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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2024AP2177-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DESMOND J. WILHITE,

Defendant-Appellant.

APPEAL FROM AN ORDER REVOKING CONDITIONAL RELEASE, ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE JOSANN M. REYNOLDS, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUES PRESENTED

Through a plea agreement, Desmond J. Wilhite entered a plea of not guilty by reason of mental disease or defect (NGI) to a charge of threatening an officer, and several other charges were dismissed. The circuit court placed Wilhite on conditional release. Alleging that he violated the rules of conditional release, the Department of Health Services (DHS) moved to revoke Wilhite's conditional release under Wis. Stat. § 971.17(3)(e). After a hearing, the circuit court found that Wilhite violated his rules and revoked his conditional release.

For the first time on appeal, Wilhite contends that section 971.17(3)(e) is facially unconstitutional because it allowed for revocation of his conditional release based on a violation of the rules or conditions of conditional release without proof of dangerousness. He also asserts that the State presented insufficient evidence to support the circuit court's order revoking his conditional release.

The State reorders the issues on appeal.[1]

1. Did the State prove by clear and convincing evidence that Wilhite violated a rule or condition of release?

The circuit court answered: Yes.

This Court should answer: Yes.

2. Is Wilhite's constitutional challenge forfeited, and if not, has Wilhite shown beyond a reasonable doubt that section 971.17(3)(e) is facially unconstitutional?

The circuit court did not answer this question because Wilhite did not raise it there.

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[1] Under the constitutional avoidance doctrine, this Court "ordinarily resolves a case on available non-constitutional grounds." *State v. Scott*, 2018 WI 74, ¶ 12, 382 Wis. 2d 476, 914 N.W.2d 141. If the evidence to support revocation was insufficient, then this Court would not decide Wilhite's constitutional claim.

This Court should find the issue forfeited, but if not, it should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not seek oral argument or publication.

STATEMENT OF THE CASE

A. The State charged Wilhite, who later entered an NGI plea after being restored to competency.

The State charged Wilhite with threat to a law enforcement officer, resisting an officer, criminal damage to property, and disorderly conduct. (R. 2:1–2.) According to the complaint, MYA reported that he and Wilhite were together in a living room when Wilhite challenged him to a fight and later threatened to "kick [his] ass" and kill him. (R. 2:2.) After MYA locked Wilhite out of the house, Wilhite broke down a door to the garage. (R. 2:2.) MYA believed that Wilhite was going to assault him with a dolly that Wilhite had picked up. (R. 2:3.) Although Wilhite initially complied with an officer's request to place his hands behind his back, Wilhite spun around and pushed away from the officer. (R. 2:3.) Even after the officer took Wilhite to the ground, Wilhite refused commands to lie on his stomach and continued to thrash after being handcuffed. (R. 2:3.) When officers walked Wilhite to the car, Wilhite threatened to get a gun after he got out of jail and shoot the officer in the face. (R. 2:3.)

After a competency evaluation (R. 17:1; 19), the circuit court determined that Wilhite was not competent but likely to regain competency (R. 22:1–2). After being found competent, the circuit court found probable cause at a preliminary examination and bound him over for trial. (R. 174:10.) After another court-ordered competency

evaluation (R. 46; 51), the circuit court determined that Wilhite was competent to proceed (R. 175:3).

The State subsequently charged Wilhite in a second case, Dane County case no. 2020CF500, with fourth-degree sexual assault, disorderly conduct, and two counts of misdemeanor bail jumping in connection with this incident. (R. 63:15.) Wilhite's second case concerned allegations that officers responded to a group home after Wilhite called police and reported that he had raped a woman. (R. 63:16.) The woman reported that Wilhite had reached around her waist, grabbed her breasts and her pants near her vagina and that Wilhite pulled his pants down, exposing his penis. (R. 63:16.) Wilhite later told his expert, who prepared a report in support of his insanity defense, that he gave the staffer a hug, that they fell, and that he did nothing wrong. (R. 63:15.)

Wilhite entered into a plea agreement to resolve both cases. (R. 173:3–4.) Wilhite agreed to "plead guilty but not guilty by reason of mental disease or defect" to felony battery or threat to a law enforcement officer in this case and disorderly conduct and two counts of misdemeanor bail jumping in his other case, no. 2020CF500. (R. 64:1–2; 173:3–4.)

The circuit court asked Wilhite about both charged incidents during the plea colloquy. As to this case, Wilhite agreed that the police went to a group home, that he damaged a doorway, that he fought with the police, and that he threatened and swore at them. (R. 173:5.) As to the second case, Wilhite could not recall making inappropriate comments to a nurse who was helping him, but he did recall that he was loud and aggressive, that the police had to be called, and that his conduct caused a disturbance and violated a condition of his bail. (R. 173:6–7.) Based on its colloquy with Wilhite, the circuit court accepted Wilhite's pleas and found him not guilty by reason of mental disease or defect. (R. 173:12–13.) During the colloquy, the circuit court noted the report of the defense

expert, Psychologist Michael Spierer, who opined that Wilhite was not able to conform his conduct to the law. (R. 63:16–17; 173:13.)

The circuit court issued an order for commitment and an order for a predisposition investigation. (R. 65; 67.) Nicole Whiteaker prepared a conditional release plan on DHS's behalf and recommended against conditional release because Wilhite posed "a significant risk of bodily harm to himself or others or of serious property damage." (R. 71:8.) Wilhite's expert, Dr. Craig Schoenecker, opined that Wilhite did not pose a danger to himself, others, or property and could be placed on conditional release. (R. 80:5; 182:4.)

At a hearing, the State agreed with Dr. Schoenecker's conclusions and stipulated to Wilhite's conditional release. (R. 182:3–5.) The circuit court accepted the stipulation and ordered preparation of a conditional release plan. (R. 87; 182:9.) Whiteaker subsequently submitted a proposed release plan to the circuit court, which set forth the conditions of Wilhite's release, including his residential placement, treatment needs, and the Department of Correction's (DOC) management of his supervision. (R. 90:2–4.) Based on the parties' stipulation, the circuit court ordered placement on conditional release and set the length of Wilhite's commitment to three years in this case.[2] (R. 93:1; 94:2; 96:1.)

B. DHS moved in February 2023 to revoke Wilhite's conditional release but later withdrew the motion.

In February 2023, DHS petitioned for revocation of conditional release based on allegations that Wilhite threatened to knock out the teeth of a group home employee and threw large chunks of ice at the employee's car. (R. 97;

[2] Wilhite's commitment is scheduled to expire on June 2, 2025. (R. 153:1.)

98:1.) The conditional release team moved to withdraw its petition to revoke his conditional release after adjusting his treatment plan. (R. 99.)

C. DHS again moved to revoke Wilhite's conditional release in October 2023, but based on the parties' stipulation, the circuit court withdrew the petition.

In October 2023, DHS petitioned for revocation of Wilhite's conditional release a second time based on allegations that he threatened a group home staff member by threatening to beat him and that he assaulted a group home staff member by throwing a cup of liquid at the staffer and shoving the staffer. (R. 100; 101:1.) In November 2023, Jacob Kornelik, a conditional release case manager, filed an adjustment summary describing Wilhite's behavior on conditional release and recommended its revocation. (R. 105:2–6.)

Wilhite's counsel proposed an alternative to revocation based on a residential treatment provider's willingness to accept "Wilhite back into residential agency." (R. 111:1–3.) Wilhite and the State stipulated to the proposed alternative to revocation and that Wilhite's conditional release should not be revoked. (R. 112; 180:4.) Based on this stipulation, the circuit court ordered the petition for revocation of conditional release withdrawn. (R. 115:1–2; 180:4–5.)

D. The circuit court granted DHS's 2024 petition to revoke conditional release.

In January 2024, DHS petitioned for revocation of Wilhite's supervised release a third time based on allegations that he violated his rules of supervised release by acting disorderly when he broke a window, kicked a bucket, threw OxiClean on the floor, and got into a group home employee's face. (R. 117:1–2; 118.)

At a hearing on the revocation petition, the circuit court determined that section 971.17(3) required the State to show a violation of a rule or condition of release or to show dangerousness,[3] and that a showing of dangerousness was not required. (R. 178:25–26, 35.) Several witnesses testified at the revocation hearing.

Nicole Brierly, a DOC probation agent who supervised Wilhite, testified about her recommendation for conditional release based on Wilhite's increased anger and outbursts. (R. 178:6.) Brierly was familiar with Wilhite's history at the group home. (R. 178.10.) Brierly recommended that Wilhite receive treatment at Mendota Mental Health Institute (Mendota), including "one-on-one therapy and treatment" as well as counseling, which would help him in the community. (R. 178:9–10.)

Tyler Mohr, a community integration specialist, testified about the January 11, 2024 incident. (R. 184:9.) Wilhite became upset when Mohr asked him to turn down music he was listening to, while pounding on a table. (R. 184:9–10.) Wilhite ripped a phone away from Mohr's hands and then returned it to Mohr. (R. 184:10.) Mohr characterized Wilhite as aggressive and described Wilhite as getting close to his face, putting a finger in his face, and calling him profanities. (R. 184:12–13.) Wilhite grabbed a phone, locked himself in his room, and started to make calls, which was against the rules, unless Wilhite's supervisor, Jonathan Beckett, approved the calls. (R. 184:10, 12.) After Wilhite returned the phone, he asked for permission to go outside. (R. 184:10.) When Mohr denied Wilhite's request out of concern that he was not "safe going in the community" and that he could endanger somebody, Wilhite tried to go out the

[3] Like the circuit court, the State uses "dangerousness" as shorthand to refer to Wis. Stat. § 971.17(3)(e)'s language: "the safety of the person or others."

window. (R. 184:10.) Wilhite screamed profanities when Mohr spoke to Beckett about the situation. (R. 184:11.)

Beckett testified that he was Wilhite's service coordinator and responsible for Wilhite's medical needs and care management reporting. (R. 184:20–21.) Beckett had worked with Wilhite for several years. (R. 184:23.) Regarding the January 12, 2024 incident, Beckett met with Wilhite in an effort to redirect him from talking about the previous day's incident. (R. 184:22.) Wilhite accused Beckett of not listening to him, asked for a new group home, and told Beckett to take him to jail. (R. 184:24–25.) Wilhite was banging on things and stomping around the home. (R. 184:25.) Wilhite began throwing things around, including a phone, kicked a mop bucket, threatened to jump out the window, and "was literally stating the rules that he has while he broke them." (R. 184:26.) Beckett told Wilhite that he would be revoked if he broke the rules. (R. 184:30.) Noting Wilhite's history, including his testing of boundaries and extensive past property damage, Beckett believed that stabilization was necessary for Wilhite. (R. 184:27–28.)

The court received into evidence the DHS "Conditional Release Rules and Conditions" form, which Beckett reviewed with Wilhite and which Wilhite signed. (R. 134:1–2; 184:47–48.) Beckett explained that his group home and care management rules did not allow Wilhite to make outgoing calls when he was not engaging in safe behavior. (R. 184:41–42, 50.) Beckett explained that DHS Rule 6 required Wilhite to comply with the rules of the facility where he was being treated. (R. 184:50.)

Jacob Kornelik, Wilhite's conditional release manager, testified that he prepared an adjustment summary report, which documented Wilhite's behaviors while on conditional release and which was admitted into evidence without objection. (R. 128; 178:16; 184:55.) Kornelik explained that Wilhite was subject to conditional release rules and

conditions. (R. 134; 178:26.) Kornelik noted that Wilhite had 15 incident reports and was taken into custody on three occasions. (R. 128:7; 184:56.) The treatment team, which included a DHS conditional release specialist, Wilhite's probation agent, and Kornelik, concluded that Wilhite's conditional release should be revoked and that he should be placed at Mendota for treatment that will help him when he returns to the community. (R. 184:56.) Kornelik believed that Wilhite's behavior appeared "to be escalating from verbal threats, inappropriate language, and property damage, to physically assaulting a staff members [sic] of the group home." (R. 128:7; 184:63.) Kornelik noted that his adjustment summary documented prior incidents of behavior, including assaulting staff members. (R. 184:64.)

Wilhite testified that he was aware of the rules about making phone calls. (R. 179:8.) As to the January 11 incident, Wilhite believed that Mohr got into his "boundary space," that he picked up a phone to call the agent, that Mohr snatched the phone from his hands, and that Wilhite then picked up the house phone and called his social worker. (R. 179:11.) Wilhite denied using profanities against Mohr or threatening him. (R. 179:11–12.) As to the January 12 incident, Wilhite claimed that he accidentally knocked over the mop bucket when he went into the kitchen after Beckett would not talk about the prior day's incident. (R. 179:13–14.) Wilhite claimed that he just wanted to get outside and that the window frame broke by accident. (R. 179:15.) Wilhite believed that he understood the rules of the house. (R. 179:18.)

Wilhite's great aunt testified that several male family members have a genetic disorder and that they have a high level of anxiety that sometimes leads to outbursts. (R. 179:20.) The great aunt noted that their behaviors can escalate when they are confronted and that, "You just have to be prepared all the time and be watchful." (R. 179:21–22.) Wilhite's

grandmother testified that she understood that Wilhite was not allowed to make calls from the group home. (R. 178:34.)

The circuit court determined that the State "met its burden by clear and convincing evidence that [Wilhite] violated his rules." (R. 178:46.) In its oral ruling, the circuit court noted Wilhite's "history of aggression and explosiveness," including in his two cases. (R. 179:46.) While noting that his recent behavior is "not the most serious," the circuit court observed that three revocation petitions had been filed against Wilhite in the past 12 months and that two were withdrawn to give Wilhite second and third chances. (R. 179:47–48.) It noted Brierly's testimony that Wilhite's "temper tantrums are increasing" and that his needs "cannot be met in the group home." (R. 179:46–47.) The circuit court expressed its concern that Wilhite's behavior was "escalating" and revoked his conditional release. (R. 179:47–48.)

Wilhite appeals.

STANDARDS OF REVIEW

Wilhite challenges the sufficiency of the evidence offered to support the circuit court's order revoking his conditional release. When this Court reviews a decision related to revocation of an insanity acquittee's conditional release, it defers to the circuit court's findings of fact unless they are clearly erroneous. *State v. Jefferson*, 163 Wis. 2d 332, 337–38, 471 N.W.2d 274 (Ct. App. 1991). "The trial court's application of those facts to the law" presents a legal question that this Court reviews independently. *Id.*[4]

[4] The State accepts that *Jefferson*'s clearly erroneous standard controls the standard of review. *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). But more recent cases interpreting other provisions in Wis. Stat. § 971.17 related to conditional release apply the sufficiency standard. *See, e.g.*, *State*

Wilhite's sufficiency challenge and constitutional challenge require this Court to interpret Wis. Stat. § 971.17(3). Statutory interpretation presents a question of law that this Court reviews independently. *State v. Klapps*, 2021 WI App 5, ¶ 15, 395 Wis. 2d 743, 954 N.W.2d 38. This Court looks to the statute's language and, if its meaning is plain, stops its inquiry. *State ex rel. Kalal v. Circuit Ct. for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning . . . ." *Id.* Not only is statutory language to be "interpreted in the context in which it is used," it is to be interpreted "reasonably, to avoid absurd or unreasonable results." *Id.* ¶ 46.

Wilhite raises a facial challenge to section 971.17(3)(e)'s revocation standard. The constitutionality of a statute presents a legal question that this Court determines independently. *State v. Prado*, 2021 WI 64, ¶ 17, 397 Wis. 2d 719, 960 N.W.2d 869. This Court presumes that a statute is constitutional. *Id.* ¶ 37. A party challenging a statute's constitutionality bears the burden of overcoming this presumption and must prove that the statute is unconstitutional beyond a reasonable doubt. *Id.* "In a facial challenge, the 'challenger must establish, beyond a reasonable doubt, that there are no possible applications or interpretations of the statute which would be constitutional.'"

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v. Randall (*Randall III*), 2011 WI App 102, ¶¶ 13–14, 336 Wis. 2d 399, 802 N.W.2d 194 (review of decision denying a conditional release petition); *State v. Wilinski*, 2008 WI App 170, ¶ 12, 314 Wis. 2d 643, 762 N.W.2d 399 (review of decision ordering an initial commitment and institutional placement). Indeed, although Wilhite references *Jefferson*'s clearly erroneous standard, he frames the issue by reference to the sufficiency standard. (Wilhite's Br. 19.) The State preserves the standard of review question for Wisconsin Supreme Court review.

State v. Pocian, 2012 WI App 58, ¶ 6, 341 Wis. 2d 380, 814 N.W.2d 894 (citation omitted).

ARGUMENT

I. The State proved by clear and convincing evidence that Wilhite violated a condition or rule of his conditional release.

A. Section 971.17(3)(e) authorized the court to revoke conditional release based on a violation of the rules or conditions without a showing of dangerousness.

After a defendant is found not guilty by reason of mental disease or defect, the circuit court proceeds under Wis. Stat. § 971.17's commitment provisions. Wis. Stat. § 971.165(3)(b). Under Wis. Stat. § 971.17(2)(a), the circuit court must enter an initial commitment order and, assuming no further investigation or examination is needed, proceeds under section 971.17(3). Based on its consideration of certain criteria, the circuit court issues a commitment order that specifies whether the insanity acquittee is committed to institutional care or placed on conditional release. Wis. Stat. § 971.17(3)(a). When the circuit court specifies conditional release, it notifies DHS, which then prepares a conditional release plan that addresses the insanity acquittee's "need, if any, for supervision, medication, community support services, residential services, vocational services, and alcohol or other drug abuse treatment." Wis. Stat. § 971.17(3)(d). The order for conditional release places the insanity acquittee in DHS's custody and control. Wis. Stat. § 971.17(3)(e). "A conditionally released person is subject to the conditions set by the court and to the rules of [DHS]." *Id.*

Section 971.17(3)(e) guides revocation of an insanity acquittee's conditional release. First, DHS may take into custody an insanity acquittee upon an allegation "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." *Id*. Within 72 hours of the detention, DHS must "submit a statement showing probable cause of the detention and a petition to revoke the order for conditional release to the committing court." *Id*.

At a hearing on the petition,

> [t]he state 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. If the court determines after hearing 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, it may revoke the order for conditional release and order that the released person be placed in an appropriate institution.

Wis. Stat. § 971.17(3)(e) (emphasis added). Interpreting this language, this Court explained, "at the revocation hearing, the court [is] charged with reviewing the evidence to determine whether [the insanity acquittee] had violated any of the rules of his conditional release *or* presented a danger to himself or others." *Klapps*, 395 Wis. 2d 743, ¶ 37 (emphasis added).

An examination of the prior statute guiding revocation reinforces the conclusion that section 971.17(3)(e) permits a circuit court to revoke conditional release based on *either* dangerousness *or* a violation of rule or condition. Before the Legislature created Wis. Stat. § 971.17(3)(e) through 1989 Wis. Act 334, the revocation of conditional release required a showing of both a condition violation *and* dangerousness. Wisconsin Stat. § 971.17(3) (1987–88) mandated that the circuit court revoke conditional release when "the conditions of release have not been fulfilled *and* that the safety of the person or safety of others requires" it. *Id*. (emphasis added).

Thus, section 971.17(3)(e)'s plain language authorizes a circuit court to revoke conditional release based on a showing that the insanity acquittee has violated a rule or condition of conditional release OR is dangerous.

B. The State proved by clear and convincing evidence that Wilhite violated a rule or condition of release.

Based on section 971.17(3)(e)'s plain language, the circuit court determined that it could revoke Wilhite's supervision based on either a violation of the conditions or rules *or* a showing of dangerousness. (R. 178:35–36; 184:7.) Based on the hearing evidence, the circuit court determined that the State proved by clear and convincing evidence that Wilhite violated the rules or condition of conditional release and that it did not have to find Wilhite dangerous. (R. 179:46.) The record supports this determination.

To begin, Wilhite was required to comply with the rules and conditions of his conditional release. Beckett, his group home supervisor, went through the DHS Conditional Release Rules and Conditions form with Wilhite, who signed it. (R. 134; 184:47–48.) Relevant to Wilhite's case, the DHS rules and conditions include:

> 6. You shall abide by all rules of any detention or mental health facility in which you may be confined and or treated.
>
> . . . .
>
> 19. You shall treat all members of your Conditional Release team, staff and members of your group home . . . and treatment providers with courtesy and respect.
>
> 20. You shall not engage in any verbal, written or physical behavior that is abusive, harassing, threatening, or violent in nature including but not limited to property damage or psychological, emotional, sexual, or economic intimidation.

> 20. [sic] You shall not have physical contact with anyone without their permission. This includes but is not limited to grabbing, hitting, kicking and/or pushing your body against another person's body.

(R. 134:1–2.) Mohr explained that Wilhite was not allowed to make calls without approval from a supervisor or his case manager. (R. 184:10, 12, 17.) Because the rule about phone calls was a rule of Wilhite's facility, Beckett testified that unapproved calls violated DHS Rule 6. (R. 184:48–50.) Wilhite understood the group home's rules and knew that he was subject to the home's rules about phone use. (R. 179:8, 18.)

Wilhite's conduct on January 11 and 12 violated the DHS rules. As detailed in Mohr's testimony and report, on January 11, Wilhite ripped a phone from Mohr's hand, put his fingers in Mohr's face, called him profanities, placed eight unapproved phone calls, and went outside without permission. (R. 127:1; 184:9–13.) Wilhite's act of grabbing the phone violated Rule 20, which prohibited physical contact with anyone without their permission. (R. 134:2.) His act of placing his finger in Mohr's face and shouting profanities violated Rule 20, which prohibited verbal behavior that was "abusive, harassing, threatening, or violent." (R. 134:2.) His conduct also violated Rule 19, which required Wilhite to treat his providers "with courtesy and respect." (R. 134:2.) His act of placing unapproved calls violated Rule 6, which required Wilhite to comply with the group home's rules, including rules about phone calls. (R. 134:1; 184:48.) Finally, Wilhite's act of going outside violated Rule 6 after Mohr denied Wilhite's request based on his assessment that Wilhite was a danger to himself or others. (R. 184:10.)

Wilhite's January 12 interactions with Beckett also violated the rules. As detailed in Beckett's report and testimony, when Wilhite did not believe that Beckett was listening to him, he became upset and started throwing things

around the house, kicking things over, threatening to jump out the window, and damaging the window by slamming it shut several times. (R. 126:1; 184:22–28.) Beckett noted that Wilhite "was literally stating the rules as he broke them." (R. 184:26.) Wilhite admitted damaging the window frame and knocking over things in the basement. (R. 179:15–16.) Wilhite's conduct was discourteous and disrespectful in violation of Rule 19 and was abusive, harassing, and threatening in violation of Rule 20. (R. 134:2.)

Contrary to his argument (Wilhite's Br. 23), the circuit court, sitting as the fact finder, had sufficient evidence from which to conclude that the State proved by clear and convincing evidence that Wilhite violated his rules and conditions of release.

In challenging the sufficiency of the evidence, Wilhite notes the court's comment that the conduct was not "serious." (Wilhite's Br. 23.) Wilhite takes this comment out of context. Referencing Wilhite's January 12 conduct, the circuit court explained, "those are not the most serious *but my concern is that it's escalating*. My concern is that they petitioned three times now and withdrew the other petitions to bring him back to let him try again and yet here we are." (R. 179:47–48 (emphasis added).) The record demonstrates that Wilhite's conduct was escalating. Furthermore, section 971.17(3)(e) does not require a "serious" violation of rules or conditions for a court to revoke release.

As the circuit court noted, DHS had filed two previous petitions to revoke conditional release, which were later withdrawn, and Wilhite was returned to his group home. *See supra* Statement of the Case, Sections B & C. Moreover, Agent Brierly testified that Wilhite's "anger has increased" and that his "outbursts have come back," as evidenced by property

damage at the group home and making threats. (R. 178:5).[5] She recommended that Wilhite be taken into custody due his threats and that institutional treatment, including therapy and counseling, would provide "the skills he needs [that] would help him greatly in the community." (R. 178:5–6, 9–10.)

Kornelik, Wilhite's conditional release coordinator, agreed that Wilhite should be revoked for the purpose of receiving treatment based on his assessment that Wilhite's behavior was escalating "from verbal threats, inappropriate language, and property damage, to physically assaulting a staff members [sic] of the group home." (R. 128:7; 184:63.) Kornelik's adjustment summary of conditional release, which was admitted into evidence without objection, supported his opinion that Wilhite's behavior was escalating. (R. 128; 184:55.) While on conditional release, Wilhite had 15 incident reports and was taken into custody on three occasions. (R. 128:7; 184:56.) The report documented several incidents, including threatening "the program manager with violence and [throwing] ice at his car," resulting in him being taken into custody; absconding from the group home, including on January 13, March 31, September 20, and October 16; on October 16, 2023, attempting to provoke another resident to fight him; cornering a staff member, throwing a cup of liquid at the staff member, using his body to push the staff member, and then calling the police and asking to be taken into custody because he was threatening the staff; and on December 27, verbally threatening staff. (R. 128:2–6.)

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[5] Although Wilhite objected to Brierly's testimony (R. 178:6), the circuit court later determined, based on a decision from this Court, that the formal rules of evidence do not apply to a proceeding revoking conditional release. (R. 184:3–4 (citing *State v. Mahone*, 127 Wis. 2d 364, 372, 379 N.W.2d 878 (Ct. App. 1985) (equating procedures to probation revocation proceeding where rules do not apply)).) Wilhite does not challenge this ruling on appeal, and the State does not address it further.

The court's observations about Wilhite's escalating behavior were consistent with his aunt's experience that his behavior could escalate and that "[y]ou just have to be prepared all the time and be watchful." (R. 179:20–22.)

Not only did the record demonstrate that Wilhite violated his conditions and rules of release, but it also supports the circuit court's assessment that Wilhite's conduct was escalating toward physical violence. Its concerns were not merely hypothetical. Referencing his two cases that resulted in his insanity acquittal, it noted that Wilhite had a "history of aggression and explosiveness." (R. 179:46.) During the plea colloquy, Wilhite admitted damaging a doorway and then fighting with and threatening responding officers at one group home and, in the second incident, becoming physically aggressive with a nurse at the group home. (R. 173:5–7.) The circuit court may not have affirmatively found dangerousness, but contrary to Wilhite's argument (Wilhite's Br. 20), the record demonstrated that his conduct escalated to dangerousness. Therefore, even if dangerousness were still a conjunctive requirement under the statute (which it is not), the circuit court's ruling revoking release would have been correct.

Neither Wilhite's release team nor the circuit court should have had to wait for Wilhite to physically harm himself or others before revoking his conditional release. Under the circumstances, the circuit court reasonably exercised its discretion under section 971.17(3)(e) ("may revoke") when it revoked Wilhite.[6]

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[6] If this Court determines that proof of dangerousness is required to revoke and that the record is insufficient, then this Court should remand the matter for further proceedings. Because Wilhite failed to raise the issue in the circuit court, the State and the circuit court believed that revocation could occur based on a rules violation alone. *See infra* Section II.A.1. and C.

II. Wilhite's facial constitutional challenge to section 971.17(3)(e) fails on procedural grounds and on the merits.

A. Wilhite forfeited this Court's review of his constitutional challenge.

1. Wisconsin Stat. § 971.17(7m) required Wilhite to raise his constitutional challenge in circuit court.

Wisconsin Stat. § 971.17(7m) provides that an NGI committee "shall file a motion for postdisposition relief in the circuit court before a notice of appeal is filed unless the grounds for seeking relief are sufficiency of the evidence or issues previously raised." This language is mandatory: "[W]e conclude that the plain meaning of Wis. Stat. § 971.17(7m) requires a postdisposition motion when an issue has not been previously raised." *See Klapps*, 395 Wis. 2d 743, ¶ 20.

Klapps involved an NGI committee who argued on appeal that the circuit court was biased in revoking his conditional release. *Klapps*, 395 Wis. 2d 743, ¶¶ 12, 16. He did not object to the court's actions at his evidentiary hearing, nor did he raise his challenge in a postdisposition motion. *Id.* ¶¶ 12, 14. Klapps contended that the error was structural and did not need to be preserved at the circuit court. *Id.* ¶ 16. This Court disagreed, noting that the requirement that new issues be raised in a postdisposition motion "is not a mere rule of convenience." *Id.* ¶ 25. Rather, "it is essential to the orderly administration of justice, as it promotes efficiency and justice by giving the parties and the trial judge notice" and the opportunity "to correct or avoid the alleged error . . . all to the end of eliminating the need for appeal." *Id.*

Wilhite, as the party raising a challenge to section 971.17(3)(e)'s constitutionality, cannot meet his burden of demonstrating that he preserved the issue in the circuit court. *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611

N.W.2d 727. He does not even allege that he asserted his constitutional challenge in the circuit court before or during revocation proceedings. (Wilhite's Br. 7–18.) And Wilhite did not file a section 971.17(7m) postdisposition motion raising his constitutional challenge. (R. 198.)

Wilhite's failure to develop his claim in the circuit court deprived the State and the circuit court notice of the alleged error and an opportunity to correct or avoid any error, which could have made this appeal unnecessary. *Klapps*, 395 Wis. 2d 743, ¶ 25. For example, had Wilhite asserted before trial that the Due Process Clause foreclosed revocation of conditional release without a showing of dangerousness, the State could have litigated the revocation hearing differently by presenting additional evidence of dangerousness. And instead of deciding the case based on a rule or condition violation (R. 179:46), the circuit court could have determined explicitly whether Wilhite was dangerous under section 971.17(3)(e). Moreover, the circuit court might have chosen to exercise its discretion differently and declined to revoke release if the State could only prove a rules violation and not dangerousness. Wis. Stat. § 917.17(3)(e) ("it *may* revoke").

Similarly, had Wilhite raised his constitutional claim through a section 971.17(7m) postdisposition motion, the circuit court could have addressed his claim by reopening the evidence to allow the State to offer evidence of dangerousness, by reconsidering its decision to revoke conditional release, or by deciding the merits of his constitutional claim.

And if Wilhite did not realize that he had a constitutional claim until after he filed his notice of appeal, he could have asked this Court "for remand to the circuit court for action upon specific issues," and this Court could then have reviewed the circuit court's order entered after remand. Wis. Stat. §§ (Rule) 808.075(5), (8).

This Court should conclude, as it did in *Klapps*, 395 Wis. 2d 743, ¶¶ 26–29, that Wilhite forfeited appellate review of his constitutional challenge to the revocation of his conditional release by failing to preserve it in the circuit court.[7]

2. Wilhite's noncompliance with the Declaratory Judgments Act, Wis. Stat. § 806.04(11), forecloses judicial review of his facial challenge.

In addition to Wilhite's forfeiture of his constitutional claim, this Court should decline review for another reason: Wilhite's noncompliance with section 806.04(11).

Section 806.04(11) requires a party challenging a statute's constitutionality to serve the Attorney General with a copy of the proceeding. And when a challenge relates to a statute's construction or validity, this section, as amended by 2017 Wis. Act 369, also requires service of a copy of the proceedings on certain legislative officials, including "the speaker of the assembly, the president of the senate, and the senate majority leader." Wis. Stat. § 806.04(11).

In *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 116, 280 N.W.2d 757 (1979), the Wisconsin Supreme Court recognized that even when an "appeal does not involve an action for declaratory judgment, a pronouncement by this court on the constitutionality of an act is precedent no matter how the issue is presented." Therefore, it "conclude[d] that cogent reasons exist for the application of the service requirement in

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[7] In *State v. Klapps*, 2021 WI App 5, ¶ 28, 395 Wis. 2d 743, 954 N.W.2d 38, this Court addressed Klapps's unpreserved, judicial bias claim through its exercise of its discretionary reversal authority under Wis. Stat. § 752.35. Wilhite has not asked this Court to exercise its discretionary reversal authority, and this Court should not develop the argument for him. *State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992).

all cases involving constitutional challenges." *Id.* at 117. The Wisconsin Supreme Court later clarified the *Kurtz* rule, holding that noncompliance with section 806.04(11) was not jurisdictional and was curable when the underlying action did not seek a declaratory judgment. *Brown Cnty. Hum. Servs. v. B.P.*, 2019 WI App 18, ¶ 27, 386 Wis. 2d 557, 927 N.W.2d 560 (citation omitted).

Wilhite has not demonstrated that he complied with his duty to notify the Attorney General and the appropriate legislative officials, as section 806.04(11) requires. This Court should not allow him to prospectively cure the defect through service *after* the State files its brief in this matter. In *B.P.*, 386 Wis. 2d 557, ¶¶ 27–28, this Court declined to consider a constitutional challenge where notice was not given and the party raised the challenge "for the first time on appeal." Likewise, Wilhite did not raise and develop his facial constitutional challenge to section 971.17(3)(e) until his appeal, and this Court should decline his invitation to address it now.

Had Wilhite given timely service, the Attorney General could have appeared or, alternatively, advised and consulted with the district attorney under Wis. Stat. § 165.25(3), for the purpose of developing the circuit court record. In consultation with the Attorney General, the district attorney may have decided to present evidence to show Wilhite's dangerous and avoid the issue altogether. And the Attorney General or the district attorney could have made and preserved the arguments necessary to sustain section 971.17(3)(e)'s constitutionality. *See supra* Section II.A.1.

Wilhite might suggest that filing his brief here constitutes sufficient service on the Attorney General and cures his noncompliance with section 806.04(11). But such a response overlooks the broad scope of the Attorney General's responsibilities—responsibilities that transcend its representation of the State in criminal appeals. Wis. Stat.

§ 165.25(1). A constitutional challenge like Wilhite's implicates other core functions of the Department of Justice, including its duty to represent State agencies, officials, and employees in civil actions brought against them based on alleged civil rights violations. Wis. Stat. §§ 165.25(1m), (6). This is especially problematic when the challenge is not an as-applied challenge, but a facial constitutional challenge that, if successful, would effectively result in a declaration that section 971.17(3)(e) is unconstitutional and will impact how DHS manages *all* conditionally released insanity acquittees. Moreover, service of the brief on the Department of Justice does not satisfy Wilhite's responsibility under section 806.04(11) to notify the Legislature of his challenges.

Wilhite's decision to wait until his appeal to develop his facial challenge to section 971.17(3)(e) undermines the Legislature's expressed policy to require litigants to serve notice of constitutional challenges on the Attorney General and on the Legislature's leadership. It deprived these constitutional officers of a meaningful opportunity to develop the record and defend the statute in the circuit court. This Court should decline to consider Wilhite's facial challenge based on his failure to prove compliance with section 806.04(11)'s service requirements.

3. This Court's subject matter jurisdiction aside, section 971.17(7m) specifies what issues this Court is competent to address on appeal.

Wilhite may reply that his facial constitutional challenge to section 971.17(3)(e) "is a matter of subject matter jurisdiction and cannot be waived." *State v. Bush*, 2005 WI 103, ¶ 17, 283 Wis. 2d 90, 699 N.W.2d 80, *holding modified by City of Eau Claire v. Booth*, 2016 WI 65, ¶ 17, 370 Wis. 2d 595, 882 N.W.2d 738. But subject matter jurisdiction does not, by itself, confer competency on a court, including this Court, to decide an issue.

"[S]ubject matter jurisdiction and competence are related but distinct concepts." *City of Cedarburg v. Hansen*, 2020 WI 11, ¶ 49, 390 Wis. 2d 109, 938 N.W.2d 463, *opinion modified*, 2020 WI 45, 391 Wis. 2d 671, 943 N.W.2d 544. While "subject matter jurisdiction is about the type or category of case brought[,] [c]ompetence presupposes a court has subject matter jurisdiction and is about a court's ability to exercise its jurisdiction in an individual case." *Id.* In contrast to subject matter jurisdiction, "[s]tatutory competency . . . defines a circuit court's 'ability to undertake a consideration of the specific case or issue before it.'" *State v. Sanders*, 2018 WI 51, ¶ 20, 381 Wis. 2d 522, 912 N.W.2d 16 (citation omitted). And "noncompliance with statutory requirements pertaining to the invocation of [a court's] jurisdiction" may affect a court's "ability to exercise its subject matter jurisdiction." *Hansen*, 390 Wis. 2d 109, ¶ 49 (citation omitted).

Just because a court has subject matter jurisdiction over an issue does not mean that it has competency to decide an issue that is raised for the first time on appeal. Through section 971.17(7m), the Legislature established a procedure that specifies what claims a litigant can raise on appeal: a challenge to the sufficiency of the evidence, an issue previously raised, and a claim raised through a motion for postdisposition relief. As such, it is a rule of statutory competency because it limits what issues this Court can consider on appeal. *See Vill. of Trempealeau v. Mikrut*, 2004 WI 79, ¶¶ 12–13, 273 Wis. 2d 76, 681 N.W.2d 190 (discussing circumstances with noncompliance with statutory procedures, including time limits, resulting in loss of competency). Section 971.17(7m) does not confer competency

on this Court to reach Wilhite's unpreserved claims as a matter of right. And this Court should not do so. [8]

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[8] Wisconsin Supreme Court decisions have stated that a facial constitutional challenge goes to a circuit court's subject matter jurisdiction and cannot be waived. *State v. Cole*, 2003 WI 112, ¶ 46, 264 Wis. 2d 520, 665 N.W.2d 328; *State v. Bush,* 2005 WI 103, ¶ 17, 283 Wis. 2d 90, 699 N.W.2d 80, *holding modified by City of Eau Claire v. Booth*, 2016 WI 65, ¶ 17, 370 Wis. 2d 595, 882 N.W.2d 738. While this language may bind this Court, *Cook*, 208 Wis. 2d at 189–90, the State questions whether *every* facial challenge to a statute implicates subject matter jurisdiction. Indeed, the federal circuits are divided on whether a facial constitutional challenge is even jurisdictional. *United States v. Herrera*, 51 F.4th 1226, 1283 (10th Cir. 2022) (collecting cases).

Moreover, the question of subject matter jurisdiction begs the question of whether a litigant must first raise facial constitutional challenges in the circuit court. In *Cole* and *Bush*, the litigants first raised their claims in circuit court before raising them on appeal. *Cole*, 264 Wis. 2d 520, ¶ 2; *Bush*, 283 Wis. 2d 90, ¶ 1. And in *Bush*, 283 Wis. 2d 90, 15 n.6, the court acknowledged its prior holding in *State v. Wilks*, 121 Wis. 2d 93, 107, 358 N.W.2d 273 (1984), where it declined, in the exercise of its discretion, to consider a constitutional challenge to an ordinance "raised for the first time on appeal." Indeed, "it has long been the rule that the constitutionality of a statute normally cannot be raised for the first time on appeal as a matter of right. *State v. Weso*, 60 Wis. 2d 404, 413, 210 N.W.2d 442 (1973) (collecting cases). And in *Milwaukee Cnty. v. Mary F.-R.*, 2013 WI 92, ¶ 3, 351 Wis. 2d 273, 839 N.W.2d 581, the court "assume[d], without deciding," that Mary F.-R. did not forfeit her right to raise a constitutional challenge. In a concurrence joined by two other justices, Justice Ziegler noted that the court granted review to decide "whether a facial challenge to the constitutionality of a statute can be forfeited. *Id*. ¶ 72 (Ziegler, J, concurring). Justice Ziegler then proceeded to explain, by reference to prior caselaw, that a challenge to a statute's constitutionality can be forfeited through a failure to raise the claim in circuit court. *Id*. ¶¶ 74–77.

The State preserves these issues for Wisconsin Supreme Court review.

B. Wilhite's facial challenge to section 971.17(3)(e) fails on the merits.[9]

1. Due process does not require States to treat insanity acquittees like other civil committees.

Wilhite's facial constitutional challenge to section 971.17(3)(e) proceeds on the flawed assumption that, as an insanity acquittee, he has the *same* constitutional rights as a person who has been committed civilly. (Wilhite's Br. 12.) Specifically, Wilhite ignores U.S. Supreme Court and Wisconsin Supreme Court precedents that recognize the authority of the government to treat criminally committed persons such as insanity acquittees differently from civilly committed persons.

To begin, the insanity defense is a statutory right of a criminal defendant and is not guaranteed under the United States nor Wisconsin Constitution. *State v. Lagrone*, 2016 WI 26, ¶ 32, 368 Wis. 2d 1, 878 N.W.2d 636. Unlike civil commitment actions, an insanity defense is an affirmative

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[9] By briefing the merits, the State does not concede that Wilhite's facial constitutional challenge is properly before this Court. *See supra* Section II.A. This Court should decline an invitation to jump to an issue's merits simply because a respondent briefed it. Rather, this Court should only address the merits if it first determines that it was properly preserved. The Wisconsin Supreme Court noted the double standard that respondents face when replying to arguments unpreserved in the lower court. "[R]esponding to an issue that the opposing party did not fully brief or raise below 'open[s] the door for the Court of Appeals to consider the issue "thoroughly" briefed.'" *Estate of Miller v. Storey*, 2017 WI 99, ¶ 64 n.30, 378 Wis. 2d 358, 903 N.W.2d 759 (second alteration in original) (citations omitted). On the other hand, the respondent's failure to address the merits "'can be used against the respondent if the Court of Appeals' decides to consider the issue and determines it has been forfeited by the party that declined to respond on the basis that the issue had not been fully briefed." *Id.* (citation omitted).

defense to criminal liability and punishment. Wis. Stat. § 971.15(3). A defendant like Wilhite must assert the defense through a special plea. Wis. Stat. § 971.165(1). Through Wisconsin's bifurcated procedures, the State must first prove Wilhite's factual liability for the crime beyond a reasonable doubt before the burden shifts to him to show by a preponderance of the evidence that he is not responsible for his crime due to his mental defect. Wis. Stat. §§ 971.15(3) and 971.165; *State v. Magett*, 2014 WI 67, ¶ 33, 355 Wis. 2d 617, 850 N.W.2d 42. As such, the insanity phase is not a "purely civil" proceeding but "a special proceeding in the dispositional phase of a criminal proceeding." *Lagrone*, 368 Wis. 2d 1, ¶ 34 (citation omitted). Importantly, "[a] successful acquittee, although relieved of the criminal sanctions for his or her criminal conduct, is nonetheless guilty." *State v. Randall (Randall I)*, 192 Wis. 2d 800, 833, 532 N.W.2d 94 (1995).

The U.S. Supreme Court and Wisconsin Supreme Court have recognized that these significant differences between insanity acquittees and "civil-commitment candidates" justify different treatment. *State v. Field*, 118 Wis. 2d 269, 278–79, 347 N.W.2d 365 (1984). A civil commitment proceeding implicates a concern that a person might be committed because the person merely "exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable." *Addington v. Texas*, 441 U.S. 418, 426–27 (1979). But when the insanity defense is asserted, "proof that [a defendant] committed a criminal act as a result of mental illness eliminates the risk that he is being committed for mere 'idiosyncratic behavior.' A criminal act by definition is not 'within a range of conduct that is generally acceptable.'" *Jones v. United States*, 463 U.S. 354, 367 (1983) (citations omitted).

Interpreting *Jones*, the Wisconsin Supreme Court identified "two facts" that an NGI verdict establishes: "first,

that the defendant committed an act constituting a criminal offense; second, the defendant committed the act because of mental illness." *Field*, 118 Wis. 2d at 277 (citation omitted). Moreover, "[t]he fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness." *Jones*, 463 U.S. at 355; *Field*, 118 Wis. 2d at 278. In contrast to a civil committee, "the fact that a person who has been found not guilty by reason of mental disease has committed a criminal act demonstrates a degree of dangerousness to society that may be lacking in the actions of one who is civilly committed." *Field*, 118 Wis. 2d at 283. And because an insanity acquittee was found to have committed the crime beyond a reasonable doubt, "insanity acquittees constitute a special class that should be treated differently from other candidates for commitment." *Id*. at 282 (quoting *Jones*, 463 U.S. at 370).

These differences justify treating insanity acquittees differently from civilly committed persons. For example, based on these differences, both the U.S. Supreme Court and the Wisconsin Supreme Court rejected constitutional challenges that provide for an "automatic commitment"[10] upon an insanity finding. *Field*, 118 Wis. 2d at 284; *Jones*, 463 U.S. at 366 (noting that automatic commitment of insanity acquittees serves the purposes of both treatment *and* protection of society).

2. *Foucha* does not help Wilhite.

Wilhite argues that section 971.17(3)(e)'s revocation proceeding is contrary to *Foucha v. Louisiana*, 504 U.S. 71

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[10] Although Wis. Stat. § 971.17(3)(a) allows the court to consider commitment or conditional release when it enters the order, an earlier version of section 971.17 mandated an initial, institutional commitment upon an NGI finding. Wis. Stat. § 971.17(1) (1981–82).

(1992) because it allows for revocation based on a rule or condition violation without a showing of dangerousness. (Wilhite's Br. 12–16.) Wilhite's reliance on *Foucha* is misplaced because there, the U.S. Supreme Court interpreted Louisiana's insanity commitment statute, which differs significantly from section 971.17.

In *Randall I*, the Wisconsin Supreme Court noted three critical differences between Louisiana's statutory scheme and Wisconsin's scheme regulating the commitment of insanity acquittees.

First, "[u]nlike Louisiana's scheme, a successful [Wisconsin] insanity acquittee" has been found guilty beyond a reasonable doubt of committing a crime. *Randall I,* 192 Wis. 2d at 833. Importantly, "[i]t is the determination of guilt which provides the basis for the [S]tate *to incapacitate and treat the insanity acquittee*." *Id.* (emphasis added).

Second, Louisiana's scheme allowed the state to commit an insanity acquittee for an "indefinite and unlimited duration," *Randall I,* 192 Wis. 2d at 808. In contrast, Wisconsin's scheme limits the duration of the commitment to a term of less than the maximum term of imprisonment for the underlying offense. In other words, the commitment period in Wisconsin never exceeds the maximum term of confinement that the person could have received if he or she had been convicted of the underlying offense. *Id.* at 808–09; Wis. Stat. § 971.17(1)(a), (b).

Thus, unlike Foucha, Wilhite did not face indefinite confinement in a mental facility. *Foucha*, 504 U.S. at 82–83. While Wilhite, who committed a Class H felony, faced a maximum six-year sentence with a maximum three-year term of initial confinement for the underlying crime, the circuit court was capped at setting the length of commitment to the maximum term of initial confinement, which was three years.

Wis. Stat § 971.17(1)(b); (R. 2:1; 65:1). Here, the circuit court set Wilhite's commitment for three years. (R. 65:2.)

Third, Louisiana's scheme did not require Louisiana to "prove by clear and convincing evidence that [Foucha was] demonstrably dangerous to the community" to justify continued detention. *Foucha*, 504 U.S. at 81. Instead, the Louisiana statute required the insanity acquittee to prove that he was not dangerous. *Id.* at 73, 82. In contrast, Wisconsin's NGI commitment law places the burden on the State to prove by clear and convincing evidence that the person remains dangerous to himself, herself, or others for a commitment to continue. *Randall I*, 192 Wis. 2d at 808–09. Thus, whether initially committed following an NGI determination or committed following revocation, an insanity acquittee may petition for conditional release, which will prompt a court-ordered evaluation and then a prompt hearing on the petition. Wis. Stat. § 971.17(4)(a), (c), (d). And section 971.17(4)(d) requires the court to grant conditional release unless the State can prove dangerousness. Here, for example, the circuit court later denied Wilhite's conditional release petition, which he filed after the revocation he challenges here. (R. 139:1; 200:2.) The subsequent denial of Wilhite's release is not presently before the Court, but it shows that Wisconsin's statutory scheme does not suffer from the constitutional infirmities Louisiana's did.

In sum, the *Foucha* court interpreted an insanity commitment scheme that was fundamentally different from Wisconsin's in that it allowed for indefinite commitment and placed the burden on the insanity acquittee to demonstrate eligibility for relief. These differences mattered to Justice O'Connor, who cast the deciding vote in *Foucha*. In her concurrence, which the *Randall I* court quoted with approval, Justice O'Connor explained:

> [T]he Court's opinion addresses only the specific statutory scheme before us, which broadly permits

> indefinite confinement of sane insanity acquittees in psychiatric facilities. This case does not require us to pass judgment on more narrowly drawn laws that provide for detention of insanity acquittees, or on statutes that provide for punishment of persons who commit crimes while mentally ill.

Randall I, 192 Wis. 2d at 831–32 (quoting *Foucha*, 504 U.S. at 86–87 (O'Connor, J., concurring)).

Wilhite misplaces his reliance on *Kansas v. Hendricks*, 521 U.S. 346 (1997), which interpreted Kansas's sexually violent person commitment statute. (Wilhite's Br. 15.) Like Wis. Stat. § 980.02, the Kansas statute allowed the State to file a civil commitment action against certain sex offenders who are being released from sentences. *Hendricks*, 521 U.S. at 351–53. A commitment under Kansas's sex predator statute is both involuntary and indefinite. *Id*. at 358. As such, Wisconsin's NGI commitment significantly differs from a Chapter 980 commitment because: (1) an NGI commitment results from an insanity acquittee's voluntarily choice to affirmatively assert and successfully prove that he was insane when he committed his crime; and (2) it is of limited duration, i.e., at most, the maximum term of initial confinement for the crime that the defendant committed. *Hendricks* does not help Wilhite.

Based on *Foucha*, Wilhite asserts that "due process demands 'clear and convincing evidence that the individual is mentally ill *and* dangerousness' to support confinement under a civil commitment." (Wilhite's Br. 15 (quoting *Portage Cnty. v. J.W.K.*, 2019 WI 54, ¶ 16, 386 Wis. 2d 672, 927 N.W.2d 509).) Wilhite's reliance on *J.W.K.* is misplaced. *J.W.K.* was a civil committee under Chapter 51, not an insanity acquittee like Wilhite, who was found guilty of a crime beyond a reasonable doubt. That finding of guilt demonstrates a degree of dangerousness in Wilhite that is not necessarily present in persons, like J.W.K, who were civilly committed. *Field*, 118 Wis. 2d at 278, 283–84. And this difference justifies treating

insanity acquittees like Wilhite differently from civilly committed persons. *Id*. at 282.

3. Allowing for revocation of conditional release for a rule or condition violation does not violate due process.

Wilhite bears the burden of proving section 971.17(3)(e)'s unconstitutionality beyond a reasonable doubt because it allows for a revocation of release based on a rule or condition violation without a showing of dangerousness. Wilhite cites no decisions that hold that section 971.17(3)(e)'s revocation scheme violates due process.[11]

An NGI commitment serves two legitimate purposes: "to treat the individual's mental illness and to protect the individual and society from the acquittee's potential dangerousness." *Randall I*, 192 Wis. 2d at 833. Importantly,

> [i]ncapacitation for the purposes of treatment and rehabilitation, limited to the maximum term which could have been imposed for the criminal conduct, does not turn commitment into an impermissible form of incarceration so long as the [S]tate houses the acquittee in a facility appropriate to his or her condition and provides the acquittee with care and treatment to overcome that which makes him or her dangerous.

Id. at 833–34. Thus, while *Randall I* determined that a commitment based on dangerousness alone did not violate

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[11] In a case of persuasive authority, the Colorado Court of Appeals interpreted a statute like section 971.17(3)(e), which mandated revocation if the defendant violated a condition of release *or* if the defendant was both mentally ill and dangerous. *People v. Garlotte*, 958 P.2d 469, 475 (Colo. App. 1997). Relying on Colorado case law, that court rejected Garlotte's argument, based partly on *Foucha*, that he could not constitutionally be revoked "based solely on the violation of a condition without additional findings of a mental illness and dangerousness." *Id*. at 476–78.

due process, *id*. at 833, it recognized that a commitment for a limited duration is permissible to treat the insanity acquittee's mental condition related to his criminal conduct and does not violate due process. And due process is not violated when "there is a reasonable relationship between the nature of the commitment and the purposes for which the individual is committed." *Id*. at 837–88.

The rules and conditions of release, like those that Wilhite agreed to abide by (R. 135:1–2), are reasonably related to the dual goals of treating the underlying mental condition that precipitated the criminal conduct and safety. Even if noncompliance with a rule or condition does not jeopardize safety, it can interfere with the treatment of an insanity acquittee's mental condition, a condition that Wilhite concedes was present when he was revoked. (Wilhite's Br. 13 n.1.)

And here, the team responsible for Wilhite's care believed that the treatment available to him at Mendota would provide him with the tools he needed to function in the community. (R. 178:9–10.) To be sure, the revocation of an insanity acquittee's conditional release implicates a liberty interest, but revocation serves a legitimate goal of providing inpatient treatment for the mental condition that prompted the NGI determination. And importantly, confinement is limited by the term set in the commitment order, and it must end sooner if the State cannot prove the person is dangerous at a trial on a petition for conditional release, which an insanity acquittee may file six months after being committed. Wis. Stat. § 971.17(4). The circuit court acknowledged these important interests when it revoked conditional release, recognizing the need to get Wilhite "stabilized and then returned to the community" with the proper tools in place so that he could go to a group home. (R. 179:47.)

At the same time, the circuit court should not have had to wait for Wilhite to engage in additional "overtly dangerous

acts" before it revoked release. *State v. Burris*, 2004 WI 91, ¶ 72, 273 Wis. 2d 294, 682 N.W.2d 812. There, the Wisconsin Supreme Court interpreted Wis. Stat. § 980.06(2)(d) (1997–98), which, like section 971.17(3)(e), provided for revocation of a sexually violent person's supervised release based on either dangerousness OR a violation of a rule or condition. *Id.* ¶¶ 17, 44–49 (discussing legislative history of section 971.17(3)(e), including revocation based on a violation alone). Although Burris's revocation turned on the circuit court's safety concerns, the circuit court was "not required to ignore indications that a [committed] person has disregarded the rules repeatedly in the past and will do so in the future." *Id.* ¶ 72.

Noting *Randall I*'s language referencing a "single standard for recommitment," Wilhite contends that due process "demands a finding of dangerousness" to revoke conditional release. (Wilhite's Br. 18.) Contrary to his understanding, the *Randall I* court did not use "recommit" and "recommitment" to refer to the consequence of having conditional release revoked. Rather, "recommit" is a statutory term that describes what happens when a circuit court denies an institutionalized insanity acquittee's request to be discharged or conditionally released. "If it is not so satisfied, it shall recommit him or her to the custody of the department." *Randall I*, 192 Wis. 2d at 812 (quoting Wis. Stat. § 971.17(2) (1987–88)).

Importantly, section 971.17(3) (1987–88), which was in effect when *Randall I* was decided and guided the revocation of conditional release, did not even use "recommit." As such, the Wisconsin Supreme Court was not interpreting Wis. Stat. § 971.17(3) (1987–88) when it decided *Randall I*. And it did not hold that revocation of release, based on a condition or rule violation without a showing of dangerousness violated due process. Rather, it held that it did not violate due process for the State to continue to confine "dangerous but sane

acquittees in a mental health facility." *Randall I*, 192 Wis. 2d at 806–07. And importantly, both *Randall I* and *Jones* recognize that one of the legitimate purposes of a commitment following an insanity acquittal is to treat the person's mental condition. *Id*. at 833–34; *Jones*, 463 U.S. at 369.

Relying on *State v. Gebarski*, 90 Wis. 2d 754, 769, 280 N.W.2d 672 (1979), and *State v. Mahone*, 127 Wis. 2d 364, 376, 379 N.W.2d 878 (Ct. App. 1985), Wilhite contends that recommitment requires a showing of dangerousness. (Wilhite's Br. 16.) But these cases construed an earlier version of section 971.17(3), which required revocation when "the conditions of release have not been fulfilled *and* that the safety of such person or [others]" required it. *Gebarski*, 90 Wis. 2d at 768 n.6 (emphasis added) (quoting Wis. Stat. § 971.17(3) (1975); *Mahone*, 127 Wis. 2d at 368. Neither case interpreted the current statute nor decided whether the revocation of conditional release based solely on proof of a conditions or rules infraction violates due process. Moreover, *Gebarski* has little precedential value because its due process analysis relied partly on *State ex rel. Kovach v. Schubert*, 64 Wis. 2d 612, 219 N.W.2d 341 (1974), a decision later overruled in *Field*, 118 Wis. 2d at 271. And *Mahone* provides little help because it focused on *procedural* due process issues that arise in revocation proceedings and which are not at issue here. *Mahone*, 127 Wis. 2d at 369–71.

Similarly, the circuit court here should not have been hamstrung, forced to wait for Wilhite's rule violations to escalate and further endanger himself or others, before it could revoke Wilhite's release. Wilhite wants a ruling that would make courts powerless to enforce their rules and conditions of release absent a showing of overt dangerousness. But such a ruling would prevent the circuit court from revoking an insanity acquittee for the purpose of treating his mental condition, which is a constitutionally legitimate purpose of an NGI commitment, *Randall I*, 192

Wis. 2d at 833–34, before the conduct escalates to actual violence. By revoking Wilhite's release, the circuit court's actions allowed Willhite to be treated in a more structured setting than in the group home and prevented him from escalating his conduct into the criminal and dangerous conduct that resulted in his commitment in the first place. (R. 63:2–4; 173:5–6.)

Moreover, because Wilhite could petition for release after six months and the circuit court was required to release him if the State could not prove dangerousness under section 971.17(4)(a) and (d), the scheme limited how much time he could be confined for treatment purposes. Wilhite has not shown that section 971.17(3)(e), which provides for revocation based on a rule or condition violation without a showing of dangerousness, is unconstitutional beyond a reasonable doubt.

C. If this Court finds section 971.17(3)(e) prohibits revocation of conditional release without a finding of dangerousness, then this Court must remand for further proceedings.

Wilhite contends that because section 973.17(3)(e) does not require a showing of dangerousness, it is unconstitutional and "cannot be enforced 'under any circumstances,'" and that he must be released. (Wilhite's Br. 18.)

If this Court agrees with Wilhite that section 971.17(3)(e) is facially unconstitutional beyond a reasonable doubt, it should not invalidate section 971.17(3)(e). Rather, this Court should apply Wis. Stat. § 990.001(11)'s severability provision and decide whether, by severing the unconstitutional portion of section 971.17(3)(e), its remainder can remain intact. *See State v. Janssen,* 219 Wis. 2d 362, 379, 580 N.W.2d 260 (1998) (recognizing presumption of severability). "Unless it is evident that the Legislature would

not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Id*. (citation omitted).

Here, this Court can sever that portion of section 971.17(3)(e), which provides for revocation based solely upon a showing "that any rule or condition of release has been violated," while still allowing for revocations based on a showing of dangerousness. § 971.17(3)(e) ("the safety of the person or others requires that conditional release be revoked"). Severability is consistent with section 971.17(3)(e)'s purpose that allows for revocation of conditional release when an insanity acquittee poses a danger to himself or others in the community. Revocation permits DHS to provide care in a more structured, institutional setting, as contemplated under section 971.17(3)(c).

If this Court determines that the circuit court should not have revoked Wilhite based solely on a violation of the rules or conditions, then it should either affirm outright based on the evidence of dangerousness that is already in the record, or it should remand the matter to the circuit court for further proceedings.

The decision to revoke conditional release is discretionary. Wis. Stat. § 971.17(3)(e) ("it may revoke"). If proof of dangerousness is constitutionally required to revoke conditional release, and if the record as it stands does not already support affirmance under that standard, then the circuit court erroneously exercised its discretion when it revoked release. *See Wisconsin Ass'n of Food Dealers v. City of Madison*, 97 Wis. 2d 426, 434–35, 293 N.W.2d 540 (1980) (the remedy is remand when circuit court erroneously exercises discretion based on incomplete analysis, not for the appellate court to exercise its discretion).

Remand would be appropriate because Wilhite's untimely assertion of his constitutional claim deprived the State and circuit court with an opportunity to address his claim in a manner that could have avoided this appeal. Evidence in the record, including reports prepared after the circuit court revoked Wilhite, demonstrate ongoing concerns from treatment professionals, including Dr. Schoenecker who originally recommended conditional release, about Wilhite's condition and the danger that he poses to himself and others. (R. 80:5; 153:3–4; 182:4; 186:6–7.) Further, the record reflects that the circuit court later denied Wilhite's petition for conditional release after a hearing at which Dr. Schoenecker testified. (R. 171; 200:2.)[12] Because the State likely proved and the circuit court likely determined that Wilhite was dangerous during Wilhite's October 2024 conditional release hearing, this Court should allow the State an opportunity to prove that Wilhite is dangerous and the circuit court to review its decision to revoke conditional release.

[12] Because of the timing of Wilhite's notice of appeal, neither the order denying release nor the transcript from the October 17, 2024, conditional release hearing are in the record. (R. 200:1–2.)

CONCLUSION

This Court should affirm the circuit court's order revoking Wilhite's conditional release.

Dated this 9th day of April 2025.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 10,727 words.

Dated this 9th day of April 2025.

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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 9th day of April 2025.

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