STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2023AP722-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

N.K.B.,

Defendant-Appellant.

ON APPEAL FROM AN ORDER FOR COMMITMENT AND INVOLUNTARY MEDICATION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID C. SWANSON, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

KARA L. JANSON
Assistant Attorney General
State Bar #1081358

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809
(608) 294-2907 (Fax)
jansonkl@doj.state.wi.us

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INTRODUCTION

This is a case about involuntarily medicating a Chapter 971.14 committee who's dangerous. The circuit court found Naomi[1] not competent to stand trial for battery by prisoner and committed her to the Department of Health Services' (DHS) care. The court ordered involuntary medication to restore Naomi's trial competency under *Sell*[2] but stayed its order. The very next day, counsel for DHS wrote to the court requesting involuntary medication due to Naomi's dangerousness at Mendota.

A subsequent hearing revealed that over three weeks, Mendota staff had to segregate Naomi 17 times because of her aggressive behavior. She had pushed, kicked, and punched staff. She had slapped a peer. She had pulled a clump of hair out of a staff member's head. She had made numerous threats. And she had refused to treat a serious thyroid condition, which posed a risk of death. Finding that this was "clearly a case" where Naomi posed a danger to herself or others at Mendota, the circuit court ordered involuntary medication.

On appeal, Naomi argues that the circuit court had no authority to order involuntary medication on account of her dangerousness. She asks this Court to hold that under the pressing circumstances that Mendota staff was facing, their only recourse was to place Naomi in segregation for weeks on end or hope that the County would initiate Chapter 51 commitment proceedings.

That is not and cannot be the law. Recognizing the strong interest that the government has in maintaining the

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[1] This is a pseudonym. (Naomi's Br. 9 n.1.)

[2] *Sell v. United States*, 539 U.S. 166 (2003) (setting forth a four-factor test for involuntary medication to retore trial competency).

safety and security of its mental health institutions, our Legislature has created a statutory mechanism for involuntarily medicating Chapter 971.14 committees who are dangerous—and it doesn't require Chapter 51 commitment proceedings. The circuit court was therefore authorized to order forced medication, and under U.S. Supreme Court precedent, the order violates neither substantive nor procedural due process. This Court should affirm.

ISSUE PRESENTED

Did the circuit court err in ordering involuntary medication due to Naomi's dangerousness at Mendota?

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. Publication is warranted to clarify that during a Chapter 971.14 commitment, a circuit court may order forced medication based on the defendant-patient's dangerousness.

STATEMENT OF THE CASE

A. The State charged Naomi with battery by prisoner.

In March of this year, Naomi was an inmate at the Milwaukee County jail. (R. 2:1.) She was there because of pending misdemeanor charges for striking a nurse and kicking a police officer while staying at a psychiatric facility. (R. 37:21.) One night at the jail, a nurse came by to give Naomi her medication. (R. 2:1.) Naomi walked up and slapped the nurse in the face without saying anything. (R. 2:1.) The State charged Naomi with battery by prisoner in a new case (the one at issue here). (R. 2:1.)

B. The circuit court ordered a trial competency examination.

The next day, the circuit court ordered a trial competency examination. (R. 4:1.) The examiner opined that Naomi wasn't competent but was likely to regain competency within the time allotted if provided with psychiatric treatment. (R. 7:4.)

The examiner's report documented Naomi's long history of living with mental health challenges. (R. 7:1.) "[H]er symptoms of psychosis began when she was 23 years old," and she's been diagnosed with schizoaffective disorder, among other conditions. (R. 7:2.) Naomi "has historically reported symptoms including command hallucinations . . . delusional beliefs . . . mania, depression, anxiety, suicidal ideation, and aggression." (R. 7:2.) "She has at least 45 episodes of care with the Milwaukee Behavioral Health Division." (R. 7:2.) Although her symptoms notably improve with psychotropic medications, Naomi "has a history of medication noncompliance." (R. 7:2.)

The examiner's report further noted that Naomi had been uncooperative since her recent admission to Mendota Mental Health Institute (Mendota). (R. 7:3.) She "was verbally aggressive" with her treatment team and "threatened to harm various staff members." (R. 7:3.) A meeting on psychotropic medication "ended prematurely due to her increasing agitation and aggression." (R. 7:3.) Naomi "attempted to swing at staff" with "a container of cleaning supplies," and she had to be "placed in seclusion for continuing to hit objects in her room and ignoring staff redirects." (R. 7:3.)

The basis for the examiner's competency opinion was that Naomi was "acutely symptomatic" and couldn't "engage in coherent or reality-based conversation." (R. 7:4.) The examiner recommended involuntary medication to restore

competency and noted that Naomi's treating psychiatrist at Mendota (Dr. Murtaugh) had already requested an order. (R. 7:5; 8.)

C. The circuit court found Naomi incompetent to proceed and committed her for treatment.

Based on the examiner's report and testimony, the circuit court found Naomi incompetent to proceed but likely to regain competency with treatment. (R. 40:15.) It committed her to DHS's care. (R. 40:38.)

After hearing testimony from Dr. Murtaugh on the *Sell* factors, the circuit court ordered involuntary medication to help restore Naomi's trial competency. (R. 16; 40:17–28, 38.) However, the court stayed the involuntary medication order the next day because Naomi filed a notice of appeal challenging the order. (R. 23.)

D. DHS quickly sought an involuntary medication order to address Naomi's dangerousness at Mendota.

One day after the circuit court stayed the involuntary medication order, counsel for DHS wrote a letter asking the court to reconsider its stay decision. (R. 19:1.) Counsel explained that "without medication, [Naomi] is a danger to herself and others. [She] has repeated instances of physical aggression toward staff at Mendota Mental Health Institute and continues to refuse potentially life-saving medication to treat a physical condition." (R. 19:1.)

Regarding Naomi's aggression toward staff, DHS counsel elaborated that in a one-week period, Naomi had "hit[ ] the pane of [g]lass on her television," "emerged from her room with fists balled up and swung at staff," "grabbed a staff member's hair and attempted to hit the staff member," and "pushed a staff member's glasses against her face." (R. 19:1.)

These actions were "in addition to numerous other threats of violence, profanity, and disruptive behavior toward other patients such as staring into their rooms and causing them agitation." (R. 19:1.)

As for Naomi's posing a danger to herself, DHS counsel stated that Naomi suffers from a serious thyroid condition. (R. 19:2.) Medical staff told Naomi that if she didn't treat her medical condition, she risked damage to her organs, falling into a coma, and even death. (R. 19:2.) However, Naomi still refused to treat the thyroid condition. (R. 19:2.) Counsel said that "Mendota medical personnel believe the untreated hypothyroid state affects [Naomi's] psychiatric symptoms and could potentially make the psychiatric symptoms harder to treat." (R. 19:2.)

Counsel for DHS stressed that in the absence of involuntary medication to address Naomi's risk of harm to herself or others, she would be placed in seclusion—a "bare room with a metal door." (R. 19:1–2.) This is "unpleasant for patients and . . . can be traumatizing." (R. 19:1.) Naomi had already been secluded seven times while at Mendota, and without medication to help stabilize her, seclusion would likely continue. (R. 19:1–2.)

In short, "Mendota medical staff believe[d] [Naomi's] aggressive behaviors [would] continue without administration of medication." (R. 19:2.)

E. Following an evidentiary hearing, the circuit court ordered involuntary medication based on Naomi's dangerousness at Mendota.

One week after DHS's letter, the circuit court held an evidentiary hearing on the dangerousness issue. (R. 37.) Naomi appeared by Zoom and had counsel present at the hearing. (R. 37:2.)

Dr. Cohen, Naomi's treating psychiatrist at Mendota, testified in support of an involuntary medication order for dangerousness. (R. 37:3–5.) Dr. Cohen told the circuit court that in the span of roughly three weeks, Naomi had been secluded at Mendota 17 times on account of her dangerousness. (R. 37:6.) Dr. Cohen detailed Naomi's "escalating" aggressive behavior, which included punching, kicking, and slapping people:

> She has, in an unprovoked manner, attacked a peer, slapping her in the face. She has punched staff, kicked staff. She has grabbed staff's hair and actually pulled a clump of hair out of the staff's head. She has pushed a staff member, one of our nurse's glasses on her face, and she continues to make threats and to exhibit non[ ] redirectable, threatening behaviors.

(R. 37:6.) Dr. Cohen explained that Naomi's aggressive behavior was because of her schizoaffective disorder, which Naomi refused to treat with medication. (R. 37:7–9.)

Naomi wasn't just posing a danger to others at Mendota, Dr. Cohen continued. (R. 37:8.) She threatened harm to herself by refusing to treat her thyroid condition. (R. 37:8.) Specifically, she risked suffering "significant long-term complications such as cardiovascular issues, multiorgan issues, coma," and "death as a result of this type of hypothyroidism when it is untreated." (R. 37:8.) Dr. Cohen believed that treating Naomi's schizoaffective disorder would help address the thyroid issue: "[B]y treating her symptoms of mental illness, her thoughts and behaviors will become clearer and hopefully she would be willing to take the medications which would definitively treat her medical condition and, therefore, she could stabilize and do better medically." (R. 37:12.)

At the hearing, Dr. Cohen confirmed that she considered Naomi's physical health conditions before recommending involuntary medication. (R. 37:10–11.) Based on Naomi's medical history, medical conditions, and mental

health, Dr. Cohen opined that involuntary medication was in Naomi's best medical interest. (R. 37:12.) Dr. Cohen had reviewed the medications that Dr. Murtaugh previously recommended and agreed with his treatment plan. (R. 37:10–12.) As Naomi's treating psychiatrist, Dr. Cohen said she'd supervise the treatment. (R. 37:18.) Naomi would be monitored "very closely" for side effects, which could be addressed in "a lot of different ways." (R. 37:18.)

Following Dr. Cohen's testimony, the circuit court vacated its previous involuntary medication order based on the *Sell* factors and instead ordered forced medication due to Naomi's dangerousness at Mendota. (R. 39:10–11.) The court recognized that under U.S. Supreme Court precedent, forced medication due to a defendant-patient's dangerousness is permissible. (R. 39:2–4.) The court found that this was "clearly a case" where Naomi posed a danger to herself and others at Mendota. (R. 39:6–7.) Citing to Dr. Cohen's testimony, the court determined that involuntary medication was in Naomi's best medical interest and that she wasn't competent to refuse medication. (R. 39:7–8.)

F. Naomi was restored to competency and discharged from the commitment while this appeal was pending.

The next day, Naomi filed a notice of appeal challenging the circuit court's involuntary medication order. (R. 30.) Per CCAP, while her appeal was pending, she was restored to competency.[3] Accordingly, on July 25, 2023, the court discharged Naomi from the competency commitment and resumed the trial proceedings.

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

Naomi continues to appeal the defunct involuntary medication order.

STANDARDS OF REVIEW

The circuit court's factual findings regarding Naomi's risk to herself or others aren't in dispute. Whether the court was statutorily authorized to order medication presents a question of law subject to independent review. *State v. Anthony D.B.*, 2000 WI 94, ¶ 8, 237 Wis. 2d 1, 614 N.W.2d 435. Likewise, whether Naomi's right to due process was violated presents a legal question that this Court reviews de novo. *State v. McGuire*, 2010 WI 91, ¶ 26, 328 Wis. 2d 289, 786 N.W.2d 227.

ARGUMENT

The circuit court properly ordered involuntary medication based on Naomi's dangerousness at Mendota.[4]

A. Under *Sell*, courts should consider whether forced medication can be justified on dangerousness grounds before addressing the trial competence issue.

Individuals have a significant liberty interest in avoiding unwanted medication. *State v. Green*, 2022 WI 30,

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[4] Naomi argues that her appeal of the defunct medication order is not moot. (Naomi's Br. 39–41.) Mootness is at play where, as here, the defendant "is no longer subject to the medication order [she] challenges." *State v. Fitzgerald*, 2019 WI 69, ¶ 21, 387 Wis. 2d 384, 929 N.W.2d 165. However, exceptions to mootness apply. *See In re the Mental Commitment of Christopher S.*, 2016 WI 1, ¶ 32, 366 Wis. 2d 1, 878 N.W.2d 109. The issue whether a circuit court may order forced medication to address a defendant-patient's dangerousness during a Chapter 971.14 commitment meets at least one of the recognized exceptions to the mootness doctrine, particularly that it is likely to arise again, and a decision of the court would alleviate uncertainty. *See id.*

¶ 17, 401 Wis. 2d 542, 973 N.W.2d 770. But "a particular governmental interest" may override that constitutionally protected right. *Sell v. United States*, 539 U.S. 166, 181–82 (2003). Forced medication to restore trial competency is one example and *Sell* provides a four-factor test for assessing the constitutionality of such an order. *Id.* at 178–82.

But the government need not endeavor to prove the *Sell* factors—nor should it—where a different governmental interest justifies involuntary medication. The *Sell* Court emphasized that "[t]here are often strong reasons for a court to determine whether forced administration of drugs can be justified on . . . alternative grounds *before* turning to the trial competence question." *Sell*, 539 U.S. at 182. Relevant here, courts should consider whether forced medication is warranted for "the 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. Harper* involved a state regulation that authorized forced medication where a prison inmate was mentally ill and dangerous, and the treatment was in the inmate's best medical interest. *Washington v. Harper*, 494 U.S. 210, 222, 236 (1990). A later case, *Riggins*, "extended the application of the holding in *Harper* to pretrial detainees." *State v. Wood*, 2010 WI 17, ¶ 22, 323 Wis. 2d 321, 780 N.W.2d 63 (discussing *Riggins v. Nevada*, 504 U.S. 127 (1992)).

The *Sell* Court gave two reasons why the preferred route is to first ask whether forced medication may be justified on dangerousness grounds. "For one thing, the inquiry into whether medication is permissible, say, to render an individual nondangerous is usually more 'objective and manageable' than the inquiry into whether medication is permissible to render a defendant competent." *Sell*, 539 U.S. at 182 (citation omitted). The *Sell* Court specified that assessing whether "particular drugs are medically

appropriate and necessary to control a patient's potentially dangerous behavior (or to avoid serious harm to the patient himself)" is "easier" than trying "to balance harms and benefits related to the more quintessentially legal questions of trial fairness and competence." *Id.*

The second reason why involuntarily medicating for dangerousness is preferred is that state courts have experience making dangerousness determinations: "courts typically address involuntary medical treatment as a civil matter, and justify it on these alternative, *Harper*-type grounds." *Sell*, 539 U.S. at 182. The *Sell* Court noted that state "courts, in civil proceedings, may authorize involuntary medication where the patient's failure to accept treatment threatens injury to the patient or others." *Id.*

For this Court's purposes, the important takeaway from *Sell* is that "a court, asked to approve forced administration of drugs for purposes of rendering a defendant competent to stand trial, 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." *Sell*, 539 U.S. at 183.

B. Wisconsin law authorizes forced medication to address a defendant-patient's dangerousness during a Chapter 971.14 commitment.

There can be no serious dispute "that the State has an interest in maintaining safety, security, and functionality within" its mental health institutions. *Wood*, 323 Wis. 2d 321, ¶ 32; *see also Vitek v. Jones*, 445 U.S. 480, 495 (1980) ("Concededly the interest of the State in segregating and treating mentally ill patients is strong."). "Indeed, that interest is well-established." *Wood*, 323 Wis. 2d 321, ¶ 32 (citing *Riggins*, 504 U.S. at 135; *Harper*, 494 U.S. at 225–26).

To serve the State's strong interest, a statutory mechanism exists for involuntarily medicating Chapter 971.14 committees who are dangerous. Individuals committed pursuant to Chapter 971 are entitled to the patients' rights enumerated in Chapter 51. *See* Wis. Stat. § 51.61(1) (defining "patient" to include individuals committed under Chapter 971). Those rights include "rights . . . to refuse medication and treatment." Wis. Stat. § 51.61(1)(g). Under section 51.61(1)(g)1., patients have "the right to refuse all medication and treatment except . . . in a situation in which the medication or treatment is necessary to prevent serious physical harm to the patient or to others." Similarly, section 51.61(1)(g)3. provides that "[f]ollowing a final commitment order," patients have "the right to exercise informed consent with regard to all medication and treatment . . . unless a situation exists in which the medication or treatment is necessary to prevent serious physical harm to the individual or others." Thus, section 51.61(1)(g) authorizes orders for involuntary medication where an individual committed under Chapter 971 is dangerous.

Anthony D.B. confirms as much. There, Anthony D.B. was committed pursuant to Chapter 980 and argued that the circuit court had no authority to order forced medication during his commitment. *Anthony D.B.*, 237 Wis. 2d 1, ¶¶ 1–5. Much like Naomi here (Naomi's Br. 30–31), Anthony D.B. submitted "that ch. 980 provides no independent authority for ordering involuntary medication" and that "the State was required to initiate commitment proceedings under Wis. Stat. ch. 51 before seeking an order for involuntary medication." *Id.* ¶ 5. Our supreme court disagreed, holding that in certain circumstances, "§ 51.61(1)(g) authorizes orders for involuntary administration of medication for individuals committed under ch. 980." *Id.* ¶ 15.

The analysis in *Anthony D.B.* was straightforward: as an individual committed under Chapter 980, Anthony D.B.

met the statutory definition of a "patient" under Chapter 51, so he was entitled to refuse medication unless an exception in section 51.61(1)(g) applied. *Anthony D.B.*, 237 Wis. 2d 1, ¶¶ 9–15. Because an exception in section 51.61(1)(g)3. applied, the circuit court was authorized to order forced medication. *Id.* ¶¶ 4–5, 14–15. No additional commitment under Chapter 51 was necessary. *Id.* ¶ 10.

C. The involuntary medication order here was lawful.

In abandoning its *Sell* order in favor of an involuntary medication order based on Naomi's dangerousness at Mendota, the circuit court did what *Sell* instructed: the court prioritized the government's strong "interest in maintaining safety, security, and functionality" within its mental health institutions. *Wood*, 323 Wis. 2d 321, ¶ 32; *see also Sell*, 539 U.S. at 183.

After hearing testimony from Naomi's treating psychiatrist, the circuit court determined that this was "clearly a case" where Naomi posed a danger to herself and others at Mendota. (R. 39:6–8.) It also found that forced medication was in Naomi's best medical interest. (R. 39:6–8.)

The record fully supports the circuit court's conclusion and Naomi doesn't argue otherwise. (Naomi's Br. 20–38.) The testimony established that in the span of roughly three weeks, Naomi had been secluded at Mendota 17 times on account of her dangerousness. (R. 37:6.) Unprovoked, she slapped a peer in the face. (R. 37:6.) Naomi also punched, pushed, and kicked staff members. (R. 37:6.) She even pulled a clump of hair out of a staff member's head. (R. 37:6–7.) Further, Naomi wasn't just physically harming others at Mendota—she posed a risk of serious physical harm to herself by refusing to treat her thyroid condition. (R. 37:8.) She risked suffering "significant long-term complications such as cardiovascular issues, multiorgan issues, coma," and "death." (R. 37:8.) Finally, after

reviewing Naomi's medical history, medical conditions, and mental health, Naomi's treating psychiatrist opined that involuntary medication was in her best medical interest. (R. 37:12.)

Given this record, the circuit court had the statutory authority to order forced medication under section 51.61(1)(g). At the time, Naomi was committed under Chapter 971.14. (R. 16; 39.) She therefore had the patients' rights enumerated in section 51.61(1). Those rights included "the right to refuse all medication and treatment except . . . in a situation in which the medication or treatment is necessary to prevent serious physical harm to the patient or to others." Wis. Stat. § 51.61(1)(g)1. Naomi also had the right to "exercise informed consent with regard to all medication and treatment . . . unless a situation exists in which the medication or treatment is necessary to prevent serious physical harm to the individual or others." Wis. Stat. § 51.61(1)(g)3.; *see Anthony D.B.*, 237 Wis. 2d 1, ¶¶ 14–15, 19–20 (holding that section 51.61(1)(g)3. applies to "patients" as defined in section 51.61(1)).

Whether viewed under section 51.61(1)(g)1. or 3., the circuit court was authorized to order involuntary medication because it was necessary to prevent serious physical harm to Naomi or others at Mendota. *See Anthony D.B.*, 237 Wis. 2d 1, ¶¶ 14–15. Not only that, but under U.S. Supreme Court precedent, that was the preferred route for the court to take to medicate Naomi. *See Sell*, 539 U.S. at 183.

Naomi challenges the involuntary medication order based on her belief that "the court circumvented statutory authority and due process protections when it based the order on an obscure, judicially created standard it gleaned from *Harper* and *Sell*." (Naomi's Br. 21.) She maintains that there is no statute authorizing involuntary medication for an individual who's dangerous during a Chapter 971.14 commitment, and that "the government is left to seek

involuntary medication through civil commitment proceedings under chapter 51." (Naomi's Br. 30.) Because the circuit court didn't follow Chapter 51's civil commitment scheme in ordering involuntary medication here, Naomi contends that the order violated her right to due process. (Naomi's Br. 24–31.) And even if the court didn't have to follow Chapter 51's civil commitment scheme in ordering forced medication, Naomi still contends that "the procedure used here violated due process." (Naomi's Br. 36–38.)

Naomi is wrong on both counts: the circuit court had statutory authority to order forced medication, and the order didn't violate her right to due process.

Regarding statutory authority, as noted, our supreme court has already rejected arguments like Naomi's. In *Anthony D.B.*, the Chapter 980 committee argued that the circuit court was unauthorized to order involuntary medication because nothing in Chapter 980 said it could. *Anthony D.B.*, 237 Wis. 2d 1, ¶ 5. Similarly, here, Naomi argues that "[o]utside 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." (Naomi's Br. 30.) Anthony D.B. contended that because Chapter 980 was silent on the subject of forced medication, the government "was required to initiate" Chapter 51 commitment proceedings "before seeking an order for involuntary medication." *Anthony D.B.*, 237 Wis. 2d 1, ¶ 5. And that's exactly what Naomi's arguing here. (Naomi's Br. 30–31.)

Just as in *Anthony D.B.*, Naomi's statutory authority argument doesn't succeed for a simple reason: it disregards the plain language of section 51.61(1)(g), which authorizes forced medication for a Chapter 971.14 committee who's dangerous to herself or others. Naomi's only attempt at addressing this statute is in a footnote to her brief. (Naomi's Br. 24 n.8.) She interprets section 51.61(1)(g)1. as permitting

"[h]ospital physicians" to "involuntarily administer medications to a patient in an emergency without a court order." (Naomi's Br. 24 n.8.)

It's unclear why Naomi doesn't believe that section 51.61(1)(g)1. applied to her circumstances: Mendota "is one of two psychiatric hospitals operated by the Wisconsin Department of Health Services."[5] And to the extent she views an "emergency" as something other than a situation where medication is necessary to prevent serious physical harm to the patient or others, she's impermissibly reading language into the statute, as confirmed by the sole case she relies upon. (Naomi's Br. 24 n.8); *State ex rel. Jones v. Gerhardstein*, 141 Wis. 2d 710, 737, 416 N.W.2d 883 (1987) (holding that the right to informed consent doesn't apply "in a situation within the hospital setting when administration 'is necessary to prevent serious physical harm to the patient or to others'"). Naomi's safety risk within the hospital setting is precisely why the circuit court ordered forced medication here. By their plain terms, section 51.61(1)(g)1. and 3. authorized the order. It's simply not the law—nor should it be—that when faced with a dangerous patient who needs medication, Mendota's only recourse is to hope that the County will seek a *dual* commitment under Chapter 51, or to place Naomi in segregation for an extended period. *See Anthony D.B.*, 237 Wis. 2d 1, ¶ 10.

Naomi's due process arguments fare no better. To the extent she's arguing that the involuntary medication order violated her right to substantive due process, that argument fails under *Harper* and *Riggins*. Those cases show that an involuntary medication order satisfies substantive due process if it's medically appropriate and based on a mentally

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[5] *Mendota Mental Health Institute*, Wisconsin Department of Health Services (Apr. 13, 2023), https://www.dhs.wisconsin.gov/mmhi/index.htm.

ill person's dangerousness in a confined setting. *Harper* held that "given the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." *Harper*, 494 U.S. at 227. *Riggins* extended that rule to the pretrial confinement setting: "[u]nder *Harper*, forcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of an overriding justification and a determination of medical appropriateness. The Fourteenth Amendment affords at least as much protection to persons the State detains for trial." *Riggins*, 504 U.S. at 135.

Here, the evidence established that Naomi, a mentally ill Chapter 971.14 committee, presented a danger to herself and others. The evidence also showed that forced medication was medically appropriate. There being an overriding governmental interest and a finding of medical appropriateness, the involuntary medication order satisfied substantive due process under *Harper* and *Riggins*. Naomi offers no explanation for why the outcome should be any different just because she wasn't "a prison inmate." (Naomi's Br. 32.) The clear takeaway from *Harper* and *Riggins*, as recognized by our supreme court, is that an individual's liberty interest in avoiding unwanted medication may be outweighed by the government's interest in maintaining safety and security in its various institutional settings. *See Wood*, 323 Wis. 2d 321, ¶¶ 32–34.

That leaves Naomi's claim that the involuntary medication order offended procedural due process. Naomi's argument conflates the procedural protections that the Legislature has afforded to individuals in Chapter 51 commitment proceedings with what the Constitution requires under circumstances like hers. (Naomi's Br. 24–28.)

Harper is most on point here: in the context of involuntarily medicating a prison inmate for dangerousness, the U.S. Supreme Court addressed "what procedural protections are necessary to ensure that the decision . . . is neither arbitrary nor erroneous."[6] *Harper*, 494 U.S. at 228. It rejected the lower court's conclusion "that a full judicial hearing, with the inmate being represented by counsel, was required by the Due Process Clause before the State could administer antipsychotic drugs to him against his will." *Id.*

The *Harper* Court held that a judicial decision-maker isn't required to satisfy procedural due process in these circumstances, as long as the decision-maker is independent. *Harper*, 494 U.S. at 231–33. Beyond having an independent decision-maker, procedural due process demands that the individual receive the opportunity "to contest the [medical] staff's position at [a] hearing." *Id.* at 235. In *Harper*, it was significant that Harper received "notice, the right to be present at an adversary hearing, and the right to present and cross-examine witnesses." *Id.* It didn't matter that the hearing wasn't conducted "with the rules of evidence," that there was no identified burden of proof, and that Harper was unrepresented by legal counsel. *Id.* at 235–36.

Under *Harper*, Naomi had adequate process leading to the medication order. She had notice of the basis for involuntary medication. (R. 19; 25.) DHS's request for involuntary medication plainly details Naomi's mental health challenges and her safety risk at Mendota. (R. 19.) Naomi also received a full hearing, where she appeared with the

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[6] For what due process requires here, Naomi relies on *Vitek v. Jones*, 445 U.S. 480, 494–95 (1980). (Naomi's Br. 36.) *Harper* cites to *Vitek* and is more on point because it deals with an involuntary medication proceeding, whereas *Vitek* deals with the transfer of a prison inmate to a mental health facility for treatment. Regardless, the process discussed in both cases is substantially similar.

assistance of counsel. (R. 37:2.) At that hearing, Naomi's counsel cross-examined the State's witness in support of the involuntary medication order. (R. 37:10–19.) Further, Naomi had every opportunity to present her own witnesses. (R. 37:19.) Finally, Naomi had an independent decision-maker. (R. 38; 39.)

This is all that *Harper* requires: "allowing respondent to contest the staff's position at the hearing satisfies the requirement that the opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Harper*, 494 U.S. at 235 (citation omitted). That Naomi had a judicial hearing and lawyer[7] to assist her arguably makes this case a stronger one than *Harper* for finding adequate process leading to the involuntary medication order. *C.f. Harper*, 494 U.S. at 229, 236.

Naomi cannot and does not dispute that she had an independent decision-maker following a full hearing where she appeared with counsel, cross-examined the State's sole witness, and had the opportunity to present witnesses, including herself. (Naomi's Br. 37–38.) Therefore, short of convincing this Court that the Constitution required that she receive all or most of the procedural protections afforded to individuals in Chapter 51 commitment proceedings (a claim that *Harper* refutes), her only argument is that she had "insufficient pre-hearing notice to give her the opportunity to mount a defense and defend her rights." (Naomi's Br. 37.)

Specifically, Naomi protests that she "was not noticed of the burden of proof, the burden of persuasion, [and] the definition or elements of what the court considered 'dangerous.'" (Naomi's Br. 37.) She also complains that she wasn't "afforded notice of her rights – whether she had a right

[7] Technically, she had two lawyers helping her fight the request for involuntary medication: trial counsel and appellate counsel. (R. 25; 37.)

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." (Naomi's Br. 37.) But she offers no law supporting her claim that due process required as much, and *Harper* certainly doesn't support that position.[8] (Naomi's Br. 37.) Moreover, while Naomi objects to what she apparently deems a confusing standard of dangerousness (Naomi's Br. 9, 26, 37–38), it should be noted that *Harper* involved a similar standard. *See Harper*, 494 U.S. at 232 (stating that the decision-maker addresses whether the individual is dangerous to himself or others). Yet there was no suggestion in *Harper* that procedural due process required notice of "the definition or elements of what the [decision-maker] considered 'dangerous.'" (Naomi's Br. 37); *Harper*, 494 U.S. at 232–36.

The bottom line is that Naomi had a right to a fair process leading to the involuntary medication order, and she got one. She was notified that the government sought an involuntary medication order because she posed "a danger to herself and others." (R. 19:1.) The reasons underlying that request—all of which involved recent threats or acts of violence—were detailed in the notice. (R. 19.) With the assistance of counsel, Naomi had an opportunity to contest DHS's position at a hearing. At that hearing, she could have attempted to refute the claim that she had pushed, punched,

[8] To the extent that Naomi is relying on a non-precedential federal decision out of the Eastern District of Wisconsin (Naomi's Br. 37–38), that case addressed the constitutionality of provisions of Wisconsin's civil commitment statute that aren't at issue here. *See Lessard v. Schmidt*, 349 F. Supp. 1078, 1090 (E.D. Wis. 1972), *vacated on other grounds*, 414 U.S. 473 (1974). *Lessard* doesn't address the procedural protections required when the government seeks to involuntarily medicate a dangerous patient in its care following a commitment.

and kicked staff members at Mendota. Or, she could have tried to disprove the claim that she had pulled a clump of hair out of a staff member's head, or that she had slapped a peer. Or, she could have tried to undermine the testimony that her physical health was in danger because she wasn't taking her thyroid medication. To say that it "was impossible to fully challenge the request" for medication simply isn't true. (Naomi's Br. 37.) Naomi received due process.

CONCLUSION

This Court should affirm the circuit court's order for involuntary medication based on Naomi's dangerousness.

Dated this 17th day of November 2023.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Kara L. Janson
KARA L. JANSON
Assistant Attorney General
State Bar #1081358

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809
(608) 294-2907 (Fax)
jansonkl@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,415 words.

Dated this 17th day of November 2023.

Electronically signed by:

Kara L. Janson
KARA L. JANSON

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 17th day of November 2023.

Electronically signed by:

Kara L. Janson
KARA L. JANSON