STATE OF WISCONSIN

C O U R T O F A P P E A L S

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.

APPEALS FROM ORDERS OF INVOLUNTARY MEDICATION TO RESTORE THE DEFENDANT TO COMPETENCY, ENTERED IN MANITOWOC COUNTY CIRCUIT COURT, THE HONORABLE MARK R. ROHRER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

MICHAEL J. CONWAY
Assistant Attorney General
State Bar #1134356

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8910
(608) 294-2907 (Fax)
michael.conway@wisdoj.gov

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INTRODUCTION

Brian[1] appeals orders of involuntary medication to restore him to competency to face trial in six cases. He argues that the State failed to satisfy its burden on the first *Sell*[2] factor, and that the individualized treatment plan fails to satisfy the second and fourth *Sell* factors. His arguments are meritless.

The first *Sell* factor requires an important government interest in the prosecution. Brian is presently charged with 20 offenses—9 of which are felonies—which expose him to an aggregate sentence of more than 50 years. Brian's numerous charges and substantial sentencing exposure establish the State's important interest. Prosecution also serves the important interest of addressing Brian's serial domestic abuse and is necessary to vindicate the constitutional rights of the victims in 3 of Brian's 6 cases.

Brian contends that the individualized treatment plan is too generic to satisfy the second and fourth *Sell* factors. He insists on an exacting standard that is contradicted by prevailing law. The treating physician conducted a thorough individualized medical assessment and concluded that Brian is a generally healthy man with no medication complications. The physician proposed a medication that is typically effective and results in few side effects after reading Brian's medical records. This plan was sufficiently individualized to satisfy *Sell*.

ISSUE PRESENTED

Did the circuit court properly order involuntary medication?

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[1] The State uses the same pseudonym as the appellant.

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

The circuit court answered: Yes.

This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument.

The State requests publication. Brian raises arguments that recur in involuntary medication cases, including an argument that "serious" offenses for purpose of *Sell* may only be offenses deemed "serious" by an unrelated statute. This Court has already rejected that argument in an unpublished decision, but the argument has continued to resurface. No published decision has yet addressed the State's argument regarding the role of victim rights in addressing the first *Sell* factor, the seriousness of misdemeanor charges of domestic violence, or the impossibility of an NGI verdict for an incompetent defendant. Publication would also clarify that Brian's insistence on absolute certainty in the individualized treatment plan runs counter to law. For these reasons, publication would enunciate or clarify an existing rule of law. Wis. Stat. § (Rule) 809.23(1)(a)1.

STATEMENT OF THE CASE

The State has charged Brian with 20 offenses, 9 of which are felonies, across 6 different cases. He is presently 49 years old. (R. 38:1.)[3]

Brian's current legal jeopardy began in February 2015 in Manitowoc County Case No. 2015CF117, Appeal No. 2025AP1745-CR, when he was confined at the Manitowoc

[3] When referring to the complaints in Brian's six cases, the State uses the appropriate case number to make clear which complaint is being cited. For all other record cites, the State relies on the record from 2025AP1750-CR, as Brian has done. (Brian's Br. 7 n.2.)

County Jail. (R. 4:1.) While being escorted from a shower back to his cell, Brian swung his head into the face of a correctional officer, striking just below the officer's right eye. (R. 4:5.) As Brian was restrained, he threatened to shoot the correctional officers once he departed jail. (R. 4:5.) The State charged Brian with battery by a prisoner, a Class H felony, and three misdemeanors: disorderly conduct and two counts of misdemeanor bail jumping. (R. 4:1–2.)

In Manitowoc County Case No. 2022CM614, Appeal No. 2025AP1746, the State charged Brian with battery and disorderly conduct. (R. 2:1.) Both charges are misdemeanors and charged as acts of domestic abuse. (R. 2:1.) On December 2, 2022, Brian was a passenger in the rear seat of a car driven by his sister's boyfriend. (R. 2:2.) His sister occupied the front passenger seat. (R. 2:2.) Brian grabbed and pulled his sister's hair until the car stopped, and he exited the car. (R. 2:2.) He also threatened to "beat" his sister with his cell phone. (R. 2:2.) Police were unable to find Brian. (R. 2:2.)

Manitowoc County Case No. 2022CF907, Appeal No. 2025AP1747-CR arose the following day, when an officer recognized Brian in a bar. (R. 2:2.) The officer knew that Brian was wanted for the incident with his sister from the previous day. (R. 2:2.) Upon arresting Brian, officers discovered that Brian possessed methamphetamine and a glass pipe. (R. 2:2.) The State charged Brian with possession of methamphetamine, a Class I felony, and possession of drug paraphernalia, a misdemeanor. (R. 2:1.)

Brian's charges in Manitowoc County Case No. 2023CF295, Appeal No. 2025AP1748-CR, arose four months later in April 2023 when he again assaulted his sister, who was his roommate at the time, by punching her in the face. (R. 2:1–3.) Brian's sister went to urgent care for treatment. (R. 2:2.) She sustained a laceration to her upper lip that required stitches, a chipped and loose front upper tooth, a scraped lower lip, and a bloody nose. (R. 2:3.) She told police

that she wanted a restraining order against Brian. (R. 2:3.) For this conduct, the State charged Brian with substantial battery causing bodily harm, a Class I felony, as an act of domestic abuse. (R. 2:1.) The State also charged Brian with felony bail jumping, misdemeanor bail jumping, and disorderly conduct as an act of domestic abuse. (R. 2:1–2.)

Brian's charges in Manitowoc County Case No. 2023CF481, Appeal No. 2025AP1749-CR, arose after he continually harassed patrons of a Kwik Trip. Three times in one week in June 2023, the police cited Brian for trespassing for his conduct at the Kwik Trip. (R. 2:2.) On the fourth occasion just three days after the third incident, the police arrested Brian for disorderly conduct. (R. 2:2.) Upon being arrested, Brian yelled vulgarities at the officers and threatened to fight them. (R. 2:2.) The State charged Brian with disorderly conduct, two counts of felony bail jumping, and one count of misdemeanor bail jumping. (R. 2:1–2.)

Brian's sixth and final case raised in this appeal is Manitowoc County Case No. 2024CF488, Appeal No. 2025AP1750-CR. In July 2024, a police officer received a report that Brian was at the Kwik Trip that was the subject of Case No. 2023CF481. (R. 2:2.) Brian was subject to a condition that barred him from having any contact with that particular Kwik Trip. (R. 2:2.) The officer arrested Brian for violating that condition. (R. 2:2.) The State then charged Brian with three counts of felony bail jumping and one count of misdemeanor bail jumping. (R. 2:1.)

Brian's criminal conduct in these six cases was not new. When the State initiated the first of these six cases in 2015, Brian had already been convicted of 15 misdemeanors. (R. 2:3.) Two convictions were for violating a domestic abuse injunction. (R. 2:3.)

Brian's criminal history coincides with a multi-decade history of refusing to treat his mental illness, resulting in

multiple hospitalizations and commitments. Brian was diagnosed with schizoaffective disorder in 1995 while subject to emergency detention at Brown County Mental Health Center. (R. 36:2.) Starting in 2001, Brian was hospitalized nine times at the Winnebago Mental Health Institute. (R. 36:2.) From 2013 to 2014, Brian was restored to competency in an inpatient setting pursuant to an order of involuntary medication. (R. 36:3.) Brian "resided inpatient at Trempealeau County Health Care Center from 2015 to 2019." (R. 36:2–3.) Following that residency, Brian was subject to civil commitments under chapter 51 of the Wisconsin Statutes and treated on an outpatient basis from 2019 through 2023. (R. 36:3.) His most recent civil commitment ended on March 7, 2024. (R. 36:3.)

Brian's health record also showed a "significant history of substance abuse," which included consistent reports of Brian using methamphetamine from 2021 to 2023. (R. 36:3.) Substance abuse would lead to his "mental health deterioration." (R. 36:3.) Brian tested positive for methamphetamine in 2021. (R. 36:3.)

The proceedings that lead to the present involuntary medication appeal began in June 2024 when Brian was evaluated for competency. (R. 30:9.) The circuit court found Brian incompetent to stand trial on December 17 but likely to regain competency with treatment within the statutory period. (R. 18:24–25.) The circuit court committed Brian to the Department of Health Services for treatment. (R. 13:1; 18:25.) Brian's competency was evaluated again on April 4, 2025. (R. 30:2.)

Brian was admitted to Mendota Mental Health Institute (Mendota) on May 22, 2025. (R. 36:1.) Shortly after admission, Brian was evaluated by Mendota mental health providers. (R. 36.) They reviewed Brian's lengthy mental health history and the numerous reports prepared in his previous commitments. (R. 36:2.) The providers attempted to

interview Brian on June 5, but he refused to engage. (R. 36:5.) They diagnosed Brian with schizoaffective disorder, bipolar type, and opined that he could be restored to competency. (R. 36:5–6.)

On June 12, Dr. Kevin Murtaugh submitted a request for an involuntary medication order and an individualized treatment plan for Brian. (R. 38:1.) He personally met with Brian four times. (R. 38:3–4.) In all four meetings, Dr. Murtaugh observed Brian engage in disorganized thinking and fail to understand his condition. (R. 38:3–4.) Brian refused to take any medication. (R. 38:6.) Dr. Murtaugh reviewed Brian's mental health records dating back to 2020, his records at Mendota since admission, and three competency evaluations conducted within the preceding year. (R. 38:3.)

The circuit court held a hearing on the request for involuntary medication at which Dr. Murtaugh was the sole witness to testify. Dr. Murtaugh explained that Brian's schizoaffective disorder is a lifelong illness that may "wax and wane" but never "go[es] away entirely." (R. 47:9–10.) He recommended treating Brian with aripiprazole (brand name Abilify). (R. 47:6.) From his review of Brian's medical records, Dr. Murtaugh learned that Brian had previously been treated with haloperidol, but that Brian reported disliking how "haloperidol made him feel." (R. 47:8.) Dr. Murtaugh recommended aripiprazole as an alternative to haloperidol. (R. 47:7–8.) He explained that, "generally speaking[,] . . . most patients tolerate [aripiprazole] which is a newer medication better than haloperidol." (R. 47:8.) He wanted to "give [Brian] an opportunity to take something that . . . might work well for him and be likely to cause fewer side effects." (R. 47:8.)

Dr. Murtaugh opined that aripiprazole would restore Brian to competency. (R. 47:7–8, 16–19.) Most patients he treats with aripiprazole do "very well on it." (R. 47:12.) Dr. Murtaugh could not guarantee the same result for Brian as

someone who had never previously taken aripiprazole. (R. 47:12.) However, that limitation applied to every patient. Dr. Murtaugh "can't really pick any specific medication ahead of time that's going to be the best." (R. 47:18.) Indeed, "[s]ometimes even people [who] have taken [aripiprazole] before can have different side effects at different times." (R. 47:12.) Regardless, aripiprazole was "as good [a] medication as any other for a psychotic illness[,] [a]nd some research shows it's better in some ways in terms of preventing relapses." (R. 47:18–19.)

The individualized treatment plan specifically provided for Brian to take a "long-acting injection" of aripiprazole every four weeks. (R. 38:6.) For the first two months of treatment, Dr. Murtaugh planned for Brian to take a daily oral dose of aripiprazole in concert with the injection. (R. 38:6.) However, Brian had to agree to take the oral aripiprazole. (R. 38:6–7.) If Brian refused, Dr. Murtaugh provided for a daily injection of olanzapine as an alternative to the oral aripiprazole. (R. 38:4, 6.)

Dr. Murtaugh did not learn of any circumstances that would make any medication inappropriate for Brian. From his review of Brian's records and interviews with Brian, he did not learn of any physical conditions that would make aripiprazole inappropriate for Brian. (R. 47:6–7, 21.) Brian is "generally a healthy man." (R. 47:7.) Brian was not taking any other medications that would negatively interact with the proposed medications. (R. 47:6.) Dr. Murtaugh documented two drugs to which Brian is allergic, but Dr. Murtaugh did not plan to use them. (R. 38:3.) Dr. Murtaugh did not observe any signs that Brian should take a non-standard dose of either proposed medication. (R. 47:6–7.) For both aripiprazole and olanzapine, Dr. Murtaugh represented in the individualized treatment plan that neither medication would "require dose adjustments due to medical issues, individual physical

characteristics (e.g., height, weight) of the subject, or interactions with other medications." (R. 38:4.)

The circuit court ordered involuntary medication after concluding that the State satisfied its burden to prove the four factors provided by *Sell v. United States*, 539 U.S. 166 (2003). (R. 47:27.) For the first factor, the circuit court determined that the State had an important interest in prosecuting Brian because he "is charged with a number of felony cases." (R. 47:25–26.) For the second factor, the circuit found that Dr. Murtaugh's testimony was "uncontroverted" in showing that the medication will restore Brian to competency. (R. 47:26.) For the third factor, the circuit court accepted Dr. Murtaugh's testimony that medication is the only means of restoring Brian to competency. (R. 47:26.) For the fourth factor, the circuit court concluded that Dr. Murtaugh's testimony and the submitted individualized treatment plan provided a medically appropriate plan. (R. 47:26–27.) The testimony at the involuntary medication hearing did not address olanzapine. However, the circuit court expressly considered and relied on the written individualized treatment plan to support its ruling. (R. 47:15–16, 23, 27.)

Brian now appeals the orders of involuntary medication.[4]

STANDARD OF REVIEW

For challenges to involuntary medication orders in the context of restoration to competency, the standard of review is unsettled. *State v. D.E.C.*, 2025 WI App 9, ¶ 35, 415 Wis. 2d 161, 17 N.W.3d 67, *review denied*, 2025 WI 16. The standard of review is ultimately immaterial in this appeal because the

[4] This Court denied Brian's motion to continue a stay of the involuntary medication orders for this appeal.

State prevails under either a de novo or clearly erroneous standard for all *Sell* factors.

Regardless of whether determinations of one or all of the *Sell* factors are ultimately conclusions of law, any underlying factual findings made by the circuit court to support its ruling are reviewed for clear error. *See Matter of D.K.*, 2020 WI 8, ¶ 18, 390 Wis. 2d 50, 937 N.W.2d 901.

ARGUMENT

This Court should affirm the involuntary medication order.

Brian argues that the circuit court erred in concluding that the State satisfied the first *Sell* factor and in concluding that the individualized treatment plan was sufficient to satisfy the second and fourth *Sell* factors. His arguments are meritless.

A. The Four *Sell* Factors

A defendant who is incompetent to stand trial may be subject to an involuntary medication order to be restored to competency. *See Sell*, 539 U.S. 166. Due process requires that a trial court may issue such an order only if it makes four specific findings or conclusions. *Id*. at 178–81. Those findings or conclusions pertain to: (1) an important governmental interest; (2) involuntary medication furthering that interest; (3) the necessity of medication; and (4) the medical appropriateness of the medication. *Id*. at 180–81. "The State is required to prove the factual components of each of the four factors by clear and convincing evidence." *State v. Green*, 2021 WI App 18, ¶ 16, 396 Wis. 2d 658, 957 N.W.2d 583, *aff'd in part*, 2022 WI 30, 401 Wis. 2d 542, 973 N.W.2d 770.

"An individualized treatment plan is the necessary first step to fulfilling the second, third, and fourth *Sell*

requirements." *Green*, 396 Wis. 2d 658, ¶ 37. This treatment plan must, at a minimum, identify:

> (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 (citation omitted). In addition, "the court must consider the individualized treatment plan as applied to the particular defendant" and in light of the relevant circumstances, such as the defendant's history with psychotropic drugs and the defendant's medical record. *Id.*

B. The State satisfied the first *Sell* factor by establishing an important interest in prosecuting Brian for 20 crimes.

The first *Sell* factor requires an important governmental interest in the prosecution. "The Government's interest in bringing to trial an individual accused of a serious crime is important." *Sell*, 539 U.S. at 180. It does not matter whether it is "a serious crime against the person or a serious crime against property." *Id.* "In both instances the Government seeks to protect through application of the criminal law the basic human need for security." *Id.* This analysis is case-specific. *Id.* "Special circumstances may lessen the importance of" the government's interest. *State v. J.D.B.*, 2024 WI App 61, ¶ 37, 414 Wis. 2d 108, 13 N.W.3d 525 (quoting *Sell*, 539 U.S. at 180).

Brian contends that only 2 of his 20 charged offenses are "serious" for purposes of *Sell*. (Brian's Br. 18–19.) He makes this assertion because only his charges of battery by a prisoner in Case No. 2015CF117 and substantial battery in Case No. 2023CF295 are defined as "serious crimes" in any

Wisconsin statute (none of which pertain to involuntary medication). (Brian's Br. 19.) Brian's approach is flawed.

As an initial matter, Brian gives no explanation why his concession that 2 of his 20 charged offenses are serious, even under his own proffered approach, is not a concession that the first *Sell* factor is satisfied. The first *Sell* factor is satisfied by accusation of "a serious crime," *Sell*, 539 U.S. at 180, and in this case Brian is accused of 2 such crimes by his own admission. The other 18 charges can only add to the seriousness of his overall behavior, not somehow dilute the seriousness of the 2 most serious charges of the 20.

In any case, *Sell* factor one does not turn on a canvassing of unrelated statutes. This Court has already explained that "*Sell* explicitly prohibits analyzing this factor in such a categorical fashion." *J.D.B.*, 414 Wis. 2d 108, ¶ 37. In an unpublished but authored opinion, this Court subsequently reiterated that "there is no requirement in *J.D.B.* that a crime *must* be listed in [Wis. Stat.] § 969.08 or any other statute defining 'serious crime' in other contexts in order to qualify as a 'serious crime' under *Sell*." *State v. T.A.W.*, No. 2025AP437-CR, 2025 WL 1565100, ¶ 19 (Wis. Ct. App. June 3, 2025) (unpublished). (R-App. 3–7.) These pronouncements are squarely aligned with *Sell* because *Sell* did not limit its first factor to categorizing crimes as "serious" or not. Instead, it directed courts to "consider the facts of the individual case in evaluating the Government's interest in *prosecution*." *Sell*, 539 U.S. at 180 (emphasis added). In other words, being charged with "a serious crime" is sufficient, but not necessary, to satisfy the first *Sell* factor, the ultimate touchstone of which is the importance of the government's interest in prosecution. *Sell*, 539 U.S. at 180

Here, Brian's "prosecution" consists of 20 offenses in 6 cases. Brian's sentencing exposure, alone, illustrates the importance of his prosecution. Brian's 9 felonies consist of 7 Class H felonies and 2 Class I felonies. A Class H felony has

a maximum sentence of 6 years, with a maximum initial confinement term of 3 years. Wis. Stat. §§ 939.50(3)(h), 973.01(2)(b)8. A Class I felony has a maximum sentence of 3.5 years, with a maximum initial confinement term of 1.5 years. Wis. Stat. §§ 939.50(3)(i), 973.01(2)(b)9. A circuit court "may impose as many sentences as there are convictions" and possesses the authority to make multiple sentences consecutive to each other. Wis. Stat. § 973.15(2)(a). Thus, Brian's felonies expose him to a maximum sentence of 49 years—24 of which may be imposed as a term of initial confinement. His 11 misdemeanor offenses increase his overall sentencing exposure to more than 50 years. *See* Wis. Stat. § 939.51(3). It is not controversial to conclude, as the circuit court did, that Brian's numerous felonies established the State's important interest in prosecuting him. (R. 47:25–26.)

Brian does not reckon with his total criminal liability. Instead, he asserts that the State lacks an interest in prosecuting him because a *single* Class H felony has a maximum sentence of 6 years and maximum term of initial confinement of 3 years. (Brian's Br. 19.) The circuit court, however, did not err by aggregating Brian's offenses when considering the government's interest in prosecution. "Offenders who commit multiple crimes should not receive a sentencing 'discount' due to the sheer volume of their crimes." *State v. Setagord*, 211 Wis. 2d 397, 421, 565 N.W.2d 506 (1997). Defendants charged with multiple Class H felonies should not receive a volume discount on *Sell* factor one, either.

Moreover, the Fourth Circuit decision on which Brian purports to rely, *United States v. White*, 620 F.3d 401 (4th Cir. 2010), rejected Brian's approach. (Brian's Br. 20.) The Fourth Circuit in *White* stated that "a crime is 'serious' for involuntary medication purposes where the defendant faced a ten-year maximum sentence for the *charges* against him." *White*, 620 F.3d at 410–11 (emphasis added). After

aggregating the maximum sentences of the defendant's charges, the Fourth Circuit observed that the total maximum sentence of the defendant's charges exceeded 10 years. *Id.* at 411. Under this standard, it is immaterial whether this Court considers Brian's maximum total sentence or just the maximum term of initial confinement, as Brian suggests. (Brian's Br. 19.) Both maximum terms substantially exceed 10 years, establishing the State's important interest in prosecution under *Sell* factor one.[5]

Brian also ignores his lengthy criminal record. Brian had been convicted of 15 misdemeanors by the time that he was 38—before any of the 20 charges he now faces at the age of 49. (R. 2:1, 3.) This criminal history distinguishes him from the "first-time, then-19-year-old offender" in *J.D.B.* in which the State failed to satisfy the first *Sell* factor. *J.D.B.*, 414 Wis. 2d 108, ¶ 53. Instead, he resembles the "then-40-year-old, repeat offender" in *T.A.W.* in which the State proved the first *Sell* factor. *T.A.W.*, 2025 WL 1565100, ¶ 22. "The fact that [Brian] is a recidivist . . . increases the government's interest in prosecuting him." *United States v. Valenzuela-Puentes*, 479 F.3d 1220, 1226 (10th Cir. 2007).

The record also establishes the State's interest in prosecuting Brian as a serial domestic abuser. Brian was convicted of violating a domestic abuse injunction twice from 2001 to 2002. (R. 2:3.) He is presently charged with four offenses—three misdemeanors and a Class I felony for

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[5] The other two federal cases on which Brian relies for persuasive support do not counsel against aggregating his offenses when considering the first *Sell* factor. (Brian's Br. 19–20.) In *United States v. Breedlove*, 756 F.3d 1036 (7th Cir. 2014), the Seventh Circuit observed that "Breedlove's *crimes* carry a maximum statutory penalty of life imprisonment," *id.* at 1041 (emphasis added). In *United States v. Valenzuela-Puentes*, 479 F.3d 1220 (10th Cir. 2007), the defendant was charged with only one offense, *id.* at 1221.

substantial battery—as acts of domestic abuse for assaulting his sister on two separate occasions (in Case Nos. 2022CM614 and 2023CF295). Of those four offenses, Brian declares that only the felony is serious for *Sell*. (Brian's Br. 19.) However, he fails to account for the escalating nature of domestic abuse. "[M]ost physical assaults committed against women and men by intimates are relatively minor and consist of pushing, grabbing, shoving, slapping, and hitting." *United States v. Castleman*, 572 U.S. 157, 165 (2014) (citation omitted). It is "the accumulation of such acts over time" that subject the victim to the will of the abuser. *Id.* at 166. To unilaterally deem misdemeanor acts of domestic abuse "unserious" for *Sell* factor one would be inconsistent with *Sell*'s recognition that "the Government seeks to protect through application of the criminal law the basic human need for security." *Sell*, 539 U.S. at 180.

Relatedly, Brian's arguments ignore the victims of his crimes who possess constitutional rights that further support the State's interest in prosecution. Three of Brian's cases involve victims: the correctional officer whom Brian headbutted in Case No. 2015CF117, and the two cases in which Brian assaulted his sister. Marsy's Law constitutionally enshrines several rights for crime victims that "vest at the time of victimization." Wis. Const. art. I, § 9m(2). Crime victims are to "be treated with dignity, respect, courtesy, sensitivity, and fairness." Wis. Const. art. I, § 9m(2)(a). They are entitled to "full restitution" and "compensation as provided by law." Wis. Const. art. I, § 9m(2)(m), (n). "Marsy's law guarantees that these rights will be 'protected by law in a manner no less vigorous than the protections afforded [to] the accused.'" *State v. Johnson*, 2023 WI 39, ¶ 44, 407 Wis. 2d 195, 990 N.W.2d 174 (quoting Wis. Const. art. I, § 9m(2)).

Barring the State from involuntarily medicating Brian would deprive his victims of these constitutional rights. As

the circuit court found based on Dr. Murtaugh's uncontested testimony, medication is the only means of restoring Brian to competency to stand trial. (R. 47:26.) Brian presently refuses to take medication. (R. 47:16.) As a result, there will be no further criminal proceedings without involuntary medication. Without further criminal proceedings, Brian's victims cannot recover restitution or compensation because restitution arises only from "crimes considered at sentencing." Wis. Stat. § 973.20(1g)(a). Thus, the victims cannot obtain restitution without involuntarily medicating Brian. Moreover, deeming the charges that arise from the victims' suffering as "not serious" would offend the victims' constitutional rights to dignity, respect, courtesy, sensitivity, and fairness. Wis. Const. art. I, § 9m(2)(a). There is no rationale for depriving the correctional officer and Brian's sister of the opportunity to hold Brian accountable when victims of similar offenses committed by competent defendants do not face such a risk. Involuntary medication is necessary to vindicate the victims' constitutional rights. Those rights require the same protections as Brian's liberty interest in avoiding involuntary medication. Wis. Const. art. I, § 9m(2).

One more circumstance provides even more support for the State's interest in prosecuting Brian. Brian's methamphetamine charges in Case No. 2022CF907 present serious offenses because Brian's continued use of methamphetamine aggravates the symptoms of his mental illness. Although charged for possessing methamphetamine in December 2022, community members reported that Brian was consistently abusing methamphetamine from 2021 to 2023, and he tested positive for methamphetamine in 2021. (R. 36:3.) While subject to a civil commitment, providers observed that substance abuse would lead to Brian's "mental health deterioration." (R. 36:3.) If it is true, as Brian argues, that his mental illness precipitates his alleged criminal conduct (Brian's Br. 21–24), the State has an important

interest in prosecuting him for engaging in conduct that exacerbates his mental illness and, thus, increases the likelihood that he will commit crimes.

In sum, the State has an important interest in prosecuting a recidivist who faces a maximum sentence that exceeds 50 years and repeatedly engages in acts of domestic abuse. Moreover, prosecution will vindicate the constitutional rights of Brian's crime victims and address the substance abuse that makes Brian pose a greater threat to the public.

Despite his staggering criminal liability, Brian claims that "special circumstances" supersede the State's substantial interest in prosecuting him. (Brian's Br. 20–25.) He contends that the record shows that he is a credible candidate for a civil commitment under chapter 51 or a commitment following a verdict of not guilty by reason of mental disease or defect ("NGI"). (Brian's Br. 21–24.) Brian has not identified any special circumstances.

Brian believes that his lengthy history of chapter 51 commitments and hospitalizations undermine the State's interest in prosecution. (Brian's Br. 21.) The opposite is true. This history convincingly establishes the futility of yet another chapter 51 commitment.

Sell refused to "suggest that civil commitment is a substitute for a criminal trial." *Sell*, 539 U.S. at 180. *Sell* opined that the prospect of "*lengthy* confinement in an institution for the mentally ill" could reduce the State's interest. *Id.* (emphasis added). The State's interest could be reduced in such cases, however, because a lengthy commitment "would diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime." *Id.* Federal courts in addressing this issue have consistently required evidence that a lengthy civil commitment is possible before it can impact the disposition of *Sell* factor one. *See United States v. Cruz*, 757 F.3d 372, 388

(3d Cir. 2014); *United States v. Gutierrez*, 704 F.3d 442, 450 (5th Cir. 2013); *United States v. Dillon*, 738 F.3d 284, 294–95 (D.C. Cir. 2013).

A chapter 51 commitment decidedly does *not* constitute "*lengthy* confinement" under *Sell*. *Sell*, 539 U.S. at 180 (emphasis added). Here, the maximum term of initial civil commitment under chapter 51 is six months, and "all subsequent consecutive orders of commitment" are capped at one year. Wis. Stat. § 51.20(13)(g)1. Under Wis. Stat. § 51.20(13)(g)2d.a., the subject of a civil commitment can presumptively be treated on an outpatient basis after a mere 30 days. *See Dillon*, 738 F.3d at 294 (distinguishing the prospect of being civilly committed as an outpatient from being civilly confined for the purpose of *Sell* factor one). A civil commitment in increments of six months or one year falls far short of Brian's exposure to an aggregate sentence of more than 50 years, particularly when Brian could almost immediately be treated on an outpatient basis under chapter 51—an option no one could seriously think he would not pursue. A civil commitment therefore cannot substitute for Brian's six criminal trials. *See Sell*, 539 U.S. at 180.

Brian's circumstances also establish that a chapter 51 commitment cannot "diminish the risks" that would follow from releasing him without punishment. *Sell*, 539 U.S. at 180. Brian has been committed and hospitalized due to his mental illness intermittently for 30 years now, and he continues to engage in criminal conduct whenever released. (R. 2:3; 36:2–3.) Brian was an inpatient from 2015 to 2019 and then subject to an outpatient chapter 51 commitment from 2019 to 2023. (R. 36:2–3.) While an outpatient, Brian engaged in the conduct underlying four of his six current cases. After being discharged from his most recent chapter 51 commitment in March 2024, Brian was arrested and charged the following July in Case No. 2024CF488. (R. 2:2; 38:3.) Brian's most successful treatment appears to have been from 2013 to 2014

when he was restored to competency as an inpatient pursuant to an order of involuntary medication. (R. 36:3.) Chapter 51 commitments have simply failed to protect the public from Brian.

Because a chapter 51 commitment does not provide for lengthy civil confinement and because they have already proved futile in protecting the public from Brian, the prospect of a chapter 51 commitment does not reduce the State's interest in prosecuting Brian. *See Sell*, 539 U.S. at 180.

Brian also argues that he has a realistic prospect of an NGI verdict, asserting that his criminal conduct in all six cases was animated by his mental illness. (Brian's Br. 23–24.) This argument lacks merit, too.

Unlike civil commitment actions, an NGI defense is an affirmative defense to criminal liability and punishment that the defendant must prove. A defendant must assert the defense through a special plea. Wis. Stat. § 971.165(1). An NGI proceeding is bifurcated between a "guilt phase" and a "responsibility phase." *State v. Lagrone*, 2016 WI 26, ¶ 33, 368 Wis. 2d 1, 878 N.W.2d 636; *see* Wis. Stat. § 971.165(1)(a). In the guilt phase, the State must prove the defendant's factual liability for the crime(s) charged beyond a reasonable doubt. *State v. Randall*, 192 Wis. 2d 800, 809, 532 N.W.2d 94 (1995). If the jury returns a guilty verdict (or if the defendant pleads guilty in conjunction with his NGI defense), then the court proceeds to the responsibility phase in which the defendant must prove that a mental disease or defect prevented the defendant from appreciating the wrongfulness of his actions. Wis. Stat. § 971.15(3).

Thus, a defendant pursuing an NGI defense must be "adjudged guilty beyond a reasonable doubt—whether by trial or stipulation—of engaging in criminal conduct, before he or she is entitled to a hearing on insanity." *Randall*, 192 Wis. 2d at 833. However, a defendant incompetent to stand trial

cannot enter a plea of guilty or be tried criminally. Wis. Stat. §§ 971.08(1)(a), 971.13(1). A defendant incompetent to stand trial therefore cannot make it to the guilt phase of an NGI proceeding, because he is legally barred from being found guilty, which is a prerequisite to NGI proceedings.

In claiming that an NGI verdict is a realistic possibility, Brian ignores the essential precondition of his factual guilt. Because Brian is currently incompetent (R. 44:2), he cannot enter a plea or proceed to trial. He can be restored to competency only through medication, but he refuses to take medication voluntarily. (R. 47:9–11, 16.) He obviously opposes involuntary medication. Because Brian's incompetence bars any proceeding to establish his factual guilt and because Brian opposes the sole means of restoring his competency, the prospect of an NGI verdict is entirely illusory. Stated another way, Brian cannot rely on the prospect of an NGI verdict when his current litigation posture precludes a necessary condition to such a verdict.

It is true that this Court in *J.D.B.* considered the likelihood of an NGI verdict to reduce the State's interest in prosecution. *J.D.B.*, 414 Wis. 2d 108, ¶ 41. However, *J.D.B.* focused entirely on whether the record provided support to conclude that the defendant could have prevailed in the responsibility phase. *See id.* This Court was apparently not asked—and did not *sua sponte* address—whether the defendant could even reach the responsibility phase. Nothing in *J.D.B.* bars this Court from recognizing that Brian's inability to reach the guilt phase of an NGI trial precludes him from ever obtaining an NGI verdict. An NGI verdict is not just unlikely—it is impossible.

Perhaps Brian's confidence in a NGI verdict reflects his willingness to concede his factual guilt. If he is confident in such a result, then he should accept treatment and enter an NGI plea after being restored to competency. But nothing in *Sell* contemplates that a defendant may avoid a trial

altogether by baldly asserting that he or she would be found not mentally responsible for the alleged criminal conduct.

For these reasons, the circuit court correctly concluded that the State satisfied its burden on *Sell* factor one.

C. The individualized treatment plan is sufficient under *Sell* factors two and four.

Brian argues that the individualized treatment plan falls short on both *Sell* factors two and four. (Brian's Br. 25–30.) Under the second factor, the treatment plan must establish that involuntary medication will "significantly further" the State's interest and that the proposed medication "is substantially unlikely to have side effects" that will impair Brian's ability to assist his defense counsel. *D.E.C.*, 415 Wis. 2d 161, ¶ 37 (emphasis omitted) (quoting *Sell*, 539 U.S. at 181), *review denied*, 2025 WI 16. For an individualized treatment plan to pass constitutional muster under *Sell* factor two, "the State must show the 'substantial likelihood' that the plan will result in successful treatment based on 'evidence specific to the individual.'" *Id.* ¶ 51 (quoting *Green*, 396 Wis. 2d 658, ¶ 33). Under the fourth factor, the treatment plan must be "medically appropriate . . . in light of [the patient's] medical condition." *Id.* ¶ 63 (quoting *Sell*, 539 U.S. at 181). A "medically informed record" is sufficient for the State to meet its burden on both factors two and four. *Id.* ¶¶ 43, 75 (citation omitted).

Brian presents the same arguments for both *Sell* factors two and four. He argues that the individualized treatment plan is unconstitutionally generic. (Brian's Br. 26–30.) Brian's argument fails because it ignores the record.

Dr. Murtaugh developed Brian's treatment plan after reviewing Brian's medical records and meeting with Brian four times. (R. 38:3–4; 47:6.) From his review, Dr. Murtaugh determined that Brian "is generally a healthy man." (R. 47:7.) He found no evidence of a physical condition that would make

aripiprazole inappropriate for Brian or require adjusting Brian's dose. (R. 47:7, 21.) He also learned that Brian had previously been treated with haloperidol, but Brian reported that he did not like how haloperidol "made him feel." (R. 38:4; 47:8.) Rather than subject Brian to a medication he had tried and disliked, Dr. Murtaugh proposed using aripiprazole because, "generally speaking[,] . . . most patients tolerate [aripiprazole] which is a newer medication better than haloperidol." (R. 47:8.) Dr. Murtaugh thought that aripiprazole "might work well for [Brian] and be likely to cause fewer side effects." (R. 47:8.) In his experience, "most patients . . . do very well on [aripiprazole]." (R. 47:12.) He added that some studies show that aripiprazole is more effective at "preventing relapses." (R. 47:19.)

Dr. Murtaugh's plan for Brian to take aripiprazole can hardly be described as generic. Dr. Murtaugh "outlin[ed] an approach that [he] represented was tailored to [Brian's] individual situation." *D.E.C.*, 415 Wis. 2d 161, ¶ 43. The circuit court accepted Dr. Murtaugh's testimony as "uncontroverted." (R. 47:26.) That evidence provided "a medically informed record" that is sufficient to satisfy *Sell*'s second and fourth factors. *D.E.C.*, 415 Wis. 2d 161, ¶ 42 (quoting *Green*, 396 Wis.2d 658, ¶ 2).

Brian confuses Dr. Murtaugh's candor for genericism. He claims that the individualized treatment plan is unconstitutionally generic because Dr. Murtaugh declined to guarantee that aripiprazole would be effective and tolerable for him. (Brian's Br. 26–27.) Dr. Murtaugh acknowledged that he "cannot predict any specific . . . result for a patient who hasn't taken [aripiprazole] before." (R. 47:12.) However, Dr. Murtaugh noted that this lack of absolute certainty applies to *every patient*. (R. 47:7–8.) Even past success on aripiprazole does not guarantee future success. (R. 47:12.) Dr. Murtaugh also explained that, despite this lack of certainty, he had confidence in the efficacy of aripiprazole for Brian based on

his own experience and studies. (R. 47:12, 19.) While a generic plan without regard for the individual patient will not satisfy *Sell*, a physician's lack of absolute certainty about the effects of a proposed medication reflects measured and individualized consideration. The State need demonstrate only a "substantial likelihood" that the individualized treatment plan "will result in successful treatment based on 'evidence specific to the individual.'" *D.E.C.*, 415 Wis. 2d 161, ¶ 51 (quoting *Green*, 396 Wis. 2d 658, ¶ 33). "[T]he *Sell* standard does not require certainty." *Green*, 396 Wis. 2d 658, ¶ 33. Therefore, *Sell* "does not require a listing of each and every medical consideration or procedure that a testifying psychiatrist may testify about." *D.E.C.*, 415 Wis. 2d 161, ¶ 51. Instead, a "medically informed record" is sufficient. *Id.* ¶¶ 43, 75 (citation omitted). Dr. Murtaugh's testimony and individualized treatment plan provided the circuit court a medically informed record.

Brian cannot demand (and *Sell* does not require) that the State disprove a negative. The State was not required to negate the arbitrary possibility that Brian will not be helped by the medication or will experience side effects. If Brian had such evidence, he was free to adduce it at the hearing. The State's burden is simply to show a medically appropriate treatment that will significantly further the prosecution and that is substantially unlikely to have side effects that will hinder the defense. The State made that showing. *See D.E.C.*, 415 Wis. 2d 161, ¶ 51 (explaining that *Sell* does not require the State to present an individualized treatment plan that "resembl[es] an exhaustively annotated flowchart").

Brian also argues that the individualized treatment plan is unconstitutionally generic because Dr. Murtaugh failed to evaluate him as an individual patient. Brian's argument is based on a series of misrepresentations. (Brian's Br. 27–28.)

Brian falsely states that Dr. Murtaugh did not review his medical records or medical history. (Brian's Br. 27.) Dr. Murtaugh did review those records. (R. 38:3–4; 47:6.) Brian falsely states that Dr. Murtaugh relied almost entirely on Brian's self-reporting. (Brian's Br. 28.) The numerous medical records that Dr. Murtaugh consulted contradict this assertion. (R. 38:3.)

Brian then broadly—and falsely—states that Dr. Murtaugh did not consider the risk of side effects, Brian's comorbidities, or Brian's physical condition when crafting the individualized treatment plan. (Brian's Br. 27.) To the contrary, Dr. Murtaugh thoroughly considered Brian's individual health. Dr. Murtaugh noted that Brian had previously taken haloperidol but reported not liking "how [it] made him feel." (R. 47:8.) Dr. Murtaugh chose aripiprazole in order to minimize Brian's side effects. (R. 47:8.) He found no evidence that Brian has a physical condition that would make aripiprazole ineffective or inappropriate. (R. 38:3–4; 47:21.) In fact, Brian is "generally a healthy man." (R. 47:7.) Dr. Murtaugh noted two drugs to which Brian is allergic and determined that Brian was not taking other medications that would make psychiatric medication inappropriate. (R. 38:3; 47:7.) Dr. Murtaugh represented that none of the proposed medications "require dose adjustments due to medical issues, individual physical characteristics (e.g., height, weight) of the subject, or interactions with other medications." (R. 38:4.) Dr. Murtaugh prescribed aripiprazole because he knew from his training and expertise that it would address Brian's mental health symptoms stemming from his schizoaffective disorder. (R. 38:3–4; 47:7, 10, 16–19.)

Brian's only complaint with any rooting in the record is Dr. Murtaugh's uncertainty about whether Brian had a physical exam upon admission to Mendota. (Brian's Br. 27–28.) This uncertainty, however, is immaterial. Dr. Murtaugh specifically reviewed all of Brian's medical records at Mendota

("MMHI") since his admission on May 22, 2025. (R. 38:3.) If Brian had a physical exam upon admission, then Dr. Murtaugh would have reviewed a report prepared by the examining physician. If such a report existed, it evidently did not document any concerning physical conditions.

Brian also faults Dr. Murtaugh for acknowledging the possibility that Brian had a physical condition that he failed to disclose. (Brian's Br. 28.) Again, Dr. Murtaugh reasonably and appropriately identified the limit of his certainty. He recognized that it was theoretically possible that Brian's disorganized thinking prevented him from disclosing a physical condition. (R. 47:20.) This qualification did not invalidate Dr. Murtaugh's conclusion that Brian had no such physical conditions based on his in-person meetings with Brian and review of Brian's medical records. (R. 38:3–4; 47:7, 21.) A doctor's lack of omniscience does not render an involuntary medication order constitutionally infirm.

More fundamentally, Brian does not identify anything that Dr. Murtaugh neglected that would have been material to his medication decision. Brian theorizes that Dr. Murtaugh missed something without even suggesting what that "something" might be. (Brian's Br. 27–29.) *J.D.B.* reveals that Brian's speculation is insufficient to reverse the order of involuntary medication. In *J.D.B.*, this Court determined that the doctor failed to consider the defendant's seizure risk and diabetes diagnosis, both of which impacted the proposed medications. *J.D.B.*, 414 Wis. 2d 108, ¶ 60. Here, the record is bare of any medical condition or circumstance that would undermine or alter Dr. Murtaugh's individualized treatment plan.

Finally, Brian argues that olanzapine is not justified under the second and fourth *Sell* factors because Dr. Murtaugh's testimony did not address it at the hearing. (Brian's Br. 27–29.) However, the question for both the second and fourth *Sell* factors is whether the circuit court had a

"medically informed record." *D.E.C.*, 415 Wis. 2d 161, ¶¶ 43, 75 (citation omitted). The lack of testimony on medications in the individualized treatment plan does not spell a constitutional infirmity when the treatment plan provides a medically informed record "on its face." *Id.* ¶ 76.

Here, Dr. Murtaugh's testimony and the face of the individualized treatment plan provided the circuit court a medically informed record to authorize the involuntary medication of olanzapine. For one, the process that led Dr. Murtaugh to prescribe aripiprazole applied to olanzapine. Both medication recommendations followed Dr. Murtaugh's individualized assessment of Brian, described previously. Dr. Murtaugh provided the same representations regarding the effectiveness of olanzapine as he did for aripiprazole. He wrote that Brian did not need "dose adjustments" to olanzapine "due to medical issues, individual physical characteristics (e.g., height, weight) of the subject, or interactions with other medications." (R. 38:4.) He testified that Brian did not have a present medication or physical condition that would make any of the proposed medications inappropriate. (R. 47:6–7.)

The individualized treatment plan established the purpose and appropriateness of olanzapine. Dr. Murtaugh planned to administer a long-acting injection of aripiprazole every four weeks. (R. 38:6.) For the first two months, he planned for Brian to take a daily dose of oral aripiprazole in concert with the long-acting injection. (R. 38:6.) However, because this daily dose was oral, the plan depended on Brian taking it voluntarily. (R. 38:7.) Dr. Murtaugh proposed a daily injection of olanzapine as an alternative to the oral aripiprazole if Brian refused to take the oral aripiprazole. (R. 38:4, 6.) This explanation in the treatment plan was sufficient. *See D.E.C.*, 415 Wis. 2d 161, ¶ 76.

One of the reasons that Dr. Murtaugh did not testify about olanzapine is that Brian did not cross-examine him

about it. That decision was Brian's right since the State bears the burden of proving the *Sell* factors. *D.E.C.*, 415 Wis. 2d 161, ¶ 32. But that decision also exposed Brian to the risk that the circuit court would accept the uncontested representations in the individualized treatment plan. "The State's burden did not require the prosecutor to elicit testimony from [Dr. Murtaugh] addressing all potentially disputable aspects" of the individualized treatment plan. *Id.* ¶ 75. "If there was anything in the additional medications that appeared inappropriate to defense counsel, [Dr. Murtaugh] was available to testify on that topic." *Id.* ¶ 76.

That risk came to fruition. The circuit court supported its ruling by drawing facts from the individualized treatment plan. (R. 47:23.) It expressly relied on the individualized treatment plan to conclude that the State met its burden on the fourth *Sell* factor. (R. 47:27.) Accordingly, Brian is stuck with the facts in the individualized treatment plan, and those facts support the involuntary medication order for olanzapine. If he had a concern, he should have cross-examined Dr. Murtaugh about it.

In sum, the circuit court had a "medically informed record" for both aripiprazole and olanzapine that was sufficient to satisfy *Sell*'s second and fourth factors. *D.E.C.*, 415 Wis. 2d 161, ¶¶ 43, 75 (citation omitted).

CONCLUSION

This Court should affirm the order of involuntary medication.

Dated this 6th day of October 2025.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Michael J. Conway
MICHAEL J. CONWAY
Assistant Attorney General
State Bar #1134356

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8910
(608) 294-2907 (Fax)
michael.conway@wisdoj.gov

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,627 words.

Dated this 6th day of October 2025.

Electronically signed by:

Michael J. Conway
MICHAEL J. CONWAY

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 6th day of October 2025.

Electronically signed by:

Michael J. Conway
MICHAEL J. CONWAY