STATE OF WISCONSIN
IN SUPREME COURT
Case No. 2023AP722-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

N.K.B.,

Defendant-Appellant.

On review from a decision of the court of appeals reversing the circuit court's involuntary medication order entered in the Milwaukee County Circuit Court, the Honorable David C. Swanson, presiding.

BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

Wisconsin Statutes

OTHER AUTHORITIES CITED

INTRODUCTION

The State argues that criminal courts possess authority to **court-order** involuntary administration of medication based on a statutorily unspecified finding of "dangerousness." Over the course of this case, the State changed the source for this alleged authority. In the circuit court, the State argued it was judicially created. In the court of appeals, it alleged—for the first time—that it was § 51.61(1)(g)1. and 3. Now, the State claims the sole source for this authority is § 51.61(1)(g)3.

Section 51.61 is the Patients' Rights statute. When setting forth the right of informed consent to refuse unwanted medications, subd. (1)(g)3. carves out two narrow exceptions. Patients have the right to exercise informed consent:

> unless the committing court . . . makes a determination, following a hearing, 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.

These narrow exceptions refer to distinct types of authority. The first independent clause authorizes court-ordered medication if the court determines that the patient "is not competent to refuse" the medication. The second authorizes medical professionals to forcibly medicate if the professional

determines that doing so "is necessary to prevent serious physical harm to the individual or others."

Because court authority is limited to the "not competent to refuse" exception, § 51.61 outlines procedures for that determination only. Whereas the professionally determined authority operates without court involvement, and is commonly referred to as the "emergency" exception. The justification for the "emergency" exception requires quick action to meet the immediate need. But that justification lasts only so long as the emergency exists. Assigning the authority to medical professionals without court involvement better serves both the State and patient's interests.

Given that the court based its order on a statutorily undefined "dangerousness finding, the State invokes § 51.61(1)(g)3. in an effort to legislate court authority into the emergency exception. But this Court instructed long-ago:

> While dangerousness may legitimately justify the state's authority to involuntarily commit an individual, it does not justify the abrogation of the individual's right of informed consent with respect to psychotropic drugs.

State ex rel. Jones v. Gerhardstein, 141 Wis. 2d 710, 736-37, 416 N.W.2d 883 (1987). Moreover, § 51.20 provides explicit standards and procedures for dangerousness findings to comply with due process. Whereas, both §§ 51.61 and 971.14 have neither.

The State attempts to pitch its court authority claim under a plain language analysis. But it engages in a near nonexistent analysis of the language of the provision at issue. It first quotes § 51.61(1)(g)3. on page 20 of its brief. The only other time the State cites the "necessary to prevent serious physical harm" language—on which it bases its entire plain language analysis—is in footnote 8 where it concedes that this language "appears to permit involuntary medication to address a committee's dangerousness *without* court intervention in certain scenarios." (Emphasis in original). Still, the State pushes court-order authority, yet never cites any statutory language supporting it.

Instead, the State's "plain language" analysis turns on *State v. Anthony D.B.,* 2000 WI 94, 237 Wis. 2d 1, 614 N.W.2d 435. But *Anthony D.B.* dealt with a Ch. 980 court ordering medication under the "not competent to refuse" exception. And, for competency commitments, the legislature included that specific exception within § 971.14; so, there is no question it applies (with the addition of the *Sell*[1] factors). At no point did *Anthony D.B.* analyze the emergency exception language at issue here. Furthermore, *Anthony D.B.* did not hold that a court may order involuntary medication based on a statutorily unspecified "dangerousness" finding in an end run around § 51.20.

[1] *Sell v. United States*, 539 U.S. 166 (2003).

The State asks: "Why make everyone go through additional commitment proceedings under Chapter 51 just to address an individual's dangerousness during a valid § 971.14 commitment?"; and "Why should parallel proceedings be required to address a 971.14 committee's dangerousness but not a Chapter 980 committee's dangerousness?"

The answers are straightforward. First, due process. The legislature has decided what process the government must follow before involuntarily treating a person who is mentally ill and dangerous. Wis. Stat. § 51.20. The State may find those protections inconvenient, but that does not make those protections any less necessary. Second, unlike the commitment criteria in Chapters 51 and 980, § 971.14 does not require an adjudication of dangerousness, and the law presumes the criminal defendant committee innocent of any wrongdoing. Furthermore, the State provides no insight into what (judicially created) due process protections are required to protect the individual given that § 51.61(1)(g)3. does not contemplate an ongoing court order for the emergency exception. No such protections occurred here, as the State never filed a motion or provided notice that it was relying upon § 51.61(1)(g)3. —that reliance occurred for the first time in the court of appeals. In short, Naomi had no opportunity to defend against the State's after-the-fact justification for a "dangerousness" medication order.

ISSUE PRESENTED

This case presents the Court with a more narrow and straightforward question than the State acknowledges. That is, whether criminal courts may court-order involuntary medication under the "emergency" exception in Wis. Stat. § 51.61(1)(g)3.

The circuit court ordered involuntary medication due to a statutorily unspecified "dangerousness" finding, citing Wis. Stat. § 971.14(2)(f).

The court of appeals concluded that the court did not have the authority to court-order involuntary medication due to a statutorily unspecified "dangerousness" finding, and that no other statutory provision authorized the involuntary medication order it entered.

POSITION ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has signified that oral argument and publication are warranted.

STATEMENT OF THE CASE AND FACTS

While at a psychiatric hospital facility, Naomi allegedly kicked a nurse's shin. (37:21). The following day, the State charged Naomi with misdemeanor battery and obstructing an officer. S*ee generally* (37:6, 21, 29-30). Two-days later, the criminal court ordered a competency examination and remanded Naomi into custody without bail.

A month later, the criminal court found Naomi incompetent to proceed under § 971.14, 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.[2] (31:1).

Three weeks later, Naomi remained in the County Jail—not Mendota—, and while still in jail she allegedly slapped a nurse. (2). For this, the State charged Naomi again, this time with felony battery by prisoners, contrary to Wis. Stat. § 940.20(1). (2). At her first hearing, the criminal court ordered another competency evaluation. (31:1; 4).

Prior to the next hearing, Mendota Psychiatrist Kevin Murtaugh asked the criminal court to order involuntary medication to forcibly administer drugs to Naomi. (10). Psychologist Jenna M. Krickeberg filed

[2] *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).

the competency evaluation report which opined that Naomi was incompetent. (7:4).

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

The hearing to determine Naomi's competency to proceed occurred on April 20th. (31:2). Because competency was contested, the commissioner scheduled the contested competency hearing before the criminal court. (*Id.*).

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

Dr. Krickeberg and Dr. Murtaugh testified at the contested competency hearing. (40:2).

Dr. Krickeberg opined that Naomi suffered 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 stated that Naomi would "far more likely" become competent 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 psychiatric medications may treat. (40:19). He recommended forcibly injecting Naomi with Haloperidol. (40:21).[3] He was unaware of whether alternatives to involuntarily administering medication existed. (40:23-4).

The defense objected to court-ordered involuntary medication under the *Sell* factors. (40:33).

The court ordered the administration of involuntary medication. (40:38). The court 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 on the court-ordered medication. (15; 17). The court scheduled a supplemental hearing for May 4th, and stayed its involuntary medication order to that date. (31:3).

IV. Fourth Hearing – May 4, 2023 (37)

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

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

The court clarified, during the May 4th hearing, that it used an old standard form to order the involuntary medication. (37:4). It explained that, under a new standard form, dangerousness provided the court separate authority. This standard, the court stated, is separate from the *Sell* factors, and authorized court-ordered medication for pre-trial incompetent criminal defendants. (37:4-5). The court felt the State should get another hearing under this "dangerous" basis.

A doctor testified that the record indicated, "since April 17th" Naomi had threatened and acted in ways that substantially risked serious physical harm to others. (37:6-7). 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, as he put it, 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 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 lacked specificity as to dosage and frequency

and this could result in this occurring to her more than once a day. (37:14-6).

The State continued argumenting under the *Sell* factors. (37:22-3). It 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 *Sell* Court created a distinct dangerousness alternative to order pretrial, incompetent detainees forcibly medicated. (37:27).

The court adjourned the hearing to the afternoon. (37:33).

V. Fifth Hearing – May 4, 2023 (39)

The court 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 relied on *Sell*'s reference to 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 amended its order, granting the "request for involuntary administration of medication on grounds of dangerousness under section three of the standard form, … 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. (38:3-5).

Naomi appealed.

The court of appeals concluded that the court did not have the authority to court-order involuntary medication due to a statutorily unspecified "dangerousness" finding, and that no other statutory provision authorized the court-ordered involuntary medication. *State v. N.K.B.,* 2024 WI App 63, ¶ 43, 414 Wis. 2d 218, 14 N.W. 3d 681.

ARGUMENT

During emergencies, where immediate intervention is "necessary to prevent serious physical harm" to the patient or others, Wis. Stat. § 51.61(1)(g)3. recognizes medical professional authority to administer involuntary medication; it does not authorize ongoing court-orders.

The State relies solely on § 51.61(1)(g)3. in attempting to legitimize the criminal court's statutorily unspecified "dangerousness" finding to court-order medication.[4] While Naomi agrees that the Patients' Rights statute—§ 51.61—applies, the disagreement centers on whether the "necessary to prevent" exception, which § 51.61 provides no standards or procedures for, authorizes criminal courts to court-order ongoing medication under the plain language, context, and structure of the statute.

A. Legal principals and the standard of review.

This case presents the Court with a question involving statutory construction, which is subject to de novo review. *Noffke v. Bakke*, 2009 WI 10, ¶9, 315 Wis. 2d 350, 760 N.W.2d 156.

[4] The circuit court cited § 971.14(2)(f) as its basis for ordering medication. However, the State has correctly abandoned that argument, as it only applies at the examination stage and also does not authorize an ongoing court order.

Statutory interpretation begins with the language of the statute. Ordinarily, statutory language is given its common, ordinary and accepted meaning. However, context and structure of the statute in which the operative language appears are important to meaning. Statutory language is read where possible to give reasonable effect to every word. When its meaning under these principles is plain, the inquiry ends. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.,* 2004 WI 58, ¶¶ 45-46, 271 Wis. 2d 633, 681 N.W.2d 110.

B. The "emergency" exception authorizes medical professionals to determine when situations render it "necessary" to administer involuntary medication.

The customary right of informed consent to refuse medication provides that individuals may "refuse medication and treatment except in a situation where the medication and treatment is necessary to prevent physical harm to the defendant or others." *See* Wis. Stat. § 971.14(2)(f). The "necessary" situation in which this sole exception occurs is more commonly referred to as an "emergency."

Every statutory section containing this "emergency" exception sets forth no standard or procedures that authorize court determinations of it. *Compare, e.g.* Wis. Stat. §§ 971.14(2)(f) and 51.61(1)(g)3. That is, no provision sets forth a standard or procedures to establish court authority to execute this exception. No provision provides a burden of proof, defines key terms, specifies notice requirements, calls

for expert reports or opinions, or establishes any timeframes or hearing rights.

1. Pending competency examination, the "emergency" exception applies to pretrial defendants, as expressed in § 971.14(2)(f).

"[W]henever there is reason to doubt a defendant's competency to proceed," criminal courts must proceed under Wis. Stat. § 971.14. Within this section, the legislature elected to add specific involuntary medication provisions.

Pending competency examination, the specific medication provisions in § 971.14 provide that defendants may "refuse medication and treatment except in a situation where the medication and treatment is necessary to prevent physical harm to the defendant or others." Wis. Stat. § 971.14(2)(f).

2. Following § 971.14 competency commitment, the "emergency" exception in § 51.61(1)(g)3. applies.

Following commitment, the "emergency" exception disappears from § 971.14. *See* Wis. Stat. § 971.14(4)(b) & (5)(am). The specific provisions instead focus narrowly on a separate exception that authorizes court-ordered medication based solely on the court's

determination of whether the defendant is "not competent to refuse" medication.[5]

This does not mean, however, that the emergency exception escapes defendants once committed under § 971.14. It merely shifts to the Patients' Right statute. Once committed, the defendant becomes a "patient." Wis. Stat. § 51.61(1). And every patient has the right to exercise informed consent with regard to all medications and treatment:

> unless the committing court . . . makes a determination, following a hearing, 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.

Wis. Stat. § 51.61(1)(g)3. (emphasized). Grammatically, the conjoined conjunction "*or unless*" denotes two exceptions, each independent and sufficient to invalidate the asserted right. *See* Declerck, R. and Reed, S., May 2, 2000, The semantics and pragmatics of unless. English Language & Linguistics, 4(2), p. 211.

Therefore, a harmonious reading establishes—considering the related statutes as part of a whole and giving each provision full force and effect—that

[5] The "not competent to refuse" exception must also comply with *Sell*, 539 U.S. 166 to withstand constitutional scrutiny. *State v. Fitzgerald*, 2019 WI 69, ¶2, 387 Wis. 2d 384, 929 NW.2d 165.

following competency commitment, the defendant's right of informed consent to refuse medication has two independent exceptions: the court determined "not competent to refuse" exception under the specific Competence Proceedings statute; and the "emergency" exception under the general Patients' Rights statute.

3. The "emergency" exception—under §§ 971.14 and 51.61—provides authority to medical professionals, without court involvement.

The "emergency" exception provides statutory authority to medical professionals without court involvement. It does not, however, provide statutory authority to criminal courts to issue ongoing court-ordered medication. This assignment of authority is clear under the plain language used in the involuntary medication statutes.

First, the sections containing the emergency exception exclude *any* standard and procedures for criminal courts to court-order medication in a way that complies with due process considerations. Indeed, neither § 971.14 nor § 51.61 sets forth a standard or procedures for courts to order medication under the "emergency" exception.

This becomes obvious when comparing the "emergency" exception to provisions setting forth court authority to order medication where the individual is "not competent to refuse." Under both §§ 971.14 and 51.61, the "not competent to refuse" exception accompanies detailed provisions specifying the specific standard and court procedures. Those provisions

include: (1) the standard for "not competent to refuse" (§§ 941.14(3)(dm) & 51.61(1) (g)(4)); (2) motion and notice requirements; (3) hearing deadlines; (4) the findings and procedure required for experts reports; (5) the right to an evidentiary hearing; and (6) hearing practices. (§§ 941.14(5)(am) & 51.61(1)(g)3.). Additionally, § 971.14(4)(b)—the specific competency statute—provides the burden of proof for finding the defendant "not competent to refuse" medication.

Whereas, for the "emergency" exception, both sections simply state the exception: "unless a situation exists in which the medication or treatment is necessary to prevent serious physical harm to the individual or others." §§ 971.14(2)(f) and § 51.61(1)(g)1. & 3. Neither contains a provision providing the burden of proof, the standard, definitions of key terms. Nor do either contain a provision specifying notice requirements, findings and procedure for expert reports, or any timeframe or hearing rights. Both § 971.14 and § 51.61 exclude *any* standard or procedures for a criminal court to court-order medication in compliance with due process protections. Therefore, the meaning of the language of these sections is plain; that is, the "emergency" exception does not authorize a criminal court to court-order ongoing involuntary medication.

The State itself even concedes that the emergency exception "appears to permit involuntary medication for dangerousness *without* court intervention in certain scenarios." (State's Brief, p. 24, fn 8). The State, of course, never cites any statutory language—within § 51.61(1)(g)3. or elsewhere—to

authorize an ongoing court-order, let alone one based on a statutorily unspecified finding of "dangerousness."

Additionally, the "emergency" exception provides statutory authority to medical professionals without court involvement because doing so furthers its purpose, and gives it full force and effect. *See* (State's Brief, pp. 18-19). Indeed, the legislature recognized the historically established "implied consent concept" in which determinations of when forced medication is "necessary" is "professionally determined" without court involvement. *See State ex rel. Jones v. Gerhardstein,* 141 Wis. 2d 710, 737, 739, 416 N.W.2d 883 (1987).[6]

Assigning the authority to medical professionals without court involvement results in both the State and individual's interests being better served. For the State, no one can reasonably contest that it has a strong interest in "maintaining safety, security, and functionality within" mental health institutions. *See State v. Wood,* 2010 WI 17, ¶ 32, 323 Wis. 2d 321, 780 N.W.2d 63.

And given that the emergency exception triggers when medication is "necessary to prevent physical harm," it inherently contemplates two things: the situation may arise quickly; and these sudden

[6] The *Gerhardstein* decision "survived unscathed from a repeal and re-creation of § 51.61(1)(g)3, STATS." *Milwaukee County v. Carol J.R.,* 196 Wis. 2d 882, 884, 540 N.W.2d 233 (Ct. App. 1995).

situations may present the institution with serious concerns; such as the occurrence or serious threat of extreme violence, personal injury, homicide, or suicide. In these sudden and serious situations, even the smallest of delays are intolerable. Therefore, the ability to quickly administer involuntary medication to address the emergency serves the State's interest in maintaining safety, security, and functionality within those institutions.

For individuals, there is also a strong interest served by assigning the emergency exception authority to medical professionals. "[T]here is perhaps no right which is older than a person's right to be free from unwanted personal contact." *See Davis v. Hubbard,* 506 F.Supp. 915, 930 (N.D. Ohio 1980). And the "forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." *Washington v. Harper,* 494 U.S. 210, 229 (1990). Therefore, individuals have a strong personal and constitutional interest in regaining their right of informed consent as soon as the "necessary" justification passes.

Indeed, the emergency situation that triggers the "necessary" exception justifies forced medication only so long as the emergency exists; "it does not justify continued treatment over the person's refusal." *See* Catherine E. Blackburn; The "Therapeutic Orgy" and the "Right to Rot" Collide: The Right to Refuse Antipsychotic Drugs Under State Law, 27 Hous. L. Rev. 447, p. 36 (1990). This unjustified continuation of involuntary medication past the emergency situation would occur with court-ordered medication. Just as

judicial proceedings would intolerably delay the administration of medications, so too would ongoing court-orders intolerably expose the individual to involuntary medication past the emergency situation that makes it "necessary" to intrude upon the individual's personal and constitutional interests.

Therefore, under the plain language, as well as to further its purpose and give it full force and effect, the "emergency" exception provides statutory authority to medical professionals without court involvement. It does not provide statutory authority to criminal courts, especially since doing so would obstruct its purpose, which is to prevent intolerable days while not continuing unwanted medication past its justification.

C. *Anthony D.B.* held that ch. 980 committing courts may court-order the administration of involuntary medication under the "incompetent to refuse" clause of § 51.61.

The State concedes that the "necessary to prevent serious physical harm" clause "appears to permit involuntary medication to address a committee's dangerousness *without* court intervention in certain circumstances." (Pet. Br. 24 n. 8). But its near nonexistent analysis of the actual structure and words of the provision setting forth this clause leads to no other proper statutory interpretation. Instead, the State, at best, grossly distorts *Anthony D.B.* for its attempt to legislate authority that does not exist into this independent clause.

The holding in *Anthony D.B.* merely establishes that § 51.61, the Patients' Rights statute, applies to ch. 980 committees. *State v. Anthony D.B.,* 2000 WI 94, ¶ 26, 227 Wis. 2d 1, 514 N.W.2d 435. And therefore, the portions of § 51.61 "*authorizing a court to order medication*" (and outlining its procedure) also apply to ch. 980 committing courts. *Id.,* ¶ 1 (emphasized).

However, this does not mean that every exception mentioned in the list of patients' rights grants statutory authority to criminal courts to impose those exceptions under court-order. Indeed, the Court even identified the only clause that provides the court authority to court-order medication. In the paragraph following its block quote of § 51.61(1)(g)3. (with both exceptions), the Court stated:

> Section 51.61 provides patients with the right to make informed decisions regarding medication, except in those circumstances where, following a constitutionally sufficient procedure, the patient is determined to be **not competent to refuse medication**. Under these circumstances, § 51.61(1)(g) authorizes orders for involuntary administration of medications[.]

Id., ¶ 14 (emphasized). The Court purposefully excluded the "emergency" exception as a circumstance that authorizes courts to court-order medication. Furthermore, the holding depended upon the "procedure outlined under Wis. Stat. § 51.61(1)(g)3." *Id.,* ¶¶ 6, 14, 26. And that procedure only provides the standards and hearing requirements for the "not competent to refuse" exception.

Unlike ch. 980, the legislature included the "not competent to refuse" exception in § 971.14. Therefore, the criminal court's authority to court-order medication based on the defendant being "not competent to refuse" medication comes from the specific statute underlying the competency commitment. That is, § 971.14(4)(b). Under this provision, however, this "not competent to refuse" exception is unconstitutional, as it does not comply with *Sell*, 539 U.S. 166. *State v. Fitzgerald*, 2019 WI 69, ¶2, 387 Wis. 2d 384, 929 NW.2d 165. Thus, courts "may order involuntary medication to restore trial competency under § 971.14 only when the order complies with the *Sell* standard." *Id.*

Lastly, this Court took pains to limit *Anthony D.B.*'s application. As the Court put it, "Our conclusions in this case are limited to individuals committed pursuant to ch. 980 and who also suffer from a chronic illness such as schizophrenia." 2000 WI 94, ¶ 9. Commitments under ch. 980, like § 51.20, include an additional requisite finding that § 971.14 does not. That is, those commitments themselves require a finding that the "person is dangerous[.]" Wis. Stat. §§ 980.01(7), 980.02(2)(c). Whereas, commitments under § 971.14 do not require dangerousness, but only that the defendant is incompetent to stand trial.

Therefore, *Anthony D.B.,* like the federal decisions it cited, hurts the State's argument. There is no support for the State's assertion that *Anthony D.B.* held "that section 51.61(1)(g)3. authorized committing court to order involuntary medication to address a

committee's *dangerousness*." (Pet. Br. 7, 20). That is a gross distortion, and in no way represents the holding of the Court.

D. The *Harper* inquiry discussed in *Sell* tasks criminal courts with asking the State if it pursued alternative forced medication options before returning to the criminal court for a *Sell* order.

The State premises its argument on a flawed understanding of the *Harper* inquiry mentioned in *Sell v. United States,* 539 U.S. 166, 182 (2003). In *Sell*, the Court instructed that trial courts should ordinarily determine whether the government has first sought to forcibly administer medications on *Harper*-type grounds prior to seeking court-ordered medication based on incompetency. *Id.* at 183. That is, criminal courts should *ask* the State if it has exhausted alternative avenues before returning to the criminal court for a *Sell* order. This does not mean that criminal courts themselves may court-order medication under those alternative avenues.

1. The first *Harper*-type alternative refers to medical professional authority, such as provided in Wisconsin's "emergency" exception.

The State cites a string of decisions from various federal appellate courts. But those decisions hurt the State's cause. Each show, as in *Harper*, that the alternative ground authorized professionals (not criminal courts) to determine whether to forcibly administer medication in emergency situations (i.e.

when it is "necessary."). The decisions also show that the criminal court's task under the *Harper* inquiry is to ask the State if it, through its agencies and agents, pursued such options, and if not, why.

To begin, the alternative grounds in *Harper* authorized "only" psychiatrists to order medication when a mentally ill prisoner poses a "likelihood of serious harm" to themselves, others, or property. *Harper,* 494 U.S. 210, 215 (1990). Then, a majority vote of three prison employees allowed the prison to forcibly medicate the prisoner.[7]

The cases the State cites address similar *Harper* alternatives. In *United States v. Grape*, the appellate court acknowledged that the *Harper*-type grounds are "generally held within the inmate's medical center" where a treatment provider determines whether the inmate meets the *Harper* standard for involuntary medication. 549 F.3d 591, 599 (3rd Cir. 2008).

In *United States v. White* and *United States v. Hardy*, the Code of Federal Regulations provided medical professionals authority to forcibly medicate pretrial defendants in a "psychiatric emergency," stating that a "psychiatrist must determine" whether medication is necessary because the inmate is dangerous to himself or others. 431 F.3d 431, 434 (5th Cir. 2005); 724 F.3d 280, 288 (2nd Cir. 2013). And, in *United States v. Rivera-Guerrero,* the institution forced medication without a court order pursuant to its

[7] The specific prison policy contained additional procedural and review provisions for the committee's decision.

emergency powers "because of alleged dangerousness." 426 F.3d 1130, 1144 (9th Cir. 2005).

Additionally, in *United States v. Dillion,* the appellate court affirmed a *Sell* order because the treating doctors had first determined that the facility could not force medication under the alternative *Harper*-type basis. 738 F.3d 284, 290-91 (D.C. Cir. 2013). Whereas, in *United States v. Morrison*, the appellate court reversed the district court's *Sell* order because the government had not first provided the district court with an explanation of why it had not pursued an alternative option. 415 U.S. 1180, 1187 (10th Cir. 2005).

All said, the cases cited by the State, if anything, provide more clarity to *Sell*'s discussion of the *Harper* inquiry, and demonstrate that one alternative ground authorizes medical professionals to determine when forced medication is necessary in emergency situations.

In this case, the "emergency" exception in § 51.61(1)(g)3. provided this exact professionally determined *Harper* alternative. The problem for the State was that "dangerousness" is distinguishable from an emergency situation in which involuntary medication is "necessary" to meet the immediate need.

Furthermore, this difference highlights the deficiencies with the State raising the emergency exception for the first time on appeal in this case. First, the State never raised § 51.61(1)(g)3. as authority in the criminal court. At best, the State relied only on *Sell* and § 971.14.

Second, the court never made findings for the requisite elements of § 51.61(1)(g)3. That is, the court found neither involuntary medication "*necessary*" nor necessary to "prevent *serious physical harm* to the individual or others." *See* Wis. Stat. § 51.61(1)(g)3. (emphasized). Omitting the emergency exception as a basis may have kept the court from assessing those requisite elements. But that does not mean the State can now read them into the court's unspecified "dangerousness" finding. It does not automatically follow that an unspecified "dangerousness" finding means that the court found either, let alone both, elements required under § 51.61(1)(g)3.

Third, Naomi was provided neither notice nor process to defend against this basis that the State raises for the first time on appeal. Naomi had no adequate opportunity to respond to or create a factual record for § 51.61(1)(g)3. Therefore, the record in this case cannot support the emergency exception.

2. The second *Harper*-type alternative refers to civil proceedings, such as provided in Wis. Stat. § 51.20.

Administering involuntary medications through the initiation of civil proceedings provides the second *Harper*-type alternative discussed in *Sell*. 539 U.S. 166, 182. In *Sell*, the Court recognized that civil proceedings may authorize involuntary medication under a more objective and manageable procedure. *Id.* Under civil procedures, medical experts assessing the patient's potential dangerousness may find it easier to provide an informed opinion. *Id.* These civil

proceedings usually provide more "objective and manageable" inquiries. *Id.* This is indeed true in Wisconsin.

In Wisconsin, § 51.20 sets forth the alternative civil proceeding available to involuntarily medicate pretrial defendants. It specifically contemplates inmates in a "jail or other criminal detention facility." Wis. Stat. § 51.20(1)(ab). And, addresses connection to the involuntary medication provisions of § 51.61.Wis. Stat. §§ 51.20(8)(a)&(c), and (13)(dm). In these civil proceedings, the pretrial inmate may be involuntarily medicated after the probable cause hearing, and as part of the court's disposition order following the final hearing. Wis. Stat. §§ 51.20(8)(a)&(c), and (13)(dm).

Moreover, this alternative civil proceeding provides the "objective and manageable" inquiry of patient dangerousness by providing five specific, well-defined standards of dangerousness. Wis. Stat. § 51.20(1)(a)2.a.-e. These standards of dangerousness detail specific acts and omissions, recency considerations, and evidence that manifests and does not manifest dangerousness. Additionally, § 51.20 sets forth thorough procedures to ensure that the court's dangerousness determination complies with due process.

It specifically outlines probable cause and final hearing procedures, including specified timeframes, as well as the procedure for medical examination. It also outlines rights to fair treatment, including holding an open or closed hearing, and rights to present and cross-examine witnesses, to remain silent, to notice, to

access the expert reports timely, and to obtain the government's witness list along with the substance of their proposed testimony. Wis. Stat. § 51.20(5), (7)(a)&(c), (9), (10), and (12).

These standards and procedures each apply to the determination of the patient's dangerousness. Whereas the "dangerousness" finding the State attempts to legitimize under the "necessary to prevent" exception has none. Therefore, the State's position is merely attempting an end run around procedures and standards routinely afforded to individuals who are alleged to be mentally ill and dangerous.

But even if the criminal court's statutorily unspecified "dangerousness" finding was valid. A dangerousness finding is insufficient to court-order medication. Indeed, as this Court put it:

> While dangerousness may legitimately justify the state's authority to involuntarily commit an individual, it does not justify the abrogation of the individual's right of informed consent with respect to psychotropic drugs.

Gerhardstein, 141 Wis. 2d at 736-37. Therefore, the court's "dangerousness" finding not only usurps the legislature's specific procedure and the due process protections of § 51.20. But also, it does not get the State where it wants to go as it cannot abrogate the defendant's right of informed consent to refuse medications.

In this case, § 51.20 provided this exact *Harper* alternative. Indeed, the State's own expert, Dr. Cohen, testified that there had been discussions of initiating a chapter 51 commitment, but she did not know why it had not been pursued. (37:10). This alternative was available, but the criminal court usurped it with an impermissible shortcut.

All said, the *Harper* inquiry tasks criminal courts with determining whether "no other basis for forcibly administering medication is reasonably available." *United States v. Hernandez-Vasquez,* 513 F.3d 908, 914 (9th Cir. 2008). And these *Harper*-type alternatives include the "professionally determined" emergency exception, and § 51.20. The *Harper* inquiry does not authorize court-ordered medication based upon a statutorily unspecified "dangerousness" finding.

CONCLUSION

The Court should hold that § 971.14(4)(b) provides the statutory authority for criminal courts to court-order medication. That is, criminal courts must find that the pretrial defendant is "not competent to refuse" medication, in addition to the *Sell* factors. *See Fitzgerald,* 2019 WI 69, ¶ 2. This will further reinstruct lower courts that dangerousness, while it may justify involuntary commitment, does not justify the abrogation of the right of informed consent to refuse medication. *See Gerhardstein,* 141 Wis. 2d at 736-37.

This holding adheres to the comprehensive statutory scheme enacted by our astute legislature. The legislature enacted "two narrow exceptions." *See Winnebago County v. C.S.,* 2020 WI 33, ¶95, 391 Wis. 2d 35, 940 N.W.2d 875 (J. Hagedorn, dissenting).

Under these two narrow exceptions, the legislature comprehensively addressed every scenario. If the defendant creates an emergency situation where involuntary medication is necessary, then medical professionals are authorized to involuntarily administer medication for as long as that emergency justifies. If the defendant is incompetent to refuse medication, then the criminal court is authorized to court-order medication when warranted under the *Sell* factors. And if the defendant is mentally ill and dangerous, then the government can initiate civil commitment under § 51.20, which provides the necessary standards and procedures to adjudicate dangerousness, and provides the civil court a valid

path to order medication that comports with due process.

This comprehensive scheme strikes the appropriate balance between the State's interest in "maintaining safety, security, and functionality within" mental health institutions, and the defendant's personal and constitutional interests in receiving unwanted medication only for so long as justified.

Dated this April 14, 2025.

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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 5,094 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 April 14, 2025.

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