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SUPREME COURT

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

BRIEF OF DEFENDANT-APPELLANT RESPONDING TO NONPARTY BRIEF OF DHS

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INTRODUCTION

DHS argues that the Court of Appeals has consistently misinterpreted what *Sell* requires of the State before it can forcibly medicate incompetent defendants since it first decided *State v. Green*, 2021 WI App 18, 396 Wis. 2d 658, 957 N.W.2d 583. DHS Br. at 9-11. DHS advocates for this Court to interpret *Sell* consistent with the "Basic Approach" as described in a law review note from 2019. DHS Br. at 8-9. What DHS fails to do is articulate what specifically *Green* got wrong, and, like the State, does not explain what it believes *Sell* requires.

Sell requires an explanation of what the government plans to do, why doing so is necessary and likely to restore competency, and that its plan is medically appropriate. DHS asks this Court to sanction what *Sell* forbids—the State providing minimal to no explanation about the involuntary medication they seek and total deference to DHS's psychiatrists.

ARGUMENT

I. No authority supports DHS's position that a treatment plan is not necessary.

The crux of DHS's argument is that *State v. Green*, 2021 WI App 18, 396 Wis. 2d 658, 957 N.W.2d. 583, was wrongly decided because it "was inconsistent with Sell factor four [] on the law, which requires deference to medical judgment." DHS Br. at 7. DHS offers no citation for *Sell* requiring courts to defer to the State's psychiatrists. The contention contradicts *Sell*'s plain language that "**the court** must conclude that administration of the drugs is *medically appropriate*." *Sell v. U.S.*, 539 U.S. 166, 181 (2003) (first emphasis added). The authority DHS cites for its approach is both unpersuasive and does not support DHS's position.

DHS quotes *Green*'s requirements for a treatment plan and contends that *Sell* does not require any of it. DHS Br. at 9-10. DHS contends that *Sell* only requires that the administration of drugs be medically appropriate. DHS Br. at 10. DHS's argument seems to be that nothing should guide circuit courts in determining what is medically appropriate—aside from the testimony of its doctors.

The only citations DHS provides are quotes to *Sell*, and a citation to a law review article that describes two approaches to *Sell*: "basic" and "elaborative."[1] DHS argues: "Wisconsin should align itself with the Basic Approach, which closely follows Sell and properly defers to medical judgment." DHS Br. at 8. DHS offers no citations to any court—federal or state—that has said a treatment plan is not required or suggesting that the minimal requirements set forth in *Green* are contrary to *Sell's* holding.

According to WestLaw, the law review article DHS cites has only a single citing reference—DHS's brief. A Boolean search for "Basic Approach" and "539 U.S. 166" turns up two relevant results—the law review article and DHS's brief. The authority is unpersuasive.

Even if this law review article were authoritative, it supports *Green*. According to the article "the specific-medication-plan requirement is not just consistent with the *Sell* opinion but mandated by it." Katz at 757. According to the author: "requiring this specificity is necessary as a matter of common

[1] Nick Katz, *How the States Can Fix Sell: Forced Medication of Mentally Ill Criminal Defendants in State Courts*, 69 Duke L.J. 735 (Dec. 2019).

sense. Unless the court is aware of which drugs are to be given to the defendant, it would be impossible to make the factual findings required by the Defendant-Interest and Medically Appropriate Prongs." *Id.*

The article goes on to critique courts it claims have put too much emphasis on how medications would affect a particular defendant but still acknowledges: "a clear violation of *Sell*" "where the government made no reference at all to the individual conditions of the defendant and how medication might affect him specifically." *Id.* at 758.

Finally, the article's critique is primarily of appellate courts that it believes has been putting too many additional requirements not supported by *Sell*. However, the article acknowledges: "To some extent, requiring specifics is permissible under *Sell*: the trial court ultimately bears responsibility for gauging whether medication is 'medically appropriate' and must assess the credibility of medical expert witnesses." *Id.* at 762.

Thus, the article DHS relies upon supports a treatment plan that lists specific medications, considers a defendant's specific individual condition, and provides circuit courts necessary information to assess the treatment plan. This is what the Court of

Appeals has articulated in its opinions. *See Green*, 396 Wis. 2d 658, ¶38; *State v. J.D.B.*, 2024 WI App 61, 414 Wis. 2d 108, 13 N.W.3d 525.

DHS argues none of these requirements are appropriate. DHS's argument is that no court—appellate or circuit—should be questioning the judgment of its psychiatrists.

Despite DHS's arguments, Jared and the State agree that the State must prove each of the *Sell* factors by clear and convincing evidence. Def.-App. Br. at 18-19; Resp.-Pet. Br. at 15. This includes the State proving that what the State seeks is medically appropriate. No one—other than DHS—argues that can be done without providing a treatment plan explaining which medications will be administered and why. The State conceded this in *Green*, 396 Wis. 2d 658, ¶¶37-38.

As such, appellate courts have rightly held that the State meets its burden by providing the circuit court a "complete and medically informed record, based in part on independent medical evaluations."

Green, 396 Wis. 2d 658, ¶35 (quoting *U.S. v. Rivera-Guerrero*, 426 F.3d 1130, 1137 (9th Cir. 2005)).[2]

DHS ignores the State's burden to prove a plan is medically appropriate and that the circuit court is "not required to accept the testimony of experts." *State v. Smith*, 2016 WI 23, ¶55, 367 Wis. 2d 483, 878 N.W.2d 135; *see* Katz at 761 (noting that circuit courts must assess the credibility of expert witnesses). Presumably, it is for these reasons that the Court of Appeals stated DHS "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*." *State v. D.E.C.*, 2025 WI App 9, ¶51 n.11, 415 Wis. 2d 161, 17 N.W.3d 67.

DHS's stance is that a doctor only needs to testify that they will treat a defendant in a medically appropriate manner. This is nothing more than a "magic words" requirement that would effectively remove the fourth *Sell* factor from a court's consideration.

[2] Were it the case that every federal circuit court was misinterpreting *Sell*, it is reasonable to assume the Supreme Court would have taken one of the twenty-three cases where a writ of certiorari has been denied. *See* PFR Resp. App. at 91.

II. This case exemplifies why courts should not defer to doctors.

The failure of Dr. Illichmann to consider Jared's medical conditions exemplifies why courts cannot simply defer to psychiatrists. DHS touts the ethical responsibilities of its doctors and other professional-conduct standards and administrative rules as reason to trust its psychiatrists. DHS Br. at 12-14.[3] However, neither DHS nor the State have addressed the elephant in the room—Dr. Illichmann's assertion that Jared was diagnosed with no physical health conditions. (R.19:2; Pet.-App.28); *J.D.B.*, 414 Wis. 2d 108, ¶60. However, 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).

[3] DHS also cites Wis. Stat. § 971.14(4)(b)'s language that courts must order "whoever administers the medication or treatment to the defendant shall observe appropriate medical standards." This statute was previously deemed unconstitutional for requiring courts to order medication without consideration of *Sell*. *State v. Fitzgerald*, 2019 WI 69, ¶2, 387 Wis. 2d 384, 929 N.W.2d 165. By only having courts order medically appropriate administration, the quoted language seems to undermine *Sell*'s requirement that courts must decide whether the State's proposal is medically appropriate. 539 U.S. at 182.

Again, "the labels for nearly all of the proposed medications call for special precautions for individuals with diabetes or who are at a heightened risk of seizure." *J.D.B.*, 414 Wis. 2d 108, ¶60; Def.-App. Br. at 47-48. No party arguing in favor of the treatment plan in this case has offered any explanation of this obvious problem with Dr. Illichmann's claim that the plan was medically appropriate. (R.37:29). The closest we have is the State making veiled forfeiture arguments. Resp.-Pet. Br. at 43. The response is to simply ask courts to trust the State's psychiatrists. Resp.-Pet. Br. at 43; DHS Br. at 12-14.

Even if one were to accept DHS's position that its doctors are subject to various ethical obligations, violation of any obligation is only enforced after-the-fact. While DHS does not describe the process one would go through if subjected to inappropriate treatment, the safe assumption would be the incompetent defendant having to file a complaint with an overseeing body or file a civil suit. The Constitution requires prophylactic measures against government overreach when it comes to involuntary medication, it does not condone forced medication and reliance on malpractice remedies. *See Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (noting an individual's "significant liberty interest in **avoiding** the unwanted

administration of antipsychotic drugs") (emphasis added).

The only prophylactic measure DHS cites is a process by which dose-ranges are checked to ensure they are consistent with pre-determined doses. DHS Br. at 14.[4] However, this does not establish how those maximum doses are set. As Jared originally argued in

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[4] DHS also asserts:

> the facilities where DHS physicians practice medicine are heavily regulated under state and federal laws, and they must maintain certain certifications to be eligible for funding. DHS operates three certified facilities where psychiatrists examine patients for involuntary-medication orders: the Mendota and Winnebago mental health institutes and the Wisconsin Resource Center. *See* Wis. Stat. §§ 51.05(1), 46.056.

DHS Br. at 13.

While true, DHS is also treating individuals to competency at Sand Ridge Secure Treatment Center, per DHS's website. https://www.dhs.wisconsin.gov/srstc/index.htm (stating that Sand Ridge serves "Men involved with the criminal justice system in need of treatment to competency services committed under Wis. Stat. § 971.14.") (last accessed Jul. 13, 2025). Unlike the other institutions, Sand Ridge is not specifically named in the statutes and was created as "a secure mental health facility for the detention, evaluation and institutional care of persons under ch. 980." Wis. Stat. § 46.055. It is unclear is whether Sand Ridge is subject to the same oversight as the other facilities.

the Court of Appeals, at least one proposed medication included a minimum dosage that was double or quadruple the indicated starting dose. App. Br. at 32. Another medication had a maximum dose twice as high as the indicated range. App. Br. at 32. A third medication was likely not related to competency restoration at all, but instead for sedation. App. Br. at 33. While the arguments were deemed forfeited, the defendant in *D.E.C.* raised similar arguments regarding seemingly high dosing in the treatment plan. 415 Wis. 2d 161, ¶¶68, 70.

What this shows is that while DHS has procedures in place, it is questionable whether those procedures ensure individuals are treated in a medically appropriate way.

Moreover, this brings us back to the core of what *Sell* requires—that the State prove that its proposed forced treatment of individuals is medically appropriate. Were DHS to have the procedures it claims in place, the State could have presented that evidence to the circuit court. Seeking a blanket ruling from this Court that DHS's doctors can always be trusted violates the Constitution and will only lead to lax circuit court oversight in the instances where

mistakes are made or doctors do not abide by their ethical obligations.

III. DHS's patient-focused arguments are unavailing.

DHS confusingly argues that courts overseeing the administration of involuntary treatment plans will somehow diminish patients' rights. According to DHS: "If doctors' latitude in prescribing different medications is taken away or undermined by courts, that ultimately takes choices away from *patients*, too." DHS Br. at 10 (emphasis in original).

No one is arguing that doctors cannot have flexibility in what they prescribe. All that is required is that the doctor provide an explanation of what that flexibility entails. *J.D.B.*, 414 Wis. 2d 108, ¶58 ("While the identification of seven different antipsychotic medications is not problematic in itself, there needs to be evidence explaining how an unordered list of potential medications is individually tailored to a particular defendant."); *D.E.C.*, 415 Wis. 2d 161, ¶¶45-49 (doctor explaining reason for large list of medicines and how they would be administered was sufficiently individualized). Doctors can, and have, requested multiple medications based on various contingencies or for addressing possible side effects.

Moreover, individuals can always consent to medications in these instances. While the existence of an involuntary medication order puts coercive pressure on individuals to take medications to avoid being strapped down, no one argues—and DHS cites no authority—that individuals cannot work with their doctors to find treatment that is both effective and tolerable.

DHS also ignores that these individuals must necessarily be found to be incompetent to refuse medications. Wis. Stat. § 971.14(4)(b). Given this finding and the underlying criminal incompetency finding, it is likely that many individuals subject to involuntary medication requests will not be able to properly advocate for themselves or protect their interests. This is yet another reason that oversight by circuit courts is necessary before handing treatment decisions over to the State.

Despite what DHS claims, doctors do not "need clear guidance as to what is required to meet *Sell* factor four." DHS Br. at 11. They have it. DHS has ensured that by creating forms that reflect the opinions in *Green* and this case. Def.-App. App. at 23-27.

What DHS seeks is not to correct a mistaken reading of the law. DHS wants to remove the constitutionally mandated oversight *Sell* requires. It does not want to have to explain the medications it plans to forcibly administer or demonstrate why they are medically appropriate for individual defendants. *Sell* plainly requires the oversight DHS seeks to remove. 539 U.S. at 180-81.

CONCLUSION

Green was sound in its analysis and faithfully interprets what *Sell* requires. It should not be disturbed. Similarly, this case details when a treatment plan is insufficient under *Sell*. Neither should be disturbed.

This Court should reverse the involuntary medication order.

Dated this16th day of July 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 and the length approved by the Court. The length of this brief is 2,369 words.

Dated this 16th day of July, 2025.

Signed:
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