STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2025AP000387-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

T.R.T.,

Defendant-Appellant.

Appeal from Order of Commitment for Treatment (Incompetency) entered in the Monroe County Circuit Court, the Honorable Richard A. Radcliffe, presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Likelihood to regain competency should be reviewed as a mixed question of fact and law.

The State does not explain why a circuit court is in a better position to evaluate whether a defendant is likely to regain competency.[1] Reviewing the issue as a mixed question of fact and law is consistent with Wisconsin law and affords appropriate deference to the circuit court.

The State asserts circuit courts are in a better position to observe witnesses, observe the defendant, and to weigh the credible evidence on both sides. Resp. Br. at 12. T.R.T. disputes the last of those claims. The circuit court is in a better position to judge the credibility of the witnesses as it observes the witnesses, *State v. Garfoot*, 207 Wis. 2d 214, 223, 558 N.W.2d 626 (1997), but nothing puts it in a better position to apply its factual findings of credibility to a defendant's restorability.

As the State emphasizes, restorability is a "judicial inquiry," Resp. Br. at 10, *i.e.* a legal standard. Applying a court's factual findings and credibility determinations to a legal standard is normally a mixed question of fact and law. *Waukesha Cnty. v. J.W.J.*,

[1] This brief also uses the term "restorability" to refer to the ability of a defendant to regain to competency.

2017 WI 57, ¶15, 375 Wis. 2d 542, 895 N.W.2d 783. Judging competency is more factual as it involves analyzing facts surrounding the defendant's current presentation and witness interpretation of that presentation. *State v. Byrge*, 2000 WI 101, ¶44 n.18, 237 Wis. 2d 197, 614 N.W.2d 477. Conversely, assessing restorability involves applying factual findings to a legal standard involving the likelihood that the defendant's mental capability may be improved.

Circuit courts are not uniquely positioned to evaluate the prospect that a defendant's mental condition will improve. Realistically, the decision will be informed by the opinion of experts who have assessed the defendant. While competency is primarily a judicial determination, the ability to rehabilitate a mental condition is a medical/psychological determination.

A. The federal circuit courts' standard of review for the second *Sell* factor are not persuasive.

The State's reliance on the federal appellate circuits' analysis of the second *Sell*[2] factor—whether medication is necessary to significantly further a government's interest—is misplaced because those courts did not analyze the issue. The first court to address the issue simply said "the other *Sell* factors are factual in nature and are therefore subject to

[2] *Sell v. United States*, 539 U.S. 166 (2003).

review for clear error." *U.S. v. Gomes*, 387 F.3d 157, 160 (2nd Cir. 2004).

The first case to come out on the other side, framed the question as:

> [h]as the Government, in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness of a particular course of antipsychotic drug treatment, shown a need for that treatment sufficiently important to overcome the individual's protected interest in refusing it?

U.S. v. Bradley, 417 F.3d 1107, 1113 (10th Cir. 2005). *Bradley* correctly recognized that the question is rooted in specialized evidence regarding probability that treatment will be effective.

The first federal circuit to weigh in on the split was the Ninth, which—similar to the Second—simply stated that the issue "typically involves substantial questions of fact," and lower courts should be afforded deference. *U.S. v. Hernandez-Vasquez*, 513 F.3d 908, 915 (9th Cir. 2008). Again, no analysis, just a conclusory statement. The opinion also ignores the importance of the expert testimony that informs the finding.

The conclusory adoption of the Second Circuit's view pervades the rest of the circuits adopting that standard. *U.S. v. Evans*, 404 F.3d 227, 240 (4th Cir. 2005) (citing *Gomes*); *U.S. v. Palmer*, 507 F.3d 300, 303 (5th Cir. 2007) (agreeing with *Gomes*); *U.S. v. Green*, 532 F.3d 538, 552 (6th Cir. 2008) (citing the

Hernandez-Vasquez, *Evans*, and *Gomes*); *U.S. v. Fazio*, 599 F.3d 835, 839-40 (8th Cir. 2010) (agreeing with the majority of other circuits); *U.S. v. Diaz*, 630 F.3d 1314, 1330-31 (11th Cir. 2011) (collecting the other opinions and agreeing). This Court should not find persuasive opinions regarding a different issue where a conclusory statement snowballed into adoption of a standard without meaningful analysis.

B. The standard of review for treatability in Chapter 51 should guide this Court.

The State's attempt to distinguish restorability from the "proper subject for treatment" analysis in Chapter 51 is unconvincing. The State asserts the latter is primarily a legal question, because it turns on "abstract statutory interpretation questions" about what rehabilitation means. Resp. Br. at 14-15; Wis. Stat. § 51.01(17). The State cites nothing demonstrating that "rehabilitation" continues to confound circuit courts. Also, the statutory standard was clarified in the very case the State cites. *See Matter of Athans*, 107 Wis. 2d 331, 335-36, 320 N.W.2d 30 (1982). In fact, this Court held that rehabilitation must, in part, "ameliorate impairments and facilitate an individual's capability to function." *Id.* at 336. This is what it would mean for an individual to be restored to competency. The standards are functionally the same.[3]

[3] Moreover, the Supreme Court later described the standard for evaluating whether a committee is a proper subject for treatment as a "fact-based test," and still reviews it as a

The State, like the federal courts, makes conclusory claims that restorability is a "highly individualized, fact-specific issue." Resp. Br. at 15. The State offers no explanation or examples of why this is true or how it is different from the question of treatability in Chapter 51.

Restorability is similar to treatability under Chapter 51. App. Br. at 12-15. The Tenth Circuit acknowledges that a medical component and probability presents a primarily legal question. These principles should guide this Court in setting the standard of review as a mixed question of law and fact.

II. Courts cannot cherry-pick information and reach conclusions not supported by the record.

The issue in this matter, is not the circuit court's refusal to make findings consistent with Dr. Benson's opinion; the issue is findings made without support in the record. Decisions not supported by the record are clearly erroneous. *Royster-Clark, Inc. v. Olsen's Mill, Inc.*, 2006 WI 46, ¶11, 290 Wis. 2d 264, 714 N.W.2d 530.

The State argues the circuit court was not bound by Dr. Benson's opinion regarding T.R.T's restorability, citing the general principle that courts are "not required to accept the testimony of experts." *State v. Smith*, 2016 WI 23, ¶55, 367 Wis. 2d 483, 878

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mixed question of fact and law. *Fond du Lac Cnty. v. Helen E.F.*, 2012 WI 50, ¶36, 340 Wis. 2d 500, 814 N.W.2d 179.

N.W.2d 135; Resp. Br. at 19. While true, the State offers no authority saying courts can selectively accept the opinion of an expert regarding matters the court does not have specialized knowledge of.

A. The court was not in a position to disregard Dr. Benson's opinion regarding T.R.T.'s prognosis.

The court relied on Dr. Benson's expert opinion regarding T.R.T.'s mental illnesses and major neurocognitive disorder, by doing so, it was bound by his opinion as to T.R.T.'s prognosis, unless there was sufficient evidence to suggest another outcome.

The court did not disregard Dr. Benson's opinion entirely—instead it relied on his expertise and diagnoses to support its finding that T.R.T. lacked substantial mental capacity. (R.114:14-15; App.19-20). The court then disregarded the rest of the opinion and made a finding not supported by the record—that T.R.T. could be restored to competency.

The State does not argue, nor does the record suggest, that the court had the expertise to assess the prognosis of T.R.T. or anyone with coexisting mental illness and neurocognitive issues. Whether a person in T.R.T.'s position could be treated is not within the expertise of the court, and required specialized evidence for the court to make reasoned findings. *See State v. Perkins*, 2004 WI App 213, ¶16, 277 Wis. 2d 243, 689 N.W.2d 684 ("expert testimony is *required* only if the issue to be decided by the jury is

beyond the general knowledge and experience of the average juror") (emphasis in original).

This is not a scenario where the fact-finder could disregard portions of the expert opinion. In *State v. Owen*, this Court held that a jury could accept an expert's testimony that it was possible that a blow to a baby's chest could cause its death, and disregard the expert's inability to opine that the blow caused the death at issue. 202 Wis. 2d 620, 632-34, 551 N.W.2d 50 (Ct. App. 1996). Because the expert could not foreclose the possibility of the blow causing the death, the jury was not bound by her inability to decide. *Id.*

In *In re Commitment of Kienitz*, the Supreme Court noted that it was proper for the circuit court to rely on aspects of multiple different expert reports to form an opinion on the potential dangerousness of a Chapter 980 committee. 227 Wis. 2d 423, 438-39, 597 N.W.2d 712 (1999).

In both cases, there is a reason for the fact-finder to adopt certain portions of an expert's opinion, and not others. In *Owen*, the jury heard from an expert that the blow possibly caused the death, even if the expert could not say with certainty—they could accept that possibility in light of the evidence. In *Kienitz*, while one expert's statistical analysis did not suggest a "substantial probability" of dangerousness, the court could rely on two other experts and the defendant's extensive history to make that finding.

What T.R.T. cannot find is a case where a finder of fact could reasonably accept the expert's opinion

regarding diagnoses and reject their opinion on prognosis, as the circuit court did here.

The court's reasoning for disregarding part of the opinion is also lacking. The court claimed that Dr. Benson "relies upon the mental health history and the schizophrenia and the PTSD when determining that he's not competent to proceed, but when it comes to restoration, he doesn't mention the potential impact of restorative treatment." (R.114:17; App.22). First, this mischaracterizes Dr. Benson's opinion, which was based on the confluence of both the mental illness and major neurocognitive disorder. (R.86:18-19; App.43-44). Dr. Benson agreed people could be treated for schizoaffective disorder and PTSD, but maintained that T.R.T. would not benefit, due to the major neurocognitive disorder. (R.110:76, 80; App.147, 151).

The court's characterization of Dr. Benson's opinion was clearly erroneous. Rather than disregard the mental illnesses, Dr. Benson evaluated them in light of T.R.T.'s major neurocognitive disorder. Dr. Benson testified: "we can't divide things out in terms of saying one's more important than the other, they're all important in combination with one another." (R.110:34; App.105). He also considered and rejected the ability for T.R.T. to be treated with medications. (110:93, 94-95; App.164, 165-66).

Second, by focusing only on the evidence that T.R.T.'s conditions are generally treatable, the court failed to evaluate T.R.T.'s specific circumstances and make "an individualized, fact-specific decision."

Garfoot, 207 Wis. 2d at 227. Instead, the court's finding was one based on a generic defendant with schizoaffective disorder and PTSD, who could be treated.

Ironically, the court did exactly what it accused Dr. Benson of—disregarding one of the conditions that it found made T.R.T. not competent. The court did not explain what about the treatable mental illnesses were impacting T.R.T.'s mental capacity, such that treatment for them would make him competent. Had the evidence suggested that T.R.T. was actively psychotic and delusional (*e.g.* not competent because he had paranoid delusions that interfered with is ability to discuss the facts with his attorney), then the court's finding may have been supported by the record.

Here, the concerns were related to T.R.T.'s poor memory, (R.86:15; App.40), inability to explain or retain education regarding roles of legal terms, (R.86:15-16; App.40-41), and his overall cognitive impairment. (R.86:18-19; App.43-44). The court did not explain why it believed treatment would alleviate these concerns or point to anything in the record suggesting this. Thus, its decision was unsupported by the record.

B. By not deciding the cause of T.R.T.'s incompetency, the court could not determine the likelihood of restorability.

The court could not determine whether T.R.T. could be restored after it failed to decide what caused

T.R.T.'s incompetence. In finding T.R.T. incompetent, the court stated:

> I don't have to determine clinically what is causing his current functional limitations, whether it's the mental health or the history of neurocognitive impairments, but it's clear he is not currently able to assist in his defense.

(R.114:15; App.20). This finding made it impossible to determine whether T.R.T. was or was not likely to be restored.

While the court did not need to ascribe a medical diagnosis to determine whether an individual is incompetent, *Byrge*, 237 Wis. 2d 197, ¶31, given its reliance on the diagnoses provided by Dr. Benson, it could not find that restoration was "likely"[4] if it was not going to identify the underlying cause of the incapacity.

[4] The competency statutes require courts to determine whether a defendant is "likely" or "not likely" to be restored to competency. Wis. Stat. §§ 971.14(4)(d)&(5)(a)1. As both parties acknowledge, the statutes do not ascribe a burden to either party. App. Br. at 4; Resp. Br. at 10 n.2. T.R.T. is unaware of any statute or case defining "likely" in this context. However, "likely" is defined in Wis. Stat. § 980.01(1m) as "more likely than not." Additionally, "probable" has been defined similarly. *In re Commitment of Curiel*, 227 Wis. 2d 389, 405, 597 N.W.2d 697 (1999). Finally, "probable" is listed as a synonym to "likely" in the dictionary. *Likely*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/likely (last accessed May 20, 2025).

No one disagrees with Dr. Benson's opinion and testimony that schizoaffective disorder and PTSD are treatable conditions, (R.110:76, 80; App.147, 151), and that neurocognitive disorders are not. (R.110:79-80; App.150-51). The question is whether T.R.T. can be restored to competency with all three.

By not explaining what made T.R.T. incompetent, the circuit court's finding leaves only one conclusion—it was just as likely that T.R.T. would remain incompetent as it was that he would be restored. *See State v. Magett*, 2014 WI 67, ¶¶47-49, 355 Wis. 2d 617, 850 N.W.2d 42 (when the theory of defense allowed two equally possible explanations and only one supported an NGI[5] finding, the defendant could not meet his burden to show he was NGI by the greater weight of the credible evidence). By not deciding the root of T.R.T.'s incapacity, the court could not find it was more likely than not that T.R.T. would regain competency.[6]

III. T.R.T.'s behaviors in jail do not reflect that he is restorable.

[5] NGI is shorthand for "not guilty by reason of mental disease or defect."

[6] Given the equally likely scenarios, this case could theoretically turn on who needed to show it was more likely that T.R.T. would or would not be restored. Again, no such burden is set forth in the statutes, and T.R.T. did not originally believe it mattered in this case. Resp. Br. at 10 n.2. While he still believes the record did not support the circuit court's finding, regardless of the burden of proof, T.R.T. welcomes supplemental briefing on the issue, if the Court believes it necessary.

Testimony regarding T.R.T.'s presentation in the jail is irrelevant to whether he can be restored to competency. Criminal competency requires defendants to be able to understand legal proceedings and reasonably consult with their attorney throughout the case. *See* Wis. Stat. § 971.13(1). The State and circuit court reason that minimal functioning demonstrates an ability to become competent.

According to the State, certain facts support a finding that T.R.T. could be restored. Specifically, "Jail staff observed more or less 'normal' behavior from T.R.T. over the past two years." Resp. Br. at 17. This included "be[ing] able to interact with staff and other inmates," "follow[ing] jail rules," and "carry[ing] on a normal conversation." Resp. Br. at 17; (R.114:9, 16; App.14, 21). Neither the State, nor the circuit court explained how this demonstrates T.R.T. could be restored to competency—*i.e.* that he would be able to understand legal proceedings and meaningfully consult with his attorney.

There is no support in the record that correlates a minimum level of functioning to T.R.T.'s ability to become competent. Additionally, this evidence was presented to argue T.R.T. was feigning mental incapacity. While the evidence suggests that T.R.T. was not impaired by his schizoaffective disorder, it has little bearing on his major neurocognitive disorder. T.R.T. not espousing delusional or paranoid beliefs or any behaviors suggesting psychosis or mania, (R.102:36), only undermines the court's finding. By not demonstrating obvious psychosis or mania for two

years, the record suggests any incapacity was driven more by the neurocognitive disorder. Thus, it shows that treatment was unlikely to restore T.R.T. *Supra* at 14.

The State and circuit court's reliance on T.R.T. behaving normally does not suggest restorability. Moreover, both seem to operate under the incorrect belief that individuals with cognitive impairments must be completely helpless to either be genuinely impaired or unable to be restorable.

Again, the court was not bound by Dr. Benson's opinion. The State or court could have asked Dr. Borra hypothetical questions to get another opinion regarding whether someone in T.R.T.'s position—as described by Dr. Benson—could gain the necessary functioning. They could have asked Dr. Borra if T.R.T.'s presentation in jail suggested whether any incapacity could be rehabilitated. This could have given the court a reason to ignore Dr. Benson's prognosis.

Once the court agreed the mental illnesses and major neurocognitive disorders both contributed to the incompetency nothing in the record was sufficient to undermine Dr. Benson's opinion regarding T.R.T.'s prognosis.

Observations that T.R.T. did not appear mentally ill do not support a finding that he could be restored to competency without evidence in the record to suggest the two were related. As such, the court's

findings were not supported by the record and are clearly erroneous.

CONCLUSION

The circuit court's finding regarding T.R.T.'s restorability was clearly erroneous. This Court should reverse and remand with instructions for the circuit court to find T.R.T. not competent and not likely to regain.

Dated this 23rd day of May, 2025.

Respectfully submitted,

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CERTIFICATIONS

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 3,000 words.

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 23rd day of May, 2025.

Signed:
Electronically signed by Lucas Swank
LUCAS SWANK
Assistant State Public Defender