STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2024AP000386-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

L.A.G.,

Defendant-Appellant.

Appeal from Order of Commitment for Treatment (Incompetency) Entered in the Marathon County Circuit Court, the Hon. Scott M. Corbett, Presiding

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BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Did the State offer sufficient evidence to support an order for involuntary medication under *Sell v. United States*, 539 U.S. 166 (2003)?

The circuit court found that the State met all four *Sell* factors.

2. Should the involuntary medication orders be vacated because the court failed to find that L.A.G. was incompetent to refuse medication or treatment?

The circuit court made no findings on the record or in its written order that L.A.G. was incompetent to refuse medications but still signed an order to involuntarily medicate L.A.G.

POSITION ON ORAL ARGUMENT AND PUBLICATION

L.A.G. does not request oral argument. L.A.G. does not request publication, as this case can be decided on the law as it exists now, and this Court recently recommended for publication a case dealing with many of the same issues presented in this appeal. *State v. J.D.B.*, No. 2023AP715-CR, (WI App. Sept. 10, 2024) (publication recommended); App.56-88.

STATEMENT OF THE CASE AND FACTS

This case stems from a civil dispute between L.A.G. and R.O., regarding the ownership of a home in Mosinee.[1] During the pendency of the civil case, L.A.G. was charged with stalking[2] for conduct alleged from July 13, 2020 through May 5, 2022. (R.2:1).

L.A.G.'s alleged conduct, that caused R.O. to "suffer serious emotional distress or to fear bodily injury to or the death of himself or herself or a member of his or her family or household," was:

- July 13, 2020: L.A.G. parked in the alley behind the home[3] and yelled at a contractor. When R.O. came out, L.A.G. said "You're going down," insulted R.O., and yelled about finances before driving away. (R.2:2).

- September 14, 2021: L.A.G. had a third party put a "28 Day Notice Terminating Tenancy" on the door of the home. (R.2:3).

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[1] Per CCAP, the dispute dates back to at least 2018 when R.O. first filed a civil suit against L.A.G. *See* Marathon County case number 18-CV-582. This Court may take judicial notice of CCAP records when requested by a party. *See Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

[2] Contrary to Wis. Stat. § 940.32(2)(a).

[3] During all relevant time periods, the home that was the subject of the civil suit was occupied by R.O.

- Unknown dates: L.A.G. reported to police that R.O. had stolen her garage doors when he replaced the garage doors of the home and wanted him charged with harassment. (R.2:4).

- May 5, 2022: L.A.G. posted the house for sale on Facebook Marketplace with this language "Contact homeowner only – L[]." (R.2:5). At the time, R.O. had a *lis pendens* through the civil suit. (R.2:6).[4]

L.A.G. was charged on July 1, 2022. (R.2).

On February 6, 2023, the State filed a letter with the court stating that it was filing a competency examination it had obtained from Manitowoc County case number 21-CM-214.[5,6] Eventually, the court appointed counsel for L.A.G. who raised competency and the court ordered an examination on April 10, 2023. (R.42). After a contested competency hearing on August 2nd, L.A.G. was found incompetent, she was committed to the care of DHS, and she was remanded into custody. (R.59).

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[4] *See* 10-25-2021 CCAP entry in Marathon County case number 18-CV-582.

[5] Per CCAP, L.A.G. was charged with a single count of disorderly conduct and a competency examination was ordered on July 18, 2022. At a January 17, 2023 competency hearing, L.A.G. was found competent, but not competent to represent herself.

[6] A guardian *ad litem* was previously appointed to act for L.A.G. in the civil case in December 2021.

Just over halfway through the 12-month commitment, Colleen Considine—a psychiatrist at Mendota Mental Health Institute—filed a motion for involuntary medication along with an individual treatment plan. (R.72; App.6-10). The treatment plan lists a diagnosis of "Unspecified Schizophrenia Spectrum and Other Psychotic Disorder" and discusses L.A.G.'s physical health as well as past treatment with antipsychotic medication. (R.72:2; App.7).

That treatment plan also listed seven total antipsychotics to be provided "either in combination or in succession." (R.72:4; App.9). Of those seven medications, six were proposed to be given orally and three[7] were proposed to be given through injection "if the defendant is unable or unwilling" to take medication orally.[8] (R.72:4; App.9). In addition to the eight medications listed in the treatment plan, an addendum to the treatment plan included an open-ended list[9] of long-acting injectable antipsychotics that may forcibly administered. The plan contained a similarly open-ended list of mood stabilizers to be used "[i]f there is limited symptom improvement with an antipsychotic medication and/or she exhibits

[7] Two of the proposed medications were proposed for both oral and intravenous administration. (R.72:4; App.9).

[8] These were later described as "short-term injectable" medications. (R.138:15; App.25).

[9] Indicated by the phrasing that Dr. Considine would "prescribe a long-acting injectable form of an antipsychotic medication **such as** . . . ." (R.72:5; App.10).

symptoms consistent with severe mood instability." (R.72:5; App.10).

At a hearing on the motion, Dr. Considine testified that L.A.G. presented with "paranoia, delusional ideations, thought disorganization, [and] agitation." (R.138:10; App.20). Dr. Considine testified L.A.G.'s symptoms would be treated with antipsychotic medication, and "[a]ny of those antipsychotics medications could be beneficial for her symptoms of psychosis." (R.138:10; App.20).

Dr. Considine testified that she "would not prescribe all of [the antipsychotics] at once. [She] would start with one medication. If [L.A.G.] had a preference, [she] would try that medication." (R.138:11; App.21). She then broadly described the types of side effects antipsychotic medications can have. (R.138:12; App.22).

Dr. Considine also noted that one medication proposed, lorazepam, is a benzodiazepine "that can be used for treatment for agitation or anxiety." (R.138:13; App.23).

After describing side effects of antipsychotics that include dizziness, involuntary movement issues, and "a rare side effect called neuroleptic malignant syndrome, which could be fatal," (R.138:12; App.22), Dr. Considine opined that none of those side effects would affect L.A.G.'s ability to assist counsel—stating that the medication should help her to be able to assist. (R.138:13; App.23).

Dr. Considine testified there were no alternative treatments for psychosis and that involuntary administration of medication was medically appropriate and in L.A.G.'s "best medical interest." (R.138:14; App.24).

When discussing her request to administer a long-acting injectable, Dr. Considine stated they may be used if L.A.G. prefers it to oral medication or "if there's concern regarding treatment compliance with an oral medication if she's simply unwilling to take an oral medication, these would be an option." (R.138:14-15; App.24-25).

On cross-examination, Dr. Considine agreed that L.A.G. understood that Dr. Considine was prescribing antipsychotic medications and that she thought they would benefit L.A.G. (R.138:17-18; App.27-28). She also noted that L.A.G. "was provided written information regarding some of the medications on the treatment plan." (R.138:18; App.28).

Dr. Considine stated that she thought L.A.G. was unable to apply her understanding of the medications to herself, but did not check those boxes because the form asks about L.A.G.'s competency to refuse only if needed to treat based on dangerousness. (R.138:19; App.29; R.72:3; App.8).

When asked whether L.A.G. previously had a "serious side effect" from taking antipsychotic medications, Dr. Considine stated that L.A.G.:

> had reported after a one dose of medication of Olanzapine, which is an antidepressant. That's a different form of medication than what I'm proposing.[10] She never reported an increase of nightmares and constipation. Beyond that documented, I could not find clear side effects. [L.A.G.] reported having had side effects for medications, but I didn't see like any clear documentation of her being administered a medication in the hospital and then side effect following.

(R.138:21-22; App.31-32). Dr. Considine's report states that L.A.G. had also reported a past trial of "risperidone (antipsychotic)." (R.72:2; App.7).

During argument, counsel stated that L.A.G. had be in-custody for over 200 days at the time of the hearing, which lessened the State's interest in prosecution. (R.138:28; App.38). Counsel also noted that the case "amounts to an argument over a property dispute from several years ago . . . ." (R.138:29; App.39).

When given an opportunity to make a statement, L.A.G. stated that Dr. Considine had not explained to L.A.G. what delusions she suffered from. (R.138:30-31; App.40-41). All she was told is that she spoke "fast and rapid." (R.138:31; App.41).

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[10] Olanzapine is an antipsychotic, (R.72:2; App.7), and is one of the medications Dr. Considine proposed as a possible oral or injectable medication. (R.72:4; App.9).

L.A.G. discussed medications she had tried in the past, including lorazepam, producing "many serious side effects," including suicidal ideation, the court told her to "stay on the issue of the involuntary medication." (R.138:33-34; App.43-44).

The court found the State has an important interest in prosecuting L.A.G. because stalking is a felony with a maximum penalty of three and a half years and L.A.G. was charged in seven other (misdemeanor) cases. (R.138:39; App.49). It also found that Dr. Considine provided an individual treatment plan and testified that medication was necessary to treat L.A.G.'s mental illness. (R.138:40; App.50). The court found that the serious side effects discussed were "highly unlikely to be encountered." (R.138:42; App.52).

The court found that lesser intrusive methods had been tried and that based on its familiarity with L.A.G. that a contempt order "would only result in further sanctions that would really have no effect with respect to how we have proceeded in these cases over time." (R.138:41; App.51).

Ultimately, the court ordered involuntary medication to treat L.A.G. to competency. (R.82; App.3-5). The court granted a 14-day stay pending appeal the next day. (R.85). This Court then granted a separate emergency temporary stay and ordered the parties to brief a full stay pending appeal. The motion for stay pending appeal was ultimately withdrawn as

L.A.G. was found competent and no longer subject to the involuntary medication order.

This appeal follows.

ARGUMENT

Prior to the beginning of the property dispute in 2018, L.A.G. has no criminal convictions. She was charged in this case with stalking for a single in-person confrontation, having someone tape an eviction notice to the door of the property, reporting the garage doors stolen, and listing the house for sale on Facebook Marketplace. (R.2).

By the time the court ordered involuntary medication, L.A.G. had 211 days of credit—158 of which were spent in jail.[11] Under these facts, the State sought—and the court ordered—L.A.G. forcibly medicated.

Under the Due Process Clause, L.A.G. has a "'significant liberty interest' in refusing involuntary medication." *State v. Fitzgerald*, 2019 WI 69, ¶13, 387 Wis. 2d 384, 929 N.W.2d 165 (quoting *Washington v. Harper*, 494 U.S. 210, 221 (1990)). L.A.G. also has a statutory "right of informed consent with respect to psychotropic drugs" under Wis. Stat. §§ 51.61(1)(g)

[11] Per CCAP, L.A.G. was arrested and posted a bond on January 9, 2023 (1); this is confirmed by the signed bond. (R.25). Later, when she was found incompetent on August 2, 2023, she was remanded to the county jail until she was transported to Mendota on January 5, 2024 (157). (R.59:3).

and 971.14(3)(dm). *State ex rel. Jones v. Gerhardstein,* 141 Wis. 2d 710, 737, 416 N.W.2d 883 (1987).

Involuntary treatment for individuals deemed incompetent to stand trial is focused on rendering a person—who is presumed innocent—competent, so they can be prosecuted. *Sell v. United States,* 539 U.S. 166, 181 (2003).

For that reason, before forcibly medicating an accused person, the Constitution requires the State prove by clear and convincing evidence: "(1) the government has an important interest in proceeding to trial; (2) involuntary medication will significantly further the governmental interest; (3) involuntary medication is necessary to further the governmental interest; and (4) involuntary medication is medically appropriate." *State v. Green,* 2021 WI App 18, ¶14, 396 Wis. 2d 658, 957 N.W.2d 583; *Sell*, 539 U.S. at 180-81. The government must also prove by clear and convincing evidence that the individual is not competent to refuse medications. Wis. Stat. § 971.14(4)(b).

Here, the State failed to meet its burden under *Sell* in multiple respects and the court failed to make findings that L.A.G. was incompetent to refuse medication, as required by Wis. Stat. § 971.14(4)(b).

I. The State failed to prove the *Sell* factors by clear and convincing evidence.

The State did not meet its constitutional burden. It does not have an important interest in prosecuting L.A.G., the treatment plan is unconstitutionally generic, and there is not sufficient evidence to determine whether the plan is medically appropriate. The State is required to prove all four *Sell* factors and failed to prove three of them.

A. *Sell*'s substantive requirements and standard of review.

To meet its burden under *Sell*, the State must first prove that "*important* governmental interests are at stake." *Sell*, 539 U.S. at 180 (emphasis in original). This requires proof that medication aims to bring "to trial an individual accused of a serious crime." *Id.* To find for the State on the first factor, courts "must consider the facts of the individual case in evaluating the Government's interest in prosecution." *Id.*

Second, the State must prove that "involuntary medication will *significantly further* the government's interest in prosecuting the offense." *Id.* at 181 (emphasis in original). To meet its burden on the second factor, the State must prove "that administration of the drugs is substantially likely to render the defendant competent to stand trial" and "substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair." *Id.*

Third, the State must prove "that involuntary medication is *necessary* to further those interests." *Id.* (emphasis in original). This factor requires clear and convincing evidence that "any alternative, less intrusive treatments are unlikely to achieve substantially the same result." *Id.* In evaluating this factor, courts "must consider less intrusive means for administering the drugs, *e.g.*, a court order to the defendant backed by the contempt power, before considering more intrusive methods." *Id.*

Fourth, the State must prove "that administration of the drugs is *medically appropriate*, *i.e.*, in the patient's best medical interest in light of his [or her] medical condition." *Id.* (emphasis in original). Because "[d]ifferent kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success," courts should consider "the specific kinds of drugs at issue." *Id.*

In evaluating these factors, the task of a court is to answer the following: "Has the Government, in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness of a particular course of antipsychotic drug treatment, shown a need for that treatment sufficiently important to overcome the individual's protected interest in refusing it?" *Id.* at 183 (citing *Washington v. Harper*, 494 U.S. 210, 229 (1990); *Riggins v. Nevada*, 504 U.S. 127, 134-35 (1992)). While the Constitution may permit forcible medication in some cases, "[t]hose instances may be rare." *Id.* at 180. If the State does not meet the high burden established in *Sell*, involuntary

medication is unconstitutional. *Fitzgerald*, 387 Wis. 2d 384, ¶32.

The Wisconsin Supreme Court has reaffirmed that "a defendant's liberty interest in refusing involuntary medication at the pretrial stage of criminal proceedings" can be overcome only when "each one of the factors set out in *Sell v. United States*" is met. *State v. Green*, 2022 WI 30, ¶2, 401 Wis. 2d 542, 973 N.W.2d 770. The State bears the burden to prove each of the four *Sell* factors by clear and convincing evidence. *Green*, 396 Wis. 2d 658, ¶16; *United States v. James*, 938 F.3d 719, 723 (5th Cir. 2019) (collecting cases to show that all ten federal circuit courts that have considered the question agree on this burden and standard of proof.).

Given the serious deprivation of liberty at stake, "a high level of detail is plainly contemplated by the comprehensive findings *Sell* requires." *United States v. Chavez*, 734 F.3d 1247, 1252 (10th Cir. 2013). If the State failed to prove any of the four *Sell* factors, the involuntary medication order violates the Due Process Clause and is unconstitutional. *Sell*, 539 U.S. at 179.

Because this appeal implicates L.A.G.'s due process rights, the issues present a question of constitutional fact which requires this Court to apply facts to the applicable constitutional standard in *Sell*. *See State v. Woods*, 117 Wis. 2d 701, 715, 345 N.W.2d 457 (1984); *see also*, *Langlade Cnty. v. D.J.W.*, 2020 WI 41, ¶¶23-24, 391 Wis. 2d 231, 942 N.W.2d 277. Under that standard, this court will uphold the circuit court's

findings of fact unless they are clearly erroneous or against the great weight and clear preponderance of the evidence. *D.J.W.*, 391 Wis. 2d 231, ¶24. Whether those facts meet the legal standard is a question of law reviewed *de novo*. *Woods*, 117 Wis. 2d 701, 716; *D.J.W.*, 391 Wis. 2d 231, ¶25.

B. The State does not have an important interest in prosecuting L.A.G.

The State's interest in prosecuting L.A.G. is minimal. Under *Sell*, the State must first prove that "*important* governmental interests are at stake." *Sell*, 529 U.S. at 180 (emphasis in original). This requires the State to show that it aims to bring "to trial an individual accused of a *serious* crime." *Id*. (emphasis added). While *Sell* did not provide "specific guidance or a rigid test" to determine which crimes were serious, federal courts often defer to the judgment of the legislature. *United States v. Breedlove*, 756 F.3d 1036, 1041 (7th Cir. 2014); *see Lewis v. United States*, 518 U.S. 322, 326 (1996) ("The judiciary should not substitute its judgment as to seriousness for that of a legislature, which is far better equipped to perform the task.").

In addition, courts "must consider the facts of the individual case in evaluating the Government's interest in prosecution. Special circumstances may lessen the importance of that interest." *Sell*, 539 U.S. at 180. The State has the burden to prove by clear and convincing evidence that an important governmental interest is at stake—*i.e.*, prosecuting a

serious crime—in order to forcibly medicate a person. *Green*, 396 Wis. 2d 658, ¶16; *James*, 938 F.2d at 723. Here, it failed to do so.

The offense L.A.G. was charged with is not serious. The court found that stalking is serious because it is a felony punishable by three-and-one-half years' prison. (R.138:39; App.49). However, the legislature has designated numerous offenses as "serious" in various contexts, and stalking under Wis. Stat. § 940.32 appears in none of them.[12]

Even if stalking were a serious offense, courts must address "whether, under the particular circumstances of each individual case, the State has an important interest in bringing *that defendant* to trial []." *J.D.B.*, 2023AP715-CR, ¶37 (emphasis in original); App.70. This case is primarily the continuation of a property dispute that was already being handled in civil court. Thus, there is no important interest in prosecuting this matter. Furthermore, the circuit court did not discuss the

[12] "Serious crime" is defined in Wis. Stat. §§ 48.685(1)(c); 50.065(1)(e)1. &2.; and 969.08(10)(b). Wis. Stat. § 949.165(1)(a) incorporates the definition from § 969.08(10)(b). "Serious felony" is defined in Wis. Stat. §§ 48.415(9m)(b); 302.11(1g); 939.62(2m)(a)2m.; and 973.0135(1)(b).

Supporting this analysis, this Court recently held that battery to law enforcement was a serious crime for *Sell* purposes because it was designated as such by Wis. Stat. § 969.08. *J.D.B.*, 2023AP715-CR, ¶36; App.69-70.

specific facts of this case—only noting the charge and that L.A.G. had seven other open cases.

First, two of the acts alleged in the complaint—reporting the garage doors of the disputed property stolen and posting the home for sale on Facebook Marketplace—do not meet the criteria for actions that can be considered stalking. *See* Wis. Stat. § 940.32(1)(a).

Second, the remaining acts—yelling from a vehicle about the property dispute and having someone tape an eviction notice to the door more than one year apart—are not serious. Given the scenarios conjured when one imagines "stalking" (physically following, threatening letters, unending text messages, etc.) the acts alleged in the complaint are not serious.[13]

Third, L.A.G.'s lack of criminal history and 211 days of sentence credit severely limit the State's interest in prosecution. *See Sell*, 539 U.S. at 180. Significantly, the 157 days L.A.G. sat in the county jail waiting to be taken to a treatment facility demonstrates the State was not terribly concerned with restoring her before the timelines expired. It was noted by one competency examiner that it was "unfortunate" L.A.G. had not been taken inpatient to

[13] It is also arguable that, as a matter of law, a "reasonable person" would not be placed in serious emotional distress by these actions, if proven. *See* Wis. Stat. §§ 940.32(1)(d)&(2).

obtain psychiatric services and that she "lost several months of restoration time while still in jail." (R.64:3).

In *J.D.B.*, this Court held that an individual's due process rights are violated if the State fails to provide competency restoration within a reasonable amount of time. *J.D.B.*, 2023AP715-CR, ¶51 (citing *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)) ; App.76-77. The Court held that such "unconstitutional detention[s] further lessen[] the importance of the State's interest in prosecuting Jared for purposes of *Sell*." *Id.*, ¶52; App.77.

In *J.D.B.*, Jared was confined for 107 days between commitment and arrival at an inpatient facility. *Id.*; App.77. L.A.G. spent 50 days longer than that waiting to be transported for appropriate competency restoration services. The State was aware at latest in October 2023 that the jail-based restoration services were inadequate to restore her. (R.64:3). Despite that awareness, they allowed L.A.G. to continue languishing in the county jail, where the court had remanded her, until January.[14]

[14] The Court in *J.D.B.* suggested that individuals lose their right to bail once committed, pursuant to Wis. Stat. § 971.14(5)(a)1. *J.D.B.*, 2023AP715-CR, ¶45; App.74. L.A.G. agrees that bond no longer applies once proceedings are suspended, but DHS, not the circuit court, determines whether restoration services will be provided on an inpatient or outpatient basis. Wis. Stat. § 971.14(5)(a)1. Circuit courts may not order individuals remanded into custody, if DHS determines inpatient is necessary, the court's role is to order the sheriff to

L.A.G. was not charged with a serious crime. The facts of L.A.G.'s case, as alleged in the complaint, are not serious. L.A.G. remained in-custody 157 days before she was transported to Mendota; it was only after 211 days that the court ordered involuntary medication. By that point, any interest the State may have had in bringing L.A.G. to trial had long since dissipated. Any interest they had was not important and did not overcome L.A.G.'s constitutional rights to bodily autonomy and to be free of forcible medication.

C. The proposed treatment plan is unconstitutionally generic.

The treatment plan proposed by the State was a request to treat L.A.G. as Dr. Considine saw fit—accomplished by asking for nearly a dozen different medications to be used without meaningful oversight by the circuit court.

In order to satisfy *Sell*, the State must present "an individualized treatment plan applied to the particular defendant." *Green*, 396 Wis. 2d 658, ¶38.

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transport an individual once a bed is ready. Wis. Stat. §§ 971.14(5)(a)1.&4.

Even if DHS had determined L.A.G. was to receive restoration services in the jail, those services were clearly inadequate, and they were required to transport her inpatient "as soon as possible." Wis. Stat. § 971.14(5)(a)2. A delay of 157 days is both unconstitutional and cannot possibly be considered to have been "as soon as possible." Wis. Stat. § 971.14(5)(a)2; *see J.D.B.*, 2023AP715-CR, ¶50; App.76.

Under *Green*, "it is not enough for the for the State to simply offer a generic treatment plan." *Id.*, ¶34. Whether a treatment plan is sufficiently individualized relates to the second *Sell* factor—whether the drugs are "substantially likely" to render L.A.G. competent. *See id.*, ¶33.

"*Sell* requires an individualized treatment plan that, at a minimum, identifies (1) the specific medication or range of medications that the treating physicians are permitted to use in their treatment of the defendant, (2) the maximum dosages that may be administered, and (3) the duration of time that involuntary treatment of the defendant may continue before the treating physicians are required to report back to the court." *Id.*, ¶38 (internal citations omitted).

The State cannot "offer a generic treatment plan with a medication and dosage that are generally effective for a defendant's condition." *Green*, 396 Wis. 2d 658, ¶34. "Such a practice would reduce orders for involuntary medication to a generic exercise," which is constitutionally insufficient. *Id.* This Court recently stated:

> While the identification of seven different antipsychotic medications is not problematic in itself, there needs to be evidence explaining how an unordered list of potential medications is individually tailored to a particular defendant. That is, if a specific order of medications is appropriate for a particular defendant, that needs to be explained to the circuit court, and if no order

> is appropriate, that needs to be explained to the circuit court.

J.D.B., 2023AP715-CR, ¶58; App.80. *J.D.B.* makes clear that the State—through its doctors—needs to create a record that allows courts to understand a treatment plan and determine if it is individualized and medically appropriate for a particular defendant.

Here, eleven different medications were proposed: six of those were antipsychotics proposed for oral administration, three were antipsychotics proposed as short-acting injections, a benzodiazepine was to be administered either orally or through short-acting injection, three or more antipsychotics were proposed as long-acting injections, and two or more mood stabilizers were proposed for oral administration. (R.72:4-5; App.9-10).

Dr. Considine provided little in the way of testimony regarding why she recommended the medications or dosages she did.[15] She testified that aripiprazole was chosen "to be the preferred medication." (R.138:12; App.22). There was no testimony beyond this as to which medications would be administered and when. Regarding dosing, when asked about monitoring for side effects, Dr. Considine stated she would start at a low dose. (R.138:13; App.23). There was no testimony about effectiveness of doses.

[15] Dr. Considine simply said "any of those antipsychotic medications could be beneficial for [L.A.G.]'s symptoms of psychosis." (R.138:10; App.20).

Dr. Considine offered no explanation for the proposed dosages as applied to L.A.G. in particular. The treatment plan also calls for use of medications "either in combination or in succession." (R.72:4; App.9). There is nothing in the record clarifying to what extent medications would be used "in combination" or whether it was safe to do so. *See J.D.B.*, 2023AP715-CR, ¶58; App.80.

On this record, one must make a lot of assumptions regarding how the treatment plan will operate. This guesswork is incongruent with the "high level of detail" contemplated by *Sell*. *Chavez*, 734 F.3d at 1252. One is also required to assume Dr. Considine would not recommend unsafe dosages or combinations of medication. This is akin to the circuit court impermissibly ordering "that the medical personnel administering the drugs observe appropriate medical standards in the dispensation thereof." *Fitzgerald*, 387 Wis. 2d 384, ¶29.

What is absent from the record is any evidence that this plan was tailored to L.A.G., rather than a list of antipsychotics that are appropriate to treat any individual with schizophrenia.[16] As such, it is unconstitutionally generic.

[16] The plan here is substantially similar to the one in *J.D.B.*—nothing more than a list of medications and dosages. "If the generic dose range is appropriate for a particular defendant, that opinion needs to be explained to the circuit court before an otherwise generic dose range can be said to be 'individualized' to a defendant." *J.D.B.*, 2023AP715-CR, ¶59; App.80-81.

D. Aspects of the treatment plan are not medically appropriate.

In addition to being unconstitutionally generic, aspects of the treatment plan are not medically appropriate.

One medication listed in the treatment plan is olanzapine, with a proposed dose range of 2.5-30mg daily. (R.72:4; App.9). According to the label for Zyprexa—the name brand version of olanzapine—in clinical trials, dosages above 10mg/day were not shown to be more effective than a 10mg/day dose.[17,18] Moreover, when treating schizophrenia, olanzapine is not indicated for doses above 20mg/day. *Id.* This information is supported by information published by the Mayo Clinic.[19]

Similarly, the treatment plan proposed a dose range for oral administration of aripiprazole that went up to 30mg per day, (R.72:4; App.9), despite dosages

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[17] *ZYPREXA (olanzapine) Label*, Food and Drug Administration, https://www.accessdata.fda.gov/drugsatfda_docs/label/2014/020592s062021086s040021253s048lbl.pdf at 4 (last accessed Oct. 1, 2024).

[18] This Court should take judicial notice of the FDA labels as they are capable of accurate and ready determination and the accuracy of the FDA's ".gov" website cannot reasonably be questioned. Wis. Stat. § 902.01(2)(b).

[19] *Olanzapine (Oral Route)*, Mayo Clinic, https://www.mayoclinic.org/drugs-supplements/olanzapine-oral-route/proper-use/drg-20071350 (last accessed Oct. 1, 2024).

higher than 10-15mg/day not being any more effective than dosages of 10-15mg/day.[20]

Regarding the use of another proposed medication, ziprasidone, at no point was the circuit court informed that "[i]ntramuscular administration of ziprasidone for more than three consecutive days has not been studied."[21] Additionally, despite the lack of evidence suggesting ongoing use of ziprasidone was safe or effective, there was no restriction regarding its use in the treatment plan.

The requested use of injectable lorazepam, is also concerning. (R.72:4; App.9). Unlike the other medications requested, lorazepam is a sedative/antianxiety medication, not an antipsychotic. Notably, lorazepam is not indicated for use in treating "agitation," but is used off-label for "rapid tranquilization" of agitated patients.[22] Essentially,

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[20] ABILIFY (aripiprazole) Label, Food and Drug Administration, https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/021436s041,021713s032,021729s024,021866s026lbl.pdf at 4 (last accessed Oct. 1, 2024).

[21] GEODON (ziprasidone mesylate) Label, Food and Drug Administration, https://www.accessdata.fda.gov/drugsatfda_docs/label/2015/020825s054%2C020919s041%2C021483s014lbl.pdf at 3 (last accessed Oct. 2, 2024).

[22] Norman Ghiasi et al., Lorazepam, StatPearls Publishing (Jan. 31, 2023) https://www.ncbi.nlm.nih.gov/books/NBK532890/#:~:text=Lorazepam%20is%20FDA%2Dapproved%20for,and%20treatment%20of%20status%20epilepticus (last accessed Oct. 1, 2024).

this is not a medication that is being proposed to treat L.A.G. back to competency, but to sedate her if she becomes unruly at Mendota.[23]

The use of injectable or oral lorazepam also appears medically inappropriate, as lorazepam may worsen pre-existing depression and "is not recommended for use in patients with a primary depressive disorder or psychosis."[24] In addition to schizophrenia being a psychotic disorder, the treatment plan indicates L.A.G. has been treated with antidepressants for nearly 30 years. (R.72:2; App.7).[25]

The addendum to the treatment plan is similarly problematic. According to Dr. Considine, the proposed long-acting injectables would be used "based on [L.A.G.'s] preference or if she's unwilling to take an oral form." (R.138:15; App.25).

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[23] This conclusion is supported by the Informed Consent for Medication form for the drug, available on the DHS website, only mentioning oral lorazepam and not the injectable variant. https://www.dhs.wisconsin.gov/forms1/f2/f24277ae-ativan.pdf (last accessed Mar. 12, 2024).

[24] ATIVAN C-IV (lorazepam) Tablets Label, Food and Drug Administration, https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/017794s044lbl.pdf at 3 (last accessed Oct. 2, 2024).

[25] This is similar to *J.D.B.*, where the doctor and circuit court both failed to consider Jared's underlying medical conditions that the medication labels referenced as needing special precautions. *J.D.B.*, 2023AP715-CR, ¶60; App.81.

However, the label for one of the named medications, Haldol Decanoate, states:

> patients should be previously stabilized on antipsychotic medication before considering a conversion to haloperidol decanoate. Furthermore, it is recommended that patients being considered for haloperidol decanoate therapy have been treated with, and tolerate well, short-acting HALDOL (haloperidol) in order to reduce the possibility of an unexpected adverse sensitivity to haloperidol. [26]

Dr. Considine's testimony did not contemplate at all that L.A.G. would be stabilized on antipsychotics or that she would necessarily have been treated with haloperidol. In fact, her testimony suggested that the medication might be used if L.A.G. refused oral medication. (R.138:15; App.25).

While it might be possible that there are circumstances where the treatment plan was medically appropriate as proposed, there needs to be evidence of that in the record. *J.D.B.*, 2023AP715-CR, ¶¶58-61; App.80-82.

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[26] HALDOL Decanoate 50 (haloperidol) HALDOL Decanoate 100 (haloperidol) Label, Food and Drug Administration, https://www.accessdata.fda.gov/drugsatfda_docs/label/2017/015923s096,018701s074lbl.pdf at 30 (last accessed Aug. 19, 2024) (HALDOL comes in multiple injectable forms, and this label includes several. The label for HALDOL Decanoate begins on page 17 of the .pdf and the pages cited refer to the page number of the .pdf, not the individual label).

Here, what we have are a number of medications proposed at dosages above what has been shown to be effective or indicated for treatment of L.A.G.'s diagnosis, medications not designed for competency restoration, and medications that should not be administered to someone who is not already stabilized on antipsychotics. This treatment plan is not medically appropriate.

II. The court failed to make findings regarding L.A.G.'s competency to refuse medication.

The circuit court failed to make necessary findings regarding L.A.G.'s competency to refuse medications, as required under Wis. Stat. §§ 971.14(3)(dm), (4)(b), & (5)(am). Moreover, the evidence available did not show that Dr. Considine adequately explained the advantages, disadvantages, and alternatives to medication to L.A.G.

A. Statutory requirements for ordering involuntary medications in pre-trial competency proceedings and standard of review.

In addition to the requirements under *Sell*, Wis. Stat. § 971.14 establishes substantive due process requirements for pre-trial criminal competency proceedings.

The substantive findings required by statute are that the defendant "is not competent to refuse medication or treatment if, because of mental illness [.

. .] and after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the defendant" the defendant is either:

> 1. incapable of expressing an understanding of the advantages, disadvantages of accepting medication or treatment and the alternatives, or
>
> 2. substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness [. . .] in order to make an informed choice as to whether to accept or refuse medication or treatment.

Wis. Stat. §§ 971.14(3)(dm)1.&2.

"Whether this statutory standard has been met is a mixed question of fact and law. The circuit court's findings of fact will be upheld unless clearly erroneous. Whether those facts meet the statutory requirement is a question of law we review de novo." *Waukesha Cnty. v. J.W.J.*, 2017 WI 57, ¶15, 375 Wis. 2d 542, 895 N.W.2d 783 (internal citations omitted). The State must prove the statutory elements by clear and convincing evidence. *Outagamie Cnty. v. Melanie L.*, 2013 WI 67, ¶45, 349 Wis. 2d 148, 833 N.W.2d 607.

The Wisconsin Supreme Court has declared § 971.14(4)(b) unconstitutional to the extent it requires courts to order medication without addressing the *Sell* factors. *Fitzgerald*, 387 Wis. 2d 384, ¶25. However, the legislature has not amended § 971.14 in response to *Fitzgerald*, meaning courts must continue making the findings required by

§ 971.14 and also analyze the *Sell* factors. *J.D.B.*, 2023AP715-CR, ¶64n.14; App.83.

Essentially, the findings required under § 971.14 and *Sell* are distinct but required substantive due process protections that courts must address before issuing involuntary medication orders.

B. The circuit court did not make the findings required under § 971.14.

The circuit court failed to make findings regarding L.A.G.'s competency to refuse medications, making the order unlawful. In ordering involuntary medications, the circuit court only analyzed the *Sell* factors and did not discuss whether or not L.A.G. was incompetent to refuse medications. *See* (R.138:38-43; App.48-53; R.82:1-2; App.3-4).

Naturally, because the court did not address the requirements of § 971.14, it also failed to address any of the factors for ordering involuntary medication. *Virgil D. v. Rock Cnty.*, 189 Wis. 2d 1, 15, 524 N.W.2d 894 (1994). It also failed to make any factual findings that would facilitate appellate review of the issue. *See D.J.W.*, 391 Wis. 2d 231, ¶44 (reiterating the maxim that "the circuit court must make a record of its reasoning to ensure the soundness of its own decision making and to facilitate judicial review").

This Court should reverse based on the court's failure to make the required findings.

C. The State did not provide sufficient evidence that L.A.G. is incompetent to refuse medication.

In addition to the court's failure to make the necessary findings regarding L.A.G.'s competency to refuse medication, the State failed to provide sufficient evidence on the issue. When, as here, the circuit court must determine a patient's competency to refuse medication, "it must presume that the patient is competent to make that decision." *Virgil D.,* 189 Wis. 2d at 14. The State has the burden to overcome that presumption with clear and convincing evidence. *Id.*

In order to meet that burden, the State must first show that L.A.G. was told "the advantages and disadvantages of and alternatives to accepting the particular medication or treatment." Wis. Stat. § 971.14(3)(dm). The Wisconsin Supreme Court has ruled this language to be "largely self-explanatory." *Melanie L.*, 349 Wis. 2d 148, ¶67. The court further ruled:

> A person subject to a possible mental commitment or a possible involuntary medication order is entitled to receive from one or more medical professionals a reasonable explanation of proposed medication. The explanation should include why a particular drug is being prescribed, what the advantages of the drug are expected to be, what side effects may be anticipated or are possible, and whether there are reasonable alternatives to the prescribed medication. The explanation should be timely, and, ideally, it

> should be periodically repeated and reinforced. Medical professionals and other professionals should document the timing and frequency of their explanations so that, if necessary, they have documentary evidence to help establish this element in court.

Id.

The only time L.A.G.'s competency to refuse medication was discussed was when defense counsel cross-examined Dr. Considine on why the related boxes were not checked on the treatment plan. (R.138:18-20; App.28-30; R.72:3; App.8). Dr. Considine opined that L.A.G. was "unable of applying the understanding of the advantages and disadvantages and alternatives of medication to herself," but did not explain how she reached this opinion. (R. 138:19; App.29).

The only evidence of the required explanation was Dr. Considine testifying that she talked with L.A.G. about the advantages and disadvantages of medications and that L.A.G. "was provided written information regarding some of the medications on the treatment plan, such as [a]ripiprazole, [h]aloperidol, [and] [l]urasidone." (R.138:18; App.28).

Without more, there is no way to know if the explanation given by Dr. Considine was reasonable or adequate. Similar to *J.D.B.*, "all we know is that Dr. [Considine] tried, once, . . . in a general, non-individualized manner and for an unknown amount of time, to discuss with [L.A.G.] the advantages,

disadvantages, and alternatives to the proposed medications." *J.D.B.*, 2023AP715-CR, ¶71; App.86. Moreover, there are "serious doubts as to the adequacy of the explanation given" because the treatment plan does not appear to have been adequately individualized to L.A.G. *Id.*; App.86.

Melanie L.'s admonition that medical professionals need to be prepared to provide documentary evidence related to their medication explanations, and this Court's recent reaffirmance of that requirement in *J.D.B.*, both demonstrate why the testimony here was insufficient.

III. Exceptions to the mootness doctrine apply.

While L.A.G. has been found competent and is no longer subject to the involuntary medication order underlying this appeal,[27] exceptions to the mootness doctrine apply.

Typically, courts "will not consider a question the answer to which cannot have any practical legal effect upon an existing controversy." *State v. Leitner*, 2002 WI 77, ¶13, 253 Wis. 2d 449, 646 N.W.2d 341. Mootness is a question of law that appellate courts review *de novo*. *Id.* at ¶17. L.A.G. agrees that she is no longer subject to the underlying order and because it was stayed immediately, there are no costs associated with it. *See Sauk Cnty. v. S.A.M.*, 2022 WI 46, ¶23, 402 Wis. 2d 379, 975 N.W.2d 162.

[27] This is reflected in the CCAP entry dated 04-18-2024.

However, dismissing a moot case "is an act of judicial restraint rather than a jurisdictional requirement." *Id.*, ¶19. Sometimes, "because of their characteristics or procedural posture," issues present "a need for an answer that outweighs our concern for judicial economy." *Waukesha Cnty. v. S.L.L.*, 2019 WI 66, ¶15, 387 Wis. 2d 333, 929 N.W.2d 140.

Appellate courts recognize exceptions to the mootness doctrine when an issue: "(1) is of great public importance; (2) occurs so frequently that a definitive decision is necessary to guide circuit courts; (3) is likely to arise again and a decision of the court would alleviate uncertainty; or (4) will likely be repeated, but evades appellate review because the appellate review process cannot be completed or even undertaken in time to have a practical effect on the parties." *Melanie L.*, 349 Wis. 2d 148, ¶80. This case meets the final exception.

"The capable of repetition, yet evading review doctrine is limited to situations involving a reasonable expectation that the same complaining party would be subjected to the same action again." *Portage Cnty. v. J.W.K.*, 2019 WI 54, ¶30, 386 Wis. 2d 672, 927 N.W.2d 509 (internal quotations omitted) (emphasis in original).

It is reasonable to believe the State may try to involuntarily medicate L.A.G. in the future. This matter is still pending in the circuit court, and according to CCAP, is essentially in a holding pattern until another one of L.A.G.'s open cases goes to trial in

January 2025.[28] Also, there is nothing suggesting L.A.G. ever received medication that helped restore her to competency, despite Dr. Considine's testimony that there were no other less intrusive treatments that could achieve the same results as medication. (R.138:13; App.23).[29]

L.A.G. is currently competent; however, there were multiple opinions that medication was necessary to restore her, the most recent competency examination still offered a secondary diagnosis of schizophrenia, (R.104:10), and L.A.G. had a GAL appointed in a civil case in 2021. Given this history, it is reasonable to believe that L.A.G.'s competence may be raised in the future and the State will seek involuntary medication.

Moreover, the court of appeals has observed that these appeals are frustrated by the timelines not being crafted to facilitate timely appellate review. *J.D.B.*, 2023AP715-CR, ¶29n.7; App.67. While changes have been adopted, "[i]t remains to be seen if [Wis. Stat. § 809.109] will result in the resolution of appeals before the expiration of the underlying § 971.14 orders." *Id.*; App.67.

Finally, if L.A.G.'s competency were questioned in the future, but the reason for it were different (e.g. different symptoms or cause), a decision on the first

[28] CCAP entry from 07-09-2024.

[29] Notably, each of the doctors who opined that L.A.G. was incompetent stated outright or implied that medication would be necessary to restore her. (R.54:6); (R.64:3); (R.69:6).

Sell factor would be relevant under any circumstances. As such, this Court should reach the merits of this case.

CONCLUSION

Because the State failed to prove the *Sell* factors and the court failed to make findings that she was incompetent to refuse medication, L.A.G. respectfully requests the Court vacate the order for involuntary medication and order the circuit court deny the State's motion for the same.

Dated this 7th day of October, 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 6,905 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 7th day of October, 2024.

Signed:
Electronically signed by
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