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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2025AP437-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

T.A.W.,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUE PRESENTED

1. Did the State prove by clear and convincing evidence that it had an important interest in prosecuting Thomas[1] in order to support an order for involuntary medication to restore him to competency under *Sell v. United States*, 539 U.S. 166 (2003)?

   The circuit court answered yes.

   The court of appeals answered yes.

CRITERIA FOR REVIEW

The first *Sell* factor requires the State to prove that "*important* governmental interests are at stake." *Id.* at 180 (emphasis in original). This requires proof that medication aims to bring "to trial an individual accused of a serious crime." *Id.* To find this factor satisfied, a court "must consider the facts of the individual case in evaluating the Government's interest in prosecution." *Id.* While *Sell* did not define "serious crime," federal courts often defer to the judgment of the legislature. *United States v. Breedlove*, 756 F.3d 1036, 1041 (7th Cir. 2014); *see also Lewis v. United States*, 518 U.S. 322, 326 (1996) ("The judiciary should not substitute its judgment as to

[1] A pseudonym for the defendant-appellant-petitioner, T.A.W.

seriousness for that of a legislature, which is far better equipped to perform the task.").

In Wisconsin, the legislature has already defined the phrases "serious crime" and "serious felony" in multiple contexts.[2] The statute defining "serious crime" for the purposes of revoking bond, Wis. Stat. § 969.08, is the best fit because it is the most expansive and because holding an individual without bond best mirrors the competing interests in administering involuntary medication, i.e. a defendant's liberty interest weighed against the State's public safety and prosecutorial interests. Consequently, the court of appeals has previously relied on Wis. Stat. § 969.08 when determining whether a crime is serious for the purposes of the first *Sell* factor. *J.D.B.*, 2024 WI App 61, ¶36, 414 Wis. 2d 108, 13 N.W.3d 525.

Here, the State has only a minimal interest in prosecuting Thomas because neither of his charges are considered "serious" under Wis. Stat. § 969.08 nor any other statute. Additionally, neither of the charges—retail theft and resisting an officer causing a soft tissue injury—are violent offenses. *See* Wis. Stat. § 941.29(1g). And as the court of appeals recognized when granting a stay of Thomas's involuntary medication order, both of these alleged crimes fall on

[2] "Serious crime" is defined in Wis. Stat. §§ 48.685(1)(c); 50.065(1)(e)1. & 2; and 969.08(10)(b). Wis. Stat. § 949.165(1)(a) incorporates the definition from § 969.08(10)(b). "Serious felony" is defined in Wis. Stat. §§ 48.415(9m)(b); 302.11(1g); 939.62(2m)(a)2m.; and 973.0135(1)(b).

the lower end of the punishment spectrum, reflecting 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 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."). Moreover, in regards to the facts of Thomas's individual case, Thomas did not make any threats, his alleged conduct was not intended to harm anyone, and it only resulted in what the circuit court characterized as "a minor injury." (30:42-43; App. 58-59).

Despite the above considerations, the court of appeals concluded that the State satisfied its burden to show that it had an important interest in prosecuting Thomas. *State v. T.A.W.*, No. 2025AP437-CR, unpublished slip op., ¶23, (Wis. Ct. App. Jun. 3, 2025) (App. 13). However, the court's opinion is not recommended for publication, and there is presently no published Wisconsin caselaw addressing the first *Sell* factor in the context of non-violent crimes. Review is therefore warranted because a decision by this Court would develop and clarify the law regarding the first *Sell* factor. *See* Wis. Stat. § 809.62(1r)(c)2.

STATEMENT OF FACTS

On July 3, 2024, the State charged Thomas with one count of misdemeanor retail theft and one count of resisting an officer causing a soft tissue injury. (2:1). According to the complaint, police attempted to detain

Thomas based on a retail theft complaint at Walgreens. (2:1). Thomas allegedly resisted detention, and police officers "took him to the ground," at which point he "kicked at" one of the officers and "grabbed at" the officer's taser. (2:1-2). The officer sustained abrasions to his hands and knees during this struggle, but police were able to detain Thomas. (2:2).

Thomas's competency was called into question on July 5, 2024, and he was remanded into custody without a bail hearing in violation of Wis. Stat. § 969.01. (28:15; App. 80). A psychologist subsequently examined Thomas and opined that he lacked substantial mental capacity to understand the proceedings or assist in his defense such that he was incompetent to stand trial. (16:5-6). Nonetheless, the psychologist opined that Thomas was likely to attain competency within statutory time limits if provided with psychotropic medications. (16:6).

Thomas remained in custody in continued violation of Wis. Stat. § 969.01, and on August 13, 2024, the circuit court committed him to the Department of Health Services for treatment to restore competency. (28:13; App. 78).[3] From that point forwards, Thomas remained in county jail for an additional four months before finally transferring to the Sand Ridge Secure Treatment Center for

[3] While the circuit court committed Thomas on August 13, 2024, it did not enter a written order to that effect until August 24, 2024. (12:1-2).

competency restoration treatment on December 18, 2024. (28:13; App. 78).

On January 6, 2025, DHS filed a motion requesting an involuntary medication order. (19:1). The motion requested a hearing "to determine whether [Thomas] is competent to refuse medication and requires involuntary medication in order to gain competency[.]" (19:1). Along with the motion, DHS filed a treatment plan prepared by Andrew Kordus, a medical doctor. (19:2-4).

At the involuntary medication hearing, the State called Dr. Kordus as its sole witness. Dr. Kordus testified that he had met with Thomas on two occasions over the past several weeks, and that he believed Thomas was not competent to refuse medications. (30:5-6; App. 21-22). Dr. Kordus further testified that Thomas's diagnosis was "unspecified schizophrenia spectrum or other psychotic disorder." (30:6; App. 22). He said Thomas was experiencing thought disorganization, internal stimuli, and delusions. (30:6; App. 22). Dr. Kordus also stated that medication treatment would be the only way to treat these symptoms, and that medication would likely restore Thomas's competency to stand trial. (30:7, 14; App. 23, 30).

Dr. Kordus further testified that his treatment plan for Thomas included three medications: Risperdal, Haldol, and Olanzapine. (30:8-11; App. 24-27). He stated that Thomas had responded favorably to Risperdal and Haldol in the past, that Thomas was

currently prescribed two milligrams of Risperdal at bedtime, and that Haldol and Olanzapine could be administered if Thomas did not respond favorably to Risperdal. (30:8-12; App. 24-28). According to Dr. Kordus, the initial dose for Haldol is usually 5 milligrams, whereas Olanzapine is "administered initially [at] 10 milligrams at bedtime." (30:10-11; App. 26-27). Dr. Kordus testified that in addition to the oral versions of these medications, each medication could be administered via injections. (30:11; App. 27).

At the conclusion of testimony, the circuit court addressed the *Sell* factors and found that each factor was satisfied so as to justify involuntarily medication.[4] As to the first factor, the court analyzed whether an important government interest existed to prosecute Thomas by reference to the court of appeals' recent decision in *J.D.B.* The court first noted that the defendant in *J.D.B.* was charged with a crime that is statutorily defined as a "serious crime," and that Thomas was not charged with any crime that is statutorily defined as serious. (30:34, 38; App. 50, 54). Next, the court stated that the allegations in *J.D.B.*

[4] "In short summation, a court must find that: (1) there are important government interests at stake, including bringing a defendant to trial for a serious crime; (2) involuntary medication will significantly further those state interests; (3) involuntary medication is substantially likely to render the defendant competent to stand trial; and (4) administration of the drugs is in the patient's best medical interest in light of his medical condition." *State v. Green*, 2022 WI 30, ¶29, 401 Wis. 2d 542, 973 N.W.2d 770 (citing *Sell*, 539 U.S. at 180-81).

were more aggravated than in the instant case because J.D.B. punched and threatened to murder a police officer. (30:35; App. 51).

The court stated that Thomas's case and *J.D.B.* were similar in that special circumstances existed in both cases to lessen the government's interest in prosecution. Specifically, the court noted that both Thomas and J.D.B. were held in custody without a bail hearing in violation of Wis. Stat. § 969.01, and that both faced lengthy delays in county jail before being transferred to an institution for competency restoration treatment. (28:12-15; App. 77-80). The court also noted that the delay in Thomas's case was longer than in *J.D.B.* (28:13; App. 78).

Notwithstanding the above, the circuit court concluded that the State had an important interest in prosecuting Thomas primarily based on two allegations in the criminal complaint. (28:15; App. 80). First, the court stated that the police officer in Thomas's case allegedly suffered what the court characterized as "a minor injury." (30:43; App. 59). Second, the court stated that Thomas had allegedly attempted to grab the officer's taser at one point. (28:10-11; App. 75-76). Thus, while the court believed that the first *Sell* factor presented a "very close" case, it ultimately decided that the State had established the first factor. (28:16; App. 81).

The circuit court further concluded that the State had established the second, third, and fourth *Sell* factors. In support of this finding, the court relied

on Dr. Kordus's testimony that forced medication was likely to restore Thomas's competency to stand trial, that there were no alternatives to medication, and that the proposed treatment plan was medically appropriate for Thomas. (28:16-19; App. 81-84).

The circuit court thereafter entered an order authorizing the involuntary administration of medication, and Thomas filed a notice of motion to continue the automatic temporary stay of the order pursuant to Wis. Stat. § 809.109(7). (24:1; 25:1; App. 15). Thomas then filed a memorandum in support of the motion, and the court of appeals entered an order continuing the stay. (32:6).

Thomas subsequently appealed the involuntary medication order, and the court of appeals affirmed. *T.A.W.*, No. 2025AP437-CR, ¶1 (App. 4). The court concluded that the State had an important interest in prosecuting Thomas for the following reasons:

> Although resisting an officer causing soft tissue injury is not listed as a 'serious crime' under WIS. STAT. § 969.08, there is no requirement in *J.D.B.* that a crime must be listed in § 969.08 or any other statute defining 'serious crime' in other contexts in order to qualify as a 'serious crime' under *Sell*. There are more similarities between the charges in *J.D.B.* and against Thomas than there are differences. For example, as was the case in *J.D.B.*, the victim of the crime Thomas allegedly committed was a police officer and the charge carried a maximum penalty of six years of imprisonment. We also observe that both the charges here and in *J.D.B.* involve bodily harm

> being inflicted by the defendant, although we recognize that battery involves the intentional causing of bodily harm while resisting does not.
>
> However, there is at least one aggravating factor present in this case that was not present in *J.D.B.*; namely, that Thomas reached for Officer Dalton's Taser. As the circuit court pointed out, Thomas's conduct as described in the criminal complaint comes very close to satisfying the elements of attempting to disarm a police officer under WIS. STAT. § 941.21, but that statute requires Thomas to have actually succeeded at disarming Officer Dalton.

Id., ¶¶19-20 (footnotes omitted) (App. 10-11).

Additionally, the court of appeals held that, unlike in *J.D.B.*, special circumstances did not wholly undermine the State's interest in prosecuting Thomas for several reasons:

> First, the defendant in *J.D.B.* was a 'first-time, then-19-year-old offender,' whereas Thomas was a then-40-year-old, repeat offender. *Id.* Second, and importantly, although Thomas and the defendant in *J.D.B.* share similar stories with respect to their pretrial detentions and the timeliness with which they received treatment, Thomas lacks a record upon which to argue that there is significant potential of a future civil commitment. The record in *J.D.B.* reflected 'a significant potential for [the defendant]'s future civil commitment' through either WIS. STAT. ch. 51 proceedings or by successfully asserting an NGI defense at trial. *Id.*, ¶41.... Here, although the special circumstances highlighted by Thomas

> lessen the State's interest in prosecuting him (i.e., the length and circumstances of his pretrial detention), Thomas falls short of "totally undermin[ing]" that interest. *See Sell*, 539 U.S. at 180.

Id., ¶22 (App. 12-13).

ARGUMENT

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

A. General legal principles.

If the government seeks an involuntary medication order during criminal competency proceedings, the goal of that order is limited to "rendering the defendant *competent to stand trial*." *Sell*, 539 U.S. at 181 (emphasis in original). Unlike the civil commitment system, the criminal legal system is not the appropriate mechanism for providing broad mental health treatment. Involuntary treatment for individuals deemed incompetent in the criminal system is instead focused on rendering a person—who is presumed innocent—competent so they can be prosecuted. For that reason, *Sell* requires the State to prove that "*important* governmental interests are at stake." *Sell*, 539 U.S. at 180 (emphasis in original). This requires proof that medication aims to bring "to trial an individual accused of a serious crime." *Id.* To find the first factor satisfied, a court "must consider the facts of the individual case in evaluating the Government's interest in prosecution." *Id.* If the State

fails to prove any this factor, the involuntary medication order violates the Due Process Clause and is unconstitutional. *Id.* at 179.

B. The government does not have an important interest in prosecuting Thomas.

Sell did not define "serious crime," but federal courts often defer to the judgment of the legislature. *Breedlove*, 756 F.3d at 1041; *see also Lewis*, 518 U.S. at 326 ("The judiciary should not substitute its judgment as to seriousness for that of a legislature, which is far better equipped to perform the task."). In Wisconsin, the legislature has already defined the phrases "serious crime" and "serious felony" in multiple contexts. The statute defining "serious crime" for the purposes of revoking bond, Wis. Stat. 969.08, is the best fit because it is the most expansive and because holding an individual without bond best mirrors the competing interests in administering involuntary medication, i.e. a defendant's liberty interest weighed against the State's public safety and prosecutorial interests. Consequently, the court of appeals has relied on Wis. Stat. § 969.08 when determining whether a crime is serious for the purposes of the first *Sell* factor. *J.D.B.*, 2024 WI App 61, ¶36.

Here, the State has only a minimal interest in prosecuting Thomas because neither of his charges are considered "serious" under Wis. Stat. § 969.08 nor any other statute. Additionally, neither of Thomas's

charges are violent offenses. *See* Wis. Stat. § 941.29(1g). And as the court of appeals recognized when granting a continued stay of the involuntary medication order, both of Thomas's alleged crimes fall on the lower end of the punishment spectrum, reflecting the legislature's determination that these offenses are less serious than those in higher categories. (32:6). *See also White*, 620 F.3d at 410-11 ("Without 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.").

Thomas's case is distinct from *J.B.D.* because the defendant in that case was charged with a violent felony that is statutorily defined as a "serious crime" under Wis. Stat. § 969.08. *J.D.B.*, 2024 WI App 61, ¶36.[5] In addition to these categorical differences, the specific allegations in *J.D.B.* were more aggravated because the defendant allegedly made "threats about getting a gun and killing everyone in [his] residence." *J.D.B.*, 2024 WI App 61, ¶6. He also punched a police officer in the face and threatened to murder him. *Id.* By contrast, Thomas did not make any threats, his alleged conduct was not intended to harm the officer, and it allegedly only resulted in "a minor injury." (30:42-43; App. 58-59). While the circuit court relied heavily on the allegation that Thomas had attempted to grab the officer's taser at one point, the State never

[5] The court of appeals concluded that J.D.B. was charged with a serious crime, but held that special circumstances undermined the State's interest in prosecution. *Id.*, ¶¶35, 53.

introduced evidence from anyone with firsthand knowledge of the incident and instead chose to rely on a conclusory one-sentence statement in the complaint. (28:10-11; 30:36-37; App. 52-53, 75-76). At a minimum, the lack of evidence presented to support this allegation, the minimal level of detail provided in the complaint, and the absence of any charge filed in connection with the allegation reduces the State's interest in prosecution.

Moreover, "it is not enough that the State generally has an important interest in bringing to trial *anyone* charged with a serious crime" because special circumstances can undermine the State's interest in prosecution of a serious crime. *J.D.B.*, 2024 WI App 61, ¶37 (emphasis in original). Here, even assuming for the sake of argument that Thomas had been charged with a serious crime, three special circumstances undermine the State's interest in prosecution. First, Thomas was held in custody without a bail hearing for well over a month in violation of Wis. Stat. § 969.01. (28:15; App. 80). As the court of appeals recognized in *J.D.B.*, "[t]his statutory violation is significant, and it lessens the importance of the State's interest in prosecution." 2024 WI App 61, ¶46. Second, Thomas was ordered committed on August 13, 2024, and was supposed to be transported "forthwith" to the appropriate facility for treatment, but he remained in the county jail until December 18, 2024, when he was transferred to Sand Ridge for treatment. (28:13; 12:3; App. 78). As in *J.D.B.*, this delay is a "significant period of time that is incongruous with constitutional demands." 2024 WI App 61, ¶52. Third, Thomas has at

this point already been in custody for over nine months and counting such that there is no risk that he will be free without punishment. This consideration lessens the importance of the State's interest in prosecution because it "'diminishes the risks that ordinarily attach to freeing without punishment one who has committed a serious crime.'" *Id.*, ¶38 (quoting *Sell*, 539 U.S. at 180).

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.

CONCLUSION

For the reasons stated above, Thomas asks this Court to grant review, reverse the decision of the court of appeals, and remand with instructions for the circuit court to vacate the involuntary medication order.

Dated this 3rd day of July, 2025.

Respectfully submitted,

Electronically signed by David Malkus
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 3,171 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition 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 3rd day of July, 2025.

Signed:

Electronically signed by
David Malkus
DAVID MALKUS
Assistant State Public Defender