STATE OF WISCONSIN

IN SUPREME COURT

Case Nos. 2024AP1789-CR, 2024AP1799-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

D. E. C.,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

D.E.C. appealed from an involuntary medication order in two cases—one in Jackson County and another in Clark County. The court of appeals affirmed in a published decision. *See State v. D.E.C.*, 2025 WI App 9. (Pet-App. 3–39.) The court of appeals dismissed the Jackson County case as moot. *Id.* ¶ 1 n.2. On the merits in the Clark County case, it rejected D.E.C.'s two arguments regarding the factors for involuntary medication under *Sell v. United States*, 539 U.S. 166 (2003).

First, D.E.C. argued that the State had failed to prove that involuntary medication would significantly further its interest in prosecuting him as required by *Sell* factor two. *See D.E.C.*, 2009 WI App 9, ¶¶ 37–38. He argued that the individualized treatment plan was deficient because "numerous medications are listed and the plan does not guarantee which particular medications will in fact be administered and in what sequence." *Id.* ¶ 39. The court of appeals rejected this argument because the treating physician had in fact provided all of the allegedly missing details. *See id.* ¶¶ 41–50. Consequently, the circuit court had a "medically informed record" to support involuntary medication. *Id.* ¶¶ 42–43 (citation omitted). It determined that D.E.C. "fail[ed] to provide a supported argument explaining how the due process safeguards required by *Sell* are not meaningfully addressed by interpreting the treatment plan here in light of the detailed, medically and individually based testimony provided by" the physician. *Id.* ¶ 56.

Second, D.E.C. argued that the State had failed to satisfy *Sell*'s fourth factor, requiring that the proposed involuntary medication be medically appropriate. *Id.* ¶ 65. The court of appeals applied forfeiture to most of D.E.C.'s arguments. *Id.* ¶¶ 67–76. To the extent D.E.C. advanced a preserved argument, it had been addressed by the physician's testimony. *Id.* ¶ 66.

D.E.C. now petitions this Court for review, raising two issues. This Court should deny review. This Court has recently accepted two involuntary medication cases, D.E.C.'s involuntary medication orders are moot, and neither of D.E.C.'s two claims provide an opportunity for law development. Moreover, the second claim has been raised for the first time in his petition for review.

ARGUMENT

D.E.C.'s petition for review does not meet this Court's criteria for granting review. Wis. Stat. § (Rule) 809.62(1r). This Court's "primary function is that of law defining and law development." *Cook v. Cook*, 208 Wis. 2d 166, 188–89, 560 N.W.2d 246 (1997). It does not grant review "merely to correct error or to examine alleged error." *Vollmer v. Luety*, 156 Wis. 2d 1, 14, 456 N.W.2d 797 (1990). Rather, this Court grants review "because the alleged error in issue has some substantial significance in [its] institutional law-making responsibility as set forth in the statute and constitution and as reflected in our rules for accepting cases on petition for review." *Id*. (footnote omitted). D.E.C.'s petition does not provide an opportunity for law development.

I. Practical considerations weigh against granting review.

This Court has two pragmatic reasons for declining to accept D.E.C.'s petition for review. This Court has already accepted two involuntary medication cases for review, and D.E.C.'s case is moot.

A. This Court has already accepted two cases in which to address issues pertaining to involuntary medication orders.

D.E.C. suggests that this Court accept his petition for review to address the standard for ordering involuntary

medication. (D.E.C.'s Pet. 3–5.) This Court, however, has recently granted review in two involuntary medication cases. First, this Court accepted review of the court of appeals' published decision in *State v. J.D.B.*, 2024 WI App 61, 414 Wis. 2d 108, 13 N.W.3d 525.[1] D.E.C. argues that the court of appeals erred by ruling contrary to *J.D.B.* (D.E.C.'s Pet. 4–5.) To the extent that this Court's opportunity for law development arises from *J.D.B.*, this Court has already seized it. Second, this Court accepted review of the court of appeals' published decision in *State v. N.K.B.*, 2024 WI App 63, 414 Wis. 2d 218, 14 N.W.3d 681.[2] Although *N.K.B.* does not directly implicate D.E.C.'s case, it provides this Court yet another opportunity to issue a law-developing decision regarding involuntary medication orders. This Court need not add a third involuntary medication case to its limited and discretionary docket.

B. D.E.C.'s involuntary medication orders are moot.

As D.E.C. acknowledges, both involuntary medication orders are moot. (D.E.C.'s Pet. 27.) Mootness supports denying review.

D.E.C. tries to resuscitate the dismissed Jackson County case—Appeal No. 2024AP1789-CR—for unclear reasons. (D.E.C.'s Pet. 27 n.15.) He should be barred from

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[1] *See State v. J. D. B. Appeal Number 2023AP715-CR*, Wis. Ct. & Ct. App. Access, https://wscca.wicourts.gov/caseDetails.do?caseNo=2023AP000715&cacheId=567B91CAEAE46EBF961450F52FB9D44B&recordCount=1&offset=0 (Choose "Case History") (last visited Feb. 14, 2025).

[2] *See State v. N. K. B. Appeal Number 2023AP722-CR*, Wis. Ct. & Ct. App. Access, https://wscca.wicourts.gov/caseDetails.do?caseNo=2023AP000722&cacheId=459CAC3098CB84AD5BA979A38A9CFED6&recordCount=1&offset=0 (Choose "Case History") (last visited Feb. 14, 2025).

doing so. The court of appeals determined that D.E.C. abandoned any attempt to apply a mootness exception to the Jackson County case. *D.E.C.*, 2009 WI App 9, ¶ 1 n.2. D.E.C. cannot raise an abandoned issue. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998).

D.E.C. acknowledges that the involuntary medication order in the Clark County case—Appeal No. 2024AP1799-CR—is now moot because his commitment order expired. (D.E.C.'s Pet. 27.) He asserts that this Court should apply a mootness exception because the issues presented by his involuntary medication order are likely to recur and evade review in the population at large. (D.E.C.'s Pet. 27–30.) That is not how his proposed mootness exception works.

"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 Cty. v. J.W.K.*, 2019 WI 54, ¶ 30, 386 Wis. 2d 672, 927 N.W.2d 509 (citation omitted). D.E.C. cannot show that he, personally, will be subject to the same involuntary medication order again because he cannot be recommitted under Wis. Stat. § 971.14. *See State v. Green*, 2021 WI App 18, ¶ 55, 396 Wis. 2d 658, 957 N.W.2d 583, *review granted*, 2022 WI 88, ¶ 18, *and aff'd in part*, 2022 WI 30, ¶ 18, 401 Wis. 2d 542, 973 N.W.2d 770. Accordingly, both of his cases are moot.

II. The court of appeals correctly applied prevailing law in rejecting D.E.C.'s *Sell* factor two argument.

D.E.C. argues that the court of appeals erred in declining to require the circuit court to explicitly incorporate the treating physician's testimony from the hearing into the involuntary medication order or individualized treatment plan. (D.E.C.'s Pet. 15–22.) This claim seeks mere error correction where none exists.

D.E.C. misstates the question raised by his appeal. He presupposes that a few pages of paper comprising the individualized treatment plan and involuntary medication order are the subject of his appeal. (*See* D.E.C.'s Pet. 6, 15–17, 19, 21–22.) From that premise, D.E.C. argues that the circuit court could not rely on the treating physician's testimony without reducing that reliance to writing in the order. (D.E.C.'s Pet. 17–20.) However, D.E.C.'s premise is wrong. The court of appeals affirmed the circuit court's decision that the State had proven the second *Sell* factor by clear and convincing evidence. *D.E.C.*, 2025 WI App 9, ¶ 62. In doing so, the court of appeals reaffirmed what was obvious from *Green* and *Sell*: whether the State has satisfied its burden "tak[es] into account the entire record," not just two documents. *Id.*

Tellingly, D.E.C. has not found any caselaw to support the essential premise of his argument. (D.E.C.'s Pet. 16–17.) He did not provide any supportive authorities in the court of appeals, either. *See D.E.C.*, 2025 WI App 9, ¶ 56. A litigant's bare insistence does not merit this Court's time.

The court of appeals issued an opinion that correctly applied *Green* and *Sell*. In *Green*, the court of appeals reversed an involuntary medication order because the State "failed to present an individual treatment plan based on a medically informed record." *Green*, 396 Wis. 2d 658, ¶ 2. *Green* made it plain that it considered the record as a whole, not merely what was written in the individualized treatment plan or involuntary medication order. To that end, it explained that the record, while insufficient, included "testimony from a non-treating psychiatrist." *Id.* ¶ 41. On *Sell* factor three, *Green* concluded that the State satisfied its burden "primarily" through the physician's "testimony that 'non-medication interventions are unlikely to restore the defendant's capacities.'" *Id.* ¶ 30. Here, consistent with *Green*, the court of appeals ruled that the treating physician's testimony comprised an important part of the "medically informed

record" that supported involuntary medication. *See D.E.C.*, 2025 WI App 9, ¶ 42–43, 75.

The U.S. Supreme Court in *Sell* shared *Green*'s view on the use of physician testimony. The federal magistrate judge who recommended the contested involuntary medication order concluded that the government had satisfied its burden through physician testimony presented at a hearing. *Sell*, 539 U.S. at 172–73. In reversing, the Supreme Court did not cast doubt on the relevance of physician testimony. Like in *Green*, it ruled that the physician's testimony was substantively insufficient in that case, not *per se* insufficient as a general procedural matter, because it addressed the defendant's dangerousness rather than his competency. *Id.* at 184–85.

This Court should not review D.E.C.'s first claim because he lacks any supportive authorities, and the court of appeals faithfully applied *Green* and *Sell*.

III. This Court should not accept review of a "constitutional crisis" raised for the first time in the petition for review.

D.E.C.'s second claim has been raised for the first time in his petition for review. He argues that due process required the State to provide defense counsel with the "expert's basis for requesting specific medications," apparently consisting of every treatise the physician considered, relevant studies for each proposed medication, and any other relevant sources. (D.E.C.'s Pet. 22–26.) In effect, he demands that the State provide the defense any potential materials that could be used to cross-examine the physician prior to the hearing.

Critically, D.E.C. concedes—in a footnote—that what he now demands was not required. Under Wis. Stat. § 907.05, an expert witness, like a treating physician, does not have to disclose the facts or data underlying the expert's opinion unless ordered by a court. (D.E.C.'s Pet. 23 n.11.) The only way that he can support his new argument is by claiming that

Wis. Stat. § 907.05 is unconstitutional as applied to *all involuntary medication* cases—a sweeping declaration that is also consigned to a footnote. (D.E.C.'s Pet. 23 n.11.)

D.E.C. acknowledges that he did not raise this issue in the circuit court. (D.E.C.'s Pet. 22 n.10.) He asserts that he "sufficiently flagged" it in the court of appeals, but he does not cite to any of his prior filings. (D.E.C.'s Pet. 22 n.10.) This Court will not find any point in the circuit court or the court of appeals where D.E.C. argued that Wis. Stat. § 907.05 is unconstitutional as applied to all involuntary medication proceedings. At most, he stated in his reply brief that applying forfeiture to his *Sell* factor four arguments would create a "constitutional crisis" by shifting the State's burden to the defense. (D.E.C.'s Reply Br. 11–15.)[3] That argument materially differs from claiming that Wis. Stat. § 907.05 is unconstitutional as applied to all involuntary medication cases. It was also an improper means of raising a new argument. An appellant may not "raise an issue for the first time in its reply brief." *A.O. Smith*, 222 Wis. 2d at 492.

Under Wis. Stat. § (Rule) 809.109(2)(g), D.E.C. could have raised his as-applied challenge in a postdisposition motion. Indeed, he was obligated to. He was required to file a postdisposition motion before the notice of appeal "unless the grounds for seeking relief are sufficiency of the evidence or issues previously raised." Wis. Stat. § (Rule) 809.109(2)(h). D.E.C. opted to immediately file a notice of appeal. Having

[3] The court of appeals succinctly dispatched that argument: "The fact that D.E.C. can now identify publicly available medical details that might have provided additional material for cross-examination does not demonstrate a constitutional infirmity. The State's burden did not require the prosecutor to elicit testimony . . . addressing all potentially disputable aspects of the proposed dosages in the treatment plan." *State v. D.E.C.*, 2025 WI App 9, ¶ 75.

made that choice, he may not raise new claims in his petition for review. This Court should therefore deny review.

CONCLUSION

This Court should deny D.E.C.'s petition for review.

Dated this 20th day of February 2025.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 2,102 words.

Dated this 20th day of February 2025.

Electronically signed by:

Michael J. Conway
MICHAEL J. CONWAY

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 20th day of February 2025.

Electronically signed by:

Michael J. Conway
MICHAEL J. CONWAY