STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2023AP000722 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

N.K.B.,

Defendant-Appellant.

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

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REPLY BRIEF OF DEFENDANT-APPELLANT

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In their response, the State ignores many of the procedural due process shortcomings involved in the government's deprivation of Naomi's "core liberty interest protected by the Due Process Clause"—i.e. her right to resist the administration of mind-altering drugs forced at the hands of the government. *See Foucha v. Louisiana,* 504 U.S. 71, 80 (1992). Instead, the State now advances an argument it never made in the trial court, and which Naomi had no notice to rebut during the evidentiary hearing.

For the first time, the State argues that Wis. Stat. § 51.61(1)(g)1. or 3. justifies the involuntary medication order. But, at the original *Sell* hearing and the subsequent stay hearings, the State did not identify either subdivision; it also failed to mention the language of either subdivision—i.e., "necessary to prevent serious physical harm to the patient or to others." Not surprisingly, the court likewise never mentioned either statutory provision nor did it make any findings about the "necess[ity] to prevent serious physical harm", as the court—like Naomi—had no notice the State was advancing § 51.61(1)(g)1. or 3. as statutory authority for the involuntary medication order.

The State also complains that Naomi merely mentioned § 51.61(1)(g) in a footnote. But, Naomi shoulders no burden to guess the State's arguments; especially those arguments the State never asserted in the circuit court. Naomi merely footnoted it to explain it's available in emergency situations. The fact is the

State withheld notice of this new claim. Either way, the State is wrong.

The State's new claim fails for three reasons. First, it misinterprets § 51.61(1)(g)1. and *Harper* to redirect emergency authority from physicians to the court. Then, it misapplies *Anthony D.B.* to usurp the legislature's more specific involuntary medication statute in the competency chapter— § 971.14(3)(dm). And finally, it violates *D.J.W.* because the court failed to identify a specific subdivision or corresponding supporting facts.

A. In emergency situations, physicians may involuntarily medicate patients without a court order; for competency restoration purposes, § 971.14 and *Sell* authorize courts to issue long-term medication orders.

1. The plain language of § 51.61(1)(g)1. and 3. authorize physicians to involuntarily medicate without a court order.

Instead of engaging in a plain language analysis of the subdivisions, the State conjures up a dilemma, cherry-picks similar language within subdivisions 1. and 3. and then applies that language out of context.

First, the State asserts that the law "cannot be" "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." *Id.*, 5. The defense agrees our statutes already avoid this conjured up dilemma.[1]

Next, the State identifies the well-accepted principle "that the State has an interest in maintaining safety, security, and functionality within its mental health institutions." State's Response, 15. The defense also agrees with this principle.

But then, the State's logic a goes astray. The State illogically concludes: To account for the dilemma and "serve the State's strong interest," subdivisions 1. and 3. must authorize court "*orders* for involuntary medication where an individual under Chapter 971 is dangerous." *Id.,* 15 (emphasis added). Yet, that's not how the subdivisions satisfy either concern. Indeed, the plain language expressly excludes the court as the actor in these situations. [2]

Under both subdivisions, the plain language empowers physicians, not the courts, to determine when the "situation" necessitates involuntarily medication. Each subdivision must be "given its common, ordinary, and accepted meaning" "in the context it is used, not in isolation but as part of a whole." *State v. Jacobs,* 2023 WI App 53, ¶15, ___Wis. 2d___, ___N.W.2d___. Here, the subdivisions share

[1] There is no concern Mendota staff would be left to "hope that the County would initiate Chapter 51 commitment proceedings." For example, § 51.15(10) plainly states that a "treatment director or his designee" can initiate commitment proceedings under one of the clearly defined dangerousness standards.

[2] The State's Response muddies this plain language distinction by using an ellipsis. *See* State's Response, 15.

nearly the same plain language. Each has two exceptions to the patient's right to refuse medication; (1) when the court orders it based on incompetency to refuse medication; or (2) without a court order when there is imminent danger.

Subdivision 1. states, patients "[h]ave the right to refuse all medication and treatment except as ordered by the court under subd. 2[3], **or in a situation** in which the medication or treatment is **necessary to prevent serious physical harm** to the patient or others." (Emphasis added).

Similarly, subdivision 3. states, patients have the right to exercise informed consent "unless the committing court …, makes a determination, … that the individual is not competent to refuse medication or treatment **or unless a situation exists** in which the medication or treatment is **necessary to prevent serious physical harm** to the individual or others." (Emphasis added).

The State's argument omits the context of the subdivisions. Unlike in the first subordinate clauses, the "necessary to prevent" subordinate clauses explicitly exclude the court as the actor. Further, to fabricate the language to accord with the State's claim, this Court would need to amend the statutory language by adding language the legislature included in the first clause but excluded in the second. Doing so

[3] Subdivision 2 applies between the probable cause hearing and the final hearing. The state conceded this argument by failing to assert it in their brief-in-chief. *See A.O. Smith Corp. v. Allstate Ins. Cos.,* 222 Wis.2d 475, 491-93, 588 N.W.2d 285 (Ct.App.1998).

is contrary to the meaning and purpose of the "necessary to prevent" clause.

Omitting the court as the actor is for good reason. When medication is "necessary to prevent serious physical harm," hospitals don't have the time to wait on sluggish courts;[4] In a situation of imminent danger, involuntary medication is required immediately to prevent serious physical harm to the patient or to others. Waiting on a court order to give a mentally ill person an emergency sedative *necessary to prevent serious physical harm* is just as absurd as waiting to give naloxone to someone suffering an opioid overdose. If the State's interpretation is correct, physicians' authority to act in emergencies will be handicapped.

Given the core liberty interests at state, Naomi's plain language interpretation makes sense. It permits medical professionals to act quickly, and when the dangerous "situation" subsides the physician's authority—and the deprivation of a person's liberty—ceases. Such a balance is impossible when the court is the actor. When the justification is no longer an acute situation, the statutes transfer decision-making power to the courts to issue orders of longer duration under § 971.14 and *Sell* or § 51.20.

[4] For a court to order the involuntary administration of medication in a 971.14 commitment; first competency is raised; then, two competency examiners have 15 days to file their reports with the potential for a 15-day extension. Wis. Stat. § 971.14(2)(c); then, if one of the doctors recommends involuntary medication, there is an evidentiary hearing.

2. *Harper* analyzed a similar state law empowering physicians to act without a court order.

Washington v. Harper, 494 U.S. 210 (1990) reinforces the proper reading of subdivision 1. The State also relies on it, but *Harper* actually supports Naomi, not the government. "The Court [in *Harper*] considered a state law authorizing forced administration of those drugs to inmates who are gravely disabled or represent a significant danger to themselves or others." *Sell,* 539 U.S. at 178. Similar to § 51.61(1)(g)1., the situation justifies on-the-spot decision-making by the physician. *Id.*

What *Harper* did not do is empower circuit courts to act. *Harper* is thus germane to a constitutionality analysis of § 51.61(1)(g)1., but it does not create independent judicial authority to issue long-term medication orders.

3. *State ex rel. Jones v. Gerhardstein* supports this plain reading of § 51.61.

Further reinforcing this plain reading, is *State ex rel. Jones v. Gerhardstein,* 141 Wis. 2d 710, 739, 416 N.W.2d 883 (1987). Thirty-seven years ago, in 1987, § 51.61(1)(g) contained the same dangerous "situation" clause. That year, when the Supreme Court declared the subparagraph unconstitutional for other reasons, the Court expressly discussed the physician's ability to involuntarily medicate without a court order. *Jones*, at 739.

Indeed, the Court expressly acknowledged that in a dangerous emergency "treatment may be **professionally determined** to meet the immediate need." *Jones,* at 739 (emphases added). Then, following the Court's decision that same year, the legislature amended § 51.61(1)(g); keeping the dangerous situation clause and assigning it to subdivisions 1. and 3.

In summary, the plain language of the subdivisions—and Mendota's ability to pursue commitment proceedings itself—accounts for the State's conjured dilemma and does "serve the State's strong interest." Thus, there is no need for this Court to expand the government's power to obtain a long-term court order to intrude upon one of the most basic liberty interests amongst its citizens. *See Foucha,* 504 U.S. at 80.

B. The State misapplies *Anthony D.B.* to usurp the legislature's more specific statute—§ 971.14(3)(dm).

In an attempt to subject § 971.14 competency commitments to court orders under § 51.61(1)(g)3., the State mistakenly relies on *State v. Anthony D.B.,* 2000 WI 94. State's Response Brief, 15. *Anthony D.B.* analyzed ch. 980 commitments for sexually violent persons when the person is not competent to refuse medications. 2000 WI 94, ¶¶1-2. Unlike Naomi's emergency situation in the hospital, the State sought a medication order in anticipation of *Anthony D.B.*'s placement. *Id.,* ¶3. For competency commitments, § 971.14 already provides this authority.

In *Anthony D.B.,* the Court held that ch. 980 commitments were subjected to § 51.61(1)(g)2.&3. because "[t]o date the legislature *has not* elected to add specific involuntary medication provisions to ch. 980." *State v. Anthony D.B.,* 2000 WI 94, ¶20 (emphasis added). The opposite is true for § 971.14. For competency commitments, the legislature *has elected* to add specific involuntary medication provisions to § 971.14, specifically § 971.14(3)(dm). Thus, *Anthony D.B.*, actually supports Naomi, not the government.

Reinforcing *Anthony D.B.*'s application to commitments where "the legislature has not elected to add specific involuntary medication provision to," are the rules of legislative interpretation. In the session that followed the Court declaring § 51.61(1)(g) unconstitutional for failing to require a finding of incompetency to refuse medication, the legislature created a specific involuntary medication provision in 971.14 itself. 1989 Wis. Act 31, § 2848h and 2848t. Where two statutes relate to the same subject matter, the specific statute controls the general. *Gottsacker Real Estate Co. v. DOT,* 121 Wis.2d 264, 269, 359 N.W.2d 164 (Ct.App.1984). Here, the specific statute is § 971.14(3)(dm) as it applies specifically to pre-trial competency commitments.

It is inconsequential that the Wisconsin Supreme Court declared § 971.14(3)(dm) unconstitutional. *See State v. Fitzgerald,* 2019 WI 69, 387 Wis. 2d 384, 929 N.W.2d 165. In *Fitzgerald*, the Court held this competency-specific statute "unconstitutional to the extent it requires circuit courts to order involuntary medication" absent the *Sell* factors. *Id.*, ¶25. The legislature, however, has not

amended § 971.14. Thus, courts remain bound to this specific statute; only the additional findings under *Sell* are also required.

C. The State's new claim on appeal violates *D.J.W.*

It is important to keep in mind that when commitment orders are joined with involuntary medication orders—under chs. 51 and 971—not only is the right to bodily autonomy infringed, but there is the potential for actual harm due to adverse side effects. Besides the involuntary implications, these orders can have lasting implications, and errors can be "as undesirable as an erroneous conviction." *See Addington v. Texas,* 441 U.S. 418, 428 (1979).

As a result, legislatures and courts have recognized that "paternalistic intervention" should be minimized in dealing with the mentally ill. *See State ex. rel. Roberta S. v. Waukesha County Human Services Dept.,* 171 Wis. 2d 266, 275-77, 491 N.W.2d 114 (Ct. App. 1992).

To provide clarity and extra protection to those with governmentally impaired liberty rights—while also ensuring the soundness of judicial decision making—courts must abide by the *D.J.W.* directive. *Langlade County v. D.J.W.,* 2020 WI 41, ¶¶42, 44, 391 Wis. 2d 231, 942 N.W.2d 277.

This directive has two distinct requirements: (1) the circuit court must identify the specific subdivision on which the order is based, and (2) the court must make specific factual findings in reference to that subdivision. *Id.,* ¶42.

In this case, the court never identified a subdivision—potentially due to the State failing to argue § 51.61(1)(g)1. or 3. in the trial court. Instead, the State and the court relied on a misreading of *Sell* and *Harper*. According to the court, "the analysis set forth in *Washington v. Harper* actually is the analysis that applies here because this is a case where, again, dangerousness to herself and others is the main issue[.]" But, the court failed to identify its authority under a state law as *Harper* did. Further, the court never found the medication "necessary to prevent serious physical harm." Instead, the court issued a long-term order based on a generic finding of "dangerousness" which is contrary to the statutory language.

D. The State and the circuit court abandoned the *Sell* factors without proper notice and due process.

In its response, the State concedes that "[t]he court ordered involuntary medication to restore Naomi's trial competency under *Sell*[.]" State's Response, 5. But then, the State abandons the *Sell* factors and—for the first time—defends the government's deprivation of Naomi's liberty rights based on § 51.61(1)(g)1. or 3. Naomi had no notice to rebut the State's newly minted claim during the evidentiary hearing. An exposition of the actual procedural posture of the court's order showcases the problem.

The State asserts that subsequent to the finding of incompetency, "counsel for DHS wrote to the court requesting involuntary medication due to Naomi's

dangerousness at Mendota." State's Response, 5. That's incorrect.

What really happened is counsel for DHS wrote to the court requesting it "to reconsider the decision *to stay* the order that authorizes DHS to administer involuntary medication[.]" (19:1) (emphasis added). While that letter alleged behavioral problems, it did not identify an alternative subdivision for the medication order.

The State's expectation at the subsequent hearing, the record shows, was also to address the stay, not to reconsider the basis for the order. Indeed, when the court asked how the State wanted to proceed at the hearing, the State told the court it believed additional testimony was "relevant to the grounds of whether or not a motion to stay should be granted or not." (37:3). The State never requested reconsideration of the underlying medication order.

Following the testimony, both the State and the court mentioned the alternative discussed in *Sell*. According to the court, "[u]nder 971.14(2)(f), dangerousness is treated differently …. [because] *Sell* and the related Wisconsin cases describe dangerousness as being a different category under which the State could proceed[.]" (37:4-5). According to the State, "the *Sell* case … does talk about dangerousness." (37:4). Yet, neither provided notice of an alternative statutory ground under § 51.61(1)(g)1. or 3.

Contesting the automatic stay, was also the focus of the State's argument. The State argued "there's no longer an automatic stay" under *Green*.

(37:19). And, it's the defendant's burden for a stay under *Gudenschwager*. (37:20). Arguing against the stay, the State claimed the "defense is not able to show under that first factor a strong showing that defense is likely to proceed on the merits of appeal …. [because] [t]he Court correctly granted the involuntary medication order based upon the *Sell* factors." (37:20-1).

After a verbose argument to reconsider the stay, the State discussed "the dangerous component" solely under the *Sell* decision. (37:26). The State explicitly said, "We have to look at that case … and that opinion does address dangerousness." (37:27). In conclusion, the State stated: "So, Judge, based upon the *Gudenschwager* case … [the] defense has not made a showing under those four factors for a stay [] pending appeal, there's no automatic stay, and we'd ask that you proceed with the order to involuntarily treat." (37:27).

After a short adjournment, the Court returned—not to reconsider the stay—but to "amend the order of commitment" without notice. (39:9). The Court based its post-hearing, sua-sponte amendment on *Sell* and *Harper* without identifying § 51.61(1)(g)1. or 3.

The defense advised the court that "due process must not be subverted by asking the criminal court to order involuntary medication … based on an amorphous finding of "dangerousness" for which there is no statutory authority." (25). In response, the court clarified that ch. 51 is "a potential avenue the State could pursue here," but the court has alternative authority upon a finding of "dangerous as described

under *Washington v. Harper*." (38:4). Instead of relying on § 51.61(1)(g)1. or 3., the court mentioned § 971.14(2)(f) while obviating the *Sell* factors. This confuses both the statues and the caselaw to the peril of Naomi's constitutional rights. Naomi was not afforded formal notice in the trial court to rebut the State's new § 51.61(1)(g)1. or 3. claim.

E. The State ignores procedural shortcomings necessary for Naomi's right to due process.

The issue in this case is whether due process allows the circuit court to base its involuntary medication order—of long-term duration—on an obscure, judicially created standard. It does not.

The State does not refute—thus concedes—that Naomi was denied crucial procedural due process protections, such as: from an untimely request, a lengthy delay between request and final order, notice of the burden of proof, the definition of the key "dangerousness" element, and notice of what rights, if any, she had.

Under *Harper*, the narrow situation and duration permit physicians to act with less procedural protections. But for court orders, the prolonged core-liberty invalidation necessitates the procedures either under § 971.14(3)(dm) and the *Sell* factors, or an independent ch. 51 commitment proceeding.

CONCLUSION

For the reasons argued above, Naomi respectfully asks this Court to reverse the circuit court's involuntary medication order.

Dated this Monday, December 4, 2023

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,996 words.

Dated this Monday, December 4, 2023

Signed:

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