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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

CASE NO. 2024AP002177-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DESMOND J. WILHITE,

Defendant-Appellant.

On Appeal from an Order Revoking Conditional
Release, Entered in the Dane County Circuit Court,
the Honorable Josann M. Reynolds Presiding

REPLY BRIEF OF
DEFENDANT-APPELLANT

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ARGUMENT

I. Wisconsin Statute § 971.17(3)(e) is facially unconstitutional.

A. Mr. Wilhite's facial challenge cannot be forfeited.

The state does not dispute that Mr. Wilhite's constitutional challenge is a facial challenge. Unlike a law that is unconstitutional "as applied," a facially unconstitutional law is "null and void," and leaves courts "without the power to act under the statute." *State v. Bush*, 2005 WI 103, ¶19, 283 Wis. 2d 90, 699 N.W.2d 80; *State ex rel. Skinkis v. Treffert*, 90 Wis. 2d 528, 532, 280 N.W. 316 (Ct.App.1979). Thus, Mr. Wilhite's facial challenge to the constitutionality of Wis. Stat. § 971.17(3)(e) "goes to the subject matter jurisdiction of the court" and "cannot be waived¹." *Bush*, 283 Wis. 2d 90, ¶19.

The state acknowledges that the Wisconsin Supreme Court has repeatedly held that a facial constitutional challenge cannot be forfeited. (Resp. Br. 30, 32). This Court is bound by that holding. *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). Yet the state claims that Mr. Wilhite forfeited review

¹ The state makes no distinction between "waiver" and "forfeiture" in the context of this appeal. But after *Bush* was decided, the Wisconsin Supreme Court clarified the difference between the two terms and defined "forfeiture" as "the failure to make the timely assertion of a right." *State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612. Since *Ndina*, the Wisconsin Supreme Court has applied the term "forfeiture" to the premise that a facial challenge cannot be "waived." *Milwaukee Cty. v. Mary F.-R.*, 2013 WI 92, ¶¶31-32, 351 Wis. 2d 273, 839 N.W.2d 581. Like the state and the Wisconsin Supreme court, Mr. Wilhite adopts the term "forfeiture" in this context.

of that challenge. (Resp Br. 26). The state offers three explanations for how Mr. Wilhite forfeited his constitutional challenge. (Resp. Br. 26-32). Each explanation crumbles under the weight of decades of binding precedent establishing that Mr. Wilhite's facial challenge cannot be forfeited.

First, relying on *State v. Klapps*, 2021 WI App 5, 395 Wis. 2d 743, 954 N.W.2d 38, the state claims that Mr. Wilhite forfeited his facial challenge because Wis. Stat. § 971.17(7m) required him to raise it in the circuit court. (Resp. Br. 26-28). The state correctly points out that, like Wis. Stat. § 974.02 which governs appeals in criminal cases, § 971.17(7m) states that a person “shall” move for relief under Wis. Stat. § 809.30 unless the grounds for appeal are the sufficiency of the evidence or issues previously waived. But neither § 971.17(7m) nor *Klapps* show that Mr. Wilhite forfeited his facial constitutional challenge.

In *Klapps*, the court equated and relied on §§ 974.02 and 971.17(7m) in holding that an NGI acquittee forfeited his judicial bias claim because he did not raise it in the circuit court. 395 Wis. 2d 743, ¶¶23-27. Although *Klapps* claimed that his judicial bias claim was “a structural constitutional violation that cannot be forfeited,” he did not challenge the facial constitutionality of any statutory provision. *Id.*, ¶28. Thus, while the failure to raise “a claimed structural constitutional violation, forfeits the challenge,” Mr. Wilhite's claim is a facial challenge which—as discussed extensively both above and below—cannot be forfeited. *Id.*, ¶¶29.

Next, the state argues that Mr. Wilhite’s “noncompliance with” Wis. Stat. § 806.04(11) “forecloses judicial review of his facial challenge.” (Resp. Br. 28). It is true that, at the time the state filed its response brief, Mr. Wilhite had not served a copy of his brief to legislative officials. But § 806.04(11) does not prescribe the method or timing for providing notice to the legislature and undersigned counsel has since corrected this oversight by serving the speaker of the assembly, the president of the senate, and the senate majority leader. Because the assembly, the senate, and the legislature may move to intervene “at any time in the action” under Wis. Stat. §§ 13.365 and 803.09, this Court should consider Mr. Wilhite’s service timely.

Mr. Wilhite disputes the state’s claim that he did not comply with his duty to notify the Attorney General. (Resp. Br. 29). Unlike in the cases cited by the state, the attorney general represents the state in this action. Under Wis. Stat. § 801.18(6)(a), Mr. Wilhite served the attorney general with a copy of the proceeding by filing his appellant’s brief through the electronic filing system.

Moreover, the purpose of requiring service to the attorney general under § 806.04(11) “is to give the attorney general the opportunity to defend the statute . . . against a claim of unconstitutionality.” *Town of Walworth v. Village of Fontana-on-Geneva Lake*, 85 Wis. 2d 432, 436, 270 N.W.2d 442 (Ct.App.1978). Thus, the state’s response brief—which was submitted by the Attorney General and defended the constitutionality of §971.17(3)(e)—is proof that Mr. Wilhite served the attorney general and that the attorney general exercised its opportunity to be heard

in defense of the statute. *See State v. Dennis*, 138 Wis. 2d 99, 101, 405 N.W.2d 711 (Ct.App.1987) (deciding a constitutional claim even when the attorney general was not notified under § 806.04(11) but participated in the appeal alongside the district attorney).

The state claims that “[h]ad Wilhite given timely service” the state could have presented different evidence in the circuit court or “preserved the arguments necessary to sustain section 971.17(3)(e)’s constitutionality.” (Resp. Br. 29). But this argument fails to acknowledge that Mr. Wilhite’s facial challenge attacks the constitutionality of the substantive law and, if successful, would nullify § 971.17(3)(e) and the court’s power to act under the statute. *Bush*, 283 Wis. 2d 90, ¶17. In other words, unlike an as applied challenge, it is the substance of the statute and Mr. Wilhite’s constitutional rights that matter—not the circuit court record. *See State v. Wood*, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63 (contrasting a facial challenge with an as-applied challenge where the reviewing court considers “the facts of the particular case in front of us”).

Finally, the state implies that this Court has no competency to address Mr. Wilhite’s facial constitutional challenge because he did not file a postdisposition motion. (Resp. Br. 30). The state’s claim relies entirely on cases addressing a circuit court’s competency and forfeiture of challenges to that competency. *See Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶¶2-3, 273 Wis. 2d 76, 681 N.W.2d 190. Beyond reinforcing the fact that while a challenge to competency can be forfeited, a challenge to subject matter jurisdiction cannot, those cases have no

bearing on this Court's ability to decide Mr. Wilhite's facial challenge. *Id.*, ¶3; *State v. Sanders*, 2018 WI 51, ¶24, 381 Wis. 2d 522, 912 N.W.2d 16. The state cites no authority supporting its conclusory assertion that this Court lacks competency to hear a facial constitutional challenge that cannot be forfeited.

In the end, the state's response cannot assail the "the unassailable proposition that an issue of subject matter jurisdiction cannot be waived by inadvertence or by deliberate failure to raise it at the trial court level, and that such an issue can *always* be raised as a matter of right for the first time on appeal or review by a higher court." *Skinkis*, 90 Wis. 2d at 534 (emphasis added). Because Mr. Wilhite's facial challenge cannot be forfeited, this Court should reach the merits.

B. Wisconsin Statute § 971.17(3)(e) is facially unconstitutional because it permits confinement without proof of current dangerousness.

Although Mr. Wilhite was charged in a criminal case, he was found not guilty by reason of mental disease or defect (NGI) and was thus, "civilly committed rather than sentenced or sanctioned." *State v. Fugere*, 2019 WI 33, 386 Wis. 2d 76, 924 N.W.2d 469. It is axiomatic that a "civil commitment *for any purpose* constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979) (emphasis added). Because the purpose of an NGI commitment is to treat the acquittee's mental illness and protect the acquittee and the public from dangerousness, under the Due Process Clause, it is unconstitutional for the

government to confine a mentally ill person who “has recovered his sanity or is no longer dangerous.” *Jones v. United States*, 463 U.S. 354, 368 (1983); *O’Connor v. Donaldson*, 422 U.S. 563, 575-76 (1975).

The state does not dispute that, by its plain language, § 971.17(3)(e) authorizes revocation of conditional release and confinement of an NGI acquittee without any proof of dangerousness. The statute authorizes revocation and confinement without proof of dangerousness even though, under either § 971.17(3)(a) or (4)(d), the circuit court has already found that any person on conditional release is no longer dangerous despite their NGI commitment. Thus, because due process demands proof of current dangerousness to confine an NGI acquittee, and § 971.17(3)(e) never requires proof of dangerousness, the statute is unconstitutional beyond a reasonable doubt. *Wood*, 323 Wis. 2d 321, ¶15.

The state spills significant ink pointing out the disparate treatment of NGI acquittees and other civil commitment candidates at the point of the initial NGI commitment. (Resp. Br. 33-35). But the state’s response ignores the bedrock substantive due process principles announced in *Addington* and *O’Connor* that bind this Court and apply to *all* commitments. *See State v. Randall*, 192 Wis. 2d 800, 818, 532 N.W.2d 800 (1995) (*Randall I*).

True, an NGI finding “indicates dangerousness” and “is a sufficient foundation for commitment of an insanity acquittee for the purposes of treatment and the protection of society.” *Jones*, 463 U.S. at 364, 366. And true, “insanity acquittees constitute a special class that should be treated differently from other

candidates for commitment.” *Id.* at 370. But it does not follow that an NGI finding alone is a sufficient to justify confinement of a conditionally released NGI acquittee because “even if [an NGI acquittee’s] confinement was initially permissible” based on the indication of dangerousness, “it could not constitutionally continue after that basis no longer existed.” *O’Connor*, 422 U.S. at 574-75.

The Supreme Court has held that the government can only “confine a mentally ill person if it shows ‘by clear and convincing evidence that the individual is mentally ill and dangerous.’” *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (quoting *Jones*, 463 U.S. at 362). The state claims that “*Foucha* does not help Wilhite.” (Resp. Br. 35). But, following *Foucha* the Wisconsin Supreme Court has reinforced the basic due process principles relied on in *Foucha*. The court held that confinement under an NGI commitment is a “substantial deprivation of liberty that requires due process protection” and the “state must have ‘a constitutionally adequate purpose for the confinement.’” *Randall I*, 192 Wis. 2d at 818 (quoting *Addington*, 441 U.S. at 425 and *O’Connor*, 422 U.S. at 574.).

In other words, even if the Due Process Clause allows for “automatic commitment” following an NGI finding, the state must prove dangerousness to justify “post acquittal confinement” of an NGI acquittee. *Id.* at 821-22. Contrary to the state’s implication, *Randall I* teaches that the Due Process Clause makes no distinction between confinement following revocation of conditional release and continued confinement following the denial of conditional release. (Resp. Br. 41-42). Under *Randall I*, due

process permits confinement of an NGI acquittee “based on dangerousness alone” only when certain criteria are met. *Id.* at 840. One criterion is that “the burden of proof at the hearing for *recommitment or release* is borne by the state.” *Id.* (emphasis added).

The state’s argument that revocation based on proof of a rule violation is sufficient to satisfy due process similarly falters. “The only legitimate goal for confinement based on dangerousness is to reduce, to an acceptable level, the risk of danger which the individual poses.” *Id.* at 838. Thus, “[t]o the extent this goal is realized by providing treatment to the acquittee, confinement at a state mental health facility following an insanity acquittal is medically justified and, as such, constitutionally permissible.” *Id.* In other words, confinement must be justified by both dangerousness and treatment of the condition that gives rise to that dangerousness.

The state offers no authority for the claim that this Court should ignore the dangerousness requirement because “one of the legitimate purposes of a commitment following an insanity acquittal is to treat the person’s mental condition.” (Resp. Br. 41-42). Instead, the state relies on Mr. Wilhite’s particular rules and conditions, the allegation that he violated those rules, and the circuit court’s explanation about how confinement would “stabilize” Mr. Wilhite for his return to the community. (Resp. Br. 40, 43). But this is not an as-applied constitutional challenge that depends on an examination of the facts of Mr. Wilhite’s case—it is a facial challenge. The statute is either constitutional or it is not.

Here, Mr. Wilhite has met his burden to prove that § 971.17(3)(e) is unconstitutional beyond a reasonable doubt. The state cannot overcome the simple and fundamental principle that the government may only confine an NGI acquittee by proving that the acquittee is dangerous by clear and convincing evidence. *Foucha* 504 U.S. at 80 (1992); *Jones*, 463 U.S. at 362. Thus, because § 971.17(3)(e) requires confinement upon revocation of conditional release and revocation of conditional release never requires proof of current dangerousness, it is unconstitutional beyond a reasonable doubt.

Contrary to the state's assertion, severing the portion of § 971.17(3)(e) that allows revocation based upon proof of a rule violation and remanding to the circuit court for further proceedings is not the appropriate remedy. It is the state's burden to prove that severance "can preserve the statute in a constitutional form." *State v. Janssen*, 219 Wis. 2d 362, 388, 580 N.W.2d 260 (1998). Here, the state has not shown that the remaining portions of Wis. Stat. § 971.17(3)(e) would be "fully operative as a law" because the statute would still not require clear and convincing evidence of dangerousness to justify confinement. *Id.* at 379.

Due process demands a finding of dangerousness before an NGI acquittee can be confined. Such a finding is not an exercise of discretion. The statutory factors provided in § 971.17(4)(d) properly guide courts in determining dangerousness. *Randall I*, 192 Wis. 2d at 838-39. Severance would not require such a finding. Because the state never argued that Mr. Wilhite was dangerous and the circuit court "never found, as it must," that Mr.

Wilhite was dangerous, the proper remedy is to “vacate the circuit court’s order.” *State v. Fitzgerald*, 2019 WI 69, ¶¶33, 35, 387 Wis. 2d 384, 929 N.W.2d 165.

II. The state failed to prove that Mr. Wilhite violated a condition or rule of his conditional release or that safety requires revocation.

Mr. Wilhite agrees with the state that the plain language of § 971.17(3)(e) authorizes a circuit court to revoke conditional release based on proof that Mr. Wilhite violated a rule or condition. (Resp. Br. 21). Mr. Wilhite also agrees that the circuit court determined that it did not have to find that he was dangerous and did not find that he was dangerous. (Resp. Br. 21). Thus, if this court decides definitively that due process allows for confinement based on rule violations alone, the only remaining task is for this court to decide whether the record establishes clear and convincing evidence that Mr. Wilhite violated a rule of his conditional release.

The state claims that Mr. Wilhite violated the rules by grabbing a phone, touching someone’s face, calling someone profanities, making eight unapproved phone calls, and going outside without permission. (Resp. Br. 22). According to the state, those accusations constitute proof that Mr. Wilhite violated Rule 6, Rule 19, and Rule 20 of his conditional release. (Resp. Br. 22). But the circuit court never found that Mr. Wilhite committed those alleged acts and never found which rules Mr. Wilhite violated.

Instead, the circuit court found that Mr. Wilhite “acknowledged the broken window, the kicked over mop bucket, and the OxiClean” which were “not the most serious.” (R.179:47-48). Mr. Wilhite does not dispute that he kicked over a bucket, spilled OxiClean, and caused minor damage to a window but he disputes whether those acts constitute clear and convincing evidence of a rule violation. The circuit court’s “significant trepidation” with revoking Mr. Wilhite’s conditional release on this record and the absence of any findings about which rules Mr. Wilhite violated should cause concern about whether the state met its burden. (R.179:47-48).

If this court disagrees with the parties and determines that the plain language of § 971.17(3)(e) also requires clear and convincing evidence of dangerousness, this Court should find that the state failed to meet that burden. The circuit court’s acknowledgment that placing Mr. Wilhite somewhere else “would have been the ideal result”—reflects a lack of concern about Mr. Wilhite’s safety and the safety of others and a lack of certainty about whether any purported rule violations reached the level of dangerousness. (R.179:46-48).

Without reference to any recognized legal standard to measure dangerousness, the state concludes that Mr. Wilhite’s conduct “escalated to dangerousness.” (Resp. Br. 25). This Court should reject that conclusion because it is neither supported by facts nor law. Wisconsin Stat. § 971.17 (3)(e) grants the circuit court discretion to revoke conditional release if “the safety of the person or others requires revocation.” But a finding of dangerousness is a legal question and, consistent with the guidance of *Randall*

I, this Court should look to the statutory standard for dangerousness in § 971.17(4)(d) which requires “clear and convincing evidence that the person would pose a significant risk of bodily harm to himself or herself or to others or of serious property damage if conditionally released.” *Randall I*, 192 Wis. 2d at 838-39. On this record and under that legal standard, the state did not meet its burden.

CONCLUSION

For the reasons stated above and in the appellant’s brief, Desmond Wilhite respectfully requests that this Court reverse and remand with directions for the circuit court to vacate the order revoking conditional release.

Dated this 5th day of May, 2025.

Respectfully submitted,

Electronically signed

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,977 words.

Dated this 5th day of May, 2025.

Signed:

Electronically signed by

David J. Susens

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