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 COURT OF APPEALS DECISION REVERSING AN ORDER FOR INVOLUNTARY MEDICATION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID C. SWANSON, PRESIDING

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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Wis. Stat. § 971.14 committing courts have statutory authority to order involuntary medication to address a committee's dangerousness in an institution.

In holding that the circuit court lacked statutory authority to order involuntary medication to address Naomi's dangerousness at Mendota, the court of appeals reasoned that "Wis. Stat. § 51.61(1)(g)1. and 3. do not apply to incompetent defendants committed under § 971.14." (Pet-App. 12.) Naomi doesn't attempt to defend the court of appeals' flawed statutory interpretation analysis—at least not explicitly. (State's Br. 26–30; Naomi's Br. 19–36.) In fact, she concedes that at least some portion of Wis. Stat. § 51.61(1)(g)3., the "emergency" portion, applies to individuals committed under section 971.14. (Naomi's Br. 19, 21.)

But what of the *other* portion of section 51.61(1)(g)3., the one that expressly authorizes committing courts to order involuntary medication where a patient needs medication and isn't competent to refuse it? (State's Br. 23–25.) Ignore *that* portion, Naomi answers. (Namoi's Br. 22–23, 29.) Unlike the court of appeals, though, she offers no principles of statutory construction in defense of her position. (Naomi's Br. 22–23, 29.) Reading between the lines, Naomi silently endorses the court of appeals' misapplication of the related-statutes canon. More specifically, she believes that the closely related trial competency statute can zero out the court-authorization portion of section 51.61(1)(g)3. (Naomi's Br. 22–23, 29; Pet-App. 16–22.)

Naomi's concession on the applicability of the "emergency" portion of section 51.61(1)(g)3. gives away the game. The court-authorization portion of section 51.61(1)(g)3. applies to section 971.14 committees for the same reason that the "emergency" portion applies: there's no conflict between

sections 51.61(1)(g)3. and 971.14. (State's Br. 24, 26–28.) Under section 51.61(1)(g)3., following a prescribed procedure, a section 971.14 committing court may order involuntary medication where a committee needs medication for dangerousness and isn't competent to refuse it. This Court's unanimous decision in *Anthony D.B.*—the facts of which Naomi also would like this Court to disregard—confirms as much. (Naomi's Br. 27–30.)

For the reasons below and in the State's opening brief, this Court should reverse.

A. Section 51.61(1)(g)3. authorizes section 971.14 committing courts to order involuntary medication to address a committee's dangerousness.

A separate, dual commitment under Chapter 51 isn't necessary to involuntarily medicate a section 971.14 committee who is dangerous. (State's Br. 23–25.) Rather, section 51.61(1)(g)3. authorizes section 971.14 committing courts to issue such orders. (State's Br. 23–25.) A plain-meaning analysis of sections 51.61(1)(g)3. and 971.14 establishes as much, and this Court's decision in *Anthony D.B.* confirms the State's reading. (State's Br. 23–25.) The court of appeals erred in holding that section 51.61(1)(g)3. doesn't apply to individuals committed under section 971.14. (State's Br. 26–30.)

Naomi "agrees that the Patients' Rights statute—§ 51.61—applies" to individuals committed under section 971.14. (Naomi's Br. 19.) At least, sort of. She concedes that a portion of section 51.61(1)(g)3., the "emergency" portion, applies to section 971.14 committees. (Naomi's Br. 21–23.) Naomi then submits that the parties' "disagreement centers on whether" this "emergency" portion "authorizes criminal courts to court-order ongoing medication." (Naomi's Br. 19.)

Not so. The disagreement is over a different portion of section 51.61(1)(g)3., the portion that explicitly "allows the committing court, following a hearing, to determine that the committee 'needs' medication (because she's dangerous) and isn't competent to refuse it." (State's Br. 23–25.) While Naomi claims that the State "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,'" that isn't accurate. (Naomi's Br. 24–25.) As explained, it is relying on the "explicit court-authorization language in section 51.61(1)(g)3." (State's Br. 23–25.) The "emergency" portion of section 51.61(1)(g)3. "shows that dangerousness is a proper basis on which to seek court authorization under section 51.61(1)(g)3., if time permits that approach." (State's Br. 24 n.8.)

Though she "agrees" that section "51.61" applies to individuals committed under section 971.14, Naomi later qualifies her position: she doesn't think that the court-authorization portion of section 51.61(1)(g)3. applies. (Naomi's Br. 19, 22–23, 29.) Aside from a conclusory statement that zeroing out the court-authorization portion of section 51.61(1)(g)3. constitutes a "harmonious reading" of sections 51.61(1)(g)3. and 971.14, one that will give each statute "full force and effect," she offers no statutory interpretation analysis in support of her position. (Naomi's Br. 22–23, 29.) However, her reasoning appears to echo that of the court of appeals: because section 971.14 has involuntary medication provisions for restoring trial competency, the court-authorization portion of section 51.61(1)(g)3. doesn't apply to individuals committed under section 971.14. (Naomi's Br. 29; Pet-App. 16–22.)

That is wrong for reasons already explained and for which Naomi offers no response. (State's Br. 24, 26–29; Naomi's Br. 19–30.) Indeed, her concession that the "emergency" portion of section 51.61(1)(g)3. applies to

individuals committed under section 971.14 shows tacit acknowledgement that where related statutes don't conflict, they should be given full force and effect. (State's Br. 18–19, 24, 26–29.) What conflict exists between the court-authorization portion of section 51.61(1)(g)3. and section 971.14, such that the court-authorization language loses its full force and effect? Naomi identifies none. (Naomi's Br. 22–23, 29.)

No conflict exists. The language from section 971.14 that Naomi relies on to zero out the court-authorization portion of section 51.61(1)(g)3. concerns involuntary medication to restore a committee's trial competency.[1] (Naomi's Br. 21–23, 29; State's Br. 21–22.) It doesn't address a committee's dangerousness at an institution. (State's Br. 22; Pet-App. 18–22.) Section 51.61(1)(g)3., by contrast, is a broader statute that has involuntary medication provisions for addressing a patient's need for medication during a mental health commitment. (State's Br. 19–20.) If, following a hearing, a court finds that the patient isn't competent to refuse medication and needs it because she's dangerous, that wouldn't conflict with anything in section 971.14. Thus, the court-authorization portion of section 51.61(1)(g)3. stands. (State's Br. 24, 28.)

Zooming out, Naomi is asking this Court to hold that section 971.14 committing courts are only authorized to order involuntary medication to restore trial competency. (Naomi's Br. 37.) But that is not what the Legislature has said. By

[1] Wisconsin Stat. § 971.14 is a narrow statute governing trial competency proceedings. This Court has recognized that the involuntary medication provisions governing section 971.14 committees relate to trial competency restoration. *State v. Fitzgerald*, 2019 WI 69, ¶ 19, 387 Wis. 2d 384, 929 N.W.2d 165. This is further evidenced by Naomi's recognition that involuntary medication orders under "the 'not competent to refuse' exception in § 971.14" must also comply with *Sell*. (Naomi's Br. 22 n.5, 29.) *Sell*, of course, provides the standard for obtaining an involuntary medication order to restore trial competency. (State's Br. 15.)

making section 51.61(1)(g)3. applicable to section 971.14 committees, it has authorized section 971.14 committing courts to address other needs for medication, like dangerousness. Disagreement with the Legislature's choice—rooted in a strong preference for dual commitments—isn't a reason to cancel out the statutory language. (Naomi's Br. 26–27, 34–35.) Adopting Naomi's position does not constitute a "harmonious reading" of sections 51.61(1)(g)3. and 971.14, one that will give each statute "full force and effect." (Naomi's Br. 22–23.) It is Naomi, not the State, who's seeking "an end run around" the statutes. (Naomi's Br. 35.)

It's unclear whether, if the court-authorization portion of section 51.61(1)(g)3. applies to section 971.14 committees, Naomi disputes that dangerousness is a proper basis on which a court may order involuntary medication under the statute. (Naomi's Br. 19–36.) If she does, she's wrong. The statute is broadly written to allow a court to order involuntary medication where the patient "needs medication or treatment" and "is not competent to refuse medication or treatment." Wis. Stat. § 51.61(1)(g)3. Surely dangerousness in an institution could be a reason why a patient "needs" medication. Wis. Stat. § 51.61(1)(g)3. And as argued, the "emergency" portion of section 51.61(1)(g)3. "shows that dangerousness is a proper basis on which to seek court authorization under section 51.61(1)(g)3., if time permits that approach." (State's Br. 24 n.8.)

Anthony D.B. confirms the State's reading. (State's Br. 25.) There can be no serious dispute that the request for involuntary medication in that case was to address a patient's dangerousness at an institution. *State v. Anthony D.B.*, 2000 WI 94, ¶¶ 2–4, 237 Wis. 2d 1, 614 N.W.2d 435 ("Doctor Martha Rolli testified that involuntary medication was necessary to protect Anthony D.B. from himself, and to protect others from him."). This Court held that the court-authorization portion of section 51.61(1)(g)3. permitted the committing court to issue

such an order. *Id.* ¶¶ 1, 13–15. Only by fully ignoring the facts of the case can Naomi claim that the State "gross[ly] distort[s]" *Anthony D.B.*'s holding. (Naomi's Br. 27–30.) The State did no such thing. *Anthony D.B.* is a dangerousness case, plain and simple.[2]

Toward the end of her brief, Naomi submits, "But even if the criminal court's statutorily unspecified 'dangerousness' finding was valid. [sic] A dangerousness finding is insufficient to court-order medication." (Naomi's Br. 35.) Claiming that dangerousness "cannot abrogate the defendant's right of informed consent to refuse medications," she quotes *Jones* as saying, "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." (Naomi's Br. 35 (citing *State ex rel. Jones v. Gerhardstein*, 141 Wis. 2d 710, 736–37, 416 N.W.2d 883 (1987), *recognized as superseded by statute in Anthony D.B.*, 237 Wis. 2d 1, ¶ 20).)

Naomi misunderstands the *Jones* passage. *Jones* was an equal protection case involving differential treatment between "the class of persons involuntarily committed under sec. 51.20(13)(a), Stats., and . . . the class of persons held in precommitment detention under secs. 51.15(8) and 51.20(8)(c)." *Jones*, 141 Wis. 2d at 733–34 (footnotes omitted). The former class did not have "the right to exercise informed consent for the administration of psychotropic drugs." *Id.* at 734–35. The latter class did in non-emergency situations,

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[2] Naomi's suggestion that *Anthony D.B.* is only instructive in Chapter 980 cases is unpersuasive. Though dealing with a Chapter 980 committing court's statutory authority, the opinion explains when Wis. Stat. § 51.61(1)(g)3. applies (it applies to "patients" as defined in section 51.61(1)) and what committing courts are authorized to do when it does (order involuntary medication to address dangerousness at an institution). *State v. Anthony D.B.*, 2000 WI 94, ¶¶ 11–26, 237 Wis. 2d 1, 614 N.W.2d 435.

assuming those individuals were competent to refuse medication. *Id.*

The "state and county" in *Jones* argued that it was appropriate to deny the former class the right of informed consent "because all involuntarily committed individuals have been found to be dangerous to themselves or others." *Jones*, 141 Wis. 2d at 736. Rejecting that argument, this Court reasoned, "Dangerousness is a prerequisite to involuntary commitment; however, such a finding is in no certain way related to whether the person is competent to accept or refuse psychotropic drugs." *Id.* Thus, when this Court said that "dangerousness" "does not justify the abrogation of the individual's right of informed consent," it was saying that dangerousness is not "synonymous with incompetency to make choices about medical treatment." *Id.* at 736–37. It held "that the right [to informed consent] can be overridden only if there is a finding of probable cause to believe that the individual is incompetent to refuse drugs, as required for precommitment detainees by sec. 51.61(1)(g), Stats., or in a situation within the hospital setting when administration 'is necessary to prevent serious physical harm to the patient or others.'" *Id.* at 737.

Thus, *Jones* does not stand for the proposition that Naomi cites it for. (Naomi's Br. 35.) Rather, it undercuts her position, as it says that the right of informed consent may be overridden by a finding of incompetency to refuse medication, which the court-authorization portion of section 51.61(1)(g)3. requires. *Jones*, 141 Wis. 2d at 737. Further, if incompetency to refuse medication plus dangerousness isn't enough to override an individual's right of informed consent, it's difficult to understand how *Anthony D.B.* came out the way it did. Naomi offers no explanation. (Naomi's Br. 35.)

In short, the court-authorization portion of section 51.61(1)(g)3. applies to individuals committed under section 971.14. It allows a section 971.14 committing court, following

a prescribed procedure, to order involuntary medication to address a patient's need for medication if the patient is incompetent to refuse medication. Dangerousness at an institution may constitute such a need for medication, as the text of section 51.61(1)(g)3. shows and *Anthony D.B.* confirms. Naomi's clear preference for a dual commitment under Chapter 51 in these situations cannot trump the Legislature's choice to apply section 51.61(1)(g)3. to individuals committed under section 971.14.

B. Courts should consider whether involuntary medication is justified on dangerousness grounds before addressing the *Sell* factors.

Constitutionally, the government needs a sufficient justification for overriding an individual's liberty interest in refusing medication. (State's Br. 16.) Addressing an individual's dangerousness is one example. (State's Br. 16.) Restoring a defendant's trial competency is another. (State's Br. 16.) In setting forth the standard for criminal courts to apply when considering the trial competency question, the U.S. Supreme Court instructed those courts to first consider whether involuntary medication may be justified on dangerousness grounds. (State's Br. 16.) The inquiry is more straightforward. (State's Br. 16.)

As noted in its petition for review and opening brief, the State doesn't argue "that U.S. Supreme Court precedent provides 'an independent judicial basis for ordering involuntary medication based on dangerousness that would not require any grounding in statutory authority.'" (State's Br. 17 n.5.) It discussed *Sell* and *Harper* to explain that (1) the government needs an overriding justification for involuntary medication, (2) dangerousness and trial competency restoration may constitute overriding interests, (3) dangerousness is the preferred route for courts to take in ordering involuntary medication, and (4) assuming statutory

authority, the circuit court correctly abandoned its *Sell* order in favor of a dangerousness order. (State's Br. 16–17.)

Naomi offers a strained reading of *Sell* in response, one that serves her goal of requiring a dual commitment under Chapter 51 to involuntarily medicate a section 971.14 committee who's dangerous. (Naomi's Br. 30–36.) In her reading of *Sell*, the U.S. Supreme Court isn't instructing criminal courts to first consider ordering involuntary medication on dangerousness grounds before addressing trial competency restoration. (Naomi's Br. 30.) Rather, they're to ask whether the State "has exhausted alternative avenues before returning to the criminal court for a *Sell* order." (Naomi's Br. 30.) In other words, she believes that *Sell* directs criminal courts to send the State elsewhere to deal with a dangerousness problem, such as a Chapter 51 civil court. (Naomi's Br. 30–36.)

Naomi's reading of *Sell* is wrong and beside the point. It's wrong because *Sell* doesn't say that a criminal court should send the State to a civil court to consider whether dangerousness justifies an involuntary medication order. Rather, *Sell* contemplates that the criminal court could address the issue:

> If a court authorizes mediation on these alternative grounds, the need to consider authorization on trial competence grounds will likely disappear. Even if a court decides medication cannot be authorized on these alternative grounds, the findings underlying such a decision will help expert opinion and judicial decisionmaking in respect to a request to administer drugs for trial competence purposes. . . . We consequently believe 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 v. United States, 539 U.S. 166, 183 (2003) (emphasis added). Further, in *Riggins*, the U.S. Supreme Court contemplated a criminal court addressing the dangerousness question. There, the criminal court denied Riggins's pre-trial motion to terminate medication he'd voluntarily been taking before and during a trial competency commitment. *Riggins v. Nevada*, 504 U.S. 127, 129–31 (1992). He wanted to be off the medication for trial. *Id.* at 130. Deeming the trial court's denial of Riggins's motion an involuntary medication order, the *Riggins* Court opined, "Nevada certainly would have satisfied due process if the prosecution had demonstrated, and the *District Court had found*, that treatment with antipsychotic medication was . . . essential for the sake of Riggins' own safety or the safety of others." *Id.* at 135 (emphasis added).

Regardless, the key takeaway from *Sell* for purposes of this case is that dangerousness may constitute a sufficient justification for overriding an individual's liberty interest in refusing mediation, and if a court can justify involuntary medication on that ground before addressing the trial competency question, it should. *Sell*, 539 U.S. at 181–83. In Wisconsin, the criminal courts tasked with running *Sell* hearings are statutorily authorized to order involuntary medication to address a section 971.14 committee's dangerousness at an institution. Where that "alternative ground" for involuntary medication presents itself during a section 971.14 commitment, the criminal court should prioritize that inquiry over the *Sell* inquiry. *Id.* The circuit court correctly did that here. (State's Br. 12–13, 17.)

CONCLUSION

This Court should reverse the court of appeals.

Dated this 15th day of May 2025.

Respectfully submitted,

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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 2,842 words.

Dated this 15th day of May 2025.

Electronically signed by:

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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 Supreme Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 15th day of May 2025.

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