STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2025AP437-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

T.A.W.,

Defendant-Appellant.

On Appeal from an Order of Commitment for Treatment (Incompetency) Entered in the Milwaukee County Circuit Court, the Honorable Mark A. Sanders Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The State failed to prove the first *Sell*[1] factor by clear and convincing evidence.

The State asserts that it is irrelevant that Thomas[2] is not charged with a "serious crime" as defined by Wis. Stat. § 969.08(10)(b), the statute that defines whether a crime is serious for the purposes of modifying bail. (Response Br. at 16). Contrary to this argument, this Court has recognized that Wis. Stat. § 969.08 provides an objective parameter for evaluating the first *Sell* factor. *State v. J.D.B.*, 2024 WI App 61, ¶36, 414 Wis. 2d 108, 13 N.W.3d 525. As a result, the State's argument is directly contrary to binding precedent, and the State's interest in prosecuting Thomas is limited because neither of his charges are considered serious under Wis. Stat. § 969.08 nor any other statute.

Moreover, the State ignores that both of Thomas' alleged crimes fall on the lower end of the punishment spectrum. As this Court recognized when granting a continued stay of Thomas' involuntary medication order, the lower penalties Thomas faces reflect the legislature's determination that these offenses are less serious than those in higher categories. (32:6). *See also United States v. White*, 620 F.3d 401, 410-11 (4th Cir. 2010) ("Without

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

[2] Pseudonym for T.A.W.

establishing a hard and fast rule … a crime is serious for involuntary medication purposes where the defendant face[s] a ten-year maximum sentence for the charges against him.").

According to the State, it would be "absurd" to consider the fact that Thomas is not charged with a "violent felony" as defined by Wis. Stat. § 941.29(1g)(a). (Response Br. 16-17). This claim is meritless because Wis. Stat. § 941.29(1g)(a) provides an objective basis for classifying violence in exactly the same way that Wis. Stat. § 969.08(10)(b) provides an objective basis for evaluating seriousness. Additionally, the State flatly misstates the law when it claims that Wis. Stat. § 941.29(1g)(a) has no applicability outside of possession of firearms cases. (Response Br. at 16-17). The State ignores that the definition of violent felony under Wis. Stat. § 941.29(1g)(a) also controls statutory eligibility for the Challenge Incarceration Program, thereby reflecting the legislature's determination that Wis. Stat. § 941.29(1g)(a) has broader applicability. *See* Wis. Stat. § 302.045.

The State further overlooks that Thomas did not make any threats, that his alleged conduct was not intended to harm anyone, and that his alleged conduct only resulted in "a minor injury." (30:42-43; App. 46-47). Without acknowledging any of these facts even once, the State asserts that "no reasonable person would describe T.A.W.'s alleged criminal conduct as non-violent, much less non-serious." (Response Br. at 16-17). Since the State has wholly ignored key facts in

Thomas' case, the State has no basis to assert that any reasonable person would agree with its arguments.

The State also asserts that Thomas needs to be involuntarily medicated in order to enforce "Officer D.S.'s rights" under Marsy's Law. (Response Br. at 13-14). There are at least three problems with this argument. First, the claim that Marsy's Law categorically establishes the first *Sell* factor in victim-based cases contradicts the State's alternative argument that this factor cannot be analyzed "in such a categorical fashion[.]" (Response Br. at 16).

Second, Thomas has a federal due process right to not be involuntarily medicated unless the State proves all four *Sell* factors. *See State v. Fitzgerald*, 2019 WI 69, ¶32, 387 Wis. 2d 384, 929 N.W.2d 165. Even assuming for the sake of argument that there is a conflict between Thomas' federal due process rights and the police officer's rights under state law, Thomas' federally-protected rights take precedence. *See State v. Powers*, 2004 WI App 156, ¶10 n.7, 276 Wis. 2d 107, 687 N.W.2d 50.

Third, the State incorrectly claims that involuntary medication is needed so that the officer can obtain restitution. (Response Br. at 13). This argument makes little to no sense because the State failed to present any evidence at the involuntary medication hearing that the officer incurred financial costs or would be requesting restitution. (30:1-49; App. 5-53). Since the State failed to provide a factual basis

for restitution at the circuit court level, its argument on restitution is speculative and unpersuasive.

In regards to special circumstances that undermine the State's interest in prosecution, the State acknowledges that Thomas was held in custody without a bail hearing in violation of Wis. Stat. § 969.01, and that he faced a lengthy delay between commitment and placement in a mental health facility. However, the State incorrectly claims that the 10 months and counting that Thomas has spent in custody "is not a special circumstance" for the purposes of the first *Sell* factor. (Response Br. at 19). The State claims this period of incarceration is not significant because it is less than the maximum sentence, but the State fails to identify any legal authority supporting the idea that a defendant must serve the maximum sentence in order for confinement time to qualify as a special circumstance under *Sell*. Contrary to the State's argument, 10 months is a significant period of custody because it eliminates the possibility that Thomas would be free without punishment. *See Sell*, 539 U.S. at 180.

In addition to discounting the length of time that Thomas has spent in custody, the State falsely asserts that Thomas "made progress toward competency restoration while in jail." (Response Br. at 15). The State does not articulate why progress in jail would even be a relevant consideration for the purposes of the first *Sell* factor, but regardless, the two competency evaluations the State cites during this portion of its argument show no meaningful progress.

(16:1-16; 27:1-6). There is therefore no merit to the State's unsupported claims regarding the lack of treatment that Thomas received in jail.

Finally, the State offers up a lengthy tangent on why it believes the circuit court was permitted to rely on the allegations in the complaint at the involuntary medication hearing. (Response Br. at 18-19). This argument is non-responsive to the arguments raised in Thomas' initial brief because Thomas has not claimed that the complaint was off limits from consideration. Rather, as noted in the initial brief, the deficiency in the complaint is that it included only a conclusory one-sentence statement regarding the allegation that Thomas "grabbed at" the officer's taser. (2:2). Thus, the minimal level of detail in the complaint regarding this allegation, the lack of testimony presented to supplement it, and the absence of any charge filed in connection with it collectively reduce any interest the State has in prosecuting this uncharged allegation.

Based on the above, the non-violent offenses that Thomas is charged with do not meet the legislature's definition of serious crimes, and special circumstances reduce the government's interest in

prosecuting Thomas. For these reasons, the first *Sell* factor was not satisfied.[3]

[3] Thomas' initial brief argued that the proposed treatment did not satisfy the second and fourth *Sell* factors because it did not identify maximum dosages for the proposed medications on a daily, weekly, or monthly basis. While there was no testimony on this issue, and the treatment plan itself did not provide this information, the State notes that a letter attached to the treatment plan included daily maximum dosages for each of the proposed medications. (19:5). Undersigned counsel concedes that this letter satisfies the requirement for maximum dosages. *See J.D.B.*, 2024 WI App 61, ¶¶56-57.

CONCLUSION

For the reasons stated above and in his initial brief, Thomas asks this Court to reverse and remand with instructions for the circuit court to vacate the involuntary medication order.

Dated this 9th day of May, 2025.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 1,258 words.

Dated this 9th day of May, 2025.

Signed:

Electronically signed by
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