particular circumstances, making the plan deficient under the second *Sell* factor.

[26] Dr. Illichmann referenced the prior treatment at Mendota by stating they "would start by trying to get [Jared] to resume the [p]aliperidone and increase that." (R.37:62).

C. Treatment plans must consider and individual's medical conditions both to be sufficiently individualized and medically appropriate, which Jared's failed to do.

The proposed treatment plan completely ignored Jared's documented medical conditions and how any adverse side effects might interfere with his ability to assist his attorney.

Sell requires that courts must conclude that "administration of the drugs is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense." *Sell*, 539 U.S. at 180. This requires courts to "consider the defendant's particular circumstances and medical history." *Green*, 396 Wis. 2d 658, ¶34. Neither Dr. Illichmann nor the circuit court considered Jared's medical history.

The competency reports reflect that Jared has been diagnosed with diabetes and hypertension, has a traumatic brain injury, was prescribed seizure medication, and has self-reported having a stroke. (R.5:3); (R.15:3). Despite this, Dr. Illichmann reported that Jared was diagnosed with no physical health conditions. (R.19:2; App. 4); *J.D.B.*, 414 Wis. 2d 108, ¶60; Pet.-App.28.

This is concerning because the labels for nearly all the proposed medications call for special precautions for individuals with diabetes or at a heightened risk for seizure. *Id.*

[27,28,29,30,31,32,33] Similarly, Dr. Illichmann testified that these medications did not have side effects that could interfere with Jared's ability to assist in his own defense. (R.37:28-29; App.36-37). To the contrary, antipsychotic drugs "can have serious, even fatal, side effects." *Washington v. Harper*, 494 U.S. 210, 229-30 (1990). Dr. Illichmann's testimony minimized the side effects of the proposed medications, rather

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[27] ZYPREXA (Olanzapine) Label, FDA, https://www.accessdata.fda.gov/drugsatfda_docs/label/2014/020592s062021086s040021253s048lbl.pdf at 2 (last accessed Jun. 15, 2025) (warnings for both individuals with diabetes and "conditions that lower the seizure threshold") ("Olanzapine Label").

[28] ABILIFY (aripiprazole) Label, FDA, https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/021436s041,021713s032,021729s024,021866s026lbl.pdf at 1 (last accessed Jun. 15, 2025) (diabetes and seizure warnings) ("Aripiprazole Label").

[29] RISPERDAL (risperidone) Label, FDA, https://www.accessdata.fda.gov/drugsatfda_docs/label/2021/020272Orig1s083,020588Orig1s071,021444Orig1s057,021346Orig1s061lbl.pdf at 1 (last accessed Jun. 15, 2025) (diabetes and seizure warnings).

[30] INVEGA (paliperidone) Label, FDA, https://www.accessdata.fda.gov/drugsatfda_docs/label/2019/021999s036lbl.pdf at 1 (last accessed Jun. 15, 2025) (diabetes and seizure warnings).

[31] HALOPERIDOL (haloperidol tablet) Label, FDA, https://www.accessdata.fda.gov/spl/data/9dba72ee-b7aa-4f16-bd6d-848ddebcac67/9dba72ee-b7aa-4f16-bd6d-848ddebcac67.xml (last accessed Jun. 15, 2025) (warning regarding administration to individuals receiving anticonvulsant medication or history of seizures).

[32] SEROQUEL XR (quetiapine fumarate) Label, FDA, https://www.accessdata.fda.gov/drugsatfda_docs/label/2018/022047s033s037lbl.pdf at 1, 17 (last accessed Jun. 15, 2025) (diabetes and seizure warnings).

[33] CLOZARIL (clozapine) Label, FDA, https://www.accessdata.fda.gov/drugsatfda_docs/label/2021/019758s088lbl.pdf at 1 (last accessed Jun. 15, 2025) (diabetes warning) ("Clozapine Label").

than explaining to the court the potential side effects and risks of developing them.

The Court of Appeals previously recognized that Haldol, the brand name for haloperidol, has several potentially severe side effects:

> Haldol certainly can cause side effects, including sedation, slurred speech, a tremor, a feeling of muscle restlessness that we refer to as akathisia, a phenomenon that is certainly like tremors but referred to as parkinsonism because it mimics the appearance of individuals who have Parkinson's disease. It has the potential to affect cardiac conduction and heart rhythm. It has an impact on what's called the QT interval, which is part of the electrocardiograph rhythm, and it can certainly have some metabolic side effects as well in terms of its impacts on weight gain and blood sugar.

Green, 396 Wis. 2d 658, ¶23. Thus, in addition to not being individualized to Jared, Dr. Illichmann's testimony was incomplete.

The circuit court also never discussed Jared's medical history, simply noting that the plan was individualized because Dr. Illichmann "appeared" to be aware of the history. (R.37:78-79; App. 86-87). This is exactly the sort of delegation to the treatment provider that is not allowed under *Sell*. *Green*, 396 Wis. 2d 658, ¶44. Yet, the State seeks exactly that. Resp.-App. Br. at 43 ("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?").

Courts should reject testimony when the record available to them indicates that the doctor "was so obviously inattentive that he overlooked 'significant' medical history," *D.E.C.*, 415 Wis. 2d 161, ¶44 (characterizing this case), or has not explained how those conditions do or do not affect the proposed plan.[34]

D. The State does not explain what appropriate treatment plans look like.

The State never acknowledges that the treatment plan submitted in this case puts almost no restrictions on doctors. The State also does not describe what it believes the minimum requirements are for a treatment plan to survive under *Sell*, instead it constructs a strawman to claim too much is being asked of its doctors. Resp.-App. Br. at 23, 45.

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[34] The State tries to shift its burden to prove the plan is medically appropriate to Jared's attorney, despite no forewarning as to what sources Dr. Illichmann relied on in formulating the plan. Resp.-App. Br. at 43; (R.19); *see also D.E.C.*, 415 Wis. 2d 161, ¶¶68 (noting how at the hearing the doctor testified about relying on a specific textbook).

Hearings on these medication orders must be held within 10 days (20, with an extension), Wis. Stat. § 917.14(5)(am), the State expects attorneys to become experts in a matter of weeks, so they can evaluate these treatment plans and cross-examine doctors regarding the aspects that are not medically appropriate.

The State wants to offer treatment plans without reference to underlying medical authorities, *see* (R.19), and use gamesmanship to secure medication orders. Allowing doctors to withhold the basis for their proposed medications until the hearing is the sort of trial by ambush that Wisconsin has long abandoned. *Haack v. Temple*, 150 Wis. 2d 709, 716, 442 N.W.2d 522 (1989). Because it is the State's burden, and the circuit court must assure the plan is reasonable, *Sell* requires doctors to explain why they request specific medications in the plan and how the medications relate to treatment of individual defendants.

Here, the treatment plan contained seven antipsychotics to be administered orally, one antipsychotic to be administered by injection, and one medication to be injected to address "agitation." (R.19:3). The plan specifically said that the oral medications would be used "in combination or in succession to restore the defendant's competency to stand trial." (R.19:3). The other medications "would be given by injection if the defendant is unable or unwilling to take the proposed oral medication." (R.19:3). Thus, the State's assertion that "the specific plan was to have Jared resume taking a medication that had some success and produced no side effects," Resp.-App. Br. at 45, ignores the language in the plan and the other eight medications listed.[35]

The State also complains about defendants pushing back on its plans in other cases. Specifically, the State cites D.E.C.'s argument and the characterization by the Court of Appeals that D.E.C. argued that the State needed to provide an "annotated flowchart" that accounted for all future possibilities. App.-Resp. Br. at 45; *D.E.C.*, 415 Wis. 2d 161, ¶51. Jared has never made such a claim; this is a strawman designed to allow the State to propose deficient treatment plans.

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[35] The State references Dr. Illichmann's testimony that the medications would be offered in "sequential trials," Resp.-App. Br. at 41, but that ignores the language in the plan and was never incorporated into the circuit court's order. The order states Jared "shall submit to the administration of medication(s) or treatment as outlined in the treatment plan," it does not mention the testimony. (R.23:2; Pet.-App.37). The court's order is what carries the power of law, not the doctor's testimony. *See Chavez*, 734 F.3d at 1252-53 (describing how the court's order, rather than the treatment plan must specify the medications and maximum dosages); *see also Fieste*, 84 F.4th at 729 (requiring courts to provide a dosage range "in [their] order or by incorporating" the treatment plan).

The State omits the Court of Appeals' advisement in *D.E.C.*: "The department would be well advised to include significant details in its plans to provide clarity for everyone involved, including to assist circuit courts in the task of applying the standards under *Sell*." 415 Wis. 2d 161, ¶51 n.11. The State further ignores that in response to the Court of Appeals' decision, DHS no longer uses the template Jared's treatment plan was based on.

DHS has created new forms designed to ensure that doctors are providing sufficient information to circuit courts.[36] Those forms repeatedly ask the doctor to explain their reasoning. For example, F-03116a and F-03116b both state: "If multiple medications are listed, explain whether they are used in combination or sequentially. Provide information to explain decision-making related to medications being provided in combination or sequentially." (Resp.-App.25, 26).

Not only is the State capable of providing sufficient information, but DHS has created a form to ensure they do. Despite the State's protestations, doing so does not require undue "granularity." Resp.-App. Br. at 24, 45. The Court of Appeals' decision rightly requires the doctors working for the State to provide circuit courts with information necessary to assess whether the proposed treatment plans are constitutional. *J.D.B.*, 414 Wis. 2d 108, ¶61; Pet.-App.28-29.

[36] These forms, dated (01/2025), were obtained by undersigned counsel on Feb. 14, 2025. Jared asks that the Court take judicial notice of the forms, as their source cannot reasonably be questioned, and Jared has supplied the forms. Wis. Stat. §§ 902.01(2)(b)&(4). The forms are included in the appendix. (Resp.-App.23-27).

IV. The State did not prove that Jared was incompetent to refuse medication.

In addition to proving the *Sell* factors, the State must also prove that defendants are incompetent to refuse medication before forcibly medicating someone. Wis. Stat. § 971.14(5)(am). Proving incompetence requires that a defendant be explained the advantages, disadvantages, and alternatives to medication to a defendant and that they are either:

> 1. incapable of expressing an understanding of the advantages, disadvantages of accepting medication or treatment and the alternatives, or
>
> 2. substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness [. . .] in order to make an informed choice as to whether to accept or refuse medication or treatment.

Wis. Stat. §§ 971.14(3)(dm)1.&2.

The State must prove the statutory elements by clear and convincing evidence. *Outagamie County v. Melanie L.*, 2013 WI 67, ¶45, 349 Wis. 2d 148, 833 N.W.2d 607.[37] Courts must presume a defendant is competent to refuse medication. *Virgil D. v. Rock Cnty.*, 189 Wis. 2d 1, 14, 524 N.W.2d 894 (1994).

[37] Notably, the State never mentions its burden, instead trying to shift it onto Jared by taking language out of context to suggest individuals must prove their understanding and ability to apply it. Resp.-App. Br. at 47-48.

The State must first show that Jared was told "the advantages and disadvantages of and alternatives to accepting the particular medication or treatment." Wis. Stat. § 971.14(3)(dm). This language is "largely self-explanatory." *Melanie L.*, 349 Wis. 2d at ¶67. This Court ruled:

> A person subject to a possible mental commitment or a possible involuntary medication order is entitled to receive from one or more medical professionals a reasonable explanation of proposed medication. The explanation should include why a particular drug is being prescribed, what the advantages of the drug are expected to be, what side effects may be anticipated or are possible, and whether there are reasonable alternatives to the prescribed medication. The explanation should be timely, and, ideally, it should be periodically repeated and reinforced. Medical professionals and other professionals should document the timing and frequency of their explanations so that, if necessary, they have documentary evidence to help establish this element in court.

Id.

Dr. Illichmann testified that when he attempted to discuss the medications with Jared, he would get the same answer: that Jared did not feel as though he needed medication. (R.37:25-26). For that reason, Dr. Illichmann opined that Jared "lacks ability to apply information about medications to himself or his situation." (R.37:26).

However, Dr. Illichmann never testified whether he or others attempted to educate Jared or the frequency of these conversations as contemplated by *Melanie L.*

> [A]ll we know is that Dr. Illichmann tried, once, on the same day that the request for involuntary medication was made, in a general, non-individualized manner and for an

> unknown amount of time, to discuss with Jared the advantages, disadvantages, and alternatives to the proposed medications. Jared said that he did not believe he needed them, and the interaction ended.

J.D.B., 414 Wis. 2d 108, ¶71; Pet.-App.33. Similarly, there was no testimony regarding how Dr. Illichmann was able to reach his conclusion.

> [I]t is the responsibility of medical experts who appear as witnesses for the county to explain how they probed the issue of whether the person can 'apply' his or her understanding to his or her own mental condition. The 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. For both the patient and the medical professional, facts and reasoning are nearly as important as conclusions.

Melanie L., 349 Wis. 2d at ¶75.

By not demonstrating that Dr. Illichmann attempted to educate Jared about the medications or probed into why Jared did not believe they were necessary, the State failed to provide sufficient evidence to prove Jared was given the explanation required by Wis. Stat. § 971.14(3)(dm).

CONCLUSION

The State failed to prove the *Sell* factors and failed to demonstrate Jared received a sufficient explanation of the medications to prove he was incompetent by clear and convincing evidence.

This Court should reverse the involuntary medication order.

Dated this 23rd day of June, 2025.

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 10,998 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 23rd day of June, 2025.

Signed:
Electronically signed by
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