STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2023AP000722 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

N. K. B.,

Defendant-Appellant.

Appeal from the Milwaukee County Circuit Court Order, the Honorable David Swanson Presiding, for Involuntary Administration of Medication

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BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Naomi[1] was at a psychiatric hospital when she allegedly kicked a nurse. She was charged with misdemeanors and competency was raised at the first hearing. She was found incompetent but was still held in jail for three weeks when she allegedly slapped a nurse giving her medication. She was charged with felony battery by a prisoner and competency was again raised. Then, an involuntary medication order was requested to restore Naomi to competency, but the court concluded "the *Sell* factors do not apply here." Instead, the court construed from *Sell* and *Harper* a judicially-created alternative and granted the request because it found Naomi was "dangerous." Yet, the court neither defined "dangerous" nor did the government pursue an order under Wisconsin's alternative, existing authority – chapter 51, which contains five specific dangerous definitions.

Should this Court vacate the circuit court's involuntary medication order given the lack of statutory authority and dearth of procedural and substantive due process protections?

[1] To preserve confidentiality while promoting readability, this brief refers to N.K.B. by the pseudonym "Naomi." See Wis. Stat. § 809.19(1)(g).

The circuit court held its order "is not under the *Sell* factors" because "the *Sell* factors do not apply here." Instead, the circuit court concluded that "dangerousness" is a judicially created basis given the court's reading of *Washington v. Harper,* 494 U.S. 210 (1990) and *Sell v. United States,* 539 U.S. 166 (2003).

POSITION ON ORAL ARGUMENT AND PUBLICATION

Naomi does not request oral argument but would welcome it if the court believes it helpful to decide the issues.

Naomi requests publication because this case presents novel questions about the circuit court's authority to order involuntary medication in proceedings under § 971.14. Publication would clarify the law on an issue of constitutional importance and provide needed guidance to the bench and bar.

STATEMENT OF THE CASE AND FACTS

While at a psychiatric hospital facility on January 27th, Naomi allegedly kicked a nurse's shin. (37:21). The following day, the state charged Naomi with misdemeanor battery and obstructing an officer.

See Local County case number 2023CM305[2,3]; (*see generally* 37:6,21,29-30). At her first hearing two-days later, the court ordered a competency examination and remanded Naomi into custody without bail.[4]

A month later on March 7th, the court found Naomi incompetent to proceed and ordered detention at Mendota Mental Health Institute (Mendota). *Id.* Mendota is a facility that primarily provides services to people with mental illness and involvement with the criminal-court system.[5] (31:1).

Despite the court's conclusion that Naomi was incompetent and contrary to the court's order placing Naomi at Mendota, she was still being held at the Milwaukee County Jail three weeks later when she allegedly slapped a nurse dispensing medications. (2). For this, the state charged Naomi with felony battery by prisoners, contrary to Wis. Stat. § 940.20(1). (2). At her first hearing on April 4th, the circuit court ordered

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[2] To further confidentiality, "Local" is used as depicted in this Court's August 9, 2023 Order.

[3] This court may take judicial notice of CCAP records. *Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522

[4] CCAP Record: Local County, case no. 23CM305 available at: https://wcca.wicourts.gov/ (last accessed August 1, 2023)

[5] *See* Wisconsin Department of Health Services – Mendota Mental Health Institute available at: https://www.dhs.wisconsin.gov/mmhi/index.htm (last accessed July 8, 2023).

a competency evaluation. (31:1; 4). The competency hearing was scheduled for two-weeks later. (*Id.*).

Prior to the competency hearing, Mendota Psychiatrist Kevin Murtaugh asked the court for an order authorizing the state facility to involuntarily medicate Naomi. (10). Additionally, Psychologist Jenna M. Krickeberg filed the competency evaluation report which opined that Naomi was incompetent. (7:4).

I. Initial Hearing – April 20, 2023 (31:2)

Following the return of Dr. Krickeberg's report, the commissioner held the initial hearing on April 20th. (31:2). The state did not object, but the defense did, which caused the commissioner to schedule the contested competency hearing in the circuit court. (*Id.*).

II. Second Hearing – April 26, 2023 (40)

Six-days later, Dr. Krickeberg and Dr. Murtaugh testified at the contested competency hearing. (40:2).

Dr. Krickeberg opined that Naomi suffers from a mental illness and was incompetent to stand trial; finding that Naomi lacked the capacity to aid or assist counsel, understand counsel's role and court proceedings, and the ability to cooperate with counsel and to understand the gravity of the charges. (40:9). Dr. Krickeberg recommended that Naomi receive inpatient treatment at Mendota (40:10) and concluded

that Naomi would be unlikely to regain competence within the statutory time period without medications. (40:11-2).

The court found that Dr. Krickeberg's testimony and report established that Naomi was incompetent to proceed. (40:15). The court further held that the likelihood of Naomi attaining competence will be "far more likely" with medication. (*Id.*).

Dr. Murtaugh then testified about the requested involuntary medication order. (40:16). According to his testimony:

Naomi suffered from a mental illness which is treatable with psychiatric medications. (40:19). He recommended the psychiatric medication Haloperidol be forcefully administered via injection. (40:21).[6] He testified further, Naomi was incapable of engaging in a discussion on the risks and benefits of medications (40:20). Nonetheless, he continued that the side-effects include sedation, dystonic reaction, and tardive dyskinesia. (40:25). Tardive dyskinesia causes involuntary muscle movements in any muscle group, but most commonly involuntary hand and facial movements. (40:27). Tardive dyskinesia, even when caught very early, can result in some patients suffering from involuntary muscle movements for life. (40:26-7). He opined that the medication would have a substantial likelihood of rendering Naomi competent (40:21). Also, Naomi was incompetent to refuse

[6] He did not testify to the dosage or frequency of the forced injection. (*Id.*).

medication because Naomi did not express an understanding of the risks and benefits. (40:23). Finally, he was unaware of whether there were alternatives to involuntarily administering medication. (40:23-4).

Following the testimony, the defense objected to the court ordering involuntary medication; arguing the state failed to satisfy each of the *Sell* factors. (40:33). The defense explained that "[a]ccording to *State v.* Green*,* 396 Wis. 2d, 658, if any factor is unsatisfied, involuntary medication is a violation of the due process … clause and is unconstitutional." (40:34).

The circuit court granted the petition and ordered the involuntary administration of medication. (40:38). When analyzing the *Sell* factors, the court stated it was guided by Wis. Stat. § 51.61(1)(g). (40:35). The court found the first factor – important government interest – satisfied because there is a general interest in assisting defendants in attaining competence and this defendant's historical record includes reference to unsuccessful suicide attempts and violent behavior. (40:35-6). The court found the second factor – significantly further that governmental interest – satisfied because medication has been successful in the past. (40:36). The court found the third factor – less intrusive alternatives – satisfied because the doctors were unaware of non-medication alternatives and that "other methods" have been unsuccessful. (40:37). The court found the fourth factor – medically appropriate – satisfied

because it is in Naomi's best interest with the past history of harm to self and others, and the doctors believed medication was the only way for Naomi to attain competency. (40:38).

The defense made a brief argument that the court improperly conflated factors one and four because the "paternalistic reasons that [the court] cited for why the government has an interest in medicating [Naomi] are not actually the governmental interests that the State has in, quote, prosecuting a serious crime" as noted in paragraph 16 of *State v. Green*. (40:39). The defense further stated that the court failed to make specific findings on the nature of the charge. (*Id.*)

The court stated it disagreed and scheduled a review date for July 25th. (40:39-40).

III. Third Hearing – April 27, 2023

On April 27th, the defense filed a notice of appeal regarding the court's involuntary medication order. (15; 17). Due to the notice of appeal, the court scheduled a supplemental hearing for May 4th, and stayed the involuntary medication order to that date. (31:3).

IV. Fourth Hearing – May 4, 2023 (37)

Writing to the court the following day, the Wisconsin Department of Health Services asked the court to reconsider its stay decision. (19:1). It alleged that Naomi was a danger to herself and others. (*Id.*).

The defense responded to advise the court that a dangerousness finding does not give the court authority to order involuntary medication. (25:1).

At the May 4th hearing, the court clarified that it had used an older version of the standard form to order the involuntary medication. (37:4). Based upon reviewing the September 2022 version of the standard order, the court concluded that dangerousness is a separate court-created standard. The court concluded that this standard is separate from the *Sell* factors, and it could be used to order the pre-trial, involuntary administration of medications to an incompetent criminal defendant. (37:4-5). The court felt that the state should be given an opportunity to pursue this alternative "dangerous" standard, and allowed Mendota Psychiatrist Candace Cohen to testify.

Dr. Cohen testified that Naomi's record indicated that "since April 17th" Naomi threatened and carried out numerous acts that substantially risked serious physical harm to others. (37:6-7). She explained that these behaviors are consistent with Naomi's mental illness, (37:8), yet Naomi *does* also have a physical health condition called hypothyroidism which presents with symptoms difficult to tease apart from her mental illness. (37:9). Dr. Cohen confirmed that there had been discussions of initiating a chapter 51 commitment, but she did not know why it had not been pursued. (37:10).

Dr. Cohen finished by opining that an involuntary medication order would be in Naomi's best

interest and would not cause irreparable injury if administered because Naomi's "thoughts and behaviors will become clearer and hopefully [Naomi] would be willing to take the medications which would definitely treat [her] medical condition and, therefore, [Naomi] could stabilize and do better medically." (37:12).

Dr. Cohen described the process of administering involuntary medications. (37:14). He explained that an unspecified number of staff members would physically hold Naomi's limbs down and inject her with up to two needles at least once a day – Dr. Cohen recognized, however, that the petition lacks specificity as to dosage and frequency and this could result in this occurring more than once a day. (37:14-6).

The state argued against the stay by claiming that the defense has not shown they are likely to succeed on the merits of appeal. (37:19-21). It argued that Naomi's recent behavior substantially risked serious physical harm to others, which goes to the *Sell* factor relating to an important state interest because of its interest in preventing future victims and helping Naomi face the charges and assist themselves. (37:22-3). The state argued that because *Sell* stated that "there are often strong reasons for a Court to determine whether forced administration can be justified on these alternative grounds before turning to the trial competence question," the Court created a distinct dangerousness alternative to order pretrial, incompetent detainees forcefully medicated. (37:27).

The defense explained that *Sell's* discussion on whether forced administration can be justified on alternative grounds – such as dangerousness – did not acknowledge a separate court-created standard, but referred to the alternative authority existing in each state, such as chapter 51 in Wisconsin. (37:27-8). In regards to the *Sell* factors, the defense explained that the state had failed to satisfy the first factor – an important government interest – because continued prosecution will likely lead to an NGI conviction with treatment, so there is no important government interest when treatment for dangerousness is obtainable under chapter 51. (37:29). In regards to the stay, the defense pointed out that forcibly being held down, being injected, and having your mental processes changed against your will is sufficient irreparable harm. (37:31).

The court adjourned the hearing to review case law and decide this issue in the afternoon. (37:33).

V. Fifth Hearing – May 4, 2023 (39)

The court recalled the case in the afternoon and issued an oral decision. (39). The court believed that the United States Supreme Court created judicial authority to involuntarily medicate defendants based on a finding of dangerousness. (39:1-2). The court looked at *Sell* referencing the "often strong reasons for a court to determine whether forced administration of drugs can be justified on these alternative grounds before turning to the trial competence question" and concluded that "the *Sell* Court clearly carves out a

different treatment where it is believed that a person in custody is dangerous to him or herself or others." (39:3-4).

The court read *Washington v. Harper* to apply this alternative standard, stating "I find that the analysis set forth in *Washington v. Harper* actually is the analysis that applies here because … dangerousness … is the main issue." (39:6). The court then analyzed the facts and amended the order of commitment and granted the "request for involuntary administration of medication on grounds of dangerousness under section three of the standard form, which again is CR-206." (39:9). The court clarified that this order "is not under the *Sell* factors" because "the *Sell* factors do not apply here." (39:10).

VI. Sixth Hearing – May 5, 2023 (38)

The court recalled this matter the next day on its own motion to supplement the record in relation to chapter 51. (38:2). The court agreed that chapter 51 is a potential avenue, but concluded that the court had its own authority based on its reading of *Washington v. Harper* and *Sell v. United States*, and the applicable statutes. (38:3-5).

Naomi is appealing the involuntary medication order entered in Local County case 2023CF1417.[7]

[7] The circuit court did not order the involuntary administration of medication in Local County misdemeanor case, 2023CM305.

ARGUMENT

The court ordered Naomi to be involuntarily medicated in her criminal case, even though the court's justification for the medication order had nothing to do with the underlying criminal case—*i.e.*, competence to stand trial. Instead, the court ordered involuntary medication based upon Naomi's alleged mental illness and her "dangerousness." The government has the ability to seek an involuntary medication order for a person who is both mentally ill and currently dangerous, but it must follow the procedures set forth in chapter 51.

Those procedures are meant to protect the significant liberty interest at stake and due process. For example, protections in chapter 51 include: pleading requirements, definitions of "dangerous" (in five distinct ways), a burden of proof, defined rights, hearing requirements, and strict timelines. Naomi was denied these protections when the court erroneously concluded *Sell* and *Harper* provide independent authority for involuntarily medicating a person in a criminal case, contrary to the statutory process enacted by the legislature.

Naomi's case is an example of using the criminal system as a mental health system, a task it is ill-suited and ill-resourced to handle. When holistic mental health treatment is needed, the criminal system exacerbates the problem by confining the person in crisis in jail without adequate treatment for months until they finally receive treatment to "restore them to

competency." For Naomi, what began as a minor incident in a psychiatric hospital has spiraled out of control. Over a month after this episode, the court found her incompetent to proceed and ordered her detained at Mendota for restoration. But Naomi sat locked in the Local County Jail for an additional three weeks when she then allegedly slapped a medication passer. Once again, the government reacted, not in pursuit of a fast-acting mental health commitment, but with the state adding a felony charge. Almost a full three months passed from her episode at the psychiatric hospital facility before the court issued the involuntary medication order.

The criminal system is focused on the state's ability to prosecute a person—i.e. competency restoration—and the civil commitment system is focused on mental health treatment. That is why there are separate statutes. Here, the court circumvented statutory authority and due process protections when it based the order on an obscure, judicially created standard it gleamed from *Harper* and *Sell*. A conclusion that misconstrued that precedent and ran afoul of due process. As such, Naomi was denied due process and the involuntary medication order should be vacated.

I. When the court bypassed established due process protections and applied a misconstrued interpretation of *Harper*, *Riggins*, and *Sell*, Naomi's due process rights were violated.

This appeal centers on whether due process allows the circuit court to base its involuntary medication order on an obscure, judicially created standard. Under the Fourteenth Amendment, no state shall "deprive any person of life, liberty, or property, without due process of law." All people have a "'significant liberty interest' in refusing involuntary medication." *State v. Fitzgerald,* 2019 WI 69, ¶13, 387 Wis. 2d 384, 929 N.W.2d 165 (quoting *Washington v. Harper,* 494 U.S. 210, 221 (1990)). The government may only infringe on that liberty interest by proving that forced medication is "necessary to accomplish an essential state policy." *Riggins v. Nevada,* 504 U.S. 127, 138 (1992).

The use of psychotropic medications has an ugly history. Psychotropic medications have been used indiscriminately for behavior control and staff convenience on people who were institutionalized. *See e.g. Pennhurst State School v. Halderman,* 465 U.S. 89 127 n.1 (1984) (Brennan, J., dissenting); *Heller v. Doe,* 509 U.S. 312, 343 (1993) (Souter, J., dissenting). "The unauthorized use of psychotropic drugs to treat mental illness not only infringes upon the right to bodily autonomy, but may also cause actual harm due to adverse side effects." *State ex rel. Jones v. Gerhardstein,* 135 Wis. 2d 161, 175, 400 N.W. 2d 1 (Ct.

App. 1986). As a result, legislatures have sought to minimize paternalism in their dealings with the mentally ill in this area. *See State ex rel. Roberta S., v. Waukesha County Human Services Dept.,* 171 Wis. 2d 266, 275-277, 491 N.W.2d 114 (Ct. App. 1992).

To order involuntary medication in Wisconsin, our Supreme Court has held that "statutory authority" is required. *State v. Anthony D.B.,* 2000 WI 94, ¶24, 237 Wis. 2d 1, 614 N.W.2d 435; *see also K.N.K. v. Buhler,* 139 Wis. 2d 190, 205-06, 407 N.W.2d 282 (Wis. Ct. App. 1987). The complex public policy considerations these orders generate are most suitable for the legislature because it is uniquely designed to conduct hearings, obtain specialized input and undertake factfinding to declare public policy and legislative guidelines. Our legislature provided statutory authority in Chapter 51 and in Wis. Stat. § 971.14.

Whether the involuntary medication order violates Naomi's constitutional right to due process presents a question of law that this court reviews de novo. *State v. Silverstein,* 2017 WI App 64, ¶27, 378 Wis. 2d 42, 902 N.W.2d 550. To the extent this review requires interpretation of Wisconsin's statutes, that too presents a question of law subject to de novo review. *DOR v. River City Refuse Removal, Inc.,* 2007 WI 27, ¶26, 299 Wis. 2d 561, 729 N.W.2d 396. The orders here violate both procedural and substantive due process.

A. The court's order bypassed due process protections in chapter 51.

Our legislature cultivated chapter 51 with liberty and due process protections. It established that our state policy is:

> 1. … to assure the provision of a full range of treatment and rehabilitation services in the state for all mental disorders …[and]
>
> 2. To protect personal liberties …

Wis. Stat., § 51.001. To effectuate this purpose, the legislature designed chapter 51 as a robust system, creating a counsel on mental health, a department with mandated duties, a clinical and facility certification process, and a number of mental health services and institutions. *See generally* Wis. Stat. §§ 51.02-51.10.

To protect liberty and due process, the legislature provided trial courts guidance by codifying procedural and substantive due process protections. Such protections apply comprehensively from emergency to long-term needs.[8]

[8] Hospital physicians may involuntarily administer medications to a patient in an emergency without a court order. *See* Wis. Stat. § 51.61(1)(g)1; *Washington v. Harper,* 494 U.S. 210 (1990); and *State ex rel. Jones v. Gerhardstein,* 141 Wis. 2d 710, 739, 416 N.W.2d 883 (1987).

Chapter 51 safeguards due process by mandating that the patient receive notice reasonably calculated to afford them an opportunity to challenge the contemplated action and to understand the nature of what is happening to them. Chapter 51 does so by expressly setting forth the due process protections, such as:

1. Pleading requirements. *See* Wis. Stat. § 51.20(1).

2. Burdens of proof and production. *See* Wis. Stats. §§ 51.15(1)(ag); 51.20(7)(a); and 51.20(13)(e).

3. Definitions of dangerousness. *See* Wis. Stats. §§ 51.15(1)(ar) and 51.20(1)(a)2.

4. Notice of rights. §§ 51.15(9); 51.20(2)(b); 51.20(9)(a)4.; and 51.20(1)(a).

5. Requirements that hearings comply with the essentials of due process and fair treatment. Wis. Stat. § 51.20(5)(a) ("the right to an open hearing, the right to request a closed hearing, the right to counsel, the right to present and cross-examine witnesses, the right to remain silent and the right to a jury trial if requested under sub. (11).").

6. Detention limitations. *See* § 51.15(4)(b) & (5) ("the treatment director shall release the individual immediately" upon concluding "the individual is not eligible for commitment"); §

51.20(8) (patient may petition for release pending final hearing); and §§ 51.001 and § 51.35(1)(e)1 (placement in least restrictive placement with notice of rights if transferred).

7. Hearing timelines. § 51.20(7)(a) & (c).

8. Independent examiners. § 51.20(9).

9. Access to records pre-hearing. § 51.20(10).

10. Jury trial right on dangerousness issue. § 51.20(11).

11. Option for closed or open hearings. § 51.20(12).

12. Reevaluation procedure. § 51.20(17).

13. Department oversight. § 51.20(19).

Naomi was denied many of these crucial protections because chapter 51 was subverted. Although it can be inferred that the proceedings included some procedural rights – the right to be present and cross-examine witnesses – the ambiguity surrounding important questions handicapped the usefulness of even those basic rights. Rhetorically, can one receive effective counsel or mount a meaningful cross-examination when the key finding required is undefined? Compare the vague reference to "dangerousness" in *Sell* that the court relied upon to the detailed definitions set forth in Wis. Stat. § 51.20(1)(a)2., all of which require evidence of recent conduct to satisfy the constitutional requirement that the person is *currently* dangerous. *See Waupaca*

County v. K.E.K., 2021 WI 9, ¶¶21-30, 395 Wis. 2d 460, 954 N.W.2d 366.

In addition, could counsel effectively argue that the government failed to meet its burden when the burden is unestablished? *See e.g.* Wis. Stats. §§ 51.15(1)(ag); 51.20(7)(a); and 51.20(13)(e). Could counsel effectively ensure their client has made a knowing, voluntary, and intelligent jury trial decision when it remains unknown if it applies as it does in chapter 51.

Absent entirely from Naomi's proceedings were protection from an untimely request, protection from an unwarranted detention, and protection from a lengthy delay between request and final order; also missing, the notice of the burden of proof and production, the definition of the key element, and ultimately notice of what rights, if any, she had.

Although both chapters 51 and 971 may include additional due process protections, the purpose of reciting their expressed due process protections is to showcase the specificity required given the liberty interests at stake. The seriousness of the deprivation of liberty at stake here "shows the importance of strict adherence to stringent procedural requirements and the necessity for narrow, precise standards." *Lessard v. Schmidt,* 349 F.Supp. 1078, 1088 (E.D. Wis. 1972).[9]

[9] *Lessard* "has a complicated procedural history but the substance of its holding was never overruled. *Outagamie Cty v. Michael H.,* 2014 WI 127, ¶25 n.19, 359 Wis. 2d 272, 859 N.W.2d 603.

The comparisons highlight that whenever an important liberty interest is at stake, "notice of date, time and place" of the hearing "is not satisfactory." *Id.,* at 1092.

The court's derived alternative, however, bequeaths due process protections to obscurity. This obscurity deprived Naomi of fundamental fairness and her due process rights. In the end, Naomi went without the statutory protections, limiting her ability to reasonably challenge the government's accusations, and oppose their taking of her liberty.

B. The court's order bypassed due process protections in § 971.14

The statutory authority for circuit courts to order involuntary medications in competency proceedings is confined to § 971.14(3)(dm).

Due process protections under this statutory authority, however, are not limited to the statute itself. Instead, the Wisconsin supreme court declared § 971.14(3)(dm) and (4)(b) unconstitutional absent the additional *Sell* findings. *State v. Fitzgerald,* 2019 WI 69, ¶12-3, 387 Wis. 2d 384, 929 N.W.2d 165. Therefore, due process protections include the procedure and definitions in the statute plus the four-factor *Sell* test.

Those four factors are: (1) Are there "important governmental interests at stake, such as "bringing to trial an individual accused of a serious crime" against person or property; (2) Will the involuntary medication "significantly further" the government's interests; (3)

Is the involuntary medication "necessary to further those interests," such that "alternative, less intrusive treatments [or means] are unlikely to achieve substantially the same results;" and (4) Is the administration of the drugs "medically appropriate," considering the patient's best medical interest, the antipsychotic's success rate, and balanced against potential side-effects. *Sell,* 539 U.S. at 180-81.

In assessing those four factors, the Court tasked judges with answering the following question: "Has the Government, in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness of a particular course of antipsychotic drug treatment, shown a need for that treatment sufficiently important to overcome the individual's protected interest in refusing it?" *Id.* at 183 (citing *Harper,* 494 at 229; *Riggins,* 504 U.S. at 134-35). The Court acknowledged that an affirmative answer to this question "may be rare." *Id.* at 180.

Here, the court chose to forego reliance on the *Sell* factors to justify the involuntary medication order. Indeed, the court precisely stated so:

> [DEFENSE COUNSEL]: Just to be clear for appeal, does that mean we are vacating the old order for medication … under the *Sell* factors, [and] instituting a new order under dangerousness?
>
> THE COURT: This is not under the *Sell* factors --
>
> MS. TAYLOR: Right.

> THE COURT: I find the *Sell* factors do not apply here.

(39:10). Given that the court found the *Sell* factors did not apply, they will not be addressed further.

In addition to the unconstitutional application of § 971.14, the statute itself is significantly limited. It authorizes involuntary medication based on dangerousness only during the examination stage of competency proceedings. *State v. Farnsworth,* 2021 WI App 67, ¶12, No. 2020AP1367-CR, unpublished slip op. (Wis. Ct. App., August 10, 2021) (App. 39-42). Under § 971.14(2)(f), "[a] defendant *ordered to undergo examination* under this section . . . may refuse medication and treatment except in a situation where the medication or treatment is necessary to prevent serious physical harm to the defendant or others." (emphasis added). Based on the plain language of § 971.14, because Naomi's examination was complete and the court found her incompetent, Naomi was no longer subject to § 971.14(2)(f). *Farnsworth,* 2021 WI App 67, ¶13.

Outside the examination stage, § 971.14 makes no mention of dangerousness and authorizes involuntary medication only when the defendant is not competent to stand trial and not competent to refuse medication. *See* Wis. Stat. § 971.14(4)(b).

Given this limitation, outside of chapter 971, the government is left to seek involuntary medication through civil commitment proceedings under chapter 51. In those proceedings, courts are authorized to

involuntarily commit a person who is: (1) mentally ill, (2) a proper subject for treatment, and (3) dangerous. Wis. Stat. § 51.20(1)(a). To include an involuntary medication order with the commitment, additional findings are required. *See* Wis. Stat. § 51.61(1)(g). Thus, while dangerousness is necessary for the involuntary chapter 51 commitment, the commitment alone does not justify involuntary medication. *Jones,* 141 Wis. 2d at 736-37; *see also Winnebago Cty. v. C.S.,* 2020 WI 33, ¶36, 391 Wis. 2d 35, 940 N.W.2d 875 ("involuntary commitment is not involuntary medication").

C. The circuit court misconstrued *Harper*, *Riggins*, and *Sell* because they do not grant the circuit court authority under the Due Process Clause to order involuntary medication based on an obscure, judicially-created dangerousness standard.

A holistic reading of *Harper, Riggins,* and *Sell* shows that the circuit court was wrong to order involuntary medication based on this obscure standard. The circuit court's conclusion that its authority "is not under the *Sell* factors" because "the *Sell* factors do not apply here," and instead that *Harper* condoned a judicially created "dangerousness" alternative, takes the Supreme Court's reasoning out of context and misconstrues the holding of each of those three cases. Nothing in *Harper, Riggins,* or *Sell* grants the circuit court authority to order involuntary

medication in competency proceedings based on the accused's dangerousness.

Beginning with *Harper,* the Court established that every person "possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." *Harper,* 494 U.S. at 221.

In doing so, the Court affirmed "a state law authorizing forced administration of [psychiatric] drugs to inmates who are … gravely disabled or represent a significant danger to themselves or others." *Sell,* 539 U.S. at 178. The Court held that the state law was constitutional given the law's procedural and substantive protections. *Id.* at 215-16.

Nothing in *Harper* granted the circuit court authority to order involuntary medication in pretrial competency proceedings. The *Harper* Court scrutinized the constitutionality of a state law, it did not create separate judicial authority. Furthermore, *Harper* is inapplicable because Naomi is not a prison inmate. She is a patient committed for competency treatment and is presumed innocent.

Next, the Court in *Riggins* distinguished the due process standard in *Harper* based on the "unique circumstances of penal confinement." *Riggins*, 504 U.S. at 134-35. Unlike prison inmates, "pretrial detainees" have not been convicted and imprisoned. *Id.* at 135. So, the Court held that the government must meet a higher standard for justifying involuntary medication than in *Harper*. To forcibly

medicate a "pretrial detainee," the state must establish an "overriding justification" by proving the "need for" and "medical appropriateness" of the drug the government seeks to forcibly administer to a pretrial detainee. *Id.*

Finally, in *Sell,* the government sought to forcibly medicate a defendant found incompetent to stand trial. As here, Sell's involuntary medication order was based on dangerousness. *Id.* at 173. At his initial appearance, Sell's behavior was "totally out of control" and involved "screaming and shouting, the use of personal insults and racial epithets, and spitting in the judge's face." *Id.* at 170. The Magistrate found that the government "made a substantial and very strong showing that Dr. Sell is a danger to himself and others at the institution in which he is currently incarcerated" and ordered involuntary medication to "render him less dangerous" and restore his competency. *Id.* at 173.

On appeal of the Magistrate's order, the District Court found that the Magistrate's finding of "dangerousness" was "clearly erroneous." *Id.* at 174-75. But the court affirmed Sell's involuntary medication order because "anti-psychotic drugs are medically appropriate" and "necessary to serve the government's compelling interest in obtaining an adjudication of defendant's guilt or innocence of numerous and serious charges." *Id.* at 174. The Eighth Circuit affirmed the District Court's judgment. *Id.*

In reversing the Eighth Circuit, the Supreme Court incorporated the *Harper* and *Riggins* standards to establish a four-factor test for deciding whether forced medication complies with due process in competency proceedings.

True, the Court held that in competency proceedings "a court" need not address the four *Sell* factors if forced medication is "warranted for a different purpose, such as those purposes set out in *Harper* related to the individual's dangerousness, or purposes related to the individual's own interests where refusal to take drugs puts his health gravely at risk." *Id.* at 182. But *Sell* explained that, like in Wisconsin, these alternative grounds are customarily found in civil probate matters. *Id.* ("courts typically address involuntary medication as a civil matter, and justify it on these alternative *Harper*-type grounds."). It went on to explain "courts, in **civil proceedings**, may authorize involuntary medication where the patient's failure to accept treatment threatens injury to the patient or others." *Id.* (emphasis added). As the Court recognized, Wisconsin—like all other states—has a civil commitment system to address individuals in need of involuntary treatment who are mentally ill and dangerous. It is chapter 51.

And given that Naomi is presumed innocent, is not a prison inmate, and has not been afforded civil processes equivalent to those in *Harper,* it does not follow that due process authorizes involuntary medication based on dangerousness here.

Referring to "these alternative grounds"—i.e., civil proceedings—the *Sell* Court explained that "[i]f a court authorizes medication on these alternative grounds, the need to consider authorization on trial competence grounds will likely disappear." *Id.* at 183. *Sell* thus concluded that when "asked to approve forced administration of drugs for purposes of rendering a defendant competent to stand trial," a court "should ordinarily determine whether the Government seeks, or has first sought permission for forced administration of drugs on these other *Harper*-type grounds; and, if not, why not." *Id.*

In its full context, *Sell* suggests that criminal courts in competency proceedings should ask the government whether it has already sought, or is seeking, involuntary medication based on dangerousness in a civil proceeding. If the answer is "no," the court should determine why not. If the answer is "yes," there is no need for the criminal court to hold a hearing on the *Sell* factors unless the state first fails to justify involuntary medication in civil proceedings. After all, "[e]ven if a court decides medication cannot be authorized on these alternative grounds, the findings underlying such a decision will help to inform expert opinion and judicial decision-making in respect to a request to administer drugs for trial competence purposes." *Id.*

In other words, *Sell* neither directs nor authorizes Wisconsin's circuit courts to order involuntary medication based on dangerousness in pretrial criminal competency proceedings. Likewise,

as discussed above, no Wisconsin statute grants circuit courts the authority to order involuntary medication based on dangerousness in those proceedings. Because the state did not first seek and obtain an involuntary medication order in civil proceedings, the *Sell* test is the applicable substantive standard.

The circuit court, nonetheless, bypassed *Sell* without existing Wisconsin law supplying an "alternative ground." Indeed, it seemed as though the court assumed the role of a Washington state psychiatrist unburdened by the procedural and substantive statutory constraints. Such unguided power, however, is not the intent of *Sell* or *Harper*.

D. Even if *Riggins*, *Harper* and *Sell* intended "dangerousness" alone to permit the court to order a pre-trial criminal defendant involuntarily medicated, the procedure used here violated due process.

An involuntary medication order "cannot withstand challenge if there are no procedural safeguards to ensure the [patient's] interests are taken into account." *Harper,* 494 U.S. at 233. Given the substantial liberty interest involved, due process requires: (1) written notice of the basis for medication and the evidence relied on; (2) a meaningful hearing sufficiently after adequate notice is provided; (3) the right to be present, testify, present witnesses, and cross-examine witnesses called by the state; and (4) an independent decisionmaker. *Vitek v. Jones,* 445 U.S. 480, 494-95 (1980).

Here, the involuntary medication orders violated procedural due process because Naomi was afforded insufficient pre-hearing notice to give her the opportunity to mount a defense and defend her rights. Naomi was not noticed on the burden of proof, the burden of persuasion, the definition or elements of what the court considered "dangerous," nor was she afforded notice of her rights – whether she had a right to jury trial, to present witnesses, to remain silent and that her statements could be used adversely, and almost all of the other due process rights recognized in Wisconsin's statutes.

Procedural due process protections ensure "fundamental fairness essential to the very concept of justice." *State v. Disch,* 119 Wis. 2d 461, 469, 351 N.W.2d 492 (1984). Without notice of the court's bounds and her rights, it was impossible to fully challenge the request.

Along with the lack of pretrial notice, nothing in the record suggests that the court applied any accepted definition of "dangerousness" or held the government to any particular standard of proof. Given the liberty interest involved, Naomi had a right to notice of both the "basis for" medication and the "standard upon which [s]he may be" medicated. *Lessard v. Schmidt,* 349 F.Supp. 1078 (E.D. Wis.

1972), *vacated on other grounds,* 414 U.S. 473 (1974).[10] Naomi was never notified and the court never explained the standard for determining dangerousness.

Because Naomi was provided no advance notice and the court was silent on the applicable standard for forced medication, the hearing was unfair. Thus, even if the court had authority to order involuntary medication in competency proceedings based on dangerousness, the medication orders here violated procedural due process and should be vacated.

E. The court's circumvention of established law and its application of an obscure, judicially-created *Sell* alternative merits review because there is an active controversy and mootness exceptions apply.

Typically, courts "will not consider a question the answer to which cannot have any practical legal effect upon an existing controversy." *State v. Leitner*, 2002 WI 77, ¶13, 253 Wis. 2d 449, 646 N.W.2d 341. Mootness is a question of law that appellate courts review de novo. *Id.*, ¶17. Because "a causal relationship" exists "between a legal consequence and the challenged order," this appeal is not moot. *Sauk Cty. v. S.A.M.*, 2022 WI 46, ¶20, 402 Wis. 2d 379,

[10] *Lessard* "has a complicated procedural history but the substance of its holding was never overruled. *Outagamie Cty v. Michael H.,* 2014 WI 127, ¶25 n.19, 359 Wis. 2d 272, 859 N.W.2d 603.

975 N.W.2d 162 (citing *Marathon Cty. v. D.K.*, 2020 WI 8, ¶¶23-25, 390 Wis. 2d 50, 937 N.W.2d 901).

True, the orders for commitment and involuntary medication has expired, but an expired order is not the equivalent of a vacated order and expiration alone does not render the appeal moot. *D.K.*, 390 Wis. 2d 50, ¶25. Because the order has not been vacated, "the direct or collateral consequences of the order persist," ordering vacatur "would practically affect those consequences." *Id.,* ¶23.

F. The criminal cases are still pending and this court's answer has direct and collateral consequences.

Under § 971.14(6)(d), the court may order a competency examination at any time and, if Naomi is competent, the criminal cases "shall be resumed." Likewise, under § 971.14(5)(d), if Naomi becomes competent and is "receiving medication, the court may make appropriate orders for the continued administration of the medication in order to maintain the competence of the defendant for the duration of the proceedings." Thus, the felony and misdemeanor cases—and the question of involuntary medication in those cases—remain live controversies.

A decision on the merits of the issue presented in this appeal would shape any subsequent litigation involving medication under § 971.14 in this still-existing controversy. If the court dismisses this appeal as moot, Naomi will be denied the relief she requested irrespective of the merits of her claim. The involuntary

medication order would be left undisturbed with the circuit court free to presume its validity without the benefit of this court's guidance.

On top of the direct consequences, our supreme court held that "a causal relationship exists" between a civil commitment order and "a patient's liability for the cost of care under Wis. Stat. § 46.10(2)." *S.A.M.*, 402 Wis. 2d 379, ¶23. *S.A.M.* left open whether the stigma associated with a mental health commitment renders an appeal not moot. *Id.,* ¶27 n.5. Even "potential collateral consequences" render an appeal not moot. *Id.,* ¶¶22-25.

Pre-trial detainees are also "liable for the cost of the care, maintenance, services, and supplies" related to their commitment under Wis. Stat. § 46.10(2). Thus, there is a direct causal connection that renders the appeal not moot even without proof of "actual monetary liability," and vacating the unconstitutional medication order will remove any financial liability that may exist. *S.A.M.*, 402 Wis. 2d 379, ¶¶24-25.

On top of the collateral financial consequences, the Supreme Court has long acknowledged the "indisputable" stigmatizing nature of an involuntary mental health commitment and the "very significant impact" it can have on the committed person. *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980).

The stigma of the order here is enhanced because, unlike chapter 51 orders, orders under § 971.14 are accessible to the public. Thus, prevailing on the merits of this appeal would "practically alter"

the pre-trial defendant's publicly available "record and reputation for dangerousness" by nullifying any legal weight of the findings that it is constitutional and medically appropriate to drug her against her will based on her purported dangerousness. *S.A.M.*, 402 Wis. 2d 379, ¶23.

G. Multiple exceptions to the mootness doctrine apply.

Even if this appeal is somehow moot, dismissing a moot case "is an act of judicial restraint rather than a jurisdictional requirement." *Id.,* ¶19. Sometimes, "because of their characteristics or procedural posture," issues present "a need for an answer that outweighs our concern for judicial economy." *Waukesha Cty. v. S.L.L.*, 2019 WI 66, ¶15, 387 Wis. 2d 333, 929 N.W.2d 140.

Appellate courts recognize exceptions to the mootness doctrine when an issue: "(1) is of great public importance; (2) occurs so frequently that a definitive decision is necessary to guide circuit courts; (3) is likely to arise again and a decision of the court would alleviate uncertainty; or (4) will likely be repeated, but evades appellate review because the appellate review process cannot be completed or even undertaken in time to have a practical effect on the parties." *Outagamie Cty. v. Melanie L.*, 2013 WI 67, ¶80, 349 Wis. 2d 148, 833 N.W.2d 607. This case meets all four exceptions.

Dismissal for mootness would have a broad effect on appeals challenging involuntary medication

under § 971.14. Given the duration of the appellate process and the maximum 12-month timeline to restore competency under § 971.14, dismissal under these circumstances would effectively nullify a committee's right to appeal "questions of clear constitutional importance." *Sell*, 539 U.S. 166.

Our supreme court's recent decision in *State v. Green*, 2022 WI 30, 401 Wis. 2d 542, 973 N.W.2d 770 solidifies the need to resolve this issue to alleviate uncertainty. When defendants contest a circuit court's involuntary medication order on appeal and seek a stay pending appeal, the circuit court and court of appeals must explain why the defendant is likely to succeed on the merits of the appeal. *See State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). Without a decision on the merits of the issues presented here, this court will leave a recurring constitutional question unanswered. This court should reach the merits of this important question to alleviate uncertainty going forward.

CONCLUSION

For the reasons stated above and in the appellant's brief, the defendant respectfully asks this court to reverse the circuit court with orders to vacate the involuntary medication order.

Dated this 21st day of August, 2023.

Respectfully submitted,

Electronically signed by Timothy C. Drewa
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 6,831 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 21st day of August, 2023.

Signed:

Electronically signed by Timothy C. Drewa

TIMOTHY C. DREWA
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