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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2023AP1747-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

KYLE A. SCHAEFER
Defendant-Appellant.

APPEAL FROM AN ORDER GRANTING A
PETITION TO REVOKE CONDITIONAL RELEASE
FROM AN NGI COMMITMENT ENTERED IN
MARATHON COUNTY CIRCUIT COURT, THE
HONORABLE MICHAEL K. MORAN, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Under Wis. Stat. § 971.17(3)(e), does a circuit court have competency to hear a refiled petition seeking revocation of conditional release of a person adjudicated NGI, when that petition cures a filing defect that caused dismissal of a substantively identical petition?

The circuit court answered yes.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither.

INTRODUCTION

A circuit court ordered Kyle A. Schaefer committed for 45 years after he was found not guilty by reason of mental disease or defect (NGI) for two serious felonies. In 2021, the circuit court granted Schaefer conditional release under Wis. Stat. § 971.17(3)(e) “subject to the conditions set by the court.”

A year later, the Department of Health Services (the department) notified the circuit court that Schaefer was no longer cooperating with the treatment plan. Accordingly, the department petitioned to revoke Schaefer’s conditional release. The circuit court dismissed the petition because the department failed to comply with statutory requirements to send a copy of the petition to the public defender’s office within 72 hours of the person’s detention. The department then filed a statutorily compliant petition, citing the same grounds for revocation.

Schaefer argues that the circuit court’s dismissal of the defective first petition barred it from ever considering the substantive grounds of that petition, even if the department cured the defect by refiled it with appropriate notice. Schaefer’s proposed one-strike-and-you’re-out rule would

mean that a filing error would effectively excuse Schaefer from complying with the conditions of his release.

Schaefer's theory cannot be correct. Section 971.17 contains no language supporting Schaefer's position. Nor does any case law support his argument. And fundamentally, Schaefer's proposed one-strike rule creates absurd results. That outcome cannot arguably comport with Legislature's intent in Wis. Stat. § 971.17.

The circuit court soundly rejected Schaefer's untenable argument. This Court should affirm.

STATEMENT OF THE CASE

This Court summarized the underlying facts of Schaefer's crimes in a previous appeal of the order of commitment. (R. 129:1.) In 2014, without warning or provocation, Schaefer shot two of his relatives in their home. (R. 129:2.) The State charged him with four felonies, including attempted first-degree homicide and first-degree reckless endangerment. (R. 129:2.)

Schaefer entered NGI pleas, and two doctors concluded that he was schizophrenic at the time of the shootings. (R. 129:3.) Schaefer then entered no contest pleas to the count of attempted first-degree intentional homicide and one of the reckless endangerment counts, "both with [a] dangerous weapon enhancer and as incidents of domestic abuse." (R. 129:3.) The remaining charges were dismissed and read in. (R. 129:3.) The court accepted the parties' stipulations that Schaefer lacked mental responsibility for his conduct, that institutional placement was appropriate, and that it should order involuntary treatment. (R. 129:3–4.) In August 2016, the court ordered Schaefer committed for 45 years pursuant to Wis. Stat. § 971.17. (R. 67; 129:4.) This Court summarily affirmed the commitment order after postconviction counsel presented a no-merit appeal. (R. 129:4.)

In January 2021, Schaefer filed a petition for conditional release. (R. 147.) The circuit court granted the petition after determining that conditional release “would not pose a significant risk either of bodily harm to the defendant or to others.” (R. 164.) Accordingly, it ordered the department to prepare a plan setting forth the treatment, services, and supervision Schaefer required and who would provide those resources. (R. 164.)

The court received a plan and held a hearing at which the case manager appeared. (R. 206:2–3.) The circuit court reviewed the plan, which listed the psychiatric, behavioral, substance abuse, and other treatment Schaefer was required to undergo; it set forth rules of supervision; and it identified his assigned agents and case managers. (R. 175:2.) Specifically, the plan required Schaefer to live in a group home and participate in its programming and structured activities:

Mr. Schaefer will reside independently at The Bridge Street Mission This is a stable residence where Mr. Schaefer will receive support and supervision. This living situation will be reviewed for appropriateness by Agency and DOC and any change will require case manager and agent approval.

. . . .

. . . Mr. Schaefer will also be required to participate and engage in various groups, activities, and meetings offered through Bridge Street Mission, where he will be residing. Mr. Schaefer understands he must participate in groups as his treatment team recommends and that he is to engage in 20 hours of structured activities per week, per his Conditional Release Plan.

(R. 175:1, 3.) The circuit court approved the conditional release plan and ordered Schaefer released from custody. (R. 206:4–5.)

On September 2, 2022, the department filed a petition for revocation of conditional release alleging that Schaefer no longer had “a permanent residence due to [his] lack of engagement in programming required by the placement. This is a stability factor that is a part of his conditional release plan. His lack of a residence will significantly impact his mental health and the safety of himself and community.” (R. 180.) It appears that Schaefer was detained as of September 1 at the Marathon County Sheriff’s Department, shortly after which he was transported to Mendota. (R. 181.) As Schaefer’s case manager explained at a later hearing, Schaefer had stopped complying with the program rules in July 2022, and he had “declined to sign ongoing tier housing program contracts to Bridge Street Mission,” which meant that Schaefer lacked any housing and income. (R. 209:13–14.)

Schaefer moved to dismiss the petition because the department failed to send a copy of the petition to the regional state public defender’s office, which was required under Wis. Stat. § 971.17(3)(e). (R. 207:4–5.) At a hearing on September 29, 2022, after the department confirmed that no copy of the revocation petition was sent to the regional public defender, the circuit court dismissed the petition. (R. 208:7–8.) The circuit court then asked if the department planned “to refile,” and the agent responded that was “likely.” (R. 208:8.) Later that day, the department refiled a compliant revocation petition, (i.e., it sent a copy the public defender’s office along with the court), alleging the same probable cause. (R. 190.)

Schaefer moved to dismiss the refiled petition, arguing that “[t]he court does not have the competency to proceed in this case.” (R. 194:4.) Schaefer asserted that *Sandra D.*, a case that concerned involuntary commitment under chapters 51 and 55, was “analogous” and that under its holding, “[t]he remedy in this case for failing to submit to the court a petition within 72 hours requires dismissal of the petition.” (R. 194:4–5.)

At a hearing on October 21, 2022, the circuit court denied Schaefer's motion to dismiss. (R. 209:9.) It distinguished *Sandra D.* and held that there was nothing in section 971.17(3)(e) precluding the department from refileing a petition to correct a 72-hour rule violation. (R. 209:7–9.) The department then presented evidence at that hearing in support of its petition that Schaefer was refusing to follow the conditions of his conditional release. (R. 209:12–23.) The circuit court determined that Schaefer presented a risk of danger to himself and others due to his failure to comply with the rules, and it granted the revocation petition. (R. 203; 209:41.)

Schaefer appeals from the order denying his motion to dismiss the department's September 29, 2022 revocation petition and revoking his conditional release.

STANDARD OF REVIEW

Whether a circuit court has lost competency to proceed is a question of law. *State v. Schertz*, 2002 WI App 289, ¶ 5, 258 Wis. 2d 351, 655 N.W.2d 175. Likewise, whether a statute is mandatory or directory is also a question of law that this Court reviews de novo. *Id.* ¶ 6.

ARGUMENT

The circuit court had competency to hear the refiled and statutorily compliant petition.

The question presented asks whether a dismissed revocation petition based on a filing deficiency deprives the circuit court of competency to adjudicate a refiled, otherwise identical petition that cures that deficiency. The State begins by discussing the relevant statute, Wis. Stat. § 971.17.

A. Wisconsin Stat. § 971.17 provides procedures by which a circuit court can commit an NGI defendant and revoke that defendant's conditional release.

When, as here, a defendant in a felony criminal case is found to be NGI, the circuit court “shall commit the person to the department of health services for a specified period not exceeding the maximum term of confinement in prison that could be imposed on an offender convicted of the same felony.” Wis. Stat. § 971.17(1)(b); *see also* Wis. Stat. § 971.17(3)(a) (requiring a court to order institutional care if it finds that conditional release poses a significant risk of harm to the defendant, others, or property). As noted, the circuit court here committed Schaefer, who shot two of his relatives, to the department for 45 years, and ordered institutional care. (R. 67; 129:2, 4.)

An institutionalized NGI defendant may petition for conditional release, Wis. Stat. § 971.17(4), as Schaefer successfully did in 2021. Under subsection (4)(e)1., the circuit court correctly ordered the department to prepare a plan identifying the necessary housing, treatment, services, support, and rules required for Schaefer. (R. 164:1.)

The department, in turn, may petition to revoke a conditionally released NGI defendant if the department has probable cause to allege that “a released person has violated any condition or rule, or that the safety of the person or others requires that conditional release be revoked.” Wis. Stat. § 971.17(3)(e). The department may detain the defendant at that point, and it then has 72 hours to “submit a statement showing probable cause of the detention and a petition to revoke the order for conditional release to the committing court *and the regional office of the state public defender responsible for handling cases in the county where the committing court is located.*” Wis. Stat. § 971.17(3)(e). The circuit court then should attempt to hear the revocation

petition within 30 days, Wis. Stat. § 971.17(3)(e), though that 30-day deadline is directory, not mandatory. *Schertz*, 258 Wis. 2d 351, ¶ 1.

At the revocation hearing, the department “has the burden of proving by clear and convincing evidence that any rule or condition of release has been violated, or that the safety of the person or others requires that conditional release be revoked.” Wis. Stat. § 971.17(3)(e). If the circuit court determines that the department satisfied that burden, it may revoke conditional release and order the committed person to be placed in an institution. Wis. Stat. § 971.17(3)(e).

B. The circuit court correctly concluded, consistent with principles of statutory construction, that it had competency to consider the refiled petition.

In interpreting a statute, this Court “begins with the plain language of the statute” and “generally give[s] words and phrases their common, ordinary, and accepted meaning.” *State v. Dinkins*, 2012 WI 24, ¶ 29, 339 Wis. 2d 78, 810 N.W.2d 787 (citing *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110).

Accordingly, this Court considers statutory language “in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes.” *Id.* (quoting *Kalal*, 271 Wis. 2d 633, ¶ 46). That contextual interpretation must be reasonable and “avoid absurd or unreasonable results.” *Id.* (quoting *Kalal*, 271 Wis. 2d 633, ¶ 46). “An interpretation that contravenes the manifest purpose of the statute is unreasonable.” *Id.* (citing *Kalal*, 271 Wis. 2d 633, ¶ 49).

In addition, “courts should not add words to a statute to give it a certain meaning.” *Fond du Lac County v. Town of Rosendale*, 149 Wis. 2d 326, 334, 440 N.W.2d 818 (Ct. App. 1989). Rather, courts must “interpret the words the

legislature actually enacted into law.” *State v. Fitzgerald*, 2019 WI 69, ¶ 30, 387 Wis. 2d 384, 929 N.W.2d 165.

Here, the circuit court concluded that it had competency to consider the department’s refiled petition. (R. 209:7–9.) It noted that there was nothing in Wis. Stat. § 971.17 “that would preclude a refiling” of a dismissed petition. (R. 209:7.) It noted that other subsections of the statute limited a committed defendant’s petitions to be filed no sooner than six months after their petition was “denied,” but the statute had no similar limits on a revocation petition filed by the department. (R. 209:7.) The court also noted that a *dismissal* based on filing deficiencies and a *denial* on the merits are different things. (R. 209:7.)

The court further noted that the department’s allegations of Schaefer’s failure to comply with the conditions of his release were ongoing and remained ripe allegations at the time that the court dismissed the first petition. (R. 209:8.) Accordingly, because the original petition was dismissed due to a notice issue, nothing prevented the department from curing that issue by refiled a compliant petition. (R. 209:8.)

That decision was correct, it comports with the statutory purposes of Wis. Stat. § 971.17, and it avoids absurd results.

1. Nothing in the statute and case law interpreting it preclude the department from refiling a petition dismissed based on a filing error.

Wisconsin Stat. § 971.17(3)(e) does not provide a specific remedy for the department’s failure to send the probable cause statement to the relevant public defender’s office. Nor does it address whether the department may cure such an error by refiled the petition and providing the public defender’s office with timely notice.

Two published cases interpret paragraph (3)(e). First, in *Olson*, this Court concluded that the provision in paragraph (3)(e) that the department submit its statement of probable cause within 72 hours of the committed person's detention was mandatory. *State v. Olson*, 2019 WI App 61, ¶ 2, 389 Wis. 2d 257, 936 N.W.2d 178. In *Olson*, this Court concluded that dismissal of the petition was warranted because the department's failure in that case extended Olson's detention without access to counsel beyond the 72-hour period that the Legislature had required. *Id.* ¶ 32.

Olson, however, did not address whether such a dismissal prevented the department from refileing a statutorily compliant petition, or that a circuit court would lack competency to adjudicate such a filing.

Second, this Court concluded that the circuit court's failure to hold a final hearing within 30 days of the department's filing of a revocation petition did not deprive the circuit court of competency, because the 30-day provision was "directory rather than mandatory." *Schertz*, 258 Wis. 2d 351, ¶ 1. The petition at issue in *Schertz* was, like here, a refiled petition alleging the same grounds as a petition dismissed because the circuit court did not hold a hearing within 30 days. *Id.* ¶¶ 3–4. There, as here, the circuit court told the department that it could refile the petition, which it did, but the circuit court again missed the 30-day deadline for holding the hearing in which the court determined that Schertz violated his conditions of release and placed him into institutional care. *Id.* ¶ 4.

In *Schertz*, this Court did not express any concern that the department refiled an identical petition to the one dismissed, nor did it suggest that such a refileing was prohibited or that the circuit court would lack competency to adjudicate it.

Accordingly, Wis. Stat. § 971.17(3) and cases interpreting it do not support Schaefer's theory. Nor does an analysis through the lens of statutory construction support Schaefer's position.

2. Allowing the department to refile to cure a timing defect supports all of the statutory purposes of paragraph (3)(e).

Wisconsin Stat. § 971.17(3)(e) serves two primary purposes: “to protect the public while—at the same time—preventing delay[s] by the court or the State.” *Olson*, 389 Wis.2d 257, ¶ 20. The 72-hour provision for alerting the regional public defender's office of the petition and probable cause supporting it is a safeguard to ensure that the NGI defendant is not detained for more than 72 hours without an opportunity for representation up to and at the subsequent hearing. *Id.*

Accordingly, the remedy in *Olson*—dismissing the petition for failing the notice requirement—serves the “preventing delays” purpose. It prevents the State from keeping a person who is on conditional release from being detained without access to counsel any longer than is reasonable before the final hearing on a revocation petition. But the “public protection” purpose would be swept away if that dismissal means that the department is barred from refileing a revocation petition unless the person on release engages in new violations or dangerous behavior. In other words, dismissal of a petition based on a violation of the 72-hour rule strikes a balance between the preventing delays and public protection purposes only because the department can refile to cure the error.

Indeed, this Court in *Olson* stated as much when it adopted *Olson*'s arguments for why the 72-hour provision was mandatory and dismissal did not undercut the public protection purpose: “even if the particular violation that

caused the [d]epartment to initially detain the person was not timely pursued, *Wis. Stat. § 971.17(3)(e) explicitly authorizes the [d]epartment to initiate revocation proceedings if the [d]epartment believes ‘that the safety of the person or others requires that conditional release be revoked.’*” *Id.* ¶ 23 (emphasis added). Here, when the circuit court dismissed the department’s petition for not complying with the notice requirement, the department still believed that Schaefer—based on his unhoused status, lack of income, and failure to comply with the conditions of his release—that revocation was necessary for the safety of the public and of Schaefer. The circuit court recognized as much when it asked the department if it was going to refile the petition. (R. 208:8.) Hence, as *Olson* appears to endorse, *Wis. Stat. § 971.17(3)(e)* authorizes the department to refile a revocation petition when it is dismissed for violating the 72-hour rule.

3. Holding otherwise would invite absurd results.

Under Schaefer’s reasoning, the department’s statutory violation of the 72-hour rule in *Wis. Stat. § 971.17(3)(e)* would shelter an NGI defendant not complying with his conditional release from the reach of the department and the circuit court. That one-strike rule would create absurd results, notably that the department’s mistaken failure to copy the public defender’s office with a petition serves as a get-out-of-revocation-free card. That would absolve the NGI defendant of consequences when he is allegedly not complying with the conditions of his release. This result would undercut the public protection purpose in *Wis. Stat. § 971.17*.

C. Schaefer’s arguments are unsupported and unpersuasive.

Schaefer mainly relies on a case addressing pre-adjudication detention under chapter 51 and 55 civil commitment and protective placement statutes, *State ex rel.*

Sandra D. v. Getto, 175 Wis. 2d 490, 502, 498 N.W.2d 892 (Ct. App. 1993). (Schaefer’s Br. 8–12.) But *Sandra D.* is wholly inapplicable. In that case, county and hospital authorities abused the emergency detention statutes in chapter 55 by continually refiling petitions for placement of Sandra D. but ultimately failing notice requirements that caused dismissal without a required initial hearing within 14 days or a final hearing within 30. *Sandra D.*, 175 Wis. 2d at 495–97. As a result, Sandra D. was in emergency detention for 63 days, well in excess of the mandatory limits on such detention in chapter 55.

This Court held that under its longstanding interpretation of chapter 55, the county could not continually reinitiate dismissed proceedings to create indefinite detention “without ever releasing Sandra D. from custody.” *Id.* at 498. That was so because “[t]emporary placement under ch. 55, Stats., is an involuntary restraint on the individual’s freedom.” *Id.* (citation omitted). In the context of chapter 51 and 55 proceedings, Sandra D. was otherwise a free citizen with full due process rights. *Id.* at 498–99. Ultimately, while this Court noted that the civil statutes did not expressly prevent the county from filing successive petitions, the successive filings here rose to an abuse that violated Sandra D.’s due process rights. *Id.* at 499.

Here, Schaefer nitpicks the circuit court’s reasoning that the probable cause allegations regarding Schaefer were “more ongoing” than what was in *Sandra D.* (Schaefer’s Br. 11–12; R. 209:8.) But he disregards the court’s larger points, which were that Schaefer’s case was materially distinguishable from *Sandra D.* in three ways.

First, Schaefer’s rule violations and lack of housing and income were ongoing—as in, still active—at the time of the refiled petition. (R. 209:8–9.) The petition did not simply concern a discrete past act by Schaefer constituting a violation of his conditions. Rather, Schaefer’s behavior and

circumstances created a continuing substantial risk of danger and required revocation of his conditional release. And under Wis. Stat. § 971.17(3)(e) and *Olson*, nothing (including dismissal based on a filing defect) prevents the department from filing a revocation petition when it believes, as here, that the defendant presents a risk to the public. *Olson*, 389 Wis. 2d 257, ¶ 23.

Second, the circuit court noted that *Sandra D.* involved civil mental commitment and protective placement statutes, not NGI commitment, which was more “akin to a probation/parole-type revocation case.” (R. 209:8–9.) That observation was correct. *See State v. Jefferson*, 163 Wis. 2d 332, 337, 471 N.W.2d 274 (Ct. App. 1991) (stating that “[t]o meet minimum due process at mental recommitment proceedings pursuant to sec. 971.17(3), Stats., a person is entitled to the same procedural rules or steps that are required . . . in probation or parole revocation proceedings”). Probationers and parolees in criminal cases “have a more limited due process right than those who have not yet been convicted of a crime.” *State ex rel. Griffin v. Smith*, 2004 WI 36, ¶ 22, 270 Wis. 2d 235, 677 N.W.2d 259 (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973)).

To be sure, an NGI commitment means that defendants in those cases are not viewed as morally “culpable for the[ir] underlying criminal conduct.” *State v. Fugere*, 2019 WI 33, ¶ 43, 386 Wis. 2d 76, 924 N.W.2d 469. But they are factually culpable in the sense that they caused the same past harm and represent a similar risk of future harm to the community as a person who commits the same offense with moral culpability. Felony-level criminal conduct is “an inherent underpinning of an NGI commitment.” *Id.* ¶ 45. Accordingly, a defendant committed under Wis. Stat. § 971.17 is more akin to a parolee or supervisee than a person subjected to commitment under chapters 51 or 55.

Third, the circuit court aptly inferred that in *Sandra D.*, this Court was less concerned with the successive filings of petitions, which the statute did not prohibit and that had legitimate bases for protective placement, and more with the abuse of the emergency detention process that resulted in a significantly longer period of temporary detention than the statute allowed. (R. 209:8–9.) Here, the circuit court noted, it found no “malicious intent or any type of intent to detain in [Schaefer’s] case,” which distinguished it from the circumstances in *Sandra D.* (R. 209:9.)

To that end, to the extent Schaefer claims that this case is like *Sandra D.* because the department’s refiled caused him to be detained beyond the 30 days recommended in Wis. Stat. § 971.17 for the circuit court to hold a hearing, Schaefer’s combined period of detention was 51 days, with his final hearing occurring within 30 days of the refiled, which did not deprive the circuit court of competency. *See Schertz*, 258 Wis. 2d 351, ¶¶ 1–4 (holding that 30-day period for a final hearing in Wis. Stat. § 971.17 is directory, not mandatory). In contrast, *Sandra D.* was detained for 63 days where the mandatory statutory limits required an initial determination within 14 days and a final hearing within 30. *Sandra D.*, 175 Wis. 2d at 495 & n.2, 497–98.

Schaefer ignores these distinctions. Notably, he identifies no cases addressing an NGI commitment applying *Sandra D.* or any other chapter 51 or 55 case. The State likewise found none. That is so because cases addressing civil involuntary commitments are not applicable to a person in the NGI context. Unlike the petitioner in *Sandra D.* or another person subjected to civil commitment proceedings, Schaefer has no due process right to unfettered release from detention absent expiration of his commitment period or a judicial determination that supervision is no longer required. *See Wis. Stat. § 971.17(5)–(6)*. Schaefer’s release into the

community is conditioned on his continued compliance with his plan under Wis. Stat. § 971.17(3)(e).

Further, Schaefer's only right to release from that detention was under the terms of his conditional release, which as the department explained, Schaefer refused to comply with such that he was left without housing or income, two conditions that his "conditional" release depended on, and which created a substantial risk of public and personal harm.

Schaefer's final argument is confusing. As the State understands it, Schaefer is arguing that the refiling of a virtually identical petition to restart the revocation process cannot "cure" a time limit violation from the first filing. (Schaefer's Br. 12.) That argument implicitly concedes that the circuit court is competent to consider a petition alleging new facts supporting revocation. Yet Schaefer also invokes another chapter 51 case for the proposition that even the filing of a subsequent petition containing *new allegations* but that extends a citizen's involuntary, pre-determination detention beyond the statutory maximum is not permitted. (Schaefer's Br. 12–13 (citing *Dane County v. Stevenson L.J.*, 2009 WI App 84, ¶ 13, 320 Wis. 2d 194, 768 N.W.2d 223).)

First of all, *Stevenson L.J.* underscores why cases interpreting chapters 51 and 55 are not analogous to the NGI context. Again, the rules and due process protections in those proceedings are designed to protect the liberty interests of people who have not engaged in criminal conduct. See *Stevenson L.J.*, 320 Wis. 2d 194, ¶ 11 ("In recognition of the significant liberty interest an individual has in living where and under what conditions he or she chooses, the legislature has imposed tight time limits in connection with involuntary detention proceedings."). Because an NGI commitment requires underlying criminal conduct, a person committed under Wis. Stat. § 971.17 does not have identical liberty interests to a person subject to chapter 51 or 55 proceedings.

Further, the State is unsure if Schaefer is now claiming that under *Stevenson L.J.*, the department can *never* file a revocation petition, even one based on new facts. If he is, that proposition is outrageous and lacks support in any applicable law. If Schaefer is merely saying that a dismissal followed by the immediate refiling of a compliant petition two days later is a hollow result that does not “cure” Schaefer’s “illegal” detention, that also is wrong. The refiling cured any harm that resulted from the department’s violation of the 72-hour rule, which was that Schaefer did not have the statutorily required access to a public defender to prepare for and respond to the final hearing. The cure here was that the initial petition was dismissed and that final hearing never happened. The cure was also that the refiled petition comported with all of the statutory timelines, Schaefer and the public defender obtained sufficient notice and access to each other, and they were able to prepare for the timely final hearing on the refiled petition.

Treating an NGI defendant who is on conditional release identically to a citizen detained and subjected to civil commitment or protective placement proceedings is insensible. Schaefer fails to acknowledge the fundamental differences between statutes governing the commitment or protective placement of a mentally ill citizen, and the statutes governing conditional release of person who has committed a serious felony and has been adjudicated NGI.

D. Schaefer does not challenge the circuit court’s determination that he presents a significant risk to himself and to others.

Finally, even if his competency claim had arguable merit, Schaefer cannot obtain the relief he seeks, which is an order reversing the circuit court’s revocation of his conditional release and ordering “that he be placed on supervision in the community.” (Schaefer’s Br. 13.) Assuming Schaefer means

that the circuit court must place Schaefer back on conditional release under Wis. Stat. § 971.17, it is not clear that this Court can do that given that in the proceedings subject to this appeal as well as subsequent petitions, the circuit court has made two determinations that Schaefer, under the circumstances, does not qualify for conditional release because of the danger he poses.

First, in this case, the court ordered Schaefer's conditional release revoked after determining that Schaefer's failure to comply with the plan and loss of housing "creates a substantial risk of dangerousness to himself or others." (R. 209:38–39, 41.) Though Schaefer challenges the circuit court's competency to make that decision, he does not claim that that decision was unsound or incorrect.

Second, before filing the notice of appeal in this case, Schaefer filed a petition for conditional release on May 18, 2023. (R. 213.) After a hearing in August 2023, the circuit court denied conditional release.¹ Though the transcript from that hearing and order denying that release are not in the record, the circuit court heard testimony from Dr. Craig Schoenecker, who opined after evaluating Schaefer that conditional release to the community "would presently pose a significant risk of bodily harm to himself or others, or serious property damage." (R. 228:7.) Schaefer likewise does not challenge that judicial determination that conditional release is not appropriate based on Schaefer's risk of danger.

¹ This information is in Schaefer's CCAP record in *State of Wisconsin v. Kyle A. Schaefer*, Marathon County Case No. 2014CF385, <https://wcca.wicourts.gov> (last visited April 5, 2024), from which this Court may take judicial notice. See Wis. Stat. § 902.01; *State v. Aderemi*, 2023 WI App 8, ¶ 7 n.3, 406 Wis. 2d 132, 986 N.W.2d 306.

So, in effect, Schaefer asks this Court to ignore these unchallenged substantive determinations that Schaefer's risk of dangerousness currently disqualifies him from conditional release, and to release him based on inapplicable civil commitment rules and case law and a filing error that the department made in September 2022 and promptly remedied. His position is wholly untenable. This Court must affirm.

CONCLUSION

This Court should affirm the circuit court's order denying the motion to dismiss the revocation petition and revoking Schaefer's conditional release.

Dated this 15th day of April 2024.

Respectfully submitted,

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Electronically signed by:

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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 5001 words.

Dated this 15th day of April 2024.

Electronically signed by:

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

Dated this 15th day of April 2024.

Electronically signed by:

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