STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

CASE NOS. 2025AP1745-CR; 2025AP1746-CR; 2025AP1747-CR; 2025AP1748-CR; 2025AP1749-CR; 2025AP1750-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

B.M.T,

Defendant-Appellant.

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

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# REPLY BRIEF OF DEFENDANT-APPELLANT

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To inflict the "violence inherent" in forcibly administering antipsychotic medications that are "expressly intended to alter the will and mind of the subject" and carry the possibility of "serious, even fatal, side effects," the state must meet "a deliberately high standard." *United States v. Watson,* 793 F.3d 416, 419-20 (4th Cir. 2015); *United States v. Bush,* 585 F.3d 806, 813-14 (4th Cir. 2009) (internal citations omitted). That standard demands that the state "prove the factual components of each of the four [*Sell*][1] 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. Here, the state failed to meet its burden to prove the first, second, and fourth *Sell* factors.

### I. The likelihood of confinement under civil commitment diminishes the state's interest in prosecuting Brian under the first *Sell* factor.

As Brian explained in his appellant's brief, he concedes that he is charged with at least two "serious crimes" based on this Court's prior guidance for defining that term under *Sell* in *State v. J.D.B.,* 2024 WI App 61, ¶39, 414 Wis. 2d 108, 13 N.W.3d 525.[2] (Brian's Br. 18-19). Accordingly, there is no dispute

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

[2] This Court looked to the definition of "serious crime" in Wis. Stat. § 969.08 and observed that the alleged crime involved violence and carried a maximum penalty of six years imprisonment in concluding that it was a "serious crime for the purposes of *Sell." J.D.B.,* 414 Wis. 2d 108, ¶36.

that, "in general," the state has "an important interest" in bringing Brian to trial for his "serious crimes." *Sell,* 539 U.S. at 180.

However, as this Court unequivocally explained, "determining that the defendant is charged with a serious crime is only the first step in analyzing whether the first *Sell* factor is satisfied." *J.D.B.,* 414 Wis. 2d 108, ¶39. Yet, in direct defiance of *J.D.B.,* the state claims that "[t]he first *Sell* factor is satisfied by the accusation of 'a serious crime.'" (Resp. Br. 15). The state points to no authority that interprets the first *Sell* factor in this manner and "*Sell* explicitly prohibits analyzing [the first] factor in such a categorical fashion." *Id.*, ¶37. Instead, *Sell* instructs courts to consider "[s]pecial circumstances," including "the potential for future confinement" under civil commitment, that may lessen the state's interest in prosecution by "diminish[ing] the risks that ordinarily attach to freeing without punishment one who has committed a *serious crime*." *Sell,* 539 U.S. at 180 (emphasis added); *J.D.B.,* 414 Wis. 2d 108, ¶¶37-38.

Thus, this Court should accept Brian's concession that he is charged with "serious crimes" but reject the state's erroneous assertion that Brian's concession means that the first *Sell* factor is satisfied. *See Cook v. Cook,* 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (the court of appeals is a unitary court and cannot overrule, modify, or withdraw language from its prior published decisions). Beyond that, this Court need not invent a novel definition of "serious crime" to decide whether the first *Sell* factor is met. Instead, the sole task for this Court is to "determine if special circumstances lessen the State's interest in prosecution" of Brian's crimes. *J.D.B.,* 414 Wis. 2d 108,

¶39*; see also State ex rel. Oitzinger v. City of Marinette,* 2025 WI App 19, ¶76, 415 Wis. 2d 635, 19 N.W.3d 663 (this Court decides cases "on the narrowest possible grounds").

*Sell* teaches that a defendant's "failure to take drugs voluntarily, for example, may mean lengthy confinement in an institution for the mentally ill—and that would diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime." *Sell,* 539 U.S. at 180. And here, the record demonstrates "significant potential" for Brian's lengthy future confinement "either through chapter 51 proceedings, Wis. Stat. § 51.20, or as a result of successfully asserting at trial a defense of not guilty by reason of mental disease or defect ("NGI"), Wis. Stat. §§ 971.15, 971.17." *J.D.B.,* 414 Wis. 2d 108, ¶41.

It is the state's burden to prove the factual components of each *Sell* factor with clear and convincing evidence. *Green,* 396 Wis. 2d 658, ¶16. It is the court's obligation to consider whether the evidence in the record shows that special circumstances undermine the state's interest in prosecuting serious crime." *Sell,* 539 U.S. at 180. And here, the circuit court erred by concluding that the state proved the first *Sell* factor merely because Brian was charged with "serious crimes." (R.47:25-26).

Here, like in *J.D.B.,* the circuit court overlooked ample evidence in the record establishing the likelihood of Brian's future confinement under civil commitment and never considered whether that evidence undermines the government interest in prosecution. *J.D.B.,* 414 Wis. 2d 108, ¶39. The record here shows a high likelihood of confinement based on

Brian's "lifelong illness" and frequent hospitalizations under civil commitment. (R.36:2-3; R.38:3; R.47:9). Yet the state excuses the circuit court's failure to follow *Sell*'s mandate by claiming that Brian's "history convincingly establishes the futility of yet another chapter 51 commitment." (Resp. Br. 20).

The state concedes that Brian has been "committed and hospitalized intermittently for 30 years," including an inpatient commitment from 2015 to 2019. (Resp. Br. 21). Because of the many hospitalizations under civil commitment—including consecutive confinement for over the course of five years—the state's conclusion that "[a] chapter 51 commitment decidedly does *not* constitute '*lengthy* confinement' under *Sell"* holds no water. (Resp. Br. 21) (emphasis in original).

Moreover, according to the state's own calculations, Brian is exposed to 49 years of confinement under an NGI commitment on his felony charges alone. Wis. Stat. § 971.17(1)(b) (Resp. Br. 16). Thus, the state cannot argue that Brian's possible confinement under an NGI commitment is anything but lengthy. Instead, the state dismissed the likelihood of confinement under an NGI commitment based on the premise that Brian's incompetence bars any proceeding to establish his factual guilt." (Resp. Br. 22-23). This argument falls flat for three reasons.

First, the state's claim is undermined by the circuit court's repeated findings that Brian is likely to be restored to competency within 12 months of his commitment. (R.13:2; R.44:2). Second, the state's argument ignores the fact that this Court denied Brian's motion for a stay pending appeal and enabled

the state to begin forcibly medicating him. (Resp. Br. 12).

Third, the state's claim that "the prospect of an NGI verdict is entirely illusory" is irreconcilable with its own argument involuntary medication is "substantially likely" to restore Brian's competency under the second *Sell* factor. (Resp. Br. 23). If involuntary medication is both authorized and likely to restore Brian's competency, the prospect of an NGI commitment cannot be illusory. The state cannot have it both ways.

While it would ultimately be Brian's burden to prove an NGI defense at the responsibility phase, it is the state's burden to prove each *Sell* factor with clear and convincing evidence. In assessing whether the state has met that burden under the first *Sell* factor, "certainty that civil commitment will occur is not required in order for the State's interest in prosecution to be lessened." *J.D.B.,* 414 Wis. 2d 108, ¶41.

Given the likelihood of Brian's lengthy confinement under either chapter 51 commitment or NGI commitment, the circuit court erroneously found that the state met its burden under the first *Sell* factor. Brian's history of mental illness, previous confinement under chapter 51 commitments, and his exposure to decades of confinement under an NGI commitment establishes a near certainty of lengthy confinement and undermines the state's interest in prosecution. Thus, this Court should vacate the involuntary medication order.

## II. The state failed to meet its burden to prove the second and fourth *Sell* factors with a sufficiently individualized treatment plan and medically informed record.

For the state to meet its burden on the second and fourth *Sell* factors, it must present clear and convincing evidence to "demonstrate that the proposed treatment plan, *as applied to this particular defendant,* is 'substantially likely' to render [Brian] competent to stand trial" and is in Brian's "best medical interest in light of his medical condition." *United States v. Evans,* 404 F.3d 227, 242 (4th Cir. 2005) (emphasis in original); *Green,* 396 Wis. 2d 658, ¶¶35, 41. The *Sell* standard does not "require certainty." *Green,* 396 Wis. 2d 658, ¶33. Instead, the state must provide evidence "of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations." *Watson,* 793 F.3d at 420; *Sell,* 539 U.S. at 181.

The state offers cursory acknowledgement of the high burden at the outset of its response. (Resp. Br. 13). Yet the state attempts to diminish that burden and justify a practice that "would reduce orders for involuntary medication to a generic exercise, contrary to *Sell*'s observation that the circumstances in which orders for involuntary medication are constitutionally permissible 'may be rare.' *Green,* 396 Wis. 2d 658, ¶34 (quoting *Sell,* 539 U.S. at 180). This Court should reject that attempt and find that the state failed to meet its burden.

Relying heavily on language plucked from *State v. D.E.C.,* 2025 WI App 9, 415 Wis. 2d 161, 17 N.W.3d

67, the state seeks to dilute treatment plan requirement down to a mere showing that the record was "medically informed." (Resp. Br. 24). But given the importance of Brian's liberty interest, the state must provide the court "with a *complete and reliable* medically informed record, based in part on *independent medical evaluations* before it can reach a constitutionally balanced *Sell* determination." *United States. v. Rivera-Guerrero,* 426 F.3d 1130, 1137 (9th Cir. 2005); *Green,* 396 Wis. 2d 658, ¶35 (emphasis added).

As proof that it met its burden to establish a "medically informed record," the state claims that Dr. Murtaugh developed the treatment plan "after reviewing Brian's medical records and meeting with Brian four times." (Resp. Br. 24). Despite understating its burden and exaggerating the record, the state's response is unpersuasive. Here, the medical information in the record is neither complete nor reliable and there is no proof that the treatment plan was based on independent medical evaluations.

Under the second *Sell* factor, the state must present "evidence specific to" Brian's "particular circumstances and medical history." *Green,* 396 Wis. 2d 658, ¶¶33-34. Brian's age and weight, the duration of his mental illness, his past responses to treatment, his cognitive abilities, other medications he takes, and his medical record "may all influence whether a particular drug given at a particular dosage for a particular duration is substantially likely to render [Brian] competent." *Id.*, ¶38.

Here, "the record lacks even basic physical health information such as [Brian's] height, weight,

vitals, and current medications." *Id.,* ¶39. While Dr. Murtaugh testified that Brian previously taken haloperidol and Brian told him he did not like how it made him feel, "the record is bereft of any information" about the duration or dosage of Brian's previous antipsychotic medications "or if and how such medication may have worsened his symptoms of psychosis." *Id.* (R.38:4; R.47:8).

To prove the fourth *Sell* factor, the state must present clear and convincing evidence that "a *particular* drug is in a *particular* patient's best interest" considering "the particular patient's medical history and conditions." *Id.,* ¶42 (emphasis in original). The state does not and cannot point to any evidence in the record to refute Brian's argument that Dr. Murtaugh "did not perform a physical exam or evaluate for comorbidities." *Id.,* ¶41.

Likewise, the state cannot point to anything in the record to refute Brian's arguments that Dr. Murtaugh "did not review [Brian's] medical history" *Id.* The state claims that Dr. Murtaugh reviewed "specifically reviewed all of Brian's medical records at Mendota ("MMHI") since his admission on May 22, 2025" and consulted "numerous medical records." (Resp. Br. 24, 27). Yet the state never identified or produced any specific records that formed the basis for Dr. Murtaugh's opinion. (Resp. Br. 27).

The state is correct that Dr. Murtaugh's testimony was candid. (Resp. Br. 25). But in his candor, Dr. Murtaugh's testimony belies the state's claim about the depth of Dr. Murtaugh's knowledge about Brian's medical condition and his review of Brian's medical records.

Dr. Murtaugh's testimony reveals that he relied on his "interviews" and "meetings" with Brian as the source of his medical information. (R.38:3-4). Accordingly, Dr. Murtaugh offered no specifics about Brian's medical condition. The best Dr. Murtaugh could offer was testimony that, "*he doesn't express* any concerns about his physical health," he "*does not show any signs* of concerning physical health conditions that would necessitate a dose adjustment," and "*as far as I know,* he is generally a healthy man." (R.47:7, 10, 15) (emphasis added).

According to Dr. Murtaugh's testimony, he did not even know if Brian had a physical examination at Mendota. (R.47:12-13). Dr. Murtaugh candidly acknowledged that "it's possible that he has some sort of medical condition that he's not making us aware of." (R.47:20). Had Dr. Murtaugh examined Brian or adequately reviewed records that documented medical condition and history, he would have been able to produce specific information. Instead, Dr. Murtaugh repeatedly spoke in general terms and created a record that merely demonstrates "a generic treatment plan with a medication and dosage that are generally effective for a defendant's condition." *Id.* ¶34.

When asked to "explain" whether the medications were likely to render Brian competent, Dr. Murtaugh offered no specifics. Instead, he generically wrote that "[t]he large majority of patients with schizoaffective disorder respond to medication treatment." (R.38:4). When pushed to elaborate in his testimony, Dr. Murtaugh again couched his opinion on the second *Sell* factor in generic terms:

> [G]enerally speaking I would say most patients tolerate Abilify which is a newer medication

> better than haloperidol. So I wanted to give him an opportunity to take something that I thought might work well for him and be likely to cause fewer side effects.

(R.47:7-8).

Even when given another opportunity to offer specifics about Brian that would support his opinion on the second *Sell* factor, Dr. Murtaugh repeated the generic statement that "most patients I treat with this medication do very well on it, but I cannot predict any specific, you know, results for a patient that hasn't taken it before." (R.47:12).

When pressed on whether medication was "medically appropriate," Dr. Murtaugh's testimony was similarly generic:

> Antipsychotic medication in general I would say is, you know, as I mentioned, can't really pick any specific medication ahead of time that's going to be the best, but this is as good medication as any other for a psychotic illness. And some research shows that it's better in some ways in terms of preventing relapses.

(R.47:18-19).

Thus, like the psychiatrist's testimony in *Green*, Dr. Murtaugh's testimony "was offered as a general opinion that had no connection to [Brian] individually, in that [Dr. Murtaugh] declined to opine as to [Brian's] individual response both with regard to a return to competency and to interference with the defense." *Id.,* ¶32. Likewise, Dr. Murtaugh's "testimony about the effectiveness of antipsychotics generally in treating individuals with psychosis does not satisfy *Sell*'s command that the court must conclude that administration of the drugs is in the patient's best medical interest in light of his [or her] medical condition." *Id.,* ¶42; *Sell* 539 U.S. at 181.

The state's reliance on *D.E.C.* to distinguish *Green* is misplaced. As discussed above, the record reflects Dr. Murtaugh's lack of knowledge about Brian's medical condition and history that is akin "to the significant lapses by the department noted in *Green* and *J.D.B.*" *D.E.C.,* 415 Wis. 2d 161, ¶41. Also, unlike the record here, the treatment plan and psychiatrist's testimony in *D.E.C.* "contained specifics," clarified an approach that "was tailored to *D.E.C.'*s individual situation," and balanced "efficacy and tolerability." *Id.,* ¶43.

The bottom line is that it the state's burden to create "a complete and reliable medically informed record" to prove that the treatment plan is sufficiently individualized under the second and fourth *Sell* factors. *Green,* 396 Wis. 2d 658, ¶¶34-35. "Even if there is some supporting evidence presented by a psychiatrist at a hearing," a treatment plan violates *Sell* when it is "defectively non-specific." *D.E.C.,* 415 Wis. 2d 161, ¶51, n.11.

Rather embrace its burden, the state insists that the burden is on Brian to "identify anything that Dr. Murtaugh neglected that would have been material to his medication decision." (Resp. Br. 28). Likewise, the state faults Brian for its own failure to present *any* evidence that specifically shows olanzapine is likely to restore Brian's competence and is medically appropriate. (Resp. Br. 28-29). While the state is not required to elicit testimony about "all potentially disputable aspects" of the treatment plan, the state must otherwise establish a record that is medically informed "on its face." *Id.,* ¶76. As demonstrated above, there is no "medically informed record" here that would justify the state's burden shifting scheme. *Id.*

Because the state did not provide the court "with a complete and reliable medically informed record, based in part on independent medical evaluations," the state failed to meet its burden under the second and fourth *Sell* factors. *Rivera-Guerrero,* 426 F.3d at 1137; *Green,* 396 Wis. 2d 658, ¶35.

## CONCLUSION

For the reasons stated above and in his appellant's brief, 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 24th day of October, 2025.

Respectfully submitted,

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## CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,914 words.

Dated this 24th day of October, 2025.

Signed:

*Electronically signed by David J. Susens*
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