STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2023AP001747-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KYLE A. SCHAEFER,

Defendant-Appellant.

On Notice of Appeal from an Order Entered in the
Marathon County Circuit Court,
the Honorable Michael K. Moran, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

The circuit court lacked competency to decide the refiled petition to revoke Mr. Schaefer's conditional release.

Mr. Schaefer's detention in the Marathon County Jail, and then Mendota Mental Health Institute, became unlawful when the department failed to provide a copy of the statement of probable cause and petition for revocation of conditional release to the regional office of the state public defender within 72 hours. Once Mr. Schaefer's detention became unlawful, the circuit court lost competency to hear the state's petition and correctly dismissed it. The department was then required to release Mr. Schaefer. Instead, it continued to detain him and filed the same petition again, this time providing notice to the public defender the same day. As the newly filed petition also failed to comply with the statutory requirements, however, it did nothing to restore the circuit court's competency over this matter. The order revoking Mr. Schaefer's conditional release, therefore, must be reversed and the petition dismissed.

The state's entire argument on appeal centers on its erroneous and repeated assertion that the second petition was "statutorily compliant." The state fails, however, to explain how a petition to revoke conditional release, filed 28 days after Mr. Schaefer was taken into custody, complies with the statutory requirement that the petition be submitted within 72 hours of detention.

Rather than acknowledge this fundamental flaw in its argument, the state attempts to distract by attacking a "one-strike-and-you're-out" rule that Mr. Schaefer never proposed and pointing out the differences between civil and NGI commitments. Neither of which are directly relevant to the issue in this case: whether the circuit court had competency to hear the refiled petition to revoke Mr. Schaefer's conditional release.

A. The second petition was not submitted within 72 hours of Mr. Schaefer's detention.

The department was required to submit a statement of probable cause and petition to revoke conditional release to the circuit court and the regional office of the public defender within 72 hours of Mr. Schaefer's detention on September 1, 2022. The statute, in relevant part, states:

> If the department of health services alleges 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, he or she may be taken into custody under the rules of the department. The department of health services **shall 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 **within 72 hours after the detention**, excluding Saturdays, Sundays, and legal holidays. The court shall hear the petition within 30 days, unless the hearing or time deadline is waived by the detained person.

Wis. Stat. § 971.17(3)(e) (emphasis added). The statutory language is clear—it is the detention and associated deprivation of liberty which triggers the mandatory time limit for filing the petition.

Mr. Schaefer was taken into custody on September 1, 2022. (180). He was never released. (194:2). Clearly the second statement of probable cause and petition to revoke conditional release, submitted to the court and public defender's office on September 29, 2022, was not done so within 72 hours of Mr. Schaefer's detention. It was not "statutorily compliant" or "timely," and could not "cure" the department's error in failing to submit the first petition to the public defender's office as required. For that reason alone, the circuit court lacked competency to hear the petition and was required to dismiss it.

While the statute does not provide a specific remedy for failure to comply with the 72-hour time limits in § 971.17(3)(e), this court has. In S*tate v. Olson*, 2019 WI App 61, 389 Wis. 2d 257, 936 N.W.2d 178, this court ruled that the 72-hour time limit is mandatory. As a result, it held that the department's failure to comply with that time limit deprives the circuit court of competency and requires dismissal of the petition to revoke conditional release. *Olson*, 2019 WI App 61, ¶¶2, 34. This remedy is necessary, in part, due to "grave injury sustained by the detained person as a consequence of the Department's failure to comply with the statute," including the possibility of "indefinite detention

without due process or access to counsel." *Id.*, ¶¶ 31, 34.

The state does not explain why that remedy does not apply in this case. (*See* Response 12). In fact, it makes no attempt to distinguish this case from *Olson* at all. Because the second statement of probable cause and petition to revoke was not submitted to the court or public defender within 72 hours of Mr. Schaefer's detention, the circuit court was required to dismiss it due to lack of competency.

B. Case law is clear; refiling an identical petition does not restore the circuit court's competency to decide the matter.

While the state acknowledges this court's holding in *Olson*, it goes on to argue that it cured what it deemed to be a "filing error" in this case by "refiling the petition and providing the public defender's office with timely notice." (Response 12-13). It then asserts that *Olson* did not address whether "a circuit court would lack competency to adjudicate such a filing" and points to *Schertz*[1] in support of its claim that refiling the petition under these circumstances is acceptable. (Response 12-13). This argument fails for two independent reasons.

First, the issue decided in *Schertz* was a narrow one: "whether the thirty-day requirement in WIS. STAT. § 971.17(3)(e) is mandatory or directory."

[1] *State v. Schertz*, 2002 WI App 289, 258 Wis. 2d 351, 655 N.W.2d 175.

Schertz, 2002 WI App 289, ¶6. This court found that the 30-day time limit was directory and noted that, "[o]nly when a statutory time limit is mandatory does the circuit court generally lose competence to proceed if that time limit is not met." *Id*., ¶¶6,14. Thus, "the failure to have a hearing within thirty days did not cause the court to lose competence to decide the second petition." *Id*., ¶14. The parties did not argue, nor did this court decide, whether the mandatory 72-hour time limit was violated by the second petition and whether that caused the circuit court to lose competency. *Schertz* is not applicable to this case.

Second, as noted above, the refiled petition in this case did not "cure" any error, nor was the public defender's office provided with "timely notice." In fact, the second petition was even more deficient than the first—it was not submitted to either the court or the public defender's office until 28 days after Mr. Schaefer was taken into custody, far outside the 72-hour requirement.

Moreover, the statute does not "authorize[] the department to refile a revocation petition when it is dismissed for violating the 72-hour rule," nor did this court endorse such a conclusion in *Olson*. (Response 15). The state points to no language in the statute to support its assertion. There is none. Further, contrary to the state's argument, this court's decision in *Olson* seems to indicate that the filing of an identical petition would not restore the circuit court's competency.

The portion of the *Olson* decision on which the state relies is this court's endorsement of Olson's argument that there were safeguards in place to protect the public if the 72-hour time limit was deemed mandatory such that a violation deprived the circuit court of competency. *Olson*, 2019 WI App 61, ¶¶23-24. Olson's argument was as follows:

> It is true that such a holding would have precluded the Department from pursuing revocation of Mr. Olson's conditional release based on **these particular violations**: Mr. Olson's use of methamphetamine. This does not mean, though, that the Department was without recourse. For one thing, if, **on Mr. Olson's release**, the Department - which, recall, has Mr. Olson under supervision even when he is not in physical custody - **either learned of other violations or simply found reason to believe "the safety of [Mr. Olson] or others" required revocation, it would be free to file a new petition** - it would just have to comply with the rules when it did so.

Brief of Appellant, 9-10, *State v. Olson*, available at https://acefiling.wicourts.gov/document/eFiled/2018AP001076/218782. (emphasis added). Thus, Olson argued, and this court agreed, that the department could not refile an identical petition after violating the 72-hour time limit; it would need to release the individual and learn of new violations, or file a petition alleging that the safety of the individual or others required revocation.

Neither the statute, nor this court's decision in *Olson*, support the state's position that continuing to

detain Mr. Schaefer and refiling an identical petition[2] would restore the circuit court's competency to revoke his conditional release.

Further, allowing the department to refile an identical petition after failing to provide notice within 72-hours of detention, and without releasing the individual, does nothing to serve the statutory purpose of preventing delay and would lead only to absurd results. It would transform the mandatory 72-hour time limit into a directory one and allow the state to continue detaining an individual for as long (and as many tries) as it took to correctly submit the petition to the court and regional public defender's office. (In this case, it took two tries and 28 days after Mr. Schaefer was detained, in the next it may take longer). Sanctioning the department's actions in this case would lead to the grave consequence this court recognized in *Olson*: indefinite detention of the individual without due process or access to counsel. *Olson*, 2019 WI App. 61, ¶31.

Finally, the state tries to distinguish this case from *State ex rel Sandra D. v. Getto*, 175 Wis. 2d 490, 498 N.W.2d 892 (Ct. App. 1993), and others cited by Mr. Schaefer, by arguing that they are "wholly

[2] Both petitions contained identical probable cause statements: "On or about 9/1/2022, Mr. Schaefer does not have a permanent residence due to 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." (180; 190).

inapplicable" simply because those cases involve Ch. 51 and 55 commitments. (Response 15-20). The state seems to imply that Mr. Schaefer has either no, or less, due process rights due to his NGI adjudication and, therefore, it is free to detain him without access to counsel for longer than statutorily allowed. It fails to develop this argument, however, and also fails to explain why the underlying principles regarding circuit court competency set forth in the Ch. 51 and 55 cases do not apply here.

The state correctly notes that Sandra D. was detained for 63 days despite the mandatory time limits requiring a probable cause hearing within 14 days and a final hearing within 30. (Response 18). Similarly, Mr. Schaefer was detained for 28 days before a petition was served on the public defender and 51 days before a final hearing was held, despite the mandatory time limits requiring service of the probable cause statement and petition to revoke on the public defender within 72 hours of his detention. The state fails to explain why the latter is ok, but the former is not. Like Sandra D., Mr. Schaefer was temporarily detained without access to counsel for significantly longer than the statute allowed.

Clearly an NGI committee has due process rights. While he may not have "a due process right to unfettered release from detention," because he would remain on supervision, that does not mean the state is free to detain him indefinitely without court review or access to counsel. This court has recognized as much on more than one occasion. *See State v. Jefferson*,

163 Wis. 2d 332, 337, 471 N.W.2d 274 (Ct. Appl. 1991); *Olson*, 2019 WI App 61.

Further, this court did not find "malicious intent" in *Sandra D.*, nor did it hold that an intent to unlawfully detain must be present to prevent successive filings on the same facts. (*See* Response 18). Rather, it held that the county had abused the protective placement process, and denied Sandra D. due process of law, by filing three petitions on the same facts after dismissal for failure to comply with the time limits. *Getto,* 175 Wis. 2d at 501.

In the chapter 51 and 55 commitment cases cited by Mr. Schaefer, this court "held that once the seventy-two hour period for holding a probable cause hearing has expired, the filing of a substantially identical successive petition for detention in an effort to set back the clock did not restore the court's competency to proceed." *Dane County v. Stevenson L.J.*, 2009 WI App 84, ¶13, 320 Wis. 2d 194, 768 N.W.2d 223 (citing *Getto*, 175 Wis. 2d at 500-501 and *Kindcare v. Judith G.*, 2002 WI App 36, ¶19, 250 Wis. 2d 817, 640 N.W.2d 839). These later filings failed, not because of their content, but because the detentions they sought to justify were contrary to the statutory requirements and, thus, unlawful. *Id*. The same is true in this case.

Just as in *Sandra D.* and *Judith G.*, there was no compliance with the time limits during the first revocation proceeding in this case. *See Judith G.*, 2002 WI App 36, ¶18. Consequently, the initial petition was

dismissed. And, just as in those cases, a second probable cause statement and petition to revoke was filed "*only to avoid* the time limits." *Id*. However, again as in the mental commitment cases and as argued above, that second petition was "a nullity" because Mr. Schaefer had already been in custody for more than 72 hours by the time the second petition was submitted to the court and public defender—his detention was unlawful and, absent his release, a new petition could not comply with the statute or restore the court's competency. *See Id*.; *See also Stevenson L.J*., 2009 WI App 84, ¶13.

C. Reversal of the order and release to supervision is the appropriate remedy.

The state argues that Mr. Schaefer is not entitled to the relief he seeks because the circuit court made findings, in this proceeding and a subsequent one, indicating that he poses a danger to himself or others. (Response 20-22). The state fails to develop this argument and cites no case or other law supporting its proposition that findings and an order entered without competency can stand.

As set forth in the initial brief and above, the circuit court lacked competency to decide the petition to revoke Mr. Schaefer's conditional release. As a result, it had no authority to enter an order revoking conditional release and that order is invalid. *See Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶14, 273 Wis. 2d 76, 681 N.W.2d 190, *Mueller v. Brunn*, 105 Wis. 2d 171, 177-178, 313 N.W.2d 790 (1982). As

in *Olson*, the invalid order must be reversed, the department's petition dismissed, and Mr. Schaefer must be returned to community supervision (as he would have been had the circuit court correctly dismissed the non-compliant petition). *Olson*, 2019 WI App. 61, ¶34.

CONCLUSION

For the foregoing reasons, as well as those set forth in the initial brief, Mr. Schaefer respectfully requests that this court reverse the circuit court's order terminating his conditional release and order that he be placed on supervision in the community.

Dated this 5th day of August, 2024.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,573 words.

Dated this 5th day of August, 2024.

Signed:
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