STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case Nos. 2025AP1745-CR; 2025AP1746-CR;
2025AP1747-CR; 2025AP1748-CR;
2025AP1749-CR; 2025AP1750-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

B.M.T.,

Defendant-Appellant.

Appeal from Orders of Commitment for Treatment (Incompetency) Entered in the Manitowoc County Circuit Court, the Honorable Mark R. Rohrer, Presiding

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BRIEF OF DEFENDANT-APPELLANT

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The circuit court found Brian[1] incompetent under Wis. Stat. § 971.14 in six separate Manitowoc County cases. Following a later hearing, the circuit court ordered involuntary medication in all cases.

1. Did the involuntary medication order violate Brian's right to due process because the court failed to consider the specific facts of the cases when concluding that the state met its burden under first factor in *Sell v. United States,* 539 U.S. 166 (2003)?

Without allowing the parties to make any legal argument, the circuit court concluded that the state met its burden on the first *Sell* factor because Brian was charged with felonies.

2. Did the involuntary medication order violate Brian's right to due process because the proposed treatment plan was insufficiently individualized to prove the second and fourth *Sell* factors?

Relying solely on the testimony of a psychiatrist who did not physically examine Brian and offered no records discussing Brian's specific medical condition, the circuit court held that the state met its burden.

[1] Under Wis. Stat. § 809.109, B.M.T.'s appeal from an order under Wis. Stat. § 971.14 is confidential and this brief refers to B.M.T. by the pseudonym, "Brian."

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested because the parties can fully address the issues through briefing.

Publication is not warranted because the issue presented requires only the application of facts to binding caselaw.

STATEMENT OF THE CASE AND FACTS

Brian is a 49-year-old man with a documented history of mental illness dating back to 1995. (R.38:3; App. 17).[2] After first being diagnosed with schizoaffective disorder in 1995, Brian has been hospitalized at Winnebago Mental Health Institute on nine occasions under chapter 51 commitments. (R.38:3; App. 17). Brian was a resident at Trempealeau County Health Care Center from 2015-2019. (R.38:3; App. 17). Brian's most recent civil commitment ended in March 2024. (R.38:3; App. 17).

A few months after his most recent civil commitment ended, the state charged Brian with three counts of felony bail jumping and one count of misdemeanor bail jumping when he allegedly violated a no contact order "with Kwik Trip on 8th Street in Manitowoc." (R.2:1-2). According to the complaint, Brian "bought a Pepsi" from Kwik Trip, was "unaware

[2] Unless otherwise identified by case number, citations to the record refer to the document number in Manitowoc County Case No. 2024CF488 and Appeal No. 2025AP1750-CR.

of the bail conditions," and was transported to the Manitowoc County Jail "without incident." (R.2:2).

According to the complaint, Brian was on bond in four other cases and had been charged in 2015CF117 with battery by a prisoner, disorderly conduct, and 2 counts of misdemeanor bail jumping. (R.2:2). In total, Brian was charged with 20 counts in 6 separate cases—including 1 count of possession of drug paraphernalia, 4 counts of disorderly conduct, 5 counts of misdemeanor bail jumping, 1 count of misdemeanor battery, 1 count of possession of methamphetamine, 1 count of substantial battery, 6 counts of felony bail jumping, and 1 count of battery by prisoner—between February 24, 2015 and July 15, 2024. (R.44:2; App. 4).

On December 17, 2024, Brian was found incompetent to stand trial on each of those charges based on the evaluation and testimony of Kristine Nehring, Psy.D., a licensed psychologist. (2025AP1749-R.24:1-9; R.18:1-29; App. 6-14). Brian was committed to the care of the Department of Health Services (DHS) for competency restoration treatment for a period of 12 months. (R.44:1-2; App. 3-4). At that time, the circuit court did not order involuntary medication. (R.13:2). Brian was granted 28 days of credit for pre-commitment incarceration. (R.44:3; App. 5).

Six months later, the state moved for an involuntary medication order based on the report of Kevin Murtaugh, MD, a psychiatrist at Mendota

Mental Health Institute. (R.38:1; R.47:4; App. 15, 30). Dr. Murtaugh also submitted a treatment plan proposing a 400mg long-acting injection of aripiprazole (Abilify) every 4 weeks. (R.38:6; App. 20). Dr. Murtaugh also proposed "up to 30mg/day" of oral aripiprazole "for the first 2 months of treatment with the long-acting injection. (R.38:6; App. 20). He also proposed "Olanzapine 5-10mg/day for refused oral aripiprazole." (R.38:6).

According to Dr. Murtaugh, during a previous course of treatment, Brian "responded fairly well to long-acting injectable haloperidol but said he did not like how it made him feel." (R.38:4; App. 18). Dr. Murtaugh did not specify when Brian took haloperidol or how much he took. According to the report, B.M.T. has also "taken paliperidone long-acting injection but it's unclear if he took it long enough for it to adequately treat his symptoms." (R.38:4; App. 18). Dr. Murtaugh reported that Brian was offered oral aripiprazole on June 4, 2025, but refused all doses (R.38:6; App. 20).

According to the treatment plan, Dr. Murtaugh explained the advantages of taking aripiprazole and read the possible side effects to Brian. (R.38:8; App. 22). Brian responded that he would not take any medication and that he planned to pay for outpatient competency restoration treatment. (R:38:8; App. 22). Dr. Murtaugh attached Micromedex "DrugNotes" for oral and injectable aripiprazole to the treatment plan and gave Brian access to those notes. (R.38:8-12; App. 22-26).

On June 18, 2025, the court held an involuntary medication hearing. (R.47:1; App. 27). Dr. Murtaugh was the sole witness at the hearing. (R.47:2; App. 28). Dr. Murtaugh testified that he "performed an evaluation" on Brian and reviewed his records from Mendota and Winnebago. (R.47:5-6; App. 31-32). He repeated his medication recommendations from the treatment plan. (R.47:6; App. 32).

Dr. Murtaugh testified that Brian "isn't currently taking any other medications and he has not made us aware of any physical health conditions nor does he show any signs of a concerning physical health condition that would necessitate a dose adjustment. (R.47:6-7; App. 32-33). Without discussing any particular medical records, and without describing any physical examination, Dr. Murtaugh explained that "[a]s far as I know [Brian] is generally a healthy man" and that he was "not aware of" any medical conditions that would preclude the use of any specific psychiatric medications. (R.47:7; App. 33).

Dr. Murtaugh explained that Brian's diagnosis of schizoaffective disorder means that there are no "good evidence-based treatments" other than anti-psychotic medications. (R.47:7; App. 33). When asked if it was likely the medication would render Brian competent, he explained that Brian has not taken Abilify (aripiprazole) before and he "can't really predict" whether it would render "any one specific patient" competent. (R.47:7-8; App. 33-34). Dr. Murtaugh elaborated by describing unspecified records showing that Brian "didn't like how

specifically the medication haloperidol made him feel" but it "did seem to be helpful medication for him." (R.47:8; App. 34). According to Dr. Murtaugh, "generally speaking . . . most patients tolerate Abilify which is a newer medication better than haloperidol." (R.47:8; App. 34).

When asked if Brian was likely to become competent without medication, Dr. Murtaugh testified that he did not "believe so." (R.47:9; App. 35). Dr. Murtaugh explained that that schizoaffective disorder is a "lifelong illness" with "continuous symptoms" that may "wax and wane" but do not "resolve." (R.47:9-10; App. 35-36). Dr. Murtaugh testified that he attempted to discuss the advantages and side effects of accepting medication and Brian responded that "he doesn't take medication" and "gets focused on" receiving "treatment to competency on an outpatient basis." (R.47:8-10; App. 34-36).

Dr. Murtaugh did not discuss any specific side effects of Abilify. Instead, he explained that "most patients that I treat with this medication do very well on it, but I cannot predict any specific, you know, result for a patient who hasn't taken it before." (R.47:12; App. 38). Dr. Murtaugh concluded his direct testimony by explaining that "[s]ometimes even people who have take [Abilify] can have different side effects at different times" because "psychiatric medications are strange like that." (R.47:12; App. 38).

Responding to a question from the court about whether "any type of physical examination" took place at Mendota, Dr. Murtaugh admitted that "I don't recall if [Brian] participated in" any "opportunity to meet with one of our . . . internal medicine specialists" to do a "full history and physical." (R.47:12-13; App. 38-39).

Without hearing arguments from the parties, the circuit court immediately issued an oral ruling. (R.47:22-27; App. 48-53). The court first found that Brian is not competent to refuse medication. (R.47:23-25; App. 49-51).

Then the court discussed the four factors in *Sell* and found that the state proved the first *Sell* factor. According to the court, because Brian is "charged with a number of felony cases" which are "serious crimes as one could go to prison . . . obviously trying to make someone competent so they can be brought to trial is a sufficient important governmental interest." (R.47:25-26; App. 51-25).

Next the court found that the second *Sell* factor was met because the "doctor has clearly testified, it's uncontroverted, that the medication will assist, based upon his experience as a doctor, in making him competent to proceed to trial." (R.47:26; App. 52).

The court then found that the third *Sell* factor was met because that "doctor testified outpatient isn't going to work, medication is necessary as the means of assisting in returning [Brian] to competency to stand trial in this case." (R.47:26; App. 52).

Finally, the court found that the fourth *Sell* factor was met because there is "no medical condition that [Brian] is suffering from where there would be adverse effects in taking the medication." (R.47:26-27; App. 52-53). The court also found that the proposed treatment plan was sufficient because it included "specific medications, dosage, and frequency" and the doctor reviewed "medical history, medical conditions, and risk factors or side effects." (R.47:27; App. 53).

The circuit court issued a written order for involuntary medication in all cases. (R.44:1-3; App. 3-5).

Brian's trial attorney moved to continue the automatic stay of involuntary medication in each case, under Wis. Stat. § 809.109(7)(b). After reviewing memoranda of the parties on the stay motion, this Court denied that motion on August 5, 2025. This Court consolidated the two cases for appeal on September 24, 2025. This appeal follows.

ARGUMENT

Every individual has a "significant constitutionally protected liberty interest in avoiding the unwanted administration of antipsychotic drugs." *Sell,* 539 U.S. at 177 (internal citation omitted). The forced administration of antipsychotic medication at the hands of the government "constitutes a deprivation" of that core liberty interest "in the most literal and fundamental sense." *United States v.*

Watson, 793 F.3d 416, 419 (4th Cir. 2015) (internal citations omitted).

"With such an important liberty interest at stake, the accompanying protections should mirror the serious nature of the proceedings." *Langlade Cnty. v. D.J.W.,* 2020 WI 41, ¶43, 391 Wis. 2d 231, 942 N.W.2d 277. Thus, the Wisconsin Supreme Court has declared that circuit courts must consider the *Sell* factors before ordering involuntary medication to restore trial competency. *State v. Fitzgerald,* 2019 WI 69, ¶2, 387 Wis. 2d 384, 929 N.W.2d 165.

This Court has expanded upon that basic directive and clarified what the state must do to meet its burden under *Sell* when a defendant's "constant" and "significant liberty interest in avoiding the unwanted administration of antipsychotic drugs" is at stake. *State v. Green,* 2021 WI App 18, ¶¶ 17, 35, 396 Wis. 2d 658, 957 N.W.2d 583; *see also State v. J.D.B.,* 2024 WI App 61, 414 Wis. 2d 108, 13 N.W.3d 525, *review granted,* 2025 WI 8, 18 N.W.3d 694.

Here, because the state failed to meet its burden to prove the *Sell* factors under the binding standards in *Sell, Green,* and *J.D.B.*, this Court should reverse the circuit court and vacate the involuntary medication orders.

I. The *Sell* test and the standard of review.

To meet its burden under *Sell*, the state must first 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 for the state on the first factor, the court "must consider the facts of the individual case in evaluating the Government's interest in prosecution." *Id.*

Second, the state must prove that "involuntary medication will *significantly further* the government's interest in prosecuting the offense." *Id.* at 181 (emphasis in original). To meet its burden on the second factor, the state must prove "that administration of the drugs is substantially likely to render the defendant competent to stand trial" and "substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair." *Id.*

Third, the state must prove "that involuntary medication is *necessary* to further those interests." *Id.* (emphasis in original). This factor requires clear and convincing evidence that "any alternative, less intrusive treatments are unlikely to achieve substantially the same result." *Id.* In evaluating this factor, the court "must consider less intrusive means for administering the drugs, e.g., a court order to the defendant backed by the contempt power, before considering more intrusive methods." *Id.*

Fourth, the State must prove "that administration of the drugs is *medically appropriate*, i.e., in the patient's best medical interest in light of his [or her] medical condition." *Id.* (emphasis in original).

Because "[d]ifferent kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success," courts should consider "the specific kinds of drugs at issue." *Id*.

"[A] defendant's liberty interest in refusing involuntary medication at the pretrial stage of criminal proceedings" can be overcome only when "each one of the factors set out in *Sell*" is met. *State v. Green,* 2022 WI 30, ¶2, 401 Wis. 2d 542, 973 N.W.2d 770. The state bears the burden to prove each *Sell* factor by clear and convincing evidence. *Green,* 396 Wis. 2d 654, ¶16; *United States v. James,* 938 F.3d 719, 723 (5th Cir. 2019) (collecting cases showing that all ten federal circuits agree on this burden and standard of proof.).

In evaluating these factors, the task of the court is to answer the following: "Has 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?" *Id*. at 183 (citing *Washington v. Harper*, 494 U.S. 210, 229 (1990); *Riggins v. Nevada*, 504 U.S. 127, 134-35 (1992)). While the Constitution may permit forcible medication in some cases, "[t]hose instances may be rare." *Id*. at 180.

Given the serious deprivation of liberty at stake, "a high level of detail is plainly contemplated by the comprehensive findings *Sell* requires."

United States v. Chavez, 734 F.3d 1247, 1252 (10th Cir. 2013). If the state failed to prove any of the four *Sell* factors, the involuntary medication order violates the Due Process Clause and is unconstitutional. *Sell*, 539 U.S. at 179.

Neither *Sell* nor any Wisconsin court has specified the standard of review applicable to a circuit court's involuntary medication orders under *Sell*. *Green,* 396 Wis. 2d 658, ¶18, 957 N.W.2d 583. But because involuntary medication implicates Brian's vital liberty interests and due process rights, this Court should hold that the issues present questions of constitutional fact which require this court to apply facts to the applicable constitutional standard in *Sell*. *See State v. Woods*, 117 Wis. 2d 701, 715, 345 N.W.2d 457 (1984); *see also*, *D.J.W.*, 391 Wis. 2d. 231, ¶¶23-24. Under that standard, this Court will uphold the circuit court's findings of fact unless they are clearly erroneous or against the great weight and clear preponderance of the evidence. *D.J.W.*, 391 Wis. 2d 231, ¶24. Whether those facts meet the legal standard is a question of law reviewed *de novo*. *Woods*, 117 Wis. 2d at 716; *D.J.W.*, 391 Wis. 2d 231, ¶25.

II. The involuntary medication order violates due process because the state failed to meet its burden on the first *Sell* factor.

While the state's "interest in bringing to trial an individual accused of a serious crime is important," courts must "consider the facts of the individual case in evaluating the interest in the [state's] prosecution."

Sell, 539 U.S. at 180. Even when a defendant is charged with a serious crime, "[s]pecial circumstances may lessen the importance of [the government's] interest" in bringing the defendant to trial. *Id.*

The relevant inquiry under the first *Sell* factor is "whether, under the particular circumstances of each individual case, the state has an important interest in bringing *that defendant* to trial on that serious charge." *J.D.B.,* 2024 WI App 61, ¶37 (emphasis in original). That inquiry is two-fold and "determining whether a defendant is charged with a serious crime is only the first step." *Id.,* ¶39. "Courts must also consider the facts of the individual case to determine if special circumstances lessen the state's interest in prosecution." *Id.* Here, the state cannot meet its burden to show that it has an important interest.

A. Brian is charged with two "serious crimes."

Sell did not define "serious crime" but federal courts often defer to the judgment of the legislature. *United States v. Breedlove,* 756 F.3d 1036, 1041 (7th Cir. 2024); *see Lewis v. United States,* 518 U.S. 322, 326 (1996) ("The judiciary should not substitute its judgment as to seriousness for that of a legislature, which is far better equipped to perform the task"). Thus, this Court has looked to the definition of "serious crime" under Wis. Stat. § 969.08 for guidance. *J.D.B.,* 2024 WI App 61, ¶36.

On top of the statutory definition, this Court considers several factors—including whether the alleged crime involved violence and the maximum penalty—when determining whether a crime is a "serious crime." *Id.* Here, Brian concedes that his charges for battery by a prisoner in 15CF117 and substantial battery[3] in 23CF295 are "serious crimes."

But none of Brian's other charges are "serious" in the context of the first *Sell* factor. None meet the legislature's definition of "serious crime" under any statutory provision.[4] (R.44:2; App. 4). Likewise, while felony bail jumping is a class H felony that carries a maximum penalty of six years imprisonment, the maximum term of initial confinement is three years. *See Breedlove,* 756 F.3d at 1041 ("the maximum statutory penalty reflects at least some measure of legislative judgment regarding the seriousness of a crime"); *United State v. Valenzuela-Puentes,* 479 F.3d

[3] The legislature has classified substantial battery under Wis. Stat. § 940.19(2) as a "serious crime" in Wis. Stat. §§ 48.685(1)(c) and 50.065(1)(e), but not in Wis. Stat. § 689.08.

[4] Serious crime" is defined in Wis. Stat. §§ 48.685(1)(c); 48.686(1)(c); 50.065(1)(e)1. &2.; 969.08(10)(b). "Serious felony" is defined in Wis. Stat. §§ 48.415(9m)(b); 302.11(1g); 939.62(2m)(a)2m.; 973.0135(1)(b). "Serious sex offense" is defined in Wis. Stat. §§ 302.116(1)(a); 304.06(2m)(a); 939.615(1)(b). "Serious child sex offense" is defined in Wis. Stat. §§ 301.48(1)(e); 939.62(2m)(a)1m.; 948.13(1). "Serious sex crime" is defined in Wis. Stat. § 973.017(4)(a)2. "Serious violent crime" is defined in Wis. Stat. § 939.619(1). Other statutes incorporate definitions from these statutes. *See, e.g.* Wis. Stat. §§ 120.13(14)(b)1.; 949.165(1)(a).

1220, 1226 (10th Cir. 2007) (compiling cases of offenses with maximum penalties between 10 and 50 years that were considered "serious" under the *Sell* standard); *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 faced a ten-year maximum sentence for the charges against him.").

B. Brian's history of mental health hospitalizations and the likelihood of his confinement under civil commitment undermine the state's interest in prosecuting him.

Even though Brian is charged with two "serious crimes," that determination is "only the first step in analyzing whether the first *Sell* factor is satisfied." *J.D.B.,* 2024 WI App 61, ¶39. Under *Sell,* the facts of the case matter when evaluating the state's interest in prosecution. *Sell,* 539 U.S. at 180. But here, according to the circuit court, the state met its burden on the first *Sell* factor simply because:

> [Brian] is charged with a number of felony cases. These are serious crimes as one could go to prison. So obviously trying to make someone competent so they can be brought to trial is a sufficient important governmental interest.

(R.47:25-26; App. 51-52).

Under *Sell,* courts "must consider the facts of the individual case in evaluating the Government's interest in prosecution. Special circumstances may lessen the importance of that interest." *Sell,* 539 U.S. at 180. Thus, setting aside the circuit court's conclusory evaluation about the seriousness of the crimes, the court erred by never considering facts in the record that diminish both the seriousness of the alleged crimes and the government's interest in prosecuting them. *J.D.B.,* 2024 WI App 61, ¶37; *Sell,* 539 U.S. at 180.

When the possibility of civil commitment is "uncertain and speculative, the State's interest in prosecution is not lessened" but certainty of future commitment is not required to diminish the state's interest. *Id,* ¶¶40-41. Here it is well documented that Brian's "failure to take drugs voluntarily" has and will likely "mean lengthy confinement in an institution for the mentally ill" which "would diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime." *Sell,* 539 U.S. at 180. Based on the record, the likelihood of Brian's future confinement is anything but uncertain and speculative.

Here, like in *J.D.B,* the record shows "a significant potential for [Brian's] future civil commitment either through chapter 51 proceedings" or "as the result of successfully asserting at trial a defense of not guilty by reason of mental disease or defect ('NGI')." *Id,* ¶41.

Brian was first diagnosed with schizoaffective disorder when he was emergently detained at Brown County Mental Health Center in 1995. (R.36:2; R.38:3; App. 17). According to Dr. Murtagh, this condition is a "lifelong illness" that does not "resolve spontaneously or spontaneously improve." (R.47:9; App. 35). Brian has "received mental health and case management services through Manitowoc County Health and Human Services since 1995." (R.36:2). Based on this condition and his refusal to take medications to treat it, Brian has been hospitalized nine times at Winnebago Mental Health Institute alone since 2001. (R.36:2; R.38:3; App. 17).

It is apparent that all of Brian's alleged crimes occurred either while he was subject to civil commitment or while he was suffering through a mental health crisis. According to the record, the relevant charges in this case began when Brian was being moved by jail staff from "Med Seg back to his receiving cell" on February 24, 2015, when he allegedly committed battery by a prisoner in 2015CF117. (2025AP1745-R.1:2). Although the complaint was not filed until March 9, 2015, Brian was hospitalized at Winnebago on March 2, 2015, and was ultimately placed on a 72-hour emergency detention while there. (2024AP1749-R.24:5; App. 10). Brian remained at Winnebago until September 10, 2015, when he was "transferred to Trempealeau County Health Care Center (TCHCC)" where he remained until March of 2019. (2025AP1749-R.24:5; 2025AP1745-R.4:1; R.36:2-3; App. 10).

After his release from TCHCC, Brian's civil commitment was extended from 2019 until it ended on March 7, 2024. (R.36:2-3). Thus, Brian was under civil commitment when he allegedly committed the crimes in 2022CM614, 2022CF907, 2023CF295, and 2023CF481. (2024AP1746-R.2:1-3; 2024AP1747-R.2:1-3; 2024AP1748-2:1-5; 2024AP1749-R.2:1-4). During that time, Brian "had several returns to more restrictive environment (RTMR) due to mental health deterioration secondary to medication noncompliance and/or substance abuse" (R.36:3).

Even though the bail jumping charges in 2024CF488 were alleged on July 15, 2024, after Brian was no longer under a Chapter 51 commitment, the competency evaluation which resulted in the commitment at issue in this appeal took place at the Manitowoc County Jail on May 30, 2024, and was completed on June 5, 2024. (R.18:5-6; 2025AP1749-R24:2; App. 7). That evaluation noted that Brian had recently left his group home, stopped participating in psychiatric care, became homeless, and was "experiencing significant signs of mental illness including psychosis and mania." (R.38:3; 2025AP1749-R.24:8; App. 13, 17).

Likewise, because NGI commitments under Wis. Stat. § 971.17 are civil commitments that result in neither conviction nor punishment, the State's interest in prosecution is also diminished by the likelihood of NGI commitment in this case. *Sell* does not limit consideration based on the type of civil commitment that Brian may face. Instead, it directs

courts to consider any circumstance that lessens the State's interest prosecution. *Sell*, 539 U.S. at 180. The possibility of a civil commitment was simply one example. *Id.* ("The defendant's failure to take drugs voluntarily, *for example*, may mean lengthy confinement in an institution for the mentally ill.") (emphasis added).

In other words, considering the context of Brian's mental health diagnoses, the duration of his past civil commitment, the lengthy periods of confinement under that commitment that stemmed directly from medication non-compliance, the connection between his mental illness and alleged criminal behavior, and the duration of his ongoing mental health concerns, the potential for Brian's future confinement under Wis. Stat. §§ 51.20 or 971.17 is "distinct" and "non-speculative." *J.D.B.,* 2024 WI App 61, ¶41. Thus, "the state's interest in bringing [Brian] to trial is lessened." *Id.*

When the government seeks to forcibly medicate an individual for the sole purpose of restoring competency to stand trial, the burden is on the state to present clear and convincing evidence that "*important* governmental interests are at stake." *Sell,* 539 U.S. at 180 (emphasis in original). *Sell* demands that *courts* "*must* consider the facts of the individual case" when evaluating whether the government's interests are important. *Id.* (emphasis added). Here the court failed in its duty to consider the ample facts in the record showing that Brian's "failure to take drugs voluntarily" is likely to result in "lengthy confinement

in an institution for the mentally ill." *Id.* Because the likelihood of Brian's lengthy confinement diminishes the state's interest in prosecution, this Court should reverse and vacate the involuntary medication order based on that failure alone. *Id.*

III. The involuntary medication order violates due process because the state failed to prove the second and fourth *Sell* factors with a sufficiently individualized treatment plan.

To meet its burden under *Sell*, the state must present "an individualized treatment plan applied to the particular defendant." *Green*, 396 Wis. 2d 658, ¶38. "[I]t is not enough for the state to simply offer a generic treatment plan." *Id.,* ¶34. A sufficiently individualized treatment plan is "a universal requirement" to satisfy the second, third, and fourth *Sell* factors. *Id.,* ¶37.

"*Sell* requires an individualized treatment plan that, at a minimum, identifies (1) the specific medication or range of medications that the treating physicians are permitted to use in their treatment of the defendant, (2) the maximum dosages that may be administered, and (3) the duration of time that involuntary treatment of the defendant may continue before the treating physicians are required to report back to the court." *Id.*, ¶38 (internal citations omitted).

Because "[d]ifferent kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success," courts must analyze the *Sell* factors by focusing on "a particular drug given at a particular

dosage for a particular duration" to the "particular defendant." *Sell,* 539 U.S. at 181; *Green* 396 Wis. 2d 658, ¶38.

Here the treatment plan is insufficiently particularized to prove that treatment with Abilify and olanzapine are "substantially likely" to restore Brian to competency and "substantially unlikely" to have side effects that interfere with Brian's defense under the second *Sell* factor. *Green,* 396 Wis. 2d 658, ¶42. Likewise, the treatment plan is insufficiently individualized to prove that forced treatment with Abilify and olanzapine was "medically appropriate" for Brian under the fourth *Sell* factor. *Id.,* ¶40.

As this Court explained, "[t]he defendant's age and weight, the duration of his or her illness, his or her past responses to psychotropic medications, his or her cognitive abilities, other medications he or she takes, and his or her medical record may all influence whether a *particular drug* given at a particular dosage for a particular duration is substantially likely to render the defendant competent." *Id.,* ¶38. (emphasis added)

"It is not enough for the state to simply offer a generic treatment plan with a medication and dosage that are generally effective for a defendant's condition." *Id.,* ¶34. But here, Dr. Murtaugh did exactly that by offering generic information about the effectiveness and side effects of Abilify generally when questioned about the second *Sell* factor. *Id.,* ¶42. And although the treatment plan also authorized

involuntary administration of olanzapine, Dr. Murtaugh offered no explanation or supporting evidence to prove that olanzapine—in particular—was likely to restore Brian's competency or was in Brian's best medical interest. (R.38:6; App. 20).

At the hearing, Dr. Murtaugh acknowledged that Brian has not taken Abilify before and admitted that he "can't really predict" whether it will render Brian or "any one specific patient" competent. (R.47:8; App. 34). Instead, Dr. Murtaugh explained that "generally speaking I would say that most patients tolerate Abilify which is a new medication better than haloperidol" which Brian had taken previously (R.47:8; App. 34). He agreed that he did know whether Brian would have side effects and testified that "most patients that I treat with this medication do very well on it, but I cannot predict any specific, you know, result for a patient who hasn't taken it before." (R.47:12; App. 38).

Contrary to the requirements described in *Green,* Dr. Murtaugh "did not review [Brian's] medical records, and the record lacks even basic physical health information such as [Brian's] height, weight, vitals, and current medications." *Id.,* ¶39. Rather, Dr. Murtaugh "interviewed [Brian] but did not review medical history, did not perform a physical exam or evaluate for comorbidities, and did not evaluate risk factors for side effects of the proposed medication." *Id.,* ¶41. Dr. Murtaugh admitted that he did not even know if Brian participated in "any type of physical examination" where a doctor would "do the full history

and physical" while at Mendota. (R.47:12-13; App. 38-39).

Rather than examining Brian or offering specific information about Brian's medical condition, Dr. Murtaugh merely testified that "as far as I know [Brian] is generally a healthy man" that "does not show any signs of concerning physical health condition that would necessitate a dose adjustment." (R.47:7; App. 33). To reach that conclusion Dr. Murtaugh relied almost entirely on Brian's self-reporting. (R.47:10, 15; App. 36, 41).

Dr. Murtaugh's reliance on Brian's self-reporting is particularly troubling because Brian's symptoms of mental illness were "disorganized thinking and delusional thinking" and his "reliability as a historian" was "significantly compromised." (2025AP1749-R.24:3; R.47:16; App. 8, 42). Dr. Murtaugh acknowledged this concern when he admitted that "it's possible that he has some sort of medical condition that he's not making us aware of." (R.47:20; App. 46).

On this record, the treatment plan does not support the circuit court's finding that involuntary administration of Abilify and olanzapine would significantly further the state's interest in bringing Brian to trial under the second *Sell* factor. Given the record, it is unsurprising that the circuit court did not discuss Brian's medical history and made findings on the second *Sell* factor that reflected the lack of an individualized treatment plan:

> The doctor testified, it's uncontroverted, that the medication will assist, *based upon his experience as a doctor,* in making him competent to proceed to trial. Not only will it give him benefits on the immediate area of becoming competent, but also *this type of medication* that's attested to will have some long-term benefits where he will not have relapses into that condition.

(R.47:26; App. 52) (emphasis added).

Likewise, the court's findings on the fourth *Sell* factor glossed over the absence of information in the record about Brian's medical history and failed to acknowledge that Dr. Murtaugh proposed olanzapine without any supporting information:

> Again, there's no medical condition that [Brian] is suffering from where there would be adverse effects in taking the medication. It's appropriate, according to the doctor, and is in his best interests.

(R.47:27; App. 53).

Sell requires the treatment plan to evaluate Brian, not "a general class of persons with the patient's condition." *Id.,* ¶42. But here, the circuit court authorized the government to forcibly medicate Brian by "[s]imply matching a treatment plan for a condition to the defendant's diagnosed condition." *Id.,* ¶34. Thus, this record reflects the "kind of pro-forma review" that "does not satisfy *Sell*'s high standard" and the demand that courts must not "reduce orders for

involuntary medication to a generic exercise." *Id.,* ¶¶34-35.

Accordingly, the state failed to meet its burden to prove the second and fourth *Sell* factors with clear and convincing evidence and the involuntary medication order is "contrary to the admonition that individuals have a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs." *Id.,* ¶44. Because the order violates Brian's due process rights, this Court should order it vacated. *Fitzgerald,* 387 Wis. 2d 384, ¶33.

CONCLUSION

For the reasons stated above, B.M.T. respectfully requests that this Court reverse and remand to the circuit court with directions to vacate the order for involuntary medication.

Dated this 26th day of September, 2025.

Respectfully submitted,

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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 5,259 words.

CERTIFICATION AS TO APPENDIX

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 26th day of September, 2025.

Signed:
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