Litigating Competency and Involuntary Medication in the Changing Landscape of §971.14

(Colleen Ball and David Susens, March 8, 2021)

1. Competency.

a. If there is reason to doubt a defendant's ability to understand the proceedings and assist in his defense, defense counsel, the DA and the court each have an independent duty to raise competency. Wis. Stat. §971.14(1r)(a); *State v. Johnson*, 133 Wis. 2d 207, 395 N.W.2d 176 (1986). (*See* §971.14 at App.1). [1]

- Raising competency is not a strategic decision. If you have reason to doubt your client's competency, you must raise competency.

- A probationer has a right to a competency determination when the ALJ has reason to doubt the probationer's competency. *State ex rel. Vanderbeke v. Endicott*, 210 Wis. 2d 502, 563 N.W.2d 883 (1997). You can raise competency in revocation proceedings by writing a letter to the ALJ.

b. If the court finds reason to doubt competency, it orders a competency examination. Wis. Stat. §971.14(1r) and (2).

- Getting your client released on bond before the court orders an evaluation will avoid an inpatient evaluation. Wis. Stat. §971.14(2)(b).

c. The examiner who assesses the defendant for competency need not have a medical degree. But if the State requests involuntary medication, it must offer the opinion of an examiner with a medical degree, *i.e.* not a psychologist. (*See* Section 2 below).

d. If the court orders a competency examination, consider requesting your client's treatment records and records of prior Chapter 51 proceedings in order to defend him at competency and/or involuntary medication proceedings.

- The easiest way to obtain your client's records is by asking him to sign a release.

- If your client won't sign a release, file a motion to compel the production of these records, pursuant to Wis. Stat. §51.30(3)(b), §51.30(4)(b)(11), and 45 CFR §164.512(e)(l)(i). (*See* form motion at App.66).

e. After the examiner evaluates the defendant, she submits a written report to the court. Wis. Stat. §971.14(3). The report must address the matters listed in §971.14(3)(a) through (dm), including whether the defendant is competent to make medication or treatment decisions.

[1] "App.1" refers to a page number in the Appendix attached to this Guide.

- Once you review the report, consider the need for a second opinion based on §971.14(2)(g).

f. The court causes the examiner's report to be delivered to defense counsel and the DA and conducts a hearing under §971.14(4).

- If the defendant believes that he is competent, the State must prove that he is incompetent by clear and convincing evidence. Wis. Stat. §971.14(4)(b).

- Pursuant to §971.14(4) and (5), the court may find a defendant either: (1) competent, (2) incompetent and likely to regain competence with appropriate treatment within the time prescribed in §971.14(5)(a)1, or (3) incompetent and unlikely to regain within the time prescribed in §971.14(5)(a)1.

- Pursuant to §971.14(5)(a)1., when the court commits a defendant, DHS determines whether the commitment is inpatient or outpatient. Consider asking the court to make a (non-binding) finding recommending outpatient treatment.

- SCOW recently declared §971.14(3)(dm) and (4)(b) unconstitutional. *See State v. Fitzgerald*, 2019 WI 69, 387 Wis. 2d 384, 929 N.W.2d 165. (App.26) Thus, circuit courts may no longer order involuntary medication to restore a defendant's competency to proceed based on the fact that he is incompetent to make medication or treatment decisions. Instead, the circuit court must apply *Sell v. United States*, 539 U.S. 166 (2003) (App.11).

2. Involuntary Medication and *Sell v. United States*.

a. The court cannot order the involuntary administration of antipsychotic medication to restore a defendant's competence unless the State proves all four *Sell* factors. *See Fitzgerald*, ¶¶31-32

b. The cases in which a court may order involuntary medication to restore competency may be ***rare***. *Sell*, 539 U.S. at 180. *See also Fitzgerald*, ¶2.

c. The burden is on the State to prove each of the four *Sell* factors below by clear and convincing evidence. *See* Wis. Stat. §971.14 (4)(b) and *U.S. v. Debendetto*, 757 F.3d 547, 552 (7th Cir. 2014). The State must show that:

1) An ***important*** government interest at stake. The defendant's individual circumstances may lessen the importance of the government's interest. *Sell*, 539 U.S. at 180.

- The court must find that the crime is "serious." It should note the maximum potential sentence but focus on the expected sentence because that is a better reflection of his individual circumstances. *See State v. R.G.*, 215 A.3d 952 (N.J. Super. Ct. App. Div. July 31, 2019); *United States v. Hernandez-Vasquez*, 513 F.3d 908, 919 (9th Cir. 2008); *Debendetto*, 757 F.3d at 553.

- If the crime is serious, the court must consider whether the defendant has served most of his sentence through his pre-trial commitment and whether his refusal to take medication will result in a Chapter 51 commitment.

- If either or both are true, the State's interest in prosecuting the defendant may not be important enough to justify involuntary medication. *See Sell*, 539 U.S. at 180; *United States v. Berry*, 911 F.3d 354 (6th Cir. 2018)(Government lacked important interest in prosecuting defendant for planting a fake bomb (5-year sentence) due to lack of violence and length of time already served.)

2) Involuntary medication will ***significantly further*** the government's interest. The proposed drugs must be "substantially likely" to render the defendant competent and "substantially unlikely" to have side effects that will interfere with the defendant's ability to assist his lawyer. *See, Sell*, 539 U.S. at 181; *State v. Green*, Appeal No. 2020AP298-CR (Wis. Ct. App. 2/25/21)(recommended for publication)(App.50).

   - The State cannot offer a general treatment plan. It must offer an individualized treatment plan addressing the defendant's health and individual circumstances. *Green*, ¶34.

   - The State's doctor cannot simply explain what the proposed drug is designed to do. *United States v. Ruiz-Gaxiola*, 623 F.3d 684, 696 (9th Cir. 2010).

   - The State must address side effects of medications and how they might affect the defendant's ability to assist with his defense. *Evans*, 404 F.3d 227, 240-241 (4th Cir. 2005).

3) Involuntary medication is ***necessary*** to further that important government interest. Are alternative, less intrusive treatments unlikely to restore competency? Are there less intrusive ways (*i.e*. not force) to administer the drugs? *Id.*

   - Court cannot summarily conclude, without explanation, that less intrusive alternatives will not work. *United States v. Chatmon*, 718 F.3d 369, 376 (4th Cir. 2013).

   - Court must consider whether less intrusive ***treatments*** (*i.e*. treatments other than medication) can accomplish the same result. Less intrusive treatments include intensive education, individual therapy, stress management, and so forth. *State v. Holden*, 110 A.3d 1237, 1251 (Conn. Super. Ct. 2014)

   - Court must consider whether there is a less intrusive ***means*** than a forcible injection for administering medication. For example, the defendant may take the medication pursuant to a court order for medication backed by a contempt sanction. *Sell*, 539 U.S. at 181. The court of appeals approved this approach in *Green*, ¶¶30-31.

4) The proposed involuntary medication is ***medically appropriate*** for the particular defendant. The proposed drugs must be in the defendant's best medical interest in light of his medical condition. *Sell*, 539 U.S. at 181, *Green*, ¶42.

- The State must prove, and the court must find, that the proposed antipsychotic medication will do more than control symptoms or that it's likely benefits would outweigh its potential harm for this defendant. *See Ruiz-Gaxiola*, 623 F.3d at 705-706.

- Court can't give prison staff carte blanche to decide drugs and dosages; they must offer details about drugs, their efficacy and their effects on the defendant's particular medical condition, and the court must approve the drugs. *Green*, ¶44; *Evans*, 404 F.3d at 241-242.

d. To prove the 2nd, 3rd and 4th *Sell* factors above, the State must submit an individualized proposed treatment plan. *Green*, ¶ 38; *United States v. Chavez*, 734 F.3d 1247, 1253 (10th Cir. 2013); *United States v. Rivera-Guerrero*, 426 F.3d 1130, 1139, n.5 (9th Cir. 2005); *Evans*, 404 F.3d at 240.

➢ The treatment plan must specify the medication or medications the State seeks to administer, the dosages, and the length of time they will be administered. *Id.*

➢ Because the treatment plan must specify medication and dosages, the State's expert on involuntary medication must have a medical degree. *Chavez*, 734 F.3d at 1250; *United States v. Hernandez-Vasquez,* 513 F.3d 908, 916-917 (9th Cir. 2008).

➢ If the State fails to submit a treatment plan, the court should deny the request for involuntary medication. *Chavez*, 734 F.3d at 1254; *Watson*, 793 F.3d at 424-425.

e. The State may argue that it need not prove the *Sell* factors if it can show that medication or treatment is necessary "to prevent ***physical harm*** to the defendant or others." *See* §971.14(2)(f) and Mandatory Circuit Court Form CR-206, ¶3.B (App.9-10).

➢ This standard derives from *Washington v. Harper*, 494 U.S. 210 (1990), which held that the government may administer antipsychotic medication to a mentally ill prisoner against his will if the prisoner is (a) dangerous to himself or others, and (b) the treatment is in his medical interest. *Harper* involved a ***convicted*** prisoner. It did not involve a pre-trial detainee.

➢ If the State wants to medicate a mentally ill pre-trial detainee for dangerousness it should refer the case for a Chapter 51 commitment.

➢ Note that under §971.14(2)(f) the State may involuntarily medicate a defendant to prevent "physical harm" to himself or others. But under §51.61(1)(g)1 the State must

prove that medication is necessary to prevent "***serious*** physical harm" to the defendant or others. Both statutes apply to §971.14 detainees but they conflict. This discrepancy is the subject of a pending appeal. For now, argue that the State must meet the tougher standard.

- In a pending appeal, the Wisconsin DOJ has conceded that §971.14(2)(f) applies only during the period a defendant is undergoing a competency evaluation. After a defendant has been committed for treatment, the court has no authority to rely on sub. (2)(f) for involuntary medication.

3. Preserving and Triggering the Right to Appeal.

a. If the court orders involuntary medication, the defendant has the right to appeal the order and the right to an ***automatic*** stay of the order pending appeal. *State v. Scott*, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141. (*See* App.40).

- Alert the court to the defendant's right to an automatic stay at the same hearing where it orders medication.

- Alert Katie York, Appellate Division Director, that the circuit court has entered an involuntary medication order.

b. The law is unclear as to what triggers the ***automatic*** stay. For now, assume that defense counsel must file a Notice of Appeal in order to trigger a stay. (*See* Mandatory Circuit Court Form CR-206, ¶7, App.9-10).

c. Ask the court to refrain from entering a written order for [the number of days you need] in order to: (1) consult your client about whether to appeal; and (2) prepare a Notice of Appeal to file as soon as the court enters the order. (*See* form NOA at App.65).

- If there is a gap in time between the court's entry of a written order and defense counsel's filing of a Notice of Appeal, DHS may begin medicating the defendant and render the appeal a nullity.

d. Alert DHS that the court is ordering involuntary medication, your client wants an appeal, and he is entitled to an automatic stay of the order under *Scott*.

- Specifically, email Kristinel.Blatterman@dhs.wisconsin.gov in the Office of Legal Counsel for DHS.

e. The State may move the circuit court to lift the automatic stay of medication pursuant to *Scott.* To obtain a lift of the automatic stay, the State must prove that:

- It is likely to succeed on the merits of the defendant's appeal;

- The defendant is not likely to suffer irreparable harm if the stay is lifted

- No substantial harm will come to other parties if the stay is lifted; and
- Lifting the stay will do no harm to the public's interest. *Scott*, ¶47.

f. The amount of time the State has to restore a defendant's competency is controlled by §971.14(5)(a)(1). If the defendant exercises his right to appeal an involuntary medication order, the State may try to ask the circuit court to toll the time period for restoring competency. The court of appeals just prohibited this maneuver. *Green*, ¶¶57-63.

g. If the time for restoring your client's competency runs out during the course of the appeal, the circuit court must discharge him from the commitment and custody or the State may refer him for a Chapter 51 commitment if they meet the criteria under Chapter 51. *See* Wis. Stat. §971.14(6); Green, ¶63.

- Discharge from commitment does not always result in dismissal of the case. If the case is not dismissed, the court may require your client's appearance to address competency at specified intervals. Wis. Stat. §971.14(6)(a).

W.S.A. 971.14

971.14. Competency proceedings

Effective: March 9, 2018

Currentness

(1g) Definition. In this section, "department" means the department of health services.

(1r) Proceedings. (a) The court shall proceed under this section whenever there is reason to doubt a defendant's competency to proceed.

(b) If reason to doubt competency arises after the defendant has been bound over for trial after a preliminary examination, or after a finding of guilty has been rendered by the jury or made by the court, a probable cause determination shall not be required and the court shall proceed under sub. (2).

(c) Except as provided in par. (b), the court shall not proceed under sub. (2) until it has found that it is probable that the defendant committed the offense charged. The finding may be based upon the complaint or, if the defendant submits an affidavit alleging with particularity that the averments of the complaint are materially false, upon the complaint and the evidence presented at a hearing ordered by the court. The defendant may call and cross-examine witnesses at a hearing under this paragraph but the court shall limit the issues and witnesses to those required for determining probable cause. Upon a showing by the proponent of good cause under s. 807.13 (2) (c), testimony may be received into the record of the hearing by telephone or live audiovisual means. If the court finds that any charge lacks probable cause, it shall dismiss the charge without prejudice and release the defendant except as provided in s. 971.31 (6).

(2) Examination. (a) The court shall appoint one or more examiners having the specialized knowledge determined by the court to be appropriate to examine and report upon the condition of the defendant. If an inpatient examination is determined by the court to be necessary, the defendant may be committed to a suitable mental health facility for the examination period specified in par. (c), which shall be deemed days spent in custody under s. 973.155. If the examination is to be conducted by the department, the court shall order the individual to the facility designated by the department.

(am) Notwithstanding par. (a), if the court orders the defendant to be examined by the department or a department facility, the department shall determine where the examination will be conducted, who will conduct the examination and whether the examination will be conducted on an inpatient or outpatient basis. Any such outpatient examination shall be conducted in a jail or a locked unit of a facility. In any case under this paragraph in which the department determines that an inpatient examination is necessary, the 15-day period under par. (c) begins upon the arrival of the defendant at the inpatient facility. If an outpatient examination is begun by or through the department, and the department later determines that an inpatient examination is necessary, the sheriff shall transport the defendant to the inpatient facility designated by the department, unless the defendant has been released on bail.

(b) If the defendant has been released on bail, the court may not order an involuntary inpatient examination unless the defendant fails to cooperate in the examination or the examiner informs the court that inpatient observation is necessary for an adequate examination.

(c) Inpatient examinations shall be completed and the report of examination filed within 15 days after the examination is ordered or as specified in par. (am), whichever is applicable, unless, for good cause, the facility or examiner appointed by the court cannot complete the examination within this period and requests an extension. In that case, the court may allow one 15-day extension of the examination period. Outpatient examinations shall be completed and the report of examination filed within 30 days after the examination is ordered.

(d) If the court orders that the examination be conducted on an inpatient basis, the sheriff of the county in which the court is located shall transport any defendant not free on bail to the examining facility within a reasonable time after the examination is ordered and shall transport the defendant to the jail within a reasonable time after the sheriff and county department of community programs of the county in which the court is located receive notice from the examining facility that the examination has been completed.

(e) The examiner shall personally observe and examine the defendant and shall have access to his or her past or present treatment records, as defined under s. 51.30(1)(b).

(f) A defendant ordered to undergo examination under this section may receive voluntary treatment appropriate to his or her medical needs. The defendant may refuse medication and treatment except in a situation where the medication or treatment is necessary to prevent physical harm to the defendant or others.

(g) The defendant may be examined for competency purposes at any stage of the competency proceedings by physicians or other experts chosen by the defendant or by the district attorney, who shall be permitted reasonable access to the defendant for purposes of the examination.

(3) Report. The examiner shall submit to the court a written report which shall include all of the following:

(a) A description of the nature of the examination and an identification of the persons interviewed, the specific records reviewed and any tests administered to the defendant.

(b) The clinical findings of the examiner.

(c) The examiner's opinion regarding the defendant's present mental capacity to understand the proceedings and assist in his or her defense.

(d) If the examiner reports that the defendant lacks competency, the examiner's opinion regarding the likelihood that the defendant, if provided treatment, may be restored to competency within the time period permitted under sub. (5)(a). The examiner shall provide an opinion as to whether the defendant's treatment should occur in an inpatient facility designated by the department, in a community-based treatment program under the supervision of the department, or in a jail or a locked unit of a facility that has entered into a voluntary agreement with the state to serve as a location for treatment.

(dm) If sufficient information is available to the examiner to reach an opinion, the examiner's opinion on whether the defendant needs medication or treatment and whether the defendant is not competent to refuse medication or treatment. The defendant is not competent to refuse medication or treatment if, because of mental illness, developmental disability, alcoholism or drug dependence, and after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the defendant, one of the following is true:

1. The defendant is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.

2. The defendant is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness, developmental disability, alcoholism or drug dependence in order to make an informed choice as to whether to accept or refuse medication or treatment.

(e) The facts and reasoning, in reasonable detail, upon which the findings and opinions under pars. (b) to (dm) are based.

(4) Hearing. (a) The court shall cause copies of the report to be delivered forthwith to the district attorney and the defense counsel, or the defendant personally if not represented by counsel. Upon the request of the sheriff or jailer charged with care and control of the jail in which the defendant is being held pending or during a trial or sentencing proceeding, the court shall cause a copy of the report to be delivered to the sheriff or jailer. The sheriff or jailer may provide a copy of the report to the person who is responsible for maintaining medical records for inmates of the jail, or to a nurse licensed under ch. 441, or to a physician or physician assistant licensed under subch. II of ch. 448 who is a health care provider for the defendant or who is responsible for providing health care services to inmates of the jail. The report shall not be otherwise disclosed prior to the hearing under this subsection.

(b) If the district attorney, the defendant and defense counsel waive their respective opportunities to present other evidence on

the issue, the court shall promptly determine the defendant's competency and, if at issue, competency to refuse medication or treatment for the defendant's mental condition on the basis of the report filed under sub. (3) or (5). In the absence of these waivers, the court shall hold an evidentiary hearing on the issue. Upon a showing by the proponent of good cause under s. 807.13 (2)(c), testimony may be received into the record of the hearing by telephone or live audiovisual means. At the commencement of the hearing, the judge shall ask the defendant whether he or she claims to be competent or incompetent. If the defendant stands mute or claims to be incompetent, the defendant shall be found incompetent unless the state proves by the greater weight of the credible evidence that the defendant is competent. If the defendant claims to be competent, the defendant shall be found competent unless the state proves by evidence that is clear and convincing that the defendant is incompetent. If the defendant is found incompetent and if the state proves by evidence that is clear and convincing that the defendant is not competent to refuse medication or treatment, under the standard specified in sub. (3)(dm), the court shall make a determination without a jury and issue an order that the defendant is not competent to refuse medication or treatment for the defendant's mental condition and that whoever administers the medication or treatment to the defendant shall observe appropriate medical standards.

(c) If the court determines that the defendant is competent, the criminal proceeding shall be resumed.

(d) If the court determines that the defendant is not competent and not likely to become competent within the time period provided in sub. (5)(a), the proceedings shall be suspended and the defendant released, except as provided in sub. (6)(b).

(5) Commitment. (a)1. If the court determines that the defendant is not competent but is likely to become competent within the period specified in this paragraph if provided with appropriate treatment, the court shall suspend the proceedings and commit the defendant to the custody of the department for treatment for a period not to exceed 12 months, or the maximum sentence specified for the most serious offense with which the defendant is charged, whichever is less. The department shall determine whether the defendant will receive treatment in an appropriate institution designated by the department, while under the supervision of the department in a community-based treatment program under contract with the department, or in a jail or a locked unit of a facility that has entered into a voluntary agreement with the state to serve as a location for treatment. The sheriff shall transport the defendant to the institution, program, jail, or facility, as determined by the department.

2. If, under subd. 1., the department commences services to a defendant in jail or in a locked unit, the department shall, as soon as possible, transfer the defendant to an institution or provide services to the defendant in a community-based treatment program consistent with this subsection.

3. Days spent in commitment under this paragraph are considered days spent in custody under s. 973.155.

4. A defendant under the supervision of the department placed under this paragraph in a community-based treatment program is in the custody and control of the department, subject to any conditions set by the department. If the department believes that the defendant under supervision has violated a condition, or that permitting the defendant to remain in the community jeopardizes the safety of the defendant or another person, the department may designate an institution at which the treatment shall occur and may request that the court reinstate the proceedings, order the defendant transported by the sheriff to the designated institution, and suspend proceedings consistent with subd. 1.

(am) If the defendant is not subject to a court order determining the defendant to be not competent to refuse medication or treatment for the defendant's mental condition and if the department determines that the defendant should be subject to such a court order, the department may file with the court, with notice to the counsel for the defendant, the defendant, and the district attorney, a motion for a hearing, under the standard specified in sub. (3)(dm), on whether the defendant is not competent to refuse medication or treatment. A report on which the motion is based shall accompany the motion and notice of motion and shall include a statement signed by a licensed physician that asserts that the defendant needs medication or treatment and that the defendant is not competent to refuse medication or treatment, based on an examination of the defendant by a licensed physician. Within 10 days after a motion is filed under this paragraph, the court shall, under the procedures and standards specified in sub. (4)(b), determine the defendant's competency to refuse medication or treatment for the defendant's mental condition. At the request of the defendant, the defendant's counsel, or the district attorney, the hearing may be postponed, but in no case may the postponed hearing be held more than 20 days after a motion is filed under this paragraph.

(b) The defendant shall be periodically reexamined by the department examiners. Written reports of examination shall be furnished to the court 3 months after commitment, 6 months after commitment, 9 months after commitment and within 30 days prior to the expiration of commitment. Each report shall indicate either that the defendant has become competent, that the defendant remains incompetent but that attainment of competency is likely within the remaining commitment period, or that the defendant has not made such progress that attainment of competency is likely within the remaining commitment period. Any report indicating such a lack of sufficient progress shall include the examiner's opinion regarding whether the defendant is mentally ill, alcoholic, drug dependent, developmentally disabled or infirm because of aging or other like incapacities.

(c) Upon receiving a report under par. (b) indicating the defendant has regained competency or is not competent and unlikely to become competent in the remaining commitment period, the court shall hold a hearing within 14 days of receipt of the report and the court shall proceed under sub. (4). If the court determines that the defendant has become competent, the defendant shall be discharged from commitment and the criminal proceeding shall be resumed. If the court determines that the defendant is making sufficient progress toward becoming competent, the commitment shall continue.

(d) If the defendant is receiving medication the court may make appropriate orders for the continued administration of the medication in order to maintain the competence of the defendant for the duration of the proceedings. If a defendant who has been restored to competency thereafter again becomes incompetent, the maximum commitment period under par. (a) shall be 18 months minus the days spent in previous commitments under this subsection, or 12 months, whichever is less.

(6) Discharge; civil proceedings. (a) If the court determines that it is unlikely that the defendant will become competent within the remaining commitment period, it shall discharge the defendant from the commitment and release him or her, except as provided in par. (b). The court may order the defendant to appear in court at specified intervals for redetermination of his or her competency to proceed.

(b) When the court discharges a defendant from commitment under par. (a), it may order that the defendant be taken immediately into custody by a law enforcement official and promptly delivered to a facility specified in s. 51.15(2)(d), an approved public treatment facility under s. 51.45(2)(c), or an appropriate medical or protective placement facility. Thereafter, detention of the defendant shall be governed by s. 51.15, 51.45(11), or 55.135, as appropriate. The district attorney or corporation counsel may prepare a statement meeting the requirements of s. 51.15(4) or (5), 51.45(13)(a), or 55.135 based on the allegations of the criminal complaint and the evidence in the case. This statement shall be given to the director of the

facility to which the defendant is delivered and filed with the branch of circuit court assigned to exercise criminal jurisdiction in the county in which the criminal charges are pending, where it shall suffice, without corroboration by other petitioners, as a petition for commitment under s. 51.20 or 51.45(13) or a petition for protective placement under s. 55.075. This section does not restrict the power of the branch of circuit court in which the petition is filed to transfer the matter to the branch of circuit court assigned to exercise jurisdiction under ch. 51 in the county. Days spent in commitment or protective placement pursuant to a petition under this paragraph shall not be deemed days spent in custody under s. 973.155.

(c) If a person is committed under s. 51.20 pursuant to a petition under par. (b), the county department under s. 51.42 or 51.437 to whose care and custody the person is committed shall notify the court which discharged the person under par. (a), the district attorney for the county in which that court is located and the person's attorney of record in the prior criminal proceeding at least 14 days prior to transferring or discharging the defendant from an inpatient treatment facility and at least 14 days prior to the expiration of the order of commitment or any subsequent consecutive order, unless the county department or the department of health services has applied for an extension.

(d) Counsel who have received notice under par. (c) or who otherwise obtain information that a defendant discharged under par. (a) may have become competent may move the court to order that the defendant undergo a competency examination under sub. (2). If the court so orders, a report shall be filed under sub. (3) and a hearing held under sub. (4). If the court determines that the defendant is competent, the criminal proceeding shall be resumed. If the court determines that the defendant is not competent, it shall release him or her but may impose such reasonable nonmonetary conditions as will protect the public and enable the court and district attorney to discover whether the person subsequently becomes competent.

Credits

<<For credits, see Historical Note field.>>

Editors' Notes

VALIDITY

<For validity of this section, see Matter of Commitment of C.S. (2020), 940 N.W.2d 875. >

JUDICIAL COUNCIL NOTES—1990

The *McCredden* hearing is substantially similar in purpose to the preliminary examination. The standard for admission of telephone testimony should be the same in either proceeding.

The standard for admission of telephone testimony at a competency hearing is the same as that for a preliminary examination. See s. 970.03(13) and Note thereto.

JUDICIAL COUNCIL COMMITTEE NOTE—1981

Sub. (1)(a) does not require the court to honor every request for an examination. The intent of sub. (1)(a) is to avoid unnecessary examinations by clarifying the threshold for a competency inquiry in accordance with State v.

McKnight, 65 Wis.2d 583 (1974). "Reason to doubt" may be raised by a motion setting forth the grounds for belief that a defendant lacks competency, by the evidence presented in the proceedings or by the defendant's colloquies with the judge or courtroom demeanor. In some cases an evidentiary hearing may be appropriate to assist the court in deciding whether to order an examination under sub. (2). Even when neither party moves the court to order a competency inquiry, the court may be required by due process to so inquire where the evidence raises a sufficient doubt. Pate v. Robinson, 383 U.S. 375, 387 (1966); Drope v. Missouri, 420 U.S. 162 (1975).

The Wisconsin supreme court has held that a defendant may not be ordered to undergo a competency inquiry unless the court has found probable cause to believe he or she is guilty of the offense charged. State v. McCredden, 33 Wis.2d 661 (1967). Where this requirement has not been satisfied through a preliminary examination or verdict or finding of guilt prior to the time the competency issue is raised, a special probable cause determination is required. Subsection (1)(b) allows that determination to be made from the allegations in the criminal complaint without an evidentiary hearing unless the defendant submits a particularized affidavit alleging that averments in the criminal complaint are materially false. Where a hearing is held, the issue is limited to probable cause and hearsay evidence may be admitted. See s. 911.01(4)(c).

Sub. (2)(a) requires the court to appoint one or more qualified examiners to examine the defendant when there is reason to doubt his or her competency. Although the prior statute required the appointment of a physician, this section allows the court to appoint examiners without medical degrees, if their particular qualifications enable them to form expert opinions regarding the defendant's competency.

Sub. (2)(b), (c) and (d) is intended to limit the defendant's stay at the examining facility to that period necessary for examination purposes. In many cases, it is possible for an adequate examination to be made without institutional commitment, expediting the commencement of treatment of the incompetent defendant. Fosdal, The Contributions and Limitations of Psychiatric Testimony, 50 Wis.B.Bulletin, No. 4, pp. 31–33 (April 1977).

Sub. (2)(e) clarifies the examiner's right of access to the defendant's past or present treatment records, otherwise confidential under s. 51.30.

Sub. (2)(f) clarifies that a defendant on examination status may receive voluntary treatment but, until committed under sub. (5), may not be involuntarily treated or medicated unless necessary for the safety of the defendant or others. See s. 51.61(1)(f), (g), (h) and (i).

Sub. (2)(g), like prior s. 971.14(7), permits examination of the defendant by an expert of his or her choosing. It also allows access to the defendant by examiners selected by the prosecution at any stage of the competency proceedings.

Sub. (3) requires the examiner to render an opinion regarding the probability of timely restoration to competency, to assist the court in determining whether an incompetent defendant should be committed for treatment. Incompetency commitments may not exceed the reasonable time necessary to determine whether there is a substantial probability that the defendant will attain competency in the foreseeable future: Jackson v. Indiana, 406 U.S. 715, 738 (1972). The new statute also requires the report to include the facts and reasoning which underlie the examiner's clinical findings and opinion on competency.

Sub. (4) is based upon prior s. 971.14(4). The revision emphasizes that the determination of competency is a judicial matter. State ex rel. Haskins v. Dodge County Court, 62 Wis.2d 250 (1974). The standard of proof

specified in State ex rel. Matalik v. Schubert, 57 Wis.2d 315 (1973) has been changed to conform to the "clear and convincing evidence" standard of s. 51.20(13)(e) and Addington v. Texas, 441 U.S. 418 (1979).

Sub. (5) requires, in accordance with Jackson v. Indiana, 406 U.S. 715 (1972), that competency commitments be justified by the defendant's continued progress toward becoming competent within a reasonable time. The maximum commitment period is established at 18 months, in accordance with State ex rel. Haskins v. Dodge County Court, 62 Wis.2d 250 (1974) and other data. If a defendant becomes competent while committed for treatment and later becomes incompetent, further commitment is permitted but in no event may the cumulated commitment periods exceed 24 months or the maximum sentence for the offense with which the defendant is charged, whichever is less. State ex rel. Deisinger v. Treffert, 85 Wis.2d 257 (1978).

Sub. (6) clarifies the procedures for transition to civil commitment, alcoholism treatment or protective placement when the competency commitment has not been, or is not likely to be, successful in restoring the defendant to competency. The new statute requires the defense counsel, district attorney and criminal court to be notified when the defendant is discharged from civil commitment, in order that a redetermination of competency may be ordered at that stage. State ex rel. Porter v. Wolke, 80 Wis.2d 197, 297 N.W.2d 881 (1977). The procedures specified in sub. (6) are not intended to be the exclusive means of initiating civil commitment proceedings against such persons. See e.g., In matter of Haskins, 101 Wis.2d 176 (Ct.App.1980).

COMMENTS—L.1969, C. 255

This section is derived from ALI M.P.C. 4.06, former s. 957.13 and the decision in State v. McCredden, 33 Wis.2d 661. Before commitment of an incompetent defendant, a hearing must be had to establish probable cause that a crime was committed. When probable cause is determined the court conducts a summary hearing after having appointed one or more doctors to examine the defendant. The doctor(s) must file written reports available to all parties and the court prior to the hearing and if no party contests the result the report may be the basis for the determination. This would be particularly appropriate where the report indicates that the defendant is competent. The rehearing provisions of s. 957.13 are retained.

Sub. (6) permits legal issues to be resolved even if the defendant is incompetent since some matters are purely legal in nature and motions which might result in freeing a defendant from the criminal court's jurisdiction should be permitted at any time. In such cases the Department would presumably proceed against a defendant under Ch. 51.

Notes of Decisions (175)

W. S. A. 971.14, WI ST 971.14
Current through 2019 Act 186, published April 18, 2020

STATE OF WISCONSIN, CIRCUIT COURT, _____ COUNTY

State of Wisconsin, Plaintiff
-vs-

_____
Defendant's Name

_____
Date of Birth

Order of Commitment for Treatment (Incompetency)

Case No. _____

Defendant's:

Telephone Number	Address
Present Location	

THE COURT FINDS:

1. The defendant was
   - ☐ charged and a probable cause determination was made as to the following crime(s):
   - ☐ found guilty of the following crime(s):

Crime(s) (include enhancers, if any)	Wis. Statute(s) Violated	Date(s) Committed

2. The defendant is incompetent to proceed at this time, but if provided with appropriate medication and treatment, is likely to become competent:
   - within 12 months, or
   - the maximum sentence specified for the most serious offense, whichever is less.

☐ 3. **Involuntary administration of medication**

A. The defendant is mentally ill and is charged with at least one serious crime. The involuntary administration of medication(s) or treatment is
   1) necessary to significantly further important government interests, and
   2) substantially likely to render the defendant competent to stand trial, and
   3) substantially unlikely to have side effects that undermine the fairness of the trial by interfering significantly with the defendant's ability to assist counsel in conducting a trial defense, and
   4) necessary because alternative, less intrusive treatments are unlikely to achieve substantially the same results, and

5) medically appropriate, that is, in the defendant's best medical interests in light of the defendant's medical condition. **AND**

B. The involuntary administration of medication(s) and treatment is needed because the
   1) defendant poses a current risk of harm to self or others if not medicated or treated.
   2) administration of medication and treatment is in the defendant's medical interest, and
   3) defendant is not competent to refuse medication or treatment due to mental illness, developmental disability, alcoholism, or drug dependence because:
      ☐ The defendant is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.
      ☐ The defendant is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness, developmental disability, and alcoholism or drug dependence in order to make an informed choice as to whether to accept or refuse medication or treatment.

THE COURT ORDERS:

1. These proceedings are suspended.

2. The defendant is committed on [Date] _____ to the Department of Health Services (DHS) for
   - an indeterminate term not to exceed 12 months, or
   - the maximum sentence specified for the most serious offense, whichever is less.

3. The defendant is granted _____ days of credit for pre-commitment incarceration.

4. DHS shall designate the receiving mental health institute.

5. The sheriff shall transport the defendant to and from the designated institute.

6. The institute shall periodically re-examine the defendant and furnish written reports to the court 3 months, 6 months and 9 months after commitment and 30 days prior to the expiration of the commitment.

☐ 7. If box #3 under the findings on Page 1 is checked, DHS is authorized to administer medication(s) or treatment to the defendant and shall observe appropriate medical standards in doing so. This order shall be stayed upon the filing of a notice of appeal.

8. The clerk shall provide DHS a copy of the most recent criminal complaint and examiner's report(s). The examiner shall have access to the defendant's past and or present records as defined under §51.30(1)(b), Wis. Stats.

9. Other: _____

DISTRIBUTION:
1. Court
2. Sheriff
3. Department of Health Services
4. District Attorney
5. Defendant/Attorney

_____	_____
District Attorney	Defense Attorney
_____	_____
Address	Address
_____	_____
Email Address Telephone Number	Email Address Telephone Number
_____	_____
Date Fax Number State Bar No. (if any)	Date Fax Number State Bar No. (if any)

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by United States v. Sueiro, 4th Cir.(Va.), January 9, 2020

123 S.Ct. 2174
Supreme Court of the United States

Charles Thomas SELL, Petitioner,
v.
UNITED STATES.

No. 02–5664.
|
Argued March 3, 2003.
|
Decided June 16, 2003.

Synopsis
Defendant was indicted for health care fraud, attempted murder, conspiracy, and solicitation to commit violence. After a hearing, the United States District Court for the Eastern District of Missouri, Donald J. Stohr, J., reversed magistrate judge's finding that defendant posed danger to himself and others, but affirmed holding that forcible medication to restore defendant to competency was warranted. Defendant and the Government appealed. The United States Court of Appeals for the Eighth Circuit, 282 F.3d 560, affirmed. Certiorari was granted. The Supreme Court, Justice Breyer, held that: (1) pretrial order affirming magistrate judge's order requiring defendant involuntarily to receive medication in order to render defendant competent to stand trial was immediately appealable as a collateral order; (2) Fifth Amendment Due Process Clause permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests; and (3) assuming that defendant was not dangerous to himself or others, he could not be ordered involuntarily to take antipsychotic drugs solely to render him competent to stand trial without consideration of important questions.

Vacated and remanded.

Justice Scalia filed dissenting opinion in which Justices O'Connor and Thomas joined.

West Headnotes (8)

[1] **Criminal Law** Finality of determination in general
Criminal Law Interlocutory, Collateral, and Supplementary Proceedings and Questions

The term "final decision," as used in statute which authorizes federal courts of appeals to review final decisions of the district courts, normally refers to a final judgment, such as a judgment of guilt, that terminates a criminal proceeding, and thus, a defendant normally must wait until the end of trial to obtain appellate review of a pretrial order. 28 U.S.C.A. § 1291.

30 Cases that cite this headnote

[2] **Mental Health** Custody and Confinement

District court's pretrial order affirming magistrate judge's order requiring defendant involuntarily to receive medication in order to render defendant competent to stand trial on fraud, attempted murder, and other charges was immediately appealable as a collateral order; the order conclusively determined the disputed question of whether defendant had a legal right to avoid forced medication, resolved an important issue of constitutional importance yet completely separate from the merits of the action, and was effectively unreviewable on appeal from a final judgment, in that by the time of trial defendant would have undergone forced medication and could not undo that harm even if he was acquitted.

123 Cases that cite this headnote

[3] **Constitutional Law** Administration of drugs
Mental Health Custody and Confinement

The Fifth Amendment Due Process Clause permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests. U.S.C.A. Const.Amend. 5.

182 Cases that cite this headnote

[4] **Mental Health** Custody and Confinement

For purpose of determining whether important governmental interests are at stake as required when considering whether involuntarily to administer antipsychotic drugs to render a mentally ill defendant competent to stand trial, the Government's interest in bringing to trial an individual accused of a serious crime against the person or a serious crime against property is important, but the Government must still consider the facts of the individual case in evaluating the Government's interest in prosecution; special circumstances may lessen the importance of that interest.

113 Cases that cite this headnote

[5] **Mental Health** Custody and Confinement

In order to find that involuntary medication of a mentally ill defendant will significantly further important state interests, as required when considering whether involuntarily to administer antipsychotic drugs to render a mentally ill defendant competent to stand trial, a court must find that administration of the drugs is substantially likely to render the defendant competent to stand trial, and that administration of the drugs is 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.

426 Cases that cite this headnote

[6] **Mental Health** Custody and Confinement

In order to find that involuntary medication of a mentally ill defendant is necessary to further important state interests, as required when considering whether involuntarily to administer antipsychotic drugs to render a mentally ill defendant competent to stand trial, a court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results, and must consider less intrusive means for administering the drugs, such as a court order to the defendant backed by the contempt power, before considering more intrusive methods.

250 Cases that cite this headnote

[7] **Mental Health** Custody and Confinement

In order to find that involuntary medication of a mentally ill defendant is medically appropriate, as required when considering whether involuntarily to administer antipsychotic drugs to render a mentally ill defendant competent to stand trial, a court must find that it is in the defendant's best medical interest in light of his medical condition and the specific kinds of drugs at issue, including their side effects and levels of success.

148 Cases that cite this headnote

[8] **Mental Health** Custody and Confinement

Assuming that defendant was not dangerous to himself or others, he could not be ordered involuntarily to take antipsychotic drugs solely

to render him competent to stand trial on attempted murder and other charges without consideration of important questions about trial-related side effects and risks of drugs to be used and whether they were likely to undermine fairness of trial, and consideration of effect on importance of governmental interest in prosecution by facts that defendant had already been confined at prison medical center for a long period of time, and that his refusal to take antipsychotic drugs might result in further lengthy confinement, where magistrate approved forced medication of defendant substantially, if not primarily, upon grounds of his dangerousness to others.

185 Cases that cite this headnote

****2176 *166** *Syllabus*[*]

A Federal Magistrate Judge (Magistrate) initially found petitioner Sell, who has a long history of mental illness, competent to stand trial for fraud and released him on bail, but later revoked bail because Sell's condition had worsened. Sell subsequently asked the Magistrate to reconsider his competence to stand trial for fraud and attempted murder. The Magistrate had him examined at a United States Medical Center for Federal Prisoners (Medical Center), found him mentally incompetent to stand trial, and ordered his hospitalization to determine whether he would attain the capacity to allow his trial to proceed. While there, Sell refused the staff's recommendation to take antipsychotic medication. Medical Center authorities decided to allow involuntary medication, which Sell challenged in court. The Magistrate authorized forced administration of antipsychotic drugs, finding that Sell was a danger to himself and others, that medication was the only way to render him less ****2177** dangerous, that any serious side effects could be ameliorated, that the benefits to Sell outweighed the risks, and that the drugs were substantially likely to return Sell to competence. In affirming, the District Court found the Magistrate's dangerousness finding clearly erroneous but concluded that medication was the only viable hope of rendering Sell competent to stand trial and was necessary to serve the Government's interest in obtaining an adjudication of his guilt or innocence. The Eighth Circuit affirmed. Focusing solely on the fraud charges, it found that the Government had an essential interest in bringing Sell to trial, that the treatment was medically appropriate, and that the medical evidence indicated a reasonable probability that Sell would fairly be able to participate in his trial.

Held:

1. The Eighth Circuit had jurisdiction to hear the appeal. The District Court's pretrial order was an appealable "collateral order" within the exceptions to the rule that only final judgments are appealable. The order conclusively determines the disputed question whether Sell has a legal right to avoid forced medication. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351. It also resolves an important issue, for involuntary medical treatment raises questions of clear constitutional importance. *Ibid.* And the issue is effectively unreviewable on appeal ***167** from a final judgment, *ibid.*, since, by the time of trial, Sell will have undergone forced medication—the very harm that he seeks to avoid and which cannot be undone by an acquittal. Pp. 2181–2183.

2. Under the framework of *Washington v. Harper*, 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178, and *Riggins v. Nevada*, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479, the Constitution permits the Government involuntarily to administer antipsychotic drugs to render a mentally ill defendant competent to stand trial on serious criminal charges if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the trial's fairness, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests. Pp. 2183–2186.

(a) This standard will permit forced medication solely for trial competence purposes in certain instances. But these instances may be rare, because the standard says or fairly implies the following: First, a court must find that *important* governmental interests are at stake. The Government's interest in bringing to trial an individual accused of a serious crime is important. However, courts must consider each case's facts in evaluating this interest because special circumstances may lessen its importance, *e.g.*, a defendant's refusal to take drugs may mean lengthy confinement in an institution, which would diminish the risks of freeing without punishment one who has committed a serious crime. In addition to its substantial interest in timely prosecution, the Government has a concomitant interest in assuring a defendant a fair trial. Second, the court must conclude that forced medication will *significantly further* those concomitant state interests. It must find that medication 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 defense. Third, the court must conclude that involuntary medication is *necessary* to further those interests and find that alternative, less intrusive treatments are unlikely to achieve substantially the same results. Fourth, the court must conclude that administering the drugs is *medically appropriate.* Pp. 2183–2185.

(b) The court applying these standards is trying to determine whether forced medication is necessary to further the Government's interest in rendering the defendant competent to stand trial. If a ****2178** court authorizes medication on an alternative ground, such as dangerousness, the need to consider authorization on trial competence grounds will likely disappear. There are often strong reasons for a court to consider alternative grounds first. For one thing, the inquiry into whether medication is permissible to render an individual nondangerous is usually more objective and manageable than the inquiry into whether medication is permissible to render a defendant competent. For another, ***168** courts typically address involuntary medical treatment as a civil matter. If a court decides that medication cannot be authorized on alternative grounds, its findings will help to inform expert opinion and judicial decisionmaking in respect to a request to administer drugs for trial competence purposes. Pp. 2185–2186.

3. The Eighth Circuit erred in approving forced medication solely to render Sell competent to stand trial. Because that court and the District Court held the Magistrate's dangerousness finding clearly erroneous, this Court assumes that Sell was not dangerous. And on that hypothetical assumption, the Eighth Circuit erred in reaching its conclusion. For one thing, the Magistrate did not find forced medication legally justified on trial competence grounds alone. Moreover, the experts at the Magistrate's hearing focused mainly on dangerousness. The failure to focus on trial competence could well have mattered, for this Court cannot tell whether the medication's side effects were likely to undermine the fairness of Sell's trial, a question not necessarily relevant when dangerousness is primarily at issue. Finally, the lower courts did not consider that Sell has been confined at the Medical Center for a long time, and that his refusal to be medicated might result in further lengthy confinement. Those factors, the first because a defendant may receive credit toward a sentence for time served and the second because it reduces the likelihood of the defendant's committing future crimes, moderate the importance of the governmental interest in prosecution. The Government may pursue its forced medication request on the grounds discussed in this Court's opinion but should do so based on current circumstances, since Sell's condition may have changed over time. Pp. 2186–2187.

282 F.3d 560, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and STEVENS, KENNEDY, SOUTER, and GINSBURG, JJ., joined. SCALIA, J., filed a dissenting opinion, in which O'CONNOR and THOMAS, JJ., joined, *post,* p. 2187.

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Opinion

***169** Justice BREYER delivered the opinion of the Court.

The question presented is whether the Constitution permits the Government to administer antipsychotic drugs involuntarily to a mentally ill criminal defendant—in order to render that defendant competent to stand trial for serious, but nonviolent, crimes. We conclude that the Constitution allows the Government to administer those drugs, even against the defendant's will, in limited circumstances, *i.e.,* upon satisfaction of conditions that we shall describe. Because the Court of Appeals did not find ****2179** that the requisite circumstances existed in this case, we vacate its judgment.

I

A

Petitioner Charles Sell, once a practicing dentist, has a long and unfortunate history of mental illness. In September 1982, after telling doctors that the gold he used for fillings had been contaminated by communists, Sell was hospitalized, treated with antipsychotic medication, and subsequently discharged. App. 146. In June 1984, Sell called the police to say that a leopard was outside his office boarding a bus, and he then asked the police to shoot him. *Id.*, at 148; Record Forensic Report, p. 1 (June 20, 1997 (Sealed)). Sell ***170** was again hospitalized and subsequently released. On various occasions, he complained that public officials, for example, a State Governor and a police chief, were trying to kill him. *Id.*, at 4. In April 1997, he told law enforcement personnel that he "spoke to God last night," and that "God told me every [Federal Bureau of Investigation] person I kill, a soul will be saved." *Id.*, at 1.

In May 1997, the Government charged Sell with submitting fictitious insurance claims for payment. See 18 U.S.C. § 1035(a)(2). A Federal Magistrate Judge (Magistrate), after ordering a psychiatric examination, found Sell "currently competent," but noted that Sell might experience "a psychotic episode" in the future. App. 321. The Magistrate released Sell on bail. A grand jury later produced a superseding indictment charging Sell and his wife with 56 counts of mail fraud, 6 counts of Medicaid fraud, and 1 count of money laundering. *Id.*, at 12–22.

In early 1998, the Government claimed that Sell had sought to intimidate a witness. The Magistrate held a bail revocation hearing. Sell's behavior at his initial appearance was, in the judge's words, " 'totally out of control,' " involving "screaming and shouting," the use of "personal insults" and "racial epithets," and spitting "in the judge's face." *Id.*, at 322. A psychiatrist reported that Sell could not sleep because he expected the Federal Bureau of Investigation (FBI) to " 'come busting through the door,' " and concluded that Sell's condition had worsened. *Ibid.* After considering that report and other testimony, the Magistrate revoked Sell's bail.

In April 1998, the grand jury issued a new indictment charging Sell with attempting to murder the FBI agent who had arrested him and a former employee who planned to testify against him in the fraud case. *Id.*, at 23–29. The attempted murder and fraud cases were joined for trial.

In early 1999, Sell asked the Magistrate to reconsider his competence to stand trial. The Magistrate sent Sell to the ***171** United States Medical Center for Federal Prisoners (Medical Center) at Springfield, Missouri, for examination. Subsequently the Magistrate found that Sell was "mentally incompetent to stand trial." *Id.*, at 323. He ordered Sell to "be hospitalized for treatment" at the Medical Center for up to four months, "to determine whether there was a substantial probability that [Sell] would attain the capacity to allow his trial to proceed." *Ibid.*

Two months later, Medical Center staff recommended that Sell take antipsychotic medication. Sell refused to do so. The staff sought permission to administer the medication against Sell's will. That effort is the subject of the present proceedings.

B

We here review the last of five hierarchically ordered lower court and Medical Center determinations. First, in June 1999, Medical Center staff sought permission from institutional authorities to administer antipsychotic drugs to Sell involuntarily. A reviewing psychiatrist held a hearing and considered Sell's prior history; Sell's current persecutional beliefs (for example, that Government officials were trying to suppress his knowledge about events in Waco, Texas, and had sent him ****2180** to Alaska to silence him); staff medical opinions (for example, that "Sell's symptoms point to a diagnosis of Delusional Disorder but ... there well may be an underlying Schizophrenic Process"); staff medical concerns (for example, about "the persistence of Dr. Sell's belief that the Courts, FBI, and federal government in general are against him"); an outside medical expert's opinion (that Sell suffered only from delusional disorder, which, in that expert's view, "medication rarely helps"); and Sell's own views, as well as those of other laypersons who know him (to the effect that he did not suffer from a serious mental illness). *Id.*, at 147–150.

The reviewing psychiatrist then authorized involuntary administration of the drugs, both (1) because Sell was "mentally ***172** ill and dangerous, and medication is necessary to treat the mental illness," and (2) so that Sell would "become competent for trial." *Id.*, at 145. The reviewing psychiatrist added that he considered Sell "dangerous based on threats and delusions if outside, but not necessarily in[side] prison" and that Sell was "[a]ble to function" in prison in the "open population." *Id.*, at 144.

Second, the Medical Center administratively reviewed the determination of its reviewing psychiatrist. A Bureau of Prisons official considered the evidence that had been presented at the initial hearing, referred to Sell's delusions, noted differences of professional opinion as to proper classification and treatment, and concluded that antipsychotic medication represents the medical intervention "most likely" to "ameliorate" Sell's symptoms; that other "less restrictive interventions" are "unlikely" to work; and that Sell's "pervasive belief" that he was "being targeted for nefarious actions by various governmental ... parties," along with the "current charges of conspiracy to commit murder," made Sell "a potential risk to the safety of one or more others in the community." *Id.,* at 154–155. The reviewing official "upheld" the "hearing officer's decision that [Sell] would benefit from the utilization of anti-psychotic medication." *Id.,* at 157.

Third, in July 1999, Sell filed a court motion contesting the Medical Center's right involuntarily to administer antipsychotic drugs. In September 1999, the Magistrate who had ordered Sell sent to the Medical Center held a hearing. The evidence introduced at the hearing for the most part replicated the evidence introduced at the administrative hearing, with two exceptions. First, the witnesses explored the question of the medication's effectiveness more thoroughly. Second, Medical Center doctors testified about an incident that took place at the Medical Center *after* the administrative proceedings were completed. In July 1999, Sell had approached one of the Medical Center's nurses, suggested ***173** that he was in love with her, criticized her for having nothing to do with him, and, when told that his behavior was inappropriate, added " 'I can't help it.' " *Id.,* at 168–170, 325. He subsequently made remarks or acted in ways indicating that this kind of conduct would continue. The Medical Center doctors testified that, given Sell's prior behavior, diagnosis, and current beliefs, boundary-breaching incidents of this sort were not harmless and, when coupled with Sell's inability or unwillingness to desist, indicated that he was a safety risk even within the institution. They added that he had been moved to a locked cell.

In August 2000, the Magistrate found that "the government has made a substantial and very strong showing that Dr. Sell is a danger to himself and others at the institution in which he is currently incarcerated"; that "the government has shown that anti-psychotic medication is the only way to render him less dangerous"; that newer drugs and/or changing drugs will "ameliorat [e]" any "serious side effects"; that "the benefits to Dr. Sell ... far outweigh any risks"; and that "there is a substantial probability that" the drugs will ****2181** "retur[n]" Sell "to competency." *Id.,* at 333–334. The Magistrate concluded that "the government has shown in as strong a manner as possible, that anti-psychotic medications are the only way to render the defendant not dangerous and competent to stand trial." *Id.,* at 335. The Magistrate issued an order authorizing the involuntary administration of antipsychotic drugs to Sell, *id.,* at 331, but stayed that order to allow Sell to appeal the matter to the Federal District Court, *id.,* at 337.

Fourth, the District Court reviewed the record and, in April 2001, issued an opinion. The court addressed the Magistrate's finding "that defendant presents a danger to himself or others sufficient" to warrant involuntary administration of antipsychotic drugs. *Id.,* at 349. After noting that Sell subsequently had "been returned to an open ward," the District Court held the Magistrate's "dangerousness" ***174** finding "clearly erroneous." *Id.,* at 349, and n. 5. The court limited its determination to Sell's "dangerousness *at this time* to himself and to those around him *in his institutional context.*" *Id.,* at 349 (emphasis in original).

Nonetheless, the District Court *affirmed* the Magistrate's order permitting Sell's involuntary medication. The court wrote that "anti-psychotic drugs are medically appropriate," that "they represent the only viable hope of rendering defendant competent to stand trial," and that "administration of such drugs appears necessary to serve the government's compelling interest in obtaining an adjudication of defendant's guilt or innocence of numerous and serious charges" (including fraud and attempted murder). *Id.,* at 354. The court added that it was "premature" to consider whether "the effects of medication might prejudice [Sell's] defense at trial." *Id.,* at 351, 352. The Government and Sell both appealed.

Fifth, in March 2002, a divided panel of the Court of Appeals affirmed the District Court's judgment. 282 F.3d 560 (CA8 2002). The majority affirmed the District Court's determination that Sell was not dangerous. The majority noted that, according to the District Court, Sell's behavior at the Medical Center "amounted at most to an 'inappropriate familiarity and even infatuation' with a nurse." *Id.,* at 565. The Court of Appeals agreed, "[u]pon review," that "the evidence does not support a finding that Sell posed a danger to himself or others at the Medical Center." *Ibid.*

The Court of Appeals also affirmed the District Court's order requiring medication in order to render Sell competent to stand trial. Focusing solely on the serious fraud charges, the panel majority concluded that the

"government has an essential interest in bringing a defendant to trial." *Id.*, at 568. It added that the District Court "correctly concluded that there were no less intrusive means." *Ibid.* After reviewing the conflicting views of the experts, *id.*, at 568–571, the panel majority found antipsychotic drug treatment "medically ***175** appropriate" for Sell, *id.*, at 571. It added that the "medical evidence presented indicated a reasonable probability that Sell will fairly be able to participate in his trial." *Id.*, at 572. One member of the panel dissented primarily on the ground that the fraud and money laundering charges were "not serious enough to warrant the forced medication of the defendant." *Id.*, at 574 (opinion of Bye, J.).

We granted certiorari to determine whether the Eighth Circuit "erred in rejecting" Sell's argument that "allowing the government to administer antipsychotic medication against his will solely to render him competent to stand trial for non-violent offenses," Brief for Petitioner i, violated the Constitution—in effect by improperly depriving Sell of an important "liberty" that the Constitution guarantees, Amdt. 5.

II

We first examine whether the Eighth Circuit had jurisdiction to decide Sell's appeal. ****2182** The District Court's judgment, from which Sell had appealed, was a pretrial order. That judgment affirmed a Magistrate's order requiring Sell involuntarily to receive medication. The Magistrate entered that order pursuant to an earlier delegation from the District Court of legal authority to conduct pretrial proceedings. App. 340; see 28 U.S.C. § 636(b)(1)(A). The order embodied legal conclusions related to the Medical Center's administrative efforts to medicate Sell; these efforts grew out of Sell's provisional commitment; and that provisional commitment took place pursuant to an earlier Magistrate's order seeking a medical determination about Sell's future competence to stand trial. Cf. *Riggins v. Nevada*, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992) (reviewing, as part of criminal proceeding, trial court's denial of defendant's motion to discontinue medication); *Stack v. Boyle*, 342 U.S. 1, 6–7, 72 S.Ct. 1, 96 L.Ed. 3 (1951) (district court's denial of defendant's motion to reduce bail is part of criminal proceeding and is not reviewable in separate habeas action).

[1] ***176** How was it possible for Sell to appeal from such an order? The law normally requires a defendant to wait until the end of the trial to obtain appellate review of a pretrial order. The relevant jurisdictional statute, 28 U.S.C. § 1291, authorizes federal courts of appeals to review "*final* decisions of the district courts." (Emphasis added.) And the term "final decision" normally refers to a final judgment, such as a judgment of guilt, that terminates a criminal proceeding.

Nonetheless, there are exceptions to this rule. The Court has held that a preliminary or interim decision is appealable as a "collateral order" when it (1) "conclusively determine[s] the disputed question," (2) "resolve[s] an important issue completely separate from the merits of the action," and (3) is "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978). And this District Court order does appear to fall within the "collateral order" exception.

[2] The order (1) "conclusively determine[s] the disputed question," namely, whether Sell has a legal right to avoid forced medication. *Ibid.* The order also (2) "resolve[s] an important issue," for, as this Court's cases make clear, involuntary medical treatment raises questions of clear constitutional importance. *Ibid.* See *Winston v. Lee*, 470 U.S. 753, 759, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985) ("A compelled surgical intrusion into an individual's body ... implicates expectations of privacy and security" of great magnitude); see also *Riggins, supra*, at 133–134, 112 S.Ct. 1810; *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278–279, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990); *Washington v. Harper*, 494 U.S. 210, 221–222, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990). At the same time, the basic issue—whether Sell must undergo medication against his will—is "completely separate from the merits of the action," *i.e.*, whether Sell is guilty or innocent of the crimes charged. *Coopers & Lybrand*, 437 U.S., at 468, 98 S.Ct. 2454. The issue is wholly separate as well from questions concerning trial procedures. Finally, the issue is (3) "effectively unreviewable on appeal from a final judgment." *Ibid.* By the time of trial Sell will have undergone ***177** forced medication—the very harm that he seeks to avoid. He cannot undo that harm even if he is acquitted. Indeed, if he is acquitted, there will be no appeal through which he might obtain review. Cf. *Stack, supra*, at 6–7, 72 S.Ct. 1 (permitting appeal of

order setting high bail as "collateral order"). These considerations, particularly those involving the severity of the intrusion and corresponding importance of the constitutional issue, readily distinguish Sell's case from the examples raised by the dissent. See *post,* at 2190 (opinion of SCALIA, J.).

We add that the question presented here, whether Sell has a legal right to avoid forced medication, perhaps in part ****2183** because medication may make a trial unfair, differs from the question whether forced medication *did* make a trial unfair. The first question focuses upon the right to avoid administration of the drugs. What may happen at trial is relevant, but only as a prediction. See *infra,* at 2184–2185. The second question focuses upon the right to a fair trial. It asks what *did* happen as a result of having administered the medication. An ordinary appeal comes too late for a defendant to enforce the first right; an ordinary appeal permits vindication of the second.

We conclude that the District Court order from which Sell appealed was an appealable "collateral order." The Eighth Circuit had jurisdiction to hear the appeal. And we consequently have jurisdiction to decide the question presented, whether involuntary medication violates Sell's constitutional rights.

III

We turn now to the basic question presented: Does forced administration of antipsychotic drugs to render Sell competent to stand trial unconstitutionally deprive him of his "liberty" to reject medical treatment? U.S. Const., Amdt. 5 (Federal Government may not "depriv[e]" any person of "liberty ... without due process of law"). Two prior precedents, ***178** *Harper, supra,* and *Riggins v. Nevada,* 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992), set forth the framework for determining the legal answer.

In *Harper,* this Court recognized that an individual has a "significant" constitutionally protected "liberty interest" in "avoiding the unwanted administration of antipsychotic drugs." 494 U.S., at 221, 110 S.Ct. 1028. The Court considered a state law authorizing forced administration of those drugs "to inmates who are ... gravely disabled or represent a significant danger to themselves or others." *Id.,* at 226, 110 S.Ct. 1028. The State had established "by a medical finding" that Harper, a mentally ill prison inmate, had "a mental disorder ... which is likely to cause harm if not treated." *Id.,* at 222, 110 S.Ct. 1028. The treatment decision had been made "by a psychiatrist," it had been approved by "a reviewing psychiatrist," and it "ordered" medication only because that was "in the prisoner's medical interests, given the legitimate needs of his institutional confinement." *Ibid.*

The Court found that the State's interest in administering medication was "legitima[te]" and "importan[t]," *id.,* at 225, 110 S.Ct. 1028; and it held that "the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest," *id.,* at 227, 110 S.Ct. 1028. The Court concluded that, in the circumstances, the state law authorizing involuntary treatment amounted to a constitutionally permissible "accommodation between an inmate's liberty interest in avoiding the forced administration of antipsychotic drugs and the State's interests in providing appropriate medical treatment to reduce the danger that an inmate suffering from a serious mental disorder represents to himself or others." *Id.,* at 236, 110 S.Ct. 1028.

In *Riggins,* the Court repeated that an individual has a constitutionally protected liberty "interest in avoiding involuntary administration of antipsychotic drugs"—an interest ***179** that only an "essential" or "overriding" state interest might overcome. 504 U.S., at 134, 135, 112 S.Ct. 1810. The Court suggested that, in principle, forced medication in order to render a defendant competent to stand trial for murder was constitutionally permissible. The Court, citing *Harper,* noted that the State "would have satisfied due process if the prosecution had demonstrated ... that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' *own safety or the safety of others.*" 504 U.S., at 135, 112 S.Ct. 1810 (emphasis added). And it said that the ****2184** State "*[s]imilarly* ... might have been able to justify medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of Riggins' guilt or innocence" of the murder charge "by using less intrusive means." *Ibid.* (emphasis added). Because the trial court had permitted forced medication of Riggins without taking account of his "liberty interest," with a consequent possibility of trial prejudice, the Court reversed Riggins' conviction and remanded for further proceedings. *Id.,* at 137–138, 112 S.Ct. 1810. JUSTICE KENNEDY, concurring in the

judgment, emphasized that antipsychotic drugs might have side effects that would interfere with the defendant's ability to receive a fair trial. *Id.*, at 145, 112 S.Ct. 1810 (finding forced medication likely justified only where State shows drugs would not significantly affect defendant's "behavior and demeanor").

[3] These two cases, *Harper* and *Riggins*, indicate that the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.

***180** This standard will permit involuntary administration of drugs solely for trial competence purposes in certain instances. But those instances may be rare. That is because the standard says or fairly implies the following:

[4] First, a court must find that *important* governmental interests are at stake. The Government's interest in bringing to trial an individual accused of a serious crime is important. That is so whether the offense is a serious crime against the person or a serious crime against property. In both instances the Government seeks to protect through application of the criminal law the basic human need for security. See *Riggins, supra*, at 135–136, 112 S.Ct. 1810 (" '[P]ower to bring an accused to trial is fundamental to a scheme of "ordered liberty" and prerequisite to social justice and peace' " (quoting *Illinois v. Allen*, 397 U.S. 337, 347, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) (Brennan, J., concurring))).

Courts, however, 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. The 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. We do not mean to suggest that civil commitment is a substitute for a criminal trial. The Government has a substantial interest in timely prosecution. And it may be difficult or impossible to try a defendant who regains competence after years of commitment during which memories may fade and evidence may be lost. The potential for future confinement affects, but does not totally undermine, the strength of the need for prosecution. The same is true of the possibility that the defendant has already been confined for a significant amount of time (for which he would receive credit toward any sentence ultimately imposed, see 18 U.S.C. § 3585(b)). Moreover, the Government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one.

[5] ***181** Second, the court must conclude that involuntary medication will *significantly further* those concomitant state interests. It must find that administration of the drugs is substantially likely to render the defendant competent to stand trial. At the same time, it must find that administration of the drugs is substantially ****2185** 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. See *Riggins*, 504 U.S., at 142–145, 112 S.Ct. 1810 (KENNEDY, J., concurring in judgment).

[6] Third, the court must conclude that involuntary medication is *necessary* to further those interests. The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results. Cf. Brief for American Psychological Association as *Amicus Curiae* 10–14 (nondrug therapies may be effective in restoring psychotic defendants to competence); but cf. Brief for American Psychiatric Association et al. as *Amici Curiae* 13–22 (alternative treatments for psychosis commonly not as effective as medication). And 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.

[7] Fourth, as we have said, the court must conclude that administration of the drugs is *medically appropriate, i.e.*, in the patient's best medical interest in light of his medical condition. The specific kinds of drugs at issue may matter here as elsewhere. Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success.

We emphasize that the court applying these standards is seeking to determine whether involuntary administration of drugs is necessary significantly to further a particular governmental interest, namely, the interest in rendering the defendant *competent to stand trial.* A court need not consider whether to allow forced medication for that kind of purpose, ***182** if forced medication is warranted for a *different* purpose, such as the purposes set out in *Harper* related to the individual's dangerousness, or purposes related to the individual's own interests where refusal to take drugs puts his health gravely at risk. 494 U.S., at 225–226, 110 S.Ct. 1028. There are often strong reasons

for a court to determine whether forced administration of drugs can be justified on these alternative grounds *before* turning to the trial competence question.

For one thing, the inquiry into whether medication is permissible, say, to render an individual nondangerous is usually more "objective and manageable" than the inquiry into whether medication is permissible to render a defendant competent. *Riggins, supra,* at 140, 112 S.Ct. 1810 (KENNEDY, J., concurring in judgment). The medical experts may find it easier to provide an informed opinion about whether, given the risk of side effects, particular drugs are medically appropriate and necessary to control a patient's potentially dangerous behavior (or to avoid serious harm to the patient himself) than to try to balance harms and benefits related to the more quintessentially legal questions of trial fairness and competence.

For another thing, courts typically address involuntary medical treatment as a civil matter, and justify it on these alternative, *Harper*-type grounds. Every State provides avenues through which, for example, a doctor or institution can seek appointment of a guardian with the power to make a decision authorizing medication—when in the best interests of a patient who lacks the mental competence to make such a decision. *E.g.*, Ala.Code §§ 26–2A–102(a), 26–2A–105, 26–2A–108 (West 1992); Alaska Stat. §§ 13.26.105(a), 13.26.116(b) (2002); Ariz.Rev.Stat. Ann. §§ 14–5303, 14–5312 (West 1995); Ark.Code Ann. §§ 28–65–205, 28–65–301 (1987). And courts, in civil proceedings, may authorize involuntary medication where the patient's failure to accept treatment threatens injury to the patient or others. See, *e.g.*, 28 CFR § 549.43 (2002); cf. 18 U.S.C. § 4246.

***183** If a court authorizes medication on these alternative grounds, the need to consider authorization on trial competence ****2186** grounds will likely disappear. Even if a court decides medication cannot be authorized on the alternative grounds, the findings underlying such a decision will help to inform expert opinion and judicial decisionmaking in respect to a request to administer drugs for trial competence purposes. At the least, they will facilitate direct medical and legal focus upon such questions as: Why is it medically appropriate forcibly to administer antipsychotic drugs to an individual who (1) is *not* dangerous *and* (2) *is* competent to make up his own mind about treatment? Can bringing such an individual to trial *alone* justify in whole (or at least in significant part) administration of a drug that may have adverse side effects, including side effects that may to some extent impair a defense at trial? We consequently believe that a court, asked to approve forced administration of drugs for purposes of rendering a defendant competent to stand trial, should ordinarily determine whether the Government seeks, or has first sought, permission for forced administration of drugs on these other *Harper*-type grounds; and, if not, why not.

When a court must nonetheless reach the trial competence question, the factors discussed above, *supra*, at 2184–2185, should help it make the ultimate constitutionally required judgment. 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? See *Harper, supra,* at 221–223, 110 S.Ct. 1028; *Riggins, supra,* at 134–135, 112 S.Ct. 1810.

IV

The Medical Center and the Magistrate in this case, applying standards roughly comparable to those set forth here and in *Harper*, approved forced medication substantially, if not primarily, upon grounds of Sell's dangerousness to others. ***184** But the District Court and the Eighth Circuit took a different approach. The District Court found "clearly erroneous" the Magistrate's conclusion regarding dangerousness, and the Court of Appeals agreed. Both courts approved forced medication solely in order to render Sell competent to stand trial.

We shall assume that the Court of Appeals' conclusion about Sell's dangerousness was correct. But we make that assumption *only* because the Government did not contest, and the parties have not argued, that particular matter. If anything, the record before us, described in Part I, suggests the contrary.

The Court of Appeals apparently agreed with the District Court that "Sell's inappropriate behavior ... amounted at most to an 'inappropriate familiarity and even infatuation' with a nurse." 282 F.3d, at 565. That being so, it also agreed that "the evidence does not support a finding that Sell posed a danger to himself or others at the Medical Center." *Ibid.* The Court of Appeals, however, did not discuss the potential differences (described by a psychiatrist testifying before the Magistrate) between ordinary "over-familiarity" and the same conduct engaged in persistently by a patient with Sell's behavioral history

and mental illness. Nor did it explain why those differences should be minimized in light of the fact that the testifying psychiatrists concluded that Sell was dangerous, while Sell's own expert denied, not Sell's dangerousness, but the efficacy of the drugs proposed for treatment.

The District Court's opinion, while more thorough, places weight upon the Medical Center's decision, taken after the Magistrate's hearing, to return Sell to the general prison population. It does not explain whether that return reflected an improvement in Sell's condition or whether the Medical Center saw it as permanent rather than temporary. Cf. *Harper, supra,* at 227, and n. 10, 110 S.Ct. 1028 (indicating that physical ***185** restraints and seclusion ****2187** often not acceptable substitutes for medication).

[8] Regardless, as we have said, we must assume that Sell was not dangerous. And on that hypothetical assumption, we find that the Court of Appeals was wrong to approve forced medication solely to render Sell competent to stand trial. For one thing, the Magistrate's opinion makes clear that he did *not* find forced medication legally justified on trial competence grounds alone. Rather, the Magistrate concluded that Sell *was* dangerous, and he wrote that forced medication was "the only way to render the defendant *not dangerous and* competent to stand trial." App. 335 (emphasis added).

Moreover, the record of the hearing before the Magistrate shows that the experts themselves focused mainly upon the dangerousness issue. Consequently the experts did not pose important questions—questions, for example, about trial-related side effects and risks—the answers to which could have helped determine whether forced medication was warranted on trial competence grounds alone. Rather, the Medical Center's experts conceded that their proposed medications had "significant" side effects and that "there has to be a cost benefit analysis." *Id.,* at 185 (testimony of Dr. DeMier); *id.,* at 236 (testimony of Dr. Wolfson). And in making their "cost-benefit" judgments, they primarily took into account Sell's dangerousness, not the need to bring him to trial.

The failure to focus upon trial competence could well have mattered. Whether a particular drug will tend to sedate a defendant, interfere with communication with counsel, prevent rapid reaction to trial developments, or diminish the ability to express emotions are matters important in determining the permissibility of medication to restore competence, *Riggins,* 504 U.S., at 142–145, 112 S.Ct. 1810 (KENNEDY, J., concurring in judgment), but not necessarily relevant when dangerousness is primarily at issue. We cannot tell whether ***186** the side effects of antipsychotic medication were likely to undermine the fairness of a trial in Sell's case.

Finally, the lower courts did not consider that Sell has already been confined at the Medical Center for a long period of time, and that his refusal to take antipsychotic drugs might result in further lengthy confinement. Those factors, the first because a defendant ordinarily receives credit toward a sentence for time served, 18 U.S.C. § 3585(b), and the second because it reduces the likelihood of the defendant's committing future crimes, moderate—though they do not eliminate—the importance of the governmental interest in prosecution. See *supra,* at 2184.

V

For these reasons, we believe that the present orders authorizing forced administration of antipsychotic drugs cannot stand. The Government may pursue its request for forced medication on the grounds discussed in this opinion, including grounds related to the danger Sell poses to himself or others. Since Sell's medical condition may have changed over time, the Government should do so on the basis of current circumstances.

The judgment of the Eighth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, with whom Justice O'CONNOR and Justice THOMAS join, dissenting.

The District Court never entered a final judgment in this case, which should have led the Court of Appeals to wonder whether it had any business entertaining petitioner's appeal. Instead, without so much as acknowledging that Congress has limited court-of-appeals jurisdiction to "appeals from all *final decisions* of the district courts of the United States," 28 U.S.C. § 1291 (emphasis added), and appeals from certain specified interlocutory orders, ****2188** see § 1292, the Court of

Appeals ***187** proceeded to the merits of Sell's interlocutory appeal. 282 F.3d 560 (C.A.8 2002). Perhaps this failure to discuss jurisdiction was attributable to the United States' refusal to contest the point there (as it has refused here, see Brief for United States 10, n. 5), or to the panel's unexpressed agreement with the conclusion reached by other Courts of Appeals, that pretrial forced-medication orders are appealable under the "collateral order doctrine," see, *e.g.*, *United States v. Morgan*, 193 F.3d 252, 258–259 (C.A.4 1999); *United States v. Brandon*, 158 F.3d 947, 950–951 (C.A.6 1998). But *this* Court's cases do not authorize appeal from the District Court's April 4, 2001, order, which was neither a "final decision" under § 1291 nor part of the class of specified interlocutory orders in § 1292. We therefore lack jurisdiction, and I would vacate the Court of Appeals' decision and remand with instructions to dismiss.

I

After petitioner's indictment, a Magistrate Judge found that petitioner was incompetent to stand trial because he was unable to understand the nature and consequences of the proceedings against him and to assist in his defense. As required by 18 U.S.C. § 4241(d), the Magistrate Judge committed petitioner to the custody of the Attorney General, and petitioner was hospitalized to determine whether there was a substantial probability that in the foreseeable future he would attain the capacity to stand trial. On June 9, 1999, a reviewing psychiatrist determined, after a § 549.43 administrative hearing[1], that petitioner should be required to take ***188** antipsychotic medication, finding the medication necessary to render petitioner competent for trial and medically appropriate to treat his mental illness. Petitioner's administrative appeal from that decision[2] was denied with a written statement of reasons.

At that point the Government possessed the requisite authority to administer forced medication. Petitioner responded, not by appealing to the courts the § 549.43 administrative determination, see 5 U.S.C. § 702, but by moving in the District Court overseeing his criminal prosecution for a *hearing* regarding the appropriateness of his medication. A Magistrate Judge granted the motion and held a hearing. The Government then requested from the Magistrate Judge an order authorizing the involuntary medication of petitioner, which the Magistrate Judge entered.[3] On April 4, 2001, the District Court affirmed this Magistrate Judge's order, and it is from *this* order that petitioner appealed to the Eighth Circuit.

****2189** II

A

Petitioner and the United States maintain that 28 U.S.C. § 1291, which permits the courts of appeals to review "all ***189** *final decisions* of the district courts of the United States" (emphasis added), allowed the Court of Appeals to review the District Court's April 4, 2001, order. We have described § 1291, however, as a "final judgment rule," *Flanagan v. United States*, 465 U.S. 259, 263, 104 S.Ct. 1051, 79 L.Ed.2d 288 (1984), which "[i]n a criminal case ... prohibits appellate review *until conviction and imposition of sentence*," *ibid.* (emphasis added). See also *Abney v. United States*, 431 U.S. 651, 656–657, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). We have invented[4] a narrow exception to this statutory command: the so-called "collateral order" doctrine, which permits appeal of district court orders that (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," *and* (3) are "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978). But the District Court's April 4, 2001, order fails to satisfy the third requirement of this test.

Our decision in *Riggins v. Nevada*, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992), demonstrates that the District Court's April 4, 2001, order *is* reviewable on appeal from conviction and sentence. The defendant in *Riggins* had been involuntarily medicated while a pretrial detainee, and he argued, *on appeal from his murder conviction*, that the State of Nevada had contravened the substantive-due-process standards set forth in *Washington v. Harper*, 494 U.S. 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990). Rather than holding that review of this claim was not possible on appeal from a criminal

conviction, the *Riggins* Court held that forced medication of a criminal defendant that fails to comply with *Harper* creates an unacceptable risk of trial error and entitles the defendant to automatic vacatur of his conviction. 504 U.S., at 135–138, 112 S.Ct. 1810. The Court is therefore wrong to say that "[a]n ordinary appeal comes too late for a defendant to enforce" this right, *ante*, at 2183, and appellate review of any substantive-due-process challenge to the District Court's ***190** April 4, 2001, order must wait until after conviction and sentence have been imposed.[5]

It is true that, if petitioner must wait until final judgment to appeal, he will not receive the *type* of remedy he would prefer—a predeprivation injunction rather than the postdeprivation vacatur of conviction provided by *Riggins*. But *that* ground for interlocutory appeal is emphatically rejected by our cases. See, *e.g.*, *Flanagan*, *supra* (disallowing interlocutory appeal of an order disqualifying defense counsel); *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982) *(per curiam)* (disallowing interlocutory appeal of an order denying motion to dismiss indictment on grounds of prosecutorial vindictiveness); *Carroll v. United States*, 354 U.S. 394, 77 S.Ct. 1332, 1 L.Ed.2d 1442 (1957) (disallowing interlocutory appeal of an order denying motion to suppress evidence).

We have until today interpreted the collateral-order exception to § 1291 " 'with the *utmost strictness' "* in criminal cases. *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799, 109 S.Ct. 1494, 103 L.Ed.2d 879 (1989) (emphasis added). In ****2190** the 54 years since we invented the exception, see *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), we have found only three types of prejudgment orders in criminal cases appealable: denials of motions to reduce bail, *Stack v. Boyle*, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951), denials of motions to dismiss on double-jeopardy grounds, *Abney*, *supra*, and denials of motions to dismiss under the Speech or Debate Clause, *Helstoski v. Meanor*, 442 U.S. 500, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979). The first of these exceptions was justified on the ground that the denial of a motion to reduce bail becomes moot (and thus effectively unreviewable) on appeal ***191** from conviction. See *Flanagan*, *supra*, at 266, 104 S.Ct. 1051. As *Riggins* demonstrates, that is not the case here. The interlocutory appeals in *Abney* and *Helstoski* were justified on the ground that it was appropriate to interrupt the trial when the precise right asserted was the *right not to be tried*. See *Abney*, *supra*, at 660–661, 97 S.Ct. 2034; *Helstoski*, *supra*, at 507–508, 99 S.Ct. 2445. Petitioner does not assert a right not to be tried, but a right not to be *medicated*.

B

Today's narrow holding will allow criminal defendants in petitioner's position to engage in opportunistic behavior. They can, for example, voluntarily take their medication until halfway through trial, then abruptly refuse and demand an interlocutory appeal from the order that medication continue on a compulsory basis. This sort of concern for the disruption of criminal proceedings—strangely missing from the Court's discussion today—is what has led us to state many times that we interpret the collateral-order exception narrowly in criminal cases. See *Midland Asphalt Corp.*, *supra*, at 799, 109 S.Ct. 1494; *Flanagan*, 465 U.S., at 264, 104 S.Ct. 1051.

But the adverse effects of today's narrow holding are as nothing compared to the adverse effects of the new rule of law that underlies the holding. The Court's opinion announces that appellate jurisdiction is proper because review after conviction and sentence will come only after "Sell will have undergone forced medication—the very harm that he seeks to avoid." *Ante*, at 2182. This analysis effects a breathtaking expansion of appellate jurisdiction over interlocutory orders. If it is applied faithfully (and some appellate panels will be eager to apply it faithfully), any criminal defendant who asserts that a trial court order will, if implemented, cause an immediate violation of his constitutional (or perhaps even statutory?) rights may immediately appeal. He is empowered to hold up the trial for months by claiming that review after final judgment "would come too late" to prevent the violation. A trial-court order requiring the defendant ***192** to wear an electronic bracelet could be attacked as an immediate infringement of the constitutional right to "bodily integrity"; an order refusing to allow the defendant to wear a T-shirt that says "Black Power" in front of the jury could be attacked as an immediate violation of First Amendment rights; and an order compelling testimony could be attacked as an immediate denial of Fifth Amendment rights. All these orders would be immediately appealable. *Flanagan* and *Carroll*, which held that appellate review of orders that might infringe a defendant's constitutionally protected rights *still* had to

wait until final judgment, are seemingly overruled. The narrow gate of entry to the collateral-order doctrine—hitherto traversable by only (1) orders unreviewable on appeal from judgment and (2) orders denying an asserted right not to be tried—has been generously widened.

The Court dismisses these concerns in a single sentence immediately following its assertion that the order here meets the three *Cohen*-exception requirements of (1) conclusively determining the disputed question (correct); (2) resolving an important issue separate from the merits of the ****2191** action (correct); and (3) being unreviewable on appeal (quite plainly incorrect). That sentence reads as follows: "These considerations, particularly those involving the severity of the intrusion and corresponding importance of the constitutional issue, readily distinguish Sell's case from the examples raised by the dissent." *Ante*, at 2182. That is a brand new consideration put forward in rebuttal, not at all discussed in the body of the Court's analysis, which relies on the ground that (contrary to my contention) this order *is not reviewable on appeal.* The Court's last-minute addition must mean that it is revising the *Cohen* test, to dispense with the third requirement (unreviewable on appeal) *only when the important separate issue in question involves a "severe intrusion" and hence an "important constitutional issue."* Of course I welcome this narrowing of a misguided revision—but I still ***193** would not favor the revision, not only because it is a novelty with no basis in our prior opinions, but also because of the uncertainty, and the obvious opportunity for gamesmanship, that the revision-as-narrowed produces. If, however, I did make this more limited addition to the textually unsupported *Cohen* doctrine, I would at least do so in an undisguised fashion.

* * *

Petitioner could have obtained pre-trial review of the § 549.43 medication order by filing suit under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, or even by filing a *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), action, which is available to federal pretrial detainees challenging the conditions of their confinement, see, *e.g.*, *Lyons v. United States Marshals*, 840 F.2d 202 (C.A.3 1988). In such a suit, he could have obtained immediate appellate review of denial of relief.[6] But if he chooses to challenge his forced medication in the context of a criminal trial, he must abide by the limitations attached to such a challenge—which prevent him from stopping the proceedings in their tracks. Petitioner's mistaken litigation strategy, and this Court's desire to decide an interesting constitutional issue, do not justify a disregard of the limits that Congress has imposed on courts of appeals' (and our own) jurisdiction. We should vacate the judgment here, and remand the case to the Court of Appeals with instructions to dismiss.

All Citations

539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197, 188 A.L.R. Fed. 679, 71 USLW 4456, 03 Cal. Daily Op. Serv. 5131, 2003 Daily Journal D.A.R. 6512, 16 Fla. L. Weekly Fed. S 359

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Title 28 CFR § 549.43 (2002) provides the standards and procedures used to determine whether a person in the custody of the Attorney General may be involuntarily medicated. Before that can be done, a reviewing psychiatrist must determine that it is "necessary in order to attempt to make the inmate competent for trial or is necessary because the inmate is dangerous to self or others, is gravely disabled, or is unable to function in the open population of a mental health referral center or a regular prison," § 549.43(a)(5).

2 Section 549.43(a)(6) provides: "The inmate ... may submit an appeal to the institution mental health division

administrator regarding the decision within 24 hours of the decision and ... the administrator shall review the decision within 24 hours of the inmate's appeal."

[3] It is not apparent why this order was necessary, since the Government had *already* received authorization to medicate petitioner pursuant to § 549.43. If the Magistrate Judge had denied the Government's motion (or if this Court were to reverse the Magistrate Judge's order) the Bureau of Prisons' administrative decision ordering petitioner's forcible medication would remain in place. Which is to suggest that, in addition to the jurisdictional defect of interlocutoriness to which my opinion is addressed, there may be no jurisdiction because, at the time this suit was filed, petitioner failed to meet the "remediability" requirement of Article III standing. See *Steel Co. v. Citizens for Better Environment,* 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). The Court of Appeals should address this jurisdictional issue on remand.

[4] I use the term "invented" advisedly. The statutory text provides no basis.

[5] To be sure, the order here is unreviewable after final judgment *if the defendant is acquitted.* But the "unreviewability" leg of our collateral-order doctrine—which, as it is framed, requires that the interlocutory order be "effectively unreviewable *on appeal from a final judgment,*" *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) (emphasis added)—is not satisfied by the possibility that the aggrieved party will have no occasion to appeal.

[6] Petitioner points out that there are disadvantages to such an approach—for example, lack of constitutional entitlement to appointed counsel in a *Bivens* action. That does not entitle him or us to disregard the limits on appellate jurisdiction.

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Matter of Commitment of C.S., Wis., April 10, 2020

387 Wis.2d 384
Supreme Court of Wisconsin.

STATE of Wisconsin, Plaintiff-Respondent,
v.
Raytrell K. FITZGERALD, Defendant-Appellant.
State of Wisconsin ex rel. Raytrell K. Fitzgerald, Petitioner-Petitioner,
v.
Circuit Court for Milwaukee County and the Honorable Dennis R. Cimpl, presiding, Respondents.

No. 2018AP1296-CR & 2018AP1214-W
|
Oral Argument: March 20, 2019
|
Opinion Filed: June 13, 2019

Synopsis
Background: Following competency evaluations, the Circuit Court, Milwaukee County, No. 2016CF4475, Dennis R. Cimpl, J., issued order for involuntary medication, but granted stay. Defendant filed petition for supervisory writ, and filed separate notice of appeal challenging order for involuntary administration of medication. The Court of Appeals denied petition for supervisory writ. Defendant petitioned for review, and also petitioned to bypass court of appeals for review of underlying medication order. Both petitions were granted.

[Holding:] The Supreme Court, Rebecca Grassl Bradley, J., held that involuntary medication statute violates due process by unconstitutionally infringing on the individual liberty interest in avoiding the unwanted administration of anti-psychotropic drugs.

Affirmed by an equally divided court.

Patience Drake Roggensack, C.J., concurred with opinion in which Annette Kingsland Ziegler, J., joined.

Procedural Posture(s): Appellate Review; Preliminary Hearing or Grand Jury Proceeding Motion or Objection.

West Headnotes (15)

[1] **Constitutional Law**🔑Presumptions and Construction as to Constitutionality
Constitutional Law🔑Burden of Proof

Supreme court presumes the constitutionality of a statute and tasks a party challenging it with the very heavy burden of proving its unconstitutionality beyond a reasonable doubt.

[2] **Constitutional Law**🔑Mental Health

Under the Due Process Clause, individuals have a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs; only an essential or overriding state interest can overcome this constitutionally-protected liberty interest. U.S. Const. Amend. 14.

1 Cases that cite this headnote

[3] **Mental Health**🔑Review

Issues presented by prisoner's medication order were moot, where prisoner had regained competency and pled guilty and was no longer subject to the medication order. Wis. Stat. Ann. § 971.14.

[4] **Action**🔑Moot, hypothetical or abstract questions

An issue is "moot" when its resolution will have no practical effect on the underlying controversy.

[5] **Appeal and Error**🔑Mootness

As a general matter, supreme court declines to reach moot issues.

[6] **Appeal and Error**🔑Want of Actual Controversy

Supreme court may decide an otherwise moot issue if it fits under one of the following exceptions: (1) the issues are of great public importance, (2) the constitutionality of a statute is involved, (3) the situation arises so often a definitive decision is essential to guide the trial courts, (4) the issue is likely to arise again and should be resolved by the court to avoid uncertainty, or (5) the issue is capable and likely of repetition and yet evades review because the appellate process usually cannot be completed and frequently cannot even be undertaken within a time that would result in a practical effect upon the parties.

[7] **Criminal Law**🔑Ripeness

Issue of whether circuit court incorrectly calculated defendant's sentence credit during hearing on order for involuntary medication, was moot, as defendant pled guilty and was sentenced to time served, and thus Supreme Court would decline to address the issue on appeal of medication order.

[8] **Constitutional Law**🔑Mental Health

The mere inability of a defendant to express an understanding of medication or make an informed choice about it is constitutionally insufficient to override a defendant's significant liberty interest in avoiding the unwanted administration of antipsychotic drugs. U.S. Const. Amend. 14; Wis. Stat. Ann. § 971.14(4)(b).

1 Cases that cite this headnote

[9] **Statutes**🔑Mandatory or directory statutes

Statutory term "shall" is presumed mandatory.

1 Cases that cite this headnote

[10] **Constitutional Law**🔑Rewriting to save from unconstitutionality

A judicially-created form cannot save a constitutionally infirm statute.

[11] **Constitutional Law**🔑Judicial "reading into" or "out of" statutory language
Statutes🔑Language

Court does not read words into a statute regardless of how persuasive the source may be; rather, it interprets the words the legislature actually enacted into law.

6 Cases that cite this headnote

[12] **Statutes**🔑Absent terms; silence; omissions

Under the omitted-case canon of statutory interpretation, nothing is to be added to what the text states or reasonably implies; that is, a matter

not covered is to be treated as not covered.

3 Cases that cite this headnote

[13] **Statutes**Absent terms; silence; omissions

One of the maxims of statutory construction is that courts should not add words to a statute to give it a certain meaning.

5 Cases that cite this headnote

[14] **Constitutional Law**Administration of drugs
Mental Health Custody and Confinement

Involuntary medication statute violates due process by unconstitutionally infringing on the individual liberty interest in avoiding the unwanted administration of anti-psychotropic drugs to the extent it requires courts to order medication absent findings that drugs are substantially likely to render the defendant competent to stand trial and unlikely to have side effects that would interfere significantly with the defendant's ability to assist counsel, that any alternative, less intrusive treatments are unlikely to achieve substantially the same results, or that administration of drugs are in the defendant's best medical interest in light of his medical condition. U.S. Const. Amend. 14; Wis. Stat. Ann. §§ 971.14(3)(dm), 971.14(4)(b).

1 Cases that cite this headnote

[15] **Mental Health**Custody and Confinement

Circuit court could not order involuntary medication of defendant absent consideration of the side effects of the proposed medication or whether those side effects would interfere significantly with defendant's ability to assist in his defense; circuit court never found, as required, that administration of the drugs was substantially likely to render the defendant competent to stand trial and unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense. Wis. Stat. Ann. § 971.14.

West Codenotes

Held Unconstitutional
Wis. Stat. Ann. § 971.14(3)(dm), (4)(b).

****167** Appeal from Circuit Court, Milwaukee County, Dennis R. Cimpl, Judge (L.C. No. 2016CF4475)

Attorneys and Law Firms

For the defendant-appellant in 18AP1296-CR, and petitioner-petitioner in 18AP1214-W, there were briefs filed by Colleen D. Ball, assistant state public defender. There were oral arguments by Colleen D. Ball.

For the plaintiff-respondent, there was a brief filed by Maura FJ Whelan, assistant attorney general, with whom on the brief is Brad D. Schimel, attorney general. There was an oral argument by Maura FJ Whelan.

For the respondents, there was a brief filed by Abigail C.S. Potts, assistant attorney general, with whom on the brief if Brad D. Schimel, attorney general. There was an oral argument by Abigail C.S. Potts.

An amicus curiae brief was filed in 18AP1296-CR on behalf of National Association for Criminal Defense Lawyers, Bazelon Center for Mental Health Law, National Disability Rights Network, and Disability Rights Wisconsin, by Jeffrey O. Davis, James E. Goldschmidt, Zachary T. Eastburn, and Quarles & Brady LLP, Milwaukee.

Opinion

REBECCA GRASSL BRADLEY, J.

***388** ¶1 These consolidated cases[1] concern the standard under which ***389** a circuit court may order involuntary medication to restore a defendant's competency to

proceed in a criminal case and the timing of the automatic stay of such orders established in State v. Scott, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141. The circuit court ordered Raytrell K. Fitzgerald to be involuntarily medicated pursuant to Wis. Stat. § 971.14 (2017-18)[2] to restore his competency to stand trial on a felony possession-of-a-firearm charge. After the circuit court entered its order, this court released the Scott decision, subjecting involuntary medication orders to an automatic stay pending appeal. Following a hearing on the impact of the Scott decision, the circuit court stayed its involuntary medication order but announced its plan to lift the stay in response to the State's motion. As the case proceeded through the appellate courts, the circuit court never lifted the ****168** stay. Fitzgerald petitioned the court of appeals for a supervisory writ, arguing that the automatic stay begins upon entry of the involuntary medication order rather than upon filing a notice of appeal as the court of appeals ultimately held. Because the court is equally divided on the writ matter, we affirm the court of appeals decision denying Fitzgerald's petition for a supervisory writ.

¶2 We do, however, address Fitzgerald's challenge to the constitutionality of Wis. Stat. § 971.14 based on its incompatibility with Sell v. United States, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003). In Sell, the United States Supreme Court held that in limited circumstances the government may involuntarily medicate a defendant to restore his competency to proceed to trial, and it ***390** outlined four factors that must be met before a circuit court may enter an order for involuntary medication. We hold that the standard for ordering involuntary medication set forth in § 971.14(3)(dm) and (4)(b) is unconstitutional to the extent it requires circuit courts to order involuntary medication based on the standard set forth in paragraph (3)(dm), which does not comport with Sell. We conclude circuit courts may order involuntary medication to restore trial competency under § 971.14 only when the order complies with the Sell standard. We vacate the circuit court's order for involuntary medication in this case because it is constitutionally insufficient.

I. BACKGROUND

¶3 In October 2016, the State charged Fitzgerald with possession of a firearm contrary to a harassment injunction.[3] The circuit court ordered a competency evaluation, which showed Fitzgerald suffered from "Schizoaffective disorder" and lacked substantial mental capacity to understand the proceedings or to be of meaningful assistance in his own defense. In December 2017, the circuit court signed an Order of Commitment for Treatment requesting an assessment for Fitzgerald's participation in the Outpatient Competency Restoration Program (OCRP). Dr. Brooke Lundbohm, a psychologist, sent the circuit court an OCRP assessment letter in February 2018, concluding that Fitzgerald "is clinically appropriate for the Outpatient Competency Restoration Program at this time and has been admitted to the Program," despite Fitzgerald having a history of refusing to take prescribed medication. ***391** In April 2018, Lundbohm informed the circuit court by letter that Fitzgerald's "status with the Outpatient Competency Restoration Program has changed," and he was "no longer clinically appropriate for participation in" OCRP due to safety concerns. The letter also noted that Fitzgerald displayed a lack of motivation to participate in the program. On that basis, the circuit court "deemed [Fitzgerald] no longer clinically appropriate for OCRP," remanded Fitzgerald to the Department of Health Services' (DHS) custody, and ordered a second competency evaluation under Wis. Stat. § 971.14.

¶4 In May 2018, Dr. Ana Garcia, a psychologist, conducted Fitzgerald's second competency evaluation and sent her report to the circuit court. The report noted Fitzgerald's Schizoaffective Disorder diagnosis and explained he had been "treated with Seroquel (antipsychotic medication) and Benztropine (medication used to treat the side effects of psychotropic medications)." Garcia reported that when Fitzgerald refused to take his medication while hospitalized, "an injectable version of the medication could not be forced upon him" because no order to medicate ****169** involuntarily existed. If treated with medication, Garcia opined Fitzgerald would "likely ... be restored to competency within the statutory period," and further noted that Fitzgerald was "incapable of expressing a rational understanding of the benefits and risks of medication or treatment." Accordingly, Garcia concluded that Fitzgerald was "not competent to refuse medication or treatment," and recommended that treatment continue on an inpatient basis. As to the anticipated effectiveness of the recommended treatment in restoring Fitzgerald's competency, Garcia noted in her report that "[t]reatment with antipsychotic medication is ***392** known to be effective in treating symptoms of psychosis, which is precluding [Fitzgerald's] competence to proceed" in his criminal case.

¶5 On June 18, 2018, the circuit court held a hearing on whether to issue an order for involuntary medication under Wis. Stat. § 971.14. During that hearing, Garcia testified, explaining why she believed the circuit court should issue an order for involuntary medication:

> • "Fitzgerald has continued to exhibit indications of psychotic symptoms" and was "unable to discuss his charges in a reasonable way."
>
> • "[W]e find psychotropic medication to help him better organize his thoughts, reduce the auditory hallucinations, and reduce the delusional beliefs."
>
> • Fitzgerald refused to take his medications and attempted to hide them in his room.

Garcia testified that "as a psychologist, I don't prescribe specific medications" but "I do know that for treating schizophrenia and schizoaffective disorder, the primary treatment is an antipsychotic medication, and he had been prescribed" the generic version of Seroquel during his admission at Mendota Mental Health Institute.

¶6 Fitzgerald also testified at the hearing. He thought he had been misdiagnosed, explained he had "been feeling really fine" without medication, and stated that he did not wish to submit to forced medication, expressing concerns about the dosage.

¶7 After the close of testimony, the circuit court ordered the administration of involuntary medication to restore Fitzgerald's competency. The circuit court explained the basis for its order:

> ***393** [T]here is an important government interest at stake here and that is the fact that he's charged with a serious felony. It may be a status offense, but the fact is he is alleged to be carrying a gun while under a prohibition for carrying a gun, and I recall the motion hearing that we had in this matter when the police approached him and searched him, which I found was a valid search. And so, therefore, that is in my opinion an important government interest, the furtherance of this felony.
>
> The fact that he does not take his medication is not facilitating him to be restored to competency. That's what this is all about so he can stand trial on whether or not he is guilty of this very serious offense; therefore, the fact that he's not taking his meds and has to be given them involuntarily does further that interest and I think it's also a necessary reason to further that interest. And we've got testimony from Dr. Garcia, who has reviewed his psychiatrist [sic] that the two meds or the medication that is prescribed for him is appropriate, and it was appropriate back in earlier 2013, when he was not taking and engaged in violence with his mother.[4]

****170 *394** ¶8 On June 20, 2018, before Fitzgerald filed his notice of intent to pursue postdisposition relief, this court decided Scott, 382 Wis. 2d 476, 914 N.W.2d 141. In Scott, we exercised our superintending authority to "order that involuntary medication orders [under Wis. Stat. § 971.14] are subject to an automatic stay pending appeal." Id., ¶ 43. On June 25, 2018, Fitzgerald filed his "Notice of Intent to Pursue Postdisposition Relief" and two days later filed a letter informing the circuit court that his medication order was automatically stayed under Scott.[5]

¶9 On June 27, 2018, the circuit court held another hearing. The circuit court granted the stay, but indicated that it would immediately lift the stay on the State's motion. On June 28, 2018, the same day Fitzgerald filed his petition for a supervisory writ in the court of appeals, the circuit court "vacate[d] the [June 27] proceedings" related to the automatic stay. The circuit court expressed uncertainty as to whether Scott's automatic stay occurs "after the appeal is filed or is it automatic when there's a notice of intent to appeal filed or is it automatic if there's merely an allegation that the defendant is going to file an appeal." In order to "err on the side of caution," the circuit court ordered its June 18th involuntary medication order stayed and set the matter to be heard again in two weeks. The circuit court reasoned: "[i]f the appeal ***395** is not filed I will lift the stay because then clearly [the] Scott case doesn't apply," and "[i]f the appeal is filed the State can then file a motion to lift the stay." The circuit court then signed a written order granting a stay of the June 18th involuntary medication order, but on that same day, Fitzgerald filed a petition for a supervisory writ in the court of appeals, challenging the circuit court's plan to lift the automatic stay without requiring the State to make the showing required under Scott. On July 9, 2018, Fitzgerald also filed a separate notice of appeal seeking review of the circuit court's June 18th Order for Commitment, specifically challenging the order for involuntary administration of medication.

¶10 On July 12, 2018, the court of appeals denied Fitzgerald's petition for a supervisory writ. State ex rel. Fitzgerald v. Circuit Court for Milwaukee Cty., No. 2018AP1214-W, unpublished order (Wis. Ct. App. July 12, 2018). Because the circuit court's stay remained in effect, the court of appeals concluded that "to the extent Scott establishes the automatic stay as a plain duty, the circuit court has complied." Id. at 5. However, the court

of appeals also concluded that "Fitzgerald was not entitled to an automatic stay until he actually had a **171 pending appeal, and that did not happen until he filed the notice of appeal on July 9, 2018." Id. (emphasis added). Fitzgerald petitioned for review of the court of appeals decision denying a supervisory writ, which we granted. Fitzgerald also petitioned to bypass the court of appeals for review of the June 18th underlying medication order, and we granted the bypass petition and ordered both cases to be argued on March 20, 2019.

¶11 Before this court heard oral argument in Fitzgerald's cases, the circuit court found Fitzgerald *396 competent and resumed the criminal proceedings. Fitzgerald pled guilty to the underlying charge on January 11, 2019, and the circuit court sentenced him to time served. Consequently, the State moved to dismiss as moot both of Fitzgerald's cases, but we denied the motion. After oral argument, we consolidated the two cases for the purposes of disposition.

II. DISCUSSION

A. Standard of Review

[1]¶12 The sole issue we resolve is the constitutionality of the standard for involuntary medication under Wis. Stat. § 971.14(3)(dm) and (4)(b). This court presumes the constitutionality of a statute and tasks a party challenging it with the "very heavy burden" of proving its unconstitutionality "beyond a reasonable doubt." Mayo v. Wisconsin Injured Patients and Families Comp. Fund, 2018 WI 78, ¶¶ 25, 27, 383 Wis. 2d 1, 914 N.W.2d 678 (quoted source omitted). Citing Mayo, Fitzgerald urges us to "restore the balance of [constitutional] power between the judiciary and the legislature in Wisconsin" by employing the standard applied by the United States Supreme Court, which requires a "plain showing" or clear demonstration of unconstitutionality. See id., ¶¶ 79, 90 (Rebecca Grassl Bradley, J. concurring) (quoted source omitted). We need not resolve Fitzgerald's challenge to the prevailing standard of review for challenges to the constitutionality of a statute because § 971.14(3)(dm) and (4)(b) are undoubtedly unconstitutional to the extent they require a circuit court to order the involuntary medication of a defendant when the Sell factors have not been met.

*397 B. Analysis

1. Constitutional Principles

[2]¶13 Under the Due Process Clause, individuals have "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs." Washington v. Harper, 494 U.S. 210, 221, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990). "[O]nly an 'essential' or 'overriding' state interest" can overcome this constitutionally-protected liberty interest. Sell, 539 U.S. at 178-79, 123 S.Ct. 2174 (quoting Riggins v. Nevada, 504 U.S. 127, 134, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992)). In Sell, the United States Supreme Court addressed "whether the Constitution permits the Government to administer antipsychotic drugs involuntarily to a mentally ill criminal defendant—in order to render that defendant competent to stand trial for serious, but nonviolent, crimes." Sell, 539 U.S. at 169, 123 S.Ct. 2174. The Court held that it does, but only under particular circumstances:

> [T]he Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly **172 to further important governmental trial-related interests.

Id. at 179, 123 S.Ct. 2174 (emphasis added). Although permissible in certain situations, the Sell Court explained that the "administration of drugs solely for trial competence purposes ... may be rare." Id. at 180, 123 S.Ct. 2174. The Court established a four-factor test to determine whether such medication is constitutionally appropriate.

***398** ¶14 "First, a court must find that important governmental interests are at stake." Id. "[B]ringing to trial an individual accused of a serious crime" against a person or property is an important interest. Id. The Court did, however, emphasize that prior to entering an order for involuntary medication, courts "must consider the facts of the individual case in evaluating the Government's interest in prosecution." Id.

¶15 "Second, the court must conclude that involuntary medication will significantly further" the government's interest in prosecuting the offense. Id. at 181, 123 S.Ct. 2174. This means that a court "must find that administration of the drugs is substantially likely to render the defendant competent to stand trial" and "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.

¶16 "Third, the court must conclude that involuntary medication is necessary to further those interests." Id. In other words, "[t]he court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results." Id. In order to make this finding, the deciding 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. In other words, the Sell Court considered an order directed at the defendant, requiring him to accept medication or be found in contempt of court, to be less intrusive than ordering an entity like DHS to forcibly administer medication to the defendant.

¶17 "Fourth, ... the court must conclude that administration of the drugs is medically appropriate, i.e., in the patient's best medical interest in light of his medical condition." Id. The Sell Court explained that ***399** "[t]he specific kinds of drugs at issue may matter here as elsewhere" because "[d]ifferent kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success." Id.

¶18 The Court explained that "these standards ... seek[ ] to determine whether involuntary administration of drugs is necessary significantly to further a particular governmental interest, namely, the interest in rendering the defendant competent to stand trial," and "[a] court need not consider whether to allow forced medication for that kind of purpose, if forced medication is warranted for a different purpose, such as [one] ... related to the individual's dangerousness, or ... health." Id. at 181-82, 123 S.Ct. 2174. The Court explained that "[t]here are often strong reasons for a court to determine whether forced administration of drugs can be justified on these alternative grounds before turning to the trial competence question," in part because "the inquiry into whether medication is permissible, say, to render an individual nondangerous is usually more 'objective and manageable' than the inquiry into whether medication is permissible to render a defendant competent." Id. at 182, 123 S.Ct. 2174 (quoted source omitted).

> The medical experts may find it easier to provide an informed opinion about whether, given the risk of side effects, particular drugs are medically appropriate and necessary to control a patient's ****173** potentially dangerous behavior (or to avoid serious harm to the patient himself) than to try to balance harms and benefits related to the more quintessentially legal questions of trial fairness and competence.
>
> Id.

***400** 2. Wisconsin Stat. § 971.14

¶19 Wisconsin Stat. § 971.14 requires a circuit court to enter an order for involuntary medication to restore a criminal defendant's competency to proceed provided the statutory parameters are met. Under the statute, the circuit court shall order a competency examination if "there is reason to doubt a defendant's competency to proceed."

§ 971.14(1r)(a), (2). The circuit court appoints "one or more examiners having the specialized knowledge determined by the court to be appropriate to examine and report upon the condition of the defendant." § 971.14(2)(a). "The examiner shall submit to the court a written report." § 971.14(3). Among other things, the report must include:

> (c) The examiner's opinion regarding the defendant's present mental capacity to understand the proceedings and assist in his or her defense.
>
> (d) If the examiner reports that the defendant lacks competency, the examiner's opinion regarding the likelihood that the defendant, if provided treatment, may be restored to competency within the time period permitted under sub. (5)(a)....
>
> (dm) If sufficient information is available to the examiner to reach an opinion, the examiner's opinion on whether the defendant needs medication or treatment and whether the defendant is not competent to refuse medication or treatment. The defendant is not competent to refuse medication or treatment if, because of mental illness, developmental disability, alcoholism or drug dependence, and after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the defendant, one of the following is true:
>
> > ***401** 1. The defendant is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.
> >
> > 2. The defendant is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness, developmental disability, alcoholism or drug dependence in order to make an informed choice as to whether to accept or refuse medication or treatment.

§ 971.14(3)(c)-(dm) (emphasis added).

¶20 After the report's submission, the circuit court must hold a hearing. Wis. Stat. § 971.14(4). Unless the parties waive their opportunity to present additional evidence, the circuit court shall hold an evidentiary hearing. § 971.14(4)(b). If the State proves by clear and convincing evidence "that the defendant is not competent to refuse medication or treatment, under the standard specified in sub. (3)(dm), the court shall make a determination without a jury and issue an order that the defendant is not competent to refuse medication or treatment." § 971.14(4)(b) (emphasis added).[6] In other words, the circuit court "shall" order involuntary medication or treatment if the standard ****174** described in § 971.14(3)(dm) is met: either the defendant is "incapable of expressing an understanding of the advantages and disadvantages" of medication or treatment or "substantially incapable of applying an understanding of" his mental illness "in order to make ***402** an informed choice" "to accept or refuse medication or treatment." The statute additionally provides "whoever administers the medication or treatment to the defendant shall observe appropriate medical standards." § 971.14(4)(b).

3. Wisconsin Stat. § 971.14(3)(dm) and (4)(b) do not conform with Sell's constitutional parameters.

[3] [4] [5]¶21 As a preliminary matter, we explain this court's denial of the State's motion to dismiss Fitzgerald's cases on mootness grounds. "An issue is moot when its resolution will have no practical effect on the underlying controversy." Portage Cty. v. J.W.K., 2019 WI 54, ¶ 11, 386 Wis. 2d 672, 927 N.W.2d 509 (quoted source omitted); see also City of Racine v. J-T Enters. of Am., Inc., 64 Wis. 2d 691, 700, 221 N.W.2d 869 (1974) ("This court has consistently adhered to the rule that a case is moot when 'a determination is sought which, when made, cannot have any practical effect upon an existing controversy.' " (quoted source omitted)). As a general matter, we decline to reach moot issues. J.W.K., 386 Wis. 2d 672, ¶ 12, 927 N.W.2d 509. Fitzgerald is no longer subject to the medication order he challenges; he regained competency and pled guilty. Therefore, the issues presented in reviewing that order are moot. See Winnebago Cty. v. Christopher S., 2016 WI 1, ¶ 31, 366 Wis. 2d 1, 878 N.W.2d 109 (explaining that "when an appellant appeals an order to which he or she is no longer subjected," the case is moot).

[6] [7]¶22 We may, however, decide an otherwise moot issue if it fits under one of the following exceptions: (1) "the issues are of great public importance;" ***403** (2) "the constitutionality of a statute is involved;" (3) the situation arises so often "a definitive decision is essential to guide the trial courts;" (4) "the issue is likely to arise again and should be resolved by the court to avoid uncertainty;" or (5) the issue is "capable and likely of repetition and yet

evades review because the appellate process usually cannot be completed and frequently cannot even be undertaken within a time that would result in a practical effect upon the parties." G.S. v. State, 118 Wis. 2d 803, 805, 348 N.W.2d 181 (1984); see also J.W.K., 386 Wis. 2d 672, ¶ 12, 927 N.W.2d 509. In this case, Fitzgerald challenges the constitutionality of Wis. Stat. § 971.14, which presents an issue of great public importance. Additionally, competency restoration for the purpose of prosecuting a criminal defendant arises often enough to warrant a definitive decision in order to guide the circuit courts regarding the constitutional standard for ordering involuntary medication to restore a defendant's competency to proceed. Accordingly, we choose to examine the constitutionality of § 971.14.[7] We hold that § 971.14(4)(b) is unconstitutional to the extent it requires circuit courts to order involuntary medication based on the standard set forth in paragraph (3)(dm), which does not comport with Sell, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197.

¶23 Fitzgerald argues that Wis. Stat. § 971.14 is inconsistent with the factors outlined in Sell, resulting in an unconstitutional ****175** violation of his protected liberty interest in avoiding involuntary medication. He ***404** construes § 971.14 to "permit[ ] a court to commit a person accused of a crime for involuntary treatment ... to restore competency based on his inability to understand, express or apply the advantages, disadvantages and alternatives to treatment or medication," without requiring the State to satisfy the Sell factors.

¶24 The State contends that Wis. Stat. § 971.14 is constitutional, arguing that Sell requires an involuntary medication order issued by a circuit court to meet the Sell standard and does not apply to a statute like § 971.14 governing the procedures the government must follow in order to obtain an involuntary medication order. Even if Sell does control the statute, the State argues that § 971.14 is constitutional because its language partially encompasses the Sell factors, and "the circuit courts of the State of Wisconsin have been directed to comply with the Sell test when issuing orders for commitment and involuntary medication" using Form CR-206 (which lists the Sell factors), the Judicial Benchbook, and Wis JI—Criminal SM-50 (2018).

[8] [9]¶25 We hold that Wis. Stat. § 971.14(4)(b) is unconstitutional to the extent it requires circuit courts to order involuntary medication based on the standard set forth in paragraph (3)(dm), which does not comport with Sell. Paragraph (4)(b) requires the circuit court to "issue an order that the defendant is not competent to refuse medication" if the State proves that the defendant is not competent to refuse treatment under the standard set forth in paragraph (3)(dm). In general terms, paragraph (3)(dm) considers a defendant not competent to refuse treatment if he is either "incapable of expressing an understanding" of the proposed medication ***405** or treatment or "substantially incapable of applying an understanding" of his mental illness "in order to make an informed choice" regarding medication or treatment. Under this statutory standard, a circuit court must order involuntary medication to restore trial competence regardless of whether the factors outlined in Sell are met.[8] The mere inability of a defendant to express an understanding of medication or make an informed choice about it is constitutionally insufficient to override a defendant's "significant liberty interest in avoiding the unwanted administration of antipsychotic drugs." Harper, 494 U.S. at 221, 110 S.Ct. 1028.

¶26 A comparison of the text of the statutory standard with the constitutional standard outlined in Sell illustrates how the statute falls short of protecting the significant liberty interest in avoiding the unwanted administration of psychotropic drugs. Specifically, paragraph (3)(dm) does not require the circuit court to find that an important government "interest in bringing to trial an individual accused of a serious crime" is at stake, as required by the first Sell factor. Sell, 539 U.S. at 180, 123 S.Ct. 2174. Wisconsin Stat. § 971.14 merely requires the circuit court to find probable cause that the defendant committed a crime—not necessarily a serious one. See § 971.14(1r). Nor does the statute require an individualized assessment of the circumstances surrounding the case, which may impact the circuit court's application of this factor. Even for serious crimes, "[s]pecial circumstances may lessen" the ***406** importance of the State's interest in trying ****176** the case. Sell, 539 U.S. at 180, 123 S.Ct. 2174. For example, "[t]he defendant's failure to take drugs voluntarily ... 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." Id. In other words, the "facts of the individual case" determine the importance of the government's interest. Id. Paragraph (3)(dm)

leaves no room for weighing such details.

¶27 The directive to order medication under Wis. Stat. § 971.14(3)(dm) similarly fails to include consideration of the second Sell factor: "that administration of the drugs is substantially likely to render the defendant competent to stand trial" and "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." Sell, 539 U.S. at 181, 123 S.Ct. 2174. While the expert's report must include "the examiner's opinion regarding the likelihood that the defendant, if provided treatment, may be restored to competency within the [statutory] time period,"[9] paragraph (3)(dm) does not require the circuit court to conclude that medication is substantially likely to restore a defendant's competency or to consider whether side effects "will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense." Sell, 539 U.S. at 181, 123 S.Ct. 2174.

¶28 As to the third Sell factor, the statute falls short of the constitutional prerequisite espoused in Sell requiring the circuit court to conclude that involuntary treatment is necessary to further important government interests. This factor commands the circuit ***407** court to consider and rule out—as unlikely to achieve substantially the same results—less intrusive options for treatment as well as for administering the drugs. In contrast, Wis. Stat. § 971.14(4)(b) mandates involuntary medication if the State establishes pursuant to paragraph (3)(dm) the defendant's inability to either express an understanding of the advantages and disadvantages of medication or to make an informed choice about it, regardless of the existence of less intrusive but nonetheless effective options.

¶29 The fourth Sell factor requires the circuit court to conclude that medication is "medically appropriate" meaning "in the patient's best medical interest in light of his medical condition." Sell, 539 U.S. at 181, 123 S.Ct. 2174. In contrast, Wis. Stat. § 971.14(4)(b) imposes an obligation on "whoever administers the medication or treatment to the defendant" to "observe appropriate medical standards." § 971.14(4)(b) (emphasis added). The State argues "appropriate medical standards" might encompass a consideration of the defendant's best medical interest but paragraph (4)(b) addresses the administration of medication or treatment, not whether such treatment should be ordered in the first place. Nothing in the statute empowers the person administering the drugs to override the circuit court's order that the drugs be administered. Sell requires the circuit court to conclude that the administration of medication is medically appropriate, not merely that the medical personnel administering the drugs observe appropriate medical standards in the dispensation thereof.

[10] [11] [12] [13]¶30 The State's reliance on extrinsic materials to support the constitutionality of Wis. Stat. § 971.14(3)(dm) and (4)(b) is unavailing. Although circuit ***408** courts must use Form CR-206,[10] which lists the ****177** Sell factors,[11] and the circuit court used that form to order the involuntary medication of Fitzgerald in this case, a judicially-created form cannot save a constitutionally infirm statute. While Form CR-206 directs the circuit court to make findings consistent with Sell, the statute requires the circuit court to order treatment if the statutory standard is met, regardless of whether the Sell findings are made. Likewise, the Special Materials to the jury instructions and the Judicial Benchbook cited by the State cannot alter or supplement the statutory text enacted by the legislature, which binds the circuit courts. See Hefty v. Strickhouser, 2008 WI 96, ¶ 33 n.11, 312 Wis. 2d 530, 752 N.W.2d 820 (explaining that the Judicial Benchbook "is not intended to stand as independent legal authority for any proposition of law" and is merely "an informed and insightful discussion of practice"); State v. Gilbert, 115 Wis. 2d 371, 379, 340 N.W.2d 511 (1983) (explaining that special materials are "persuasive" authority). We do not read words into a statute regardless of how persuasive the source may be; rather, we ***409** interpret the words the legislature actually enacted into law. "Under the omitted-case canon of statutory interpretation, '[n]othing is to be added to what the text states or reasonably implies (casus omissus pro omisso habendus est). That is, a matter not covered is to be treated as not covered.' " Lopez-Quintero v. Dittmann, 2019 WI 58, ¶ 18, 387 Wis. 2d 50, 928 N.W.2d 480 (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 93 (2012)). "One of the maxims of statutory construction is that courts should not add words to a statute to give it a certain meaning." Fond Du Lac Cty. v. Town of Rosendale, 149 Wis. 2d 326, 334, 440 N.W.2d 818 (Ct. App. 1989).

¶31 Application of the statutory mandate requires an order for involuntary medication based solely on the defendant's inability to express an understanding of treatment or make an informed choice of whether to accept or refuse it, resulting in the unconstitutional deprivation of the defendant's significant liberty interest in avoiding the unwanted administration of medication.

The fortuity of circuit courts sometimes following Sell as a result of using Form CR-206, the special materials to the jury instructions, and the Benchbook despite Wis. Stat. § 971.14's contrary directive may ensure that certain court orders comport with the Constitution but cannot render the statute itself constitutional.

[14]¶32 To the extent Wis. Stat. § 971.14(3)(dm) and (4)(b) require circuit courts to order involuntary medication when the Sell factors have not been met, the statute unconstitutionally infringes the individual liberty interest in avoiding the unwanted administration of anti-psychotropic drugs. Our holding does not preclude ***410** circuit courts from ordering involuntary medication for purposes of restoring a criminal defendant's competency provided ****178** the circuit courts apply the standard set forth in Sell.

[15]¶33 Applying this holding to the present case, the State conceded at oral argument that the circuit court did not consider the side effects of the proposed medication or whether those side effects would interfere significantly with Fitzgerald's ability to assist in his defense.[12] After reviewing the circuit court's decision, we agree with the State. The circuit court never found, as it must, "that administration of the drugs is substantially likely to render the defendant competent to stand trial" and "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." See Sell, 539 U.S. at 181, 123 S.Ct. 2174. We therefore vacate the circuit court's order for involuntary medication.

4. Supervisory Writ

¶34 In his petition for a supervisory writ, Fitzgerald argues this court should exercise its superintending authority and hold that the stay established in Scott begins automatically upon entry of the order for involuntary medication. The State opposes his request, arguing that "Fitzgerald did not establish the requisite elements for a supervisory writ" and requests that we "decline to exercise [our] superintending authority" to grant relief to Fitzgerald. The court is equally divided on the issue of when the automatic stay established in Scott begins. Therefore, we affirm the decision of the ***411** court of appeals denying Fitzgerald's petition for a supervisory writ. See State v. Garcia, 2019 WI 40, ¶ 1, 386 Wis. 2d 386, 925 N.W.2d 528 (per curiam) (affirming the court of appeals decision because the court was equally divided); see also, Gruhl Sash & Door Co. v. Chicago, M. & St. P. Ry. Co., 173 Wis. 215, 215, 180 N.W. 845 (1921) (explaining that where the supreme court is equally divided, the "established rule" is to affirm the court of appeals decision).

III. CONCLUSION

¶35 Circuit courts may order involuntary medication to restore a defendant's competency to proceed in a criminal case, provided the four factors the United States Supreme Court established in Sell are met. To the extent Wis. Stat. § 971.14(3)(dm) and (4)(b) require circuit courts to order involuntary medication when the Sell standard has not been met, the statute is unconstitutional. Because the circuit court did not apply the Sell factors, we vacate the circuit court's order.

¶36 Because the court is equally divided on Fitzgerald's petition to review the court of appeals decision denying his request for a supervisory writ, we affirm the decision of the court of appeals.

By the Court.—The order of the circuit court is vacated; the decision of the court of appeals is affirmed by an equally divided court.

¶37 SHIRLEY ABRAHAMSON, J., withdrew from participation before oral argument.

ROGGENSACK, C.J. concurs, joined by ZIEGLER, J. (opinion filed).

PATIENCE DRAKE ROGGENSACK, C.J. (concurring).

¶38 The issue presented by this review is whether the circuit court unconstitutionally ordered Raytrell K. Fitzgerald to be involuntarily medicated because his mental ****179** condition prevented him from ***412** being competent to stand trial. The majority opinion focuses its

attention on Wis. Stat. § 971.14(3)(dm) and opines that paragraph (3)(dm) is unconstitutional unless a gloss from Sell v. United States, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003) is applied to the statute.[1]

¶39 I agree that generally the Sell factors must enter into the circuit court's consideration of whether to order involuntary medication so as to render an incompetent defendant competent to stand trial. However, there are occasions when a defendant who is not competent to stand trial also will be dangerous to himself or to others. In those occasions, the Sell factors will not be relevant. As the United States Supreme Court has explained:

> A court need not consider whether to allow forced medication for that kind of purpose, if forced medication is warranted for a different purpose, such as ... the individual's dangerousness.

Id. at 181-82, 123 S.Ct. 2174 (citing Washington v. Harper, 494 U.S. 210, 225-26, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990)). Furthermore, determining whether medication is necessary to control dangerous behavior is often an easier task for a medical expert than it is for the expert to balance the harms and benefits related to opining on legal competence. Id. at 182, 123 S.Ct. 2174.

¶40 Wisconsin Stat. § 971.14 addresses competency proceedings. Paragraph (1r) instructs that "[t]he court shall proceed under this section whenever there is reason to doubt a defendant's competency to proceed." The statute permits the court to order an examination of the defendant "for competency purposes at any stage of the competency proceedings by physicians or other experts." § 971.14(2)(g)

***413** ¶41 The record reveals that Fitzgerald was removed from outpatient treatment because of incidents of violent conduct in relation to others. This was not the focus of the circuit court. However, a statutory provision in addition to the forced medication found in Wis. Stat. § 971.14(3)(dm) on which the majority opinion focuses, is found in paragraph (2)(f).

¶42 Wisconsin Stat. § 971.14(2)(f) provides that a defendant who is charged with a crime, is incompetent and also is dangerous to himself or others is not affected by § 971.14(3)(dm). Instead, paragraph (2)(f) provides a different test for refusing medication. It provides that a defendant "may refuse medication and treatment except in a situation where the medication or treatment is necessary to prevent physical harm to the defendant or others." § 971.14(2)(f). Therefore, if medication is ordered under paragraph (2)(f), as the United States Supreme Court has explained, the Sell factors do not apply. Sell, 539 U.S. at 182, 123 S.Ct. 2174.

¶43 While I join the majority opinion's concern for adding a Sell gloss to our interpretation of Wis. Stat. § 971.14(3)(dm) in order to preserve its constitutionality, I write to point out that if a defendant is dangerous to himself or others, ordering treatment for that condition, which will likely return the defendant to competency, does not employ the Sell factors. Because I am concerned that paragraph (2)(f) could be overlooked, I write in concurrence to point up its use when appropriate.

¶44 I am authorized to state that Justice ANNETTE KINGSLAND ZIEGLER joins this concurrence.

All Citations

387 Wis.2d 384, 929 N.W.2d 165, 2019 WI 69

Footnotes

[1] Our decision resolves two cases, State v. Fitzgerald, 2018AP1296-CR and State ex rel. Fitzgerald v. Circuit Court for Milwaukee Cty., 2018AP1214-W. We decide the merits of 2018AP1296-CR by vacating the circuit court's order. This part of our decision addresses the constitutionality of Wis. Stat. § 971.14 and although the circuit court's order is moot, we declare rights relative to it and vacate the order because it is constitutionally infirm. In 2018AP1214-W,

we are equally divided regarding the appropriate disposition and therefore affirm the decision of the court of appeals. We consolidate the cases because the facts and procedural history of each are intertwined and collectively provide necessary background information for a full understanding of our decision.

[2] All subsequent references to the Wisconsin Statutes are to the 2017-18 version unless otherwise indicated.

[3] The charge alleged violations of Wis. Stat. §§ 941.29(1m)(g) and 939.50(3)(g) (2015-16).

[4] Although the circuit court also listed several violent incidents outlined in Garcia's report and opined that "those things that I've read into the record I think exhibit that Mr. Fitzgerald, while not on the prescribed medications, is dangerous to himself and to others," the circuit court's written order for involuntary medication was not based on Fitzgerald's dangerousness. Rather, the circuit court checked the box on the form order reflecting the following grounds for involuntary medication: Fitzgerald was "mentally ill" and "charged with at least one serious crime," and the treatment was (1) "necessary to significantly further important government interests," (2) "substantially likely to render the defendant competent to stand trial," (3) "substantially unlikely to have side effects that undermine the fairness of the trial," (4) "necessary because alternative, less intrusive treatments are unlikely to achieve substantially the same results," and (5) "medically appropriate." The circuit court did not check the box indicating treatment was necessary because Fitzgerald was dangerous.

[5] The letter is dated June 25, 2018, and marked "Received 06-25-2018" in the upper right corner. Counsel asserts in the letter that it was being filed "simultaneously" with the Notice of Intent, but according to the electronic record, the letter was not filed until June 27, 2018.

[6] When a defendant claims to be competent, Wis. Stat. § 971.14(4)(b) first requires the State to prove by clear and convincing evidence that the defendant is not competent. Because Fitzgerald previously conceded he was not competent, that portion of the statute is not at issue.

[7] Fitzgerald additionally argues that the circuit court incorrectly calculated his sentence credit during the hearing on the order for involuntary medication. We do not review this issue because he pled guilty and was sentenced to time served; the issue is moot and review is unwarranted under the exceptions to dismissal for mootness.

[8] The statute directs that the circuit court "shall" issue the order for involuntary medication if paragraph (3)(dm) is met. Wis. Stat. § 971.14(4)(b). "Shall" is "presumed mandatory." State ex rel. DNR v. Wisconsin Court of Appeals, Dist. IV, 2018 WI 25, ¶ 13 n.7, 380 Wis. 2d 354, 909 N.W.2d 114 (quoted source omitted).

[9] Wis. Stat. § 971.14(3)(d).

[10] Wisconsin Stat. § 971.025(1) ("In all criminal actions ... the parties and court officials shall use the standard court forms adopted by the judicial conference.").

[11] Form CR-206 lists the Sell factors, but does not identify their source. See Sell v. United States, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003). Additionally, the form does not address the gaps between the standard in Wis. Stat. § 971.14(3)(dm) and (4)(b) and the constitutional principles set forth in Sell. The judicial conference may wish to consider modifying this form to clarify that circuit courts must follow Sell regardless of whether the standard in § 971.14(3)(dm) and (4)(b) has been met. See Wis. Stat. § 758.18(1) ("The judicial conference shall adopt standard court forms for use by parties and court officials in all civil and criminal actions and proceedings in the circuit court[.]").

[12] The box the circuit court checked on Form CR-206 listed the Sell factors, including the second factor, but the

court never addressed the side effects on the record.

[1] Majority op., ¶2.

382 Wis.2d 476
Supreme Court of Wisconsin.

STATE of Wisconsin, Plaintiff-Respondent,
v.
Andre L. SCOTT, Defendant-Appellant.

No. 2016AP2017-CR
|
Oral Argument: March 14, 2018
|
Opinion Filed: June 20, 2018

Synopsis
Background: In postconviction proceedings, defendant's counsel asked for a competency evaluation. The Circuit Court, Milwaukee County, L.C. No. 2009CF136, Jeffrey A. Kremers, J., ordered defendant to be involuntarily medicated for purposes of participating in proceedings. Defendant appealed and filed emergency motion to stay medication order. The Court of Appeals denied the stay but allowed direct appeal to proceed. Defendant petitioned Supreme Court to bypass Court of Appeals and petition was granted.

Holdings: The Supreme Court, Shirley S. Abrahamson, J., held that:

[1] order providing for involuntary medication of defendant was issued prematurely and, thus, was invalid;

[2] order was a final order issued in a special proceeding and, thus appealable of right;

[3] Court of Appeals' failure to explain its exercise of discretion in denying defendant's motion to stay was an erroneous abuse of discretion; and

[4] Supreme Court would use constitutional superintending authority to order that involuntary medication orders were subject to an automatic stay pending appeal.

Reversed and remanded.

Procedural Posture(s): Petition for Discretionary Review.

West Headnotes (16)

[1] Constitutional Law Resolution of non-constitutional questions before constitutional questions

Supreme Court does not normally decide constitutional questions if the case can be resolved on other grounds.

[2] Mental Health Custody and Confinement

Order providing for involuntary medication of defendant seeking postconviction relief was issued prematurely, and thus was invalid, where order was not preceded by determination of whether and to what extent postconviction proceedings could continue despite defendant's incompetency. Wis. Stat. Ann. § 971.14(4)(b).

[3] Criminal Law Right to counsel

Ordinarily, the defendant is not needed to assist counsel in some or all issues involved in postconviction proceedings.

[4] Mental Health Custody and Confinement

Order in competency proceeding, that defendant be medicated to competency for purposes of participating in postconviction proceeding, was a final order issued in a special proceeding, and thus appealable of right, even though postconviction proceeding and competency proceeding were related or connected; competency proceeding was not part of

defendant's underlying criminal proceeding, and order disposed of the entire matter in litigation in the competency proceeding, which was the question of defendant's competency to assist with postconviction proceeding and to refuse medication or treatment. Wis. Stat. Ann. § 808.03(1).

1 Cases that cite this headnote

[5] **Criminal Law** Finality of determination in general

The status of an order as a final order for purposes of appeal is a question of law that Supreme Court decides independently of the circuit court or court of appeals but benefiting from their analyses. Wis. Stat. Ann. § 808.03(1).

[6] **Mental Health** Custody and Confinement

Court of Appeals' failure to explain its exercise of discretion in denying defendant's motion to stay Circuit Court order for involuntary medication to restore competency was an erroneous abuse of discretion; Court of Appeals had to explain its discretionary decision-making to ensure the soundness of that decision-making and to facilitate judicial review. Wis. Stat. Ann. § 808.07.

1 Cases that cite this headnote

[7] **Criminal Law** Supersedeas or stay of proceedings

In determining whether to grant relief pending appeal, the court of appeals exercises its discretion. Wis. Stat. Ann. § 808.07.

[8] **Criminal Law** Preliminary proceedings

An appellate court reviews a circuit court's order on a motion for stay for an erroneous exercise of discretion.

1 Cases that cite this headnote

[9] **Courts** Discretion of court in general

A circuit court's discretionary decision is not the equivalent of unfettered decision-making.

[10] **Criminal Law** Discretion of Lower Court

When a circuit court exercises its discretion, it must explain on the record its reasons for its discretionary decision to ensure the soundness of its own decision making and to facilitate judicial review.

[11] **Criminal Law** Discretion of Lower Court

The circuit court's explanation on the record of its exercise of discretion must demonstrate that the circuit court examined the relevant facts, applied a proper standard of law, and used a rational process to arrive at a conclusion that a reasonable judge would make.

2 Cases that cite this headnote

[12] **Criminal Law** Discretion of Lower Court

If a circuit court fails to explain its exercise of discretion on the record, it has erroneously

exercised its discretion.

1 Cases that cite this headnote

[13] **Courts** Supervisory jurisdiction

Supreme Court would use constitutional superintending authority to order that involuntary medication orders were subject to an automatic stay pending appeal, where a defendant's significant constitutionally protected liberty interest in avoiding the unwanted administration of antipsychotic drugs was rendered a nullity if involuntary medication orders were not automatically stayed pending appeal. U.S. Const. Amend. 14; Wis. Const. art. 7, § 3.

1 Cases that cite this headnote

[14] **Courts** Supervisory jurisdiction

Supreme Court has superintending authority that is indefinite in character, unsupplied with means and instrumentalities, and limited only by the necessities of justice. Wis. Const. art. 7, § 3.

[15] **Mental Health** Custody and Confinement

On a motion to lift an automatic stay pending appeal of an involuntary medication order, the State must: (1) make a strong showing that it is likely to succeed on the merits of the appeal, (2) show that the defendant will not suffer irreparable harm if the stay is lifted, (3) show that no substantial harm will come to other interested parties if the stay is lifted, and (4) show that lifting the stay will do no harm to the public interest.

[16] **Mental Health** Custody and Confinement

Whether to grant State's motion to lift an automatic stay pending appeal of an involuntary medication order is a discretionary decision and the court of appeals must explain its discretionary decision to grant or deny the State's motion.

1 Cases that cite this headnote

****143** Appeal from Circuit Court, Milwaukee County, Jeffrey A. Kremers, Judge (L.C. No. 2009CF136)

Attorneys and Law Firms

For the defendant-appellant, there were briefs filed and an oral argument by Colleen D. Ball, assistant state public defender.

For the plaintiff-respondent, there was a brief filed by Luke N. Berg, deputy solicitor general, with whom on the brief were Brad D. Schimel, attorney general, and Ryan J. Walsh, chief deputy solicitor general. There was an oral argument by Luke N. Berg, deputy solicitor general.

Opinion

SHIRLEY S. ABRAHAMSON, J.

***480** ¶1 This is an appeal from an order of the Circuit Court for Milwaukee County, Jeffrey A. Kremers, Judge. The circuit court ordered Andre Scott, the defendant, to be involuntarily medicated to competency for purposes of participating in postconviction proceedings after the circuit court found that he was not competent to proceed with his postconviction motion for relief and was not competent to refuse medication and treatment.

****144** ¶2 The defendant petitioned this court to bypass the court of appeals[1] and decide his appeal of the circuit court order requiring involuntary medication.[2] This court granted the petition, bypassing the court of appeals.

¶3 We reverse the order of the circuit court and remand the cause to the circuit court for proceedings consistent with this opinion.

***481** ¶4 The facts underlying the circuit court order that the defendant be involuntarily medicated to competency for purposes of assisting with his postconviction proceedings are simple and undisputed.

¶5 Several years after being convicted of battery, disorderly conduct, and kidnapping, the defendant, Andre Scott, sought to pursue postconviction relief. Having concerns about the defendant's ability to assist with postconviction proceedings, defendant's counsel asked for a competency evaluation.

¶6 In response to defense counsel's request, the circuit court held a hearing on the defendant's competency. After taking testimony, the circuit court ordered the defendant to be involuntarily medicated to competency for purposes of participating in postconviction proceedings.

¶7 The State initially defended the circuit court's involuntary medication order. Thereafter, the State argued that the involuntary medication order should be vacated because it was premature. The State acknowledged that the circuit court had failed to follow the procedure this court set forth in State v. Debra A.E., 188 Wis. 2d 111, 523 N.W.2d 727 (1994), for how to resolve competency issues at the postconviction stage of criminal proceedings.

¶8 We conclude, as the State urges, that because the circuit court did not follow the mandatory procedure set forth in Debra A.E., the circuit court's order that the defendant be involuntarily medicated to competency for purposes of assisting with postconviction proceedings was issued prematurely and is invalid.

¶9 Accordingly, we reverse the order of the circuit court and remand the cause to the circuit court for further proceedings consistent with this opinion.

***482** ¶10 The instant case presents us with four questions:

1. May a circuit court require a non-dangerous but incompetent defendant to be involuntarily treated to competency in the context of postconviction proceedings, and if so, is Wis. Stat. § 971.14(4)(b) (2015-16)[3] unconstitutional on its face because it does not comport with the requirements announced in Sell v. United States, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003)?

2. Is a circuit court order finding the defendant incompetent to proceed and requiring the defendant to be involuntarily treated to competency a final order for purposes of appellate review?

3. Did the court of appeals erroneously exercise its discretion when it denied a motion for relief pending appeal without explaining its reasoning?

4. Should involuntary medication or treatment orders be automatically stayed pending appeal?

****145** ¶11 We answer the questions presented as follows:

1. Before a circuit court can require a non-dangerous but incompetent defendant to be involuntarily treated to competency in the context of postconviction proceedings, the circuit court must follow the procedure this court established in State v. Debra A.E., 188 Wis. 2d 111, 523 N.W.2d 727 (1994). If Debra A.E. is applied properly, an order finding the defendant incompetent to seek postconviction relief ordinarily will not need to include an order for ***483** involuntary medication or treatment to restore competency. The circuit court erred in the instant case by failing to comply with the procedures established in Debra A.E.

2. The proceeding to determine whether a defendant is competent is separate and distinct from the defendant's underlying criminal proceeding. Thus, an order that the defendant is not competent to proceed (and in the instant case, that the defendant should be medicated and treated to competency) is a final order issued in a special proceeding for purposes of appeal.[4]

3. The court of appeals erroneously exercised its discretion when it denied the defendant's motion for relief pending appeal without explaining its reasoning for its discretionary denial decision.

4. Involuntary medication orders are subject to an automatic stay pending appeal, which can be lifted upon a successful motion by the State.

[1]¶12 Because we reverse the circuit court order on the ground that the circuit court did not comply with Debra A.E., we need not address the effect of Sell v. United States, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003), on the constitutionality of Wis. Stat. § 971.14(4)(b). We adhere to the ***484** doctrine of constitutional avoidance: A court ordinarily resolves a case on available non-constitutional grounds.[5]

I

¶13 The facts, for purposes of this review, are simple and undisputed. In 2009, the defendant, Andre Scott, was convicted of battery, disorderly conduct, and kidnapping.

¶14 In 2015, the defendant's counsel expressed concerns about the defendant's ability to assist with the postconviction proceedings and to make decisions committed by law to the defendant to a reasonable degree of rational understanding. Defense counsel asked for a competency evaluation of the defendant, and the circuit court granted the request.

¶15 During the competency evaluation, the evaluator testified that he did not consider the defendant dangerous or threatening; that although the defendant is not competent to proceed, the defendant's ****146** symptoms are treatable; that the defendant refused medication because he lacked insight into his illness and his need for treatment; and that it was likely that the defendant's competence to proceed could be restored with psychotropic treatment.

¶16 Defense counsel explained that the defendant was never found to be dangerous to himself or anyone else; that the defendant did not want an ***485** involuntary medication order; and that the defendant likely would not have pursued an appeal if a medication order were required.

¶17 Nevertheless, the circuit court issued an order directing involuntary treatment after concluding that the defendant was not competent to proceed with his motion for postconviction relief and not competent to refuse medication and treatment. However, the circuit court stayed its involuntary medication order for 30 days so that the defendant could pursue appellate relief.

¶18 The defendant filed a petition for leave to appeal the circuit court order. Wis. Stat. § (Rule) 809.50. The court of appeals denied the defendant's petition for leave to appeal and lifted the circuit court's stay of the involuntary medication order.

¶19 The defendant then appealed the involuntary medication order as an appeal as a matter of right, Wis. Stat. § 808.03(1), and filed an emergency motion to stay the medication order pending appeal. The court of appeals denied the stay of the medication order but allowed the direct appeal to proceed. The court of appeals did not explain why it denied the defendant's motion to stay the medication order. As a result, the Department of Health Services began medicating the defendant.

¶20 The circuit court concluded that the defendant was competent to proceed after approximately seven months of treatment, and he is no longer subject to the involuntary medication order. However, the circuit court warned the defendant that it could order him to submit to treatment again if he stops taking his medication and becomes incompetent.

***486** II

[2]¶21 First, we address the circuit court order for involuntary medication and treatment of the defendant. We conclude that the circuit court erred by failing to follow the mandatory procedure this court established in Debra A.E. for a circuit court to require a non-dangerous but incompetent defendant to be involuntarily treated to competency in the context of postconviction proceedings.

[3]¶22 Under Debra A.E., the circuit court order that the defendant is incompetent for purposes of appeal need not have included an order for treatment to restore competency. Ordinarily, the defendant is not needed to assist counsel in some or all issues involved in postconviction proceedings. Debra A.E., 188 Wis. 2d at 130, 523 N.W.2d 727.

¶23 Indeed, the court noted in Debra A.E., 188 Wis. 2d at 130, 523 N.W.2d 727, that instances in which a defendant may be involuntarily medicated to competency for purposes of appeal will be rare. The record in the instant case does not support the conclusion that the instant case is one of those rare instances in which the defendant may be involuntarily medicated to competency for purposes of appeal.

¶24 Debra A.E. fashioned a mandatory process for managing postconviction relief of allegedly incompetent defendants. The process is designed to balance the interests of incompetent defendants in meaningful postconviction relief and the interest of the public in expediting postconviction relief and reaching a final determination of the merits. Debra A.E., 188 Wis. 2d at 119, 129-35, 523 N.W.2d 727. Furthermore, the ****147** Debra A.E. court concluded that if this process were followed, a court order for ***487** treatment to restore competency will ordinarily be unnecessary because "[m]eaningful postconviction relief can be provided even

though a defendant is incompetent."[6]

¶25 The process established by Debra A.E. is as follows:

- As soon as there is a good faith doubt about the defendant's competency to seek postconviction relief, defense counsel should promptly advise the appropriate court of this doubt (on the record) and move for a ruling on competency.[7]
- The court shall honor defense counsel's request when there is reason to doubt a defendant's competency.[8]
- To determine competency, the court may order an examination and hold a hearing.[9]
- The test for competency during postconviction proceedings is whether the defendant "is unable to assist counsel or to make decisions committed by law to the defendant with a reasonable degree of rational understanding."[10]
- When the issues in a postconviction proceeding rest on the record in the circuit court and involve no risk to the defendant, defense counsel can proceed with postconviction relief on a defendant's behalf even if the defendant is incompetent.[11]

***488** • When the issues in a postconviction proceeding involve some risk to the defendant, these issues require the defendant's decision-making because whether to file an appeal and the objectives to pursue are decisions committed by law to the defendant.[12]

- If the defendant's assistance is needed for decision-making and the defendant is likely to attain competency in the near future, defense counsel may move for a continuance or an enlargement of time for filing the necessary notices or motions for postconviction relief or may seek the appointment of a guardian to make the decisions that the law requires the defendant to make.[13] If the defendant's assistance is needed to develop a factual foundation and the defendant is not likely to attain competency in the near future, these issues can be raised at a later proceeding in a § 974.06 motion if the defendant regains competency.[14]

¶26 Because the procedure mandated by this court in Debra A.E. was not followed in the instant case, we conclude, as did the State, that the involuntary medication order was issued prematurely and is invalid. Specifically, the circuit court acted prematurely by ordering that the defendant be medicated to competency without determining whether and to what extent postconviction proceedings could continue despite the defendant's incompetency. As we explained in Debra A.E., "[m]eaningful postconviction relief can be provided even though a defendant is incompetent[,]" and the process through which circuit courts ****148** and counsel manage the postconviction relief of incompetent defendants will not ordinarily need to include a ***489** court order for treatment to restore competency. Debra A.E., 188 Wis. 2d at 129-30, 523 N.W.2d 727.[15]

III

[4]¶27 The second issue we address is whether the circuit court order finding the defendant incompetent to proceed and requiring the defendant to be involuntarily treated to competency is a final order for purposes of appellate review.

[5]¶28 The status of an order as a final order for purposes of appeal is a question of law that this court decides independently of the circuit court or court of appeals but benefitting from their analyses.[16]

¶29 The State argues that appeals from involuntary medication orders should be taken as interlocutory appeals. The defendant argues that these appeals should be brought as a matter of right under Wis. Stat. § 808.03(1) as an appeal of a final order of a special proceeding.[17] For the following reasons, we agree with the defendant.

***490** ¶30 A final circuit court order is appealable as of right. Wis. Stat. § 808.03(1).[18] A final circuit court order is defined in Wis. Stat. § 808.03(1) as "a judgment, order or disposition that disposes of the entire matter in litigation as to one or more of the parties ...."

¶31 The order of the circuit court in the competency proceeding at issue disposed of the entire matter in litigation between the parties, namely the question of the defendant's competency to assist with postconviction proceedings and the defendant's competency to refuse medication or treatment. An appeal of an involuntary medication order is best classified as a final order from a special proceeding.

¶32 In Voss v. Stoll, 141 Wis. 267, 124 N.W. 89 (1910), we explained that "[t]he test to be applied in determining the nature of any judicial remedy, as regards whether it is a special proceeding, is whether it is a mere proceeding in an action, or one independently thereof or merely connected therewith." Voss, 141 Wis. at 271,

124 N.W. 89 (emphasis added).

¶33 The competency proceeding is not part of the defendant's underlying criminal proceeding; it is "merely connected" to it. The competency proceeding resolves an issue separate and distinct from the issues ****149** presented in the defendant's underlying criminal proceeding. Thus, while the criminal proceeding and the competency proceeding are "related"[19] or "connected"[20] ***491** to one another, the competency proceeding is properly "treated as being commenced independently of any other action or proceeding." State v. Alger, 2015 WI 3, ¶ 76, 360 Wis. 2d 193, 858 N.W.2d 346.

¶34 Thus, we conclude that the order determining incompetency and, in the instant case, mandating involuntary medication or treatment to restore competency is a final order issued in a special proceeding and is appealable as of right pursuant to Wis. Stat. § 808.03(1).[21]

IV

[6]¶35 The third issue relates to the court of appeals' denying the defendant's motion for a stay of the involuntary medication order pending appeal.[22]

***492** [7] [8]¶36 In determining whether to grant relief pending appeal, the court of appeals exercises its discretion. An appellate court reviews a circuit court's order on a motion for stay for an erroneous exercise of discretion. Weber v. White, 2004 WI 63, ¶ 18, 272 Wis. 2d 121, 681 N.W.2d 137.

¶37 In the instant case, the court of appeals did not explain its reasons for exercising its discretion to deny the defendant's motion for a stay of the involuntary medication order pending appeal.

[9] [10]¶38 Our jurisprudence governing the proper exercise of circuit court discretion is instructive in determining whether the court of appeals must explain the reasons underlying its discretionary decision-making. The case law is clear that a circuit court's discretionary decision "is not the equivalent of unfettered decision-making."[23] When a circuit court exercises its discretion, it must explain on the record its reasons for its discretionary decision "to ensure the soundness of its own decision making and to facilitate judicial review."[24]

[11] [12]¶39 The circuit court's explanation on the record of its exercise of discretion must demonstrate that the circuit court examined the relevant facts, applied a proper standard of law, and used a ****150** rational process to arrive at a conclusion that a reasonable judge would ***493** make.[25] If a circuit court fails to explain its exercise of discretion on the record, it has erroneously exercised its discretion.[26]

¶40 The parties have not offered any case (and we have found none) that requires the court of appeals to explain the reasons underlying its discretionary decisions. However, the justification that this court has relied upon to require a circuit court to explain its discretionary decision-making applies equally to the court of appeals. The court of appeals should explain its discretionary decision-making to ensure the soundness of that decision-making and to facilitate judicial review.

¶41 We therefore conclude that the court of appeals' failure to explain its exercise of discretion in the instant case is an erroneous exercise of discretion.

V

[13]¶42 Before concluding, we address the fourth and final issue: whether involuntary medication orders should be stayed automatically pending appeal as suggested by Scott.

[14]¶43 Pursuant to Article VII, Section 3 of the Wisconsin Constitution, this court has superintending authority "that is indefinite in character, unsupplied with means and instrumentalities, and limited only by the necessities of justice." ***494** Arneson v. Jezwinski, 206 Wis. 2d 217, 225, 556 N.W.2d 721 (1996). Pursuant to that authority, we hereby order that involuntary medication orders are subject to an automatic stay pending appeal.

¶44 The reasoning for our decision is simple—if involuntary medication orders are not automatically stayed pending appeal, the defendant's "significant" constitutionally protected "liberty interest" in "avoiding the unwanted administration of antipsychotic drugs" is rendered a nullity. Sell, 539 U.S. at 177, 123 S.Ct. 2174 (quoting Washington v. Harper, 494 U.S. 210, 221, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990)).

¶45 The State shall have the opportunity to move to lift the stay, and the merits of the State's motion shall be governed by the legal standard set forth in State v. Gudenschwager, 191 Wis. 2d 431, 529 N.W.2d 225 (1995), as modified by the instant opinion.

¶46 In Gudenschwager, we explained that a stay pending appeal is appropriate where the moving party:

> (1) makes a strong showing that it is likely to succeed on the merits of the appeal;
>
> ****151** (2) shows that, unless a stay is granted, it will suffer irreparable injury;
>
> (3) shows that no substantial harm will come to other interested parties; and
>
> (4) shows that a stay will do no harm to the public interest.

Gudenschwager, 191 Wis. 2d at 440, 529 N.W.2d 225. However, because involuntary medication orders are automatically stayed pending appeal, these factors must be slightly modified to accurately explain what the State must show in its motion to lift the stay.

***495** [15]¶47 On a motion to lift an automatic stay pending appeal of an involuntary medication order, the State must:

> (1) make a strong showing that it is likely to succeed on the merits of the appeal;
>
> (2) show that the defendant will not suffer irreparable harm if the stay is lifted;
>
> (3) show that no substantial harm will come to other interested parties if the stay is lifted; and
>
> (4) show that lifting the stay will do no harm to the public interest.

[16]¶48 Whether to grant the State's motion is a discretionary decision, and as we explained above, the court of appeals must explain its discretionary decision to grant or deny the State's motion.

VI

¶49 Because the procedure mandated by this court in Debra A.E. was not followed in the instant case, we conclude, as did the State, that the involuntary medication order was issued prematurely and is invalid. We reverse the order of the circuit court and remand the cause to the circuit court for proceedings consistent with this opinion.

¶50 *By the Court.*—The order of the circuit court is reversed and the cause remanded.

All Citations

382 Wis.2d 476, 914 N.W.2d 141, 2018 WI 74

Footnotes

1 See Wis. Stat. § (Rule) 809.60 (2015-16).

2 The circuit court stayed its involuntary medication order for 30 days so that the defendant could seek appellate relief.

3 All subsequent references to the Wisconsin Statutes are to the 2015-16 version unless otherwise indicated.

4 Both the State and the defendant agree that that an involuntary medication order is immediately appealable. However, the parties propose alternative paths the court may take to hold that an involuntary medication order is immediately appealable. The defendant argues that an involuntary medication order is a final order that is appealable as a matter of right under Wis. Stat. § 808.03(1). The State argues that appeals from involuntary medication orders should be taken as interlocutory appeals. For the reasons set forth in this opinion, we agree with the defendant.

5 "This court does not normally decide constitutional questions if the case can be resolved on other grounds."

Adams Outdoor Advert., Ltd. v. City of Madison, 2006 WI 104, ¶ 91, 294 Wis. 2d 441, 717 N.W.2d 803 (quoting Labor & Farm Party v. Elections Bd., 117 Wis. 2d 351, 354, 344 N.W.2d 177 (1984)).

6 State v. Debra A.E., 188 Wis. 2d 111, 130, 523 N.W.2d 727 (1994).

7 Id. at 131, 523 N.W.2d 727.

8 Id.

9 Id. at 131-32, 523 N.W.2d 727.

10 Id. at 126, 523 N.W.2d 727.

11 Id. at 130, 523 N.W.2d 727.

12 Id. at 126, 133-34, 523 N.W.2d 727.

13 Id. at 135, 523 N.W.2d 727.

14 Id. at 135, 523 N.W.2d 727.

15 Because we reverse the circuit court order on the ground that the circuit court did not adhere to the procedures set forth in Debra A.E., we need not address the effect of Sell v. United States, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003), on the constitutionality of Wis. Stat. § 971.14(4)(b). As we stated previously, a court avoids a decision regarding the constitutionality of a statute when the court can decide the case on non-constitutional grounds. Adams Outdoor Advert., Ltd. v. City of Madison, 2006 WI 104, ¶ 91, 294 Wis. 2d 441, 717 N.W.2d 803 (quoting Labor & Farm Party v. Elections Bd., 117 Wis. 2d 351, 354, 344 N.W.2d 177 (1984)).

16 Admiral Ins. Co. v. Paper Converting Mach. Co., 2012 WI 30, ¶ 22, 339 Wis. 2d 291, 811 N.W.2d 351.

17 The defendant and the State agree that the court should rule that involuntary medication orders are immediately appealable. They point out that, as a practical matter, if an order that the defendant be treated to competency is not immediately reviewable, the order is effectively unreviewable because the defendant will have already been forced to undergo involuntary medication or treatment while the appeal proceeds.

18 A non-final circuit court order is not appealable as of right but only on leave of the court of appeals. Wis. Stat. § (Rule) 809.50.

19 Ernst v. The Steamer "Brooklyn", 24 Wis. 616, 617 (1869).

20 Voss v. Stoll, 141 Wis. 267, 271, 124 N.W. 89 (1910); Witter v. Lyon, 34 Wis. 564, 574 (1874).

21 Concluding that involuntary medication orders are final orders from special proceedings does not contradict our holding in State v. Alger, 2015 WI 3, 360 Wis. 2d 193, 858 N.W.2d 346. The Alger case involved petitions to discharge involuntary commitments under Chapter 980. The Alger court held that those petitions did not commence "actions" or "special proceedings" because those petitions were continuations of the initial underlying commitment proceeding. Alger, 360 Wis. 2d 193, ¶ 26, 858 N.W.2d 346. The Alger decision did not overrule

Voss v. Stoll, 141 Wis. 267, 124 N.W. 89 (1910); in fact, Alger partially relied on Voss. Alger, 360 Wis. 2d 193, ¶¶ 29, 76, 858 N.W.2d 346.
In the instant case, the competency proceeding is not a continuation of the defendant's underlying criminal case. Indeed, the defendant's postconviction proceedings were suspended during the pendency of the competency proceeding. The competency proceeding in the instant case, unlike the discharge petitions in Alger, resolved an issue separate and distinct from the issues presented in the defendant's postconviction proceedings.

22 See Wis. Stat. § 808.07, § (Rule) 809.12 (enabling the court of appeals to grant relief from a circuit court order pending appeal).

23 Hartung v. Hartung, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981); see also Klinger v. Oneida Cty., 149 Wis. 2d 838, 846, 440 N.W.2d 348 (1989).

24 Klinger, 149 Wis. 2d 838, 847, 440 N.W.2d 348 (1989).

25 Weber v. White, 2004 WI 63, ¶ 18, 272 Wis. 2d 121, 681 N.W.2d 137.

26 State ex rel. Johnson v. Williams, 114 Wis. 2d 354, 356-57, 338 N.W.2d 320 (1983).

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NOTICE: FINAL PUBLICATION DECISION PENDING. SEE W.S.A. 809.23.

Court of Appeals of Wisconsin.

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,
V.
JOSEPH G. GREEN, DEFENDANT-APPELLANT.

Appeal No. 2020AP298-CR
|
February 25, 2021

Cir. Ct. No. 2019CF3109

APPEAL from orders of the circuit court for Dane County: VALERIE BAILEY-RIHN, Judge. *Reversed and cause remanded with directions.*

Before Fitzpatrick, P.J., Kloppenburg, and Nashold, JJ.

Opinion

KLOPPENBURG, J.

1** ¶1 Joseph G. Green appeals the circuit court's order for commitment and for involuntary medication, issued pursuant to WIS. STAT. § 971.14 (2017-18),[1] to render Green competent to be tried for first-degree intentional homicide. Green also appeals the court's subsequent order lifting the automatic stay of the involuntary medication order. Green argues that: (1) the State did not present evidence sufficient to support the involuntary medication order under the constitutional standard announced in ***Sell v. United States, 539 U.S. 166 (2003) (the ***Sell*** factors);[2] (2) the circuit court did not "have authority" to toll the statutory period to commit Green in order to bring him to competency during the time that the involuntary medication order was stayed;[3] and (3) the circuit court did not "have authority" to hear the State's motion to lift the automatic stay of the involuntary medication order.[4]

¶2 We conclude that, considering all of the evidence the State presented before the circuit court, the State did not meet its evidentiary burden on the order for involuntary medication because it failed to present an individual treatment plan based on a medically informed record. The order for involuntary medication must therefore be reversed, along with the subsequent order lifting the automatic stay of that order.[5] We also conclude that the circuit court lacked the authority to toll the statutory period to commit Green in order to bring him to competency while the stay was in place. Green must therefore be discharged from the commitment because the statutory commitment period has expired. In light of these conclusions, the remaining issue, whether the circuit court had the authority to hear the motion to lift the automatic stay, is moot. However, because this issue is likely to recur and is of statewide interest,[6] we address it and conclude that the circuit court had the authority to hear the motion to lift the automatic stay. Accordingly, we reverse and remand to the circuit court with directions to discharge Green from commitment to the Department of Health Services.

BACKGROUND

***2** ¶3 The following facts are undisputed. On December 27, 2019, Green was charged with first-degree intentional homicide. At defense counsel's request, the circuit court ordered a competency evaluation. Doctor Craig Schoenecker, a court-appointed psychiatrist, conducted a one-hour evaluation of Green and drafted a four-page report stating his opinion that Green suffered from "Other Specified Schizophrenia and other Psychotic Disorder," that Green was incompetent to understand court proceedings and to assist in his own defense, and that Green could be rendered competent through treatment with antipsychotic medication. At the competency hearing held on February 10, 2020, Schoenecker testified and his report was admitted into evidence.

¶4 Schoenecker testified that Green exhibited symptoms of an extensive delusional belief system that included delusions regarding his criminal case and his attorney. Schoenecker testified that, if Green's psychotic delusions were treated with antipsychotic medication, Green would be substantially likely to become competent within the twelve-month period allowed by law. Finally, Schoenecker testified that psychiatric medication was medically appropriate and substantially unlikely to have side effects that would undermine the fairness of the trial, and that treatments less intrusive than involuntary medication were unlikely to restore Green to competency.

¶5 At the conclusion of the competency hearing, the

circuit court found Green incompetent based on Schoenecker's testimony and report. The court also determined that the State showed by "clear and convincing" evidence that the ***Sell*** factors were met, ordered that Green be committed to the Department of Health Services for "an indeterminate term not to exceed 12 months," and issued an order for involuntary medication.

¶6 On February 11, 2020, Green appealed the involuntary medication order and moved for an automatic stay of the order. At a hearing on the motion for a stay, the parties agreed that Green was entitled to an automatic stay,[7] and the circuit court stayed the order for involuntary medication until further order of the court.

¶7 The State subsequently filed motions to lift the automatic stay and to toll the statutory period to bring Green to competency during the time that the stay was in place. The circuit court determined that it was proper for the circuit court to hear the State's motion to lift the automatic stay and scheduled an evidentiary hearing on both of the State's motions for May 19, 2020.

¶8 At that hearing, the circuit court allowed the State, over Green's objection, to supplement the record with additional evidence regarding the order for involuntary medication that went beyond the evidence the State had presented at the competency hearing. At the hearing, the State presented additional evidence comprising a "Notice of Treatment Plan" that had been filed by the State and was signed by the prosecutor, Schoenecker's five-page report of a second competency evaluation of Green, and Schoenecker's testimony regarding his report and the State's treatment plan.

¶9 At the conclusion of the hearing, the circuit court made findings of fact and once again determined that the ***Sell*** factors were satisfied. The court granted the State's motion to lift the automatic stay of the involuntary medication order based on its determination that the State was likely to succeed on appeal and that lifting the stay would not cause irreparable harm to Green, substantial harm to any other interested parties, or harm to the public.[8] The circuit court also granted the State's motion to toll the statutory period to bring Green to competency.

***3** ¶10 Green moved this court for relief pending appeal and we granted a temporary stay of the involuntary medication order. After further briefing, we denied Green's motion for relief pending appeal and lifted the temporary stay.

¶11 We present additional undisputed facts as pertinent in the discussion below.

DISCUSSION

¶12 We discuss in turn each of the three issues presented on appeal.

I. Order for Involuntary Medication

¶13 Green argues that the order for involuntary medication must be reversed because the State did not present evidence sufficient to satisfy the constitutional standard announced in ***Sell***. We first present the standard of review and general legal principles. We next provide additional pertinent background. Finally, we explain why we conclude that the State failed to present evidence sufficient to satisfy the ***Sell*** standard and that the involuntary medication order must, therefore, be reversed.

A. Standard of Review and General Legal Principles

¶14 "In ***Sell***, the United States Supreme Court held that in limited circumstances the government may involuntarily medicate a defendant to restore his [or her] competency to proceed to trial, and it outlined four factors that must be met before a circuit court may enter an order for involuntary medication." ***State v. Fitzgerald***, 2019 WI 69, ¶2, 387 Wis. 2d 384, 929 N.W.2d 165.[9] These four factors, which we next explain in detail, are that: (1) the government has an important interest in proceeding to trial; (2) involuntary medication will significantly further the governmental interest; (3) involuntary medication is necessary to further the governmental interest; and (4) involuntary medication is medically appropriate. ***Id.***, ¶¶14-17.

¶15 Our supreme court in ***Fitzgerald***, 387 Wis. 2d 384, provided the following explanation of the ***Sell*** standard's four factors, from which we now quote at length:

> Under the Due Process Clause, individuals have "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs" ... "[O]nly an 'essential' or 'overriding' state interest" can overcome this constitutionally-protected liberty interest. ***Sell***,

539 U.S. at 178-79.... In ***Sell***, the United States Supreme Court addressed "whether the Constitution permits the Government to administer antipsychotic drugs involuntarily to a mentally ill criminal defendant—in order to render that defendant competent to stand trial for serious, but nonviolent, crimes." ***Sell***, 539 U.S. at 169. The Court held that it does, but only under particular circumstances:

> [T]he Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary to significantly further important governmental trial-related interests.

4** Although permissible in certain situations, the ***Sell Court explained that the "administration of drugs solely for trial competence purposes ... may be rare." ***Id.*** at 180. The Court established a four-factor test to determine whether such medication is constitutionally appropriate.

> "First, a court must find that important governmental interests are at stake." ***Id.*** "[B]ringing to trial an individual accused of a serious crime" against a person or property is an important interest. ***Id.*** The Court did, however, emphasize that prior to entering an order for involuntary medication, courts "must consider the facts of the individual case in evaluating the Government's interest in prosecution." ***Id.***
>
> "Second, the court must conclude that involuntary medication will significantly further" the government's interest in prosecuting the offense. ***Id.*** at 181. This means that a court "must find that administration of the drugs is substantially likely to render the defendant competent to stand trial" and "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 court must conclude that involuntary medication is necessary to further those interests." ***Id.*** In other words, "[t]he court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results." ***Id.*** In order to make this finding, the deciding 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.*** In other words, the ***Sell*** Court considered an order directed at the defendant, requiring him [or her] to accept medication or be found in contempt of court, to be less intrusive than ordering an entity like DHS to forcibly administer medication to the defendant.
>
> "Fourth, ... the court must conclude 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.*** The ***Sell*** Court explained that "[t]he specific kinds of drugs at issue may matter here as elsewhere" because "[d]ifferent kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success." ***Id.***
>
> The Court explained that "these standards ... seek[ ] to determine whether involuntary administration of drugs is necessary significantly to further a particular governmental interest, namely, the interest in rendering the defendant competent to stand trial[.]"

Fitzgerald, 387 Wis. 2d 384, ¶¶13-18 (alterations in original and citations omitted).

¶16 Thus, to briefly summarize, the ***Sell*** standard requires that: (1) the government has an "important" interest in prosecuting a "serious crime"; (2) forced medication will "significantly further" the governmental interest because it is substantially likely to render the defendant competent and substantially unlikely to have side effects that interfere with the defense; (3) involuntary medication is necessary to further the governmental interest in that there are no less intrusive but similarly effective alternatives; and (4) medication is "medically appropriate," meaning that it is in the defendant's best medical interest in light of his or her medical condition. ***Id.*** If each factor is satisfied, involuntary medication is permissible. ***Sell***, 539 U.S. at 179. If any factor is unsatisfied, involuntary medication is a violation of the Due Process Clause and is unconstitutional. ***Sell***, 539 U.S. at 179. The State is required to prove the factual components of each of the four factors by clear and convincing evidence.[10]

5** ¶17 Here, the parties agree that the first ***Sell factor is satisfied, and so our analysis is directed only at the remaining three factors.

¶18 "The ***Sell*** Court did not specify a standard for reviewing ***Sell*** orders," ***United States v. Grape***, 549 F.3d 591, 598 (3d Cir. 2008), nor have Wisconsin courts specified the standard of review governing a circuit court's determination of whether these four factors are satisfied.

¶19 The State cites the standard of review followed by the federal courts in treating the second through fourth ***Sell*** factors as questions of fact subject to clearly erroneous review. *See, e.g.,* ***United States v. Gomes***, 387 F.3d 157, 160 (2nd Cir. 2004) (stating that the clearly erroneous standard is used because the second through fourth ***Sell*** factors are "factual in nature").[11] Green, citing our supreme court's decision in ***Langlade County v. D.J.W.***, 2020 WI 41, ¶47, 391 Wis. 2d 231, 942 N.W.2d 277, argues that the second through fourth ***Sell*** factors are legal questions reviewed de novo.[12] Both parties frame their arguments in terms of whether the evidence here is sufficient to satisfy the second through fourth ***Sell*** factors.

6** ¶20 We need not resolve the parties' dispute as to the standard of review because we, like the parties, address whether the State presented evidence to show that the second through fourth ***Sell factors were met and reach the same conclusion regardless of whether we apply "clearly erroneous" or "de novo" review.

B. Additional Background

¶21 At the time of the hearing on the State's motion to lift the automatic stay of the circuit court's involuntary medication order, Green was on the waiting list for treatment at the Mendota Mental Health Institute (Mendota). Schoenecker testified at that hearing that he was not involved in prescribing medications for Green, that he had not reviewed medical records for Green, that the providers who would treat Green at Mendota had not met Green yet, and that it would be "outside of professional guidelines and standards of care to prescribe medication to someone independent of some form of assessment and/or treatment relationship."

¶22 Schoenecker testified as to the State's proposed treatment plan, which had been submitted before the hearing by the assistant district attorney but which was not signed by any physician. The plan provided that Green would be administered Haldol at a maximum dose of ten milligrams per day and a maximum of 400 milligrams per month for a period not to exceed twelve months. Schoenecker testified that the amounts identified in the State's proposed treatment plan were "consistent with what the FDA has authorized as conventional or appropriate doses." Schoenecker indicated that he had spoken to someone at Mendota about that treatment plan and testified that Mendota staff would meet with Green personally, review Green's medical records, and prescribe Haldol only after Green was evaluated "face-to-face" by both a psychiatrist and an internist, "the internist ... specifically with the purpose of focusing on acquiring medical history and identifying any potential comorbid medical conditions [Green] might suffer from or that are in need of treatment."

¶23 Regarding Haldol's side effects, Schoenecker testified:

> Haldol certainly can cause side effects, including sedation, slurred speech, a tremor, a feeling of muscle restlessness that we refer to as akathisia, a phenomenon that is certainly like tremors but referred to as parkinsonism because it mimics the appearance of individuals who have Parkinson's disease. It has the potential to affect cardiac conduction and heart rhythm. It has an impact on what's called the QT interval, which is part of the electrocardiograph rhythm, and it can certainly have some metabolic side effects as well in terms of its impacts on weight gain and blood sugar.

¶24 Schoenecker testified that persons taking Haldol could develop diabetes and that the likelihood of developing diabetes while on Haldol depended on "many variables ... from medication dose to duration of exposure to underlying family history to diet to exercise status."

¶25 Schoenecker testified that the likelihood of side effects occurring "can range from single-digit percentages, say 5 to 8 percent, up to as high as 25 to 35 percent," and that whether the side effects would interfere with an individual's ability to assist counsel in conducting a trial "hinges on the severity" of those side effects. Using sedation as an example, he explained, "I would anticipate a very mild amount of sedation would have minimal impact on one's abilities versus a tremendous amount of sedation could certainly substantially impact a person's ability in that regard." He testified that, if Haldol were to have side effects that interfered with an individual's ability to assist counsel in conducting a trial, the "most typical approach that the treating psychiatrist would likely take" would be to try a different antipsychotic treatment plan.

***7** ¶26 Schoenecker was asked for his professional opinion as to whether Haldol was substantially likely to render Green competent to stand trial. He responded, "Certainly on paper Haldol would be an appropriate treatment. My hesitation is borne of the fact that individuals' responses to particular medications can vary. And so there's not a single antipsychotic medication that is universally effective." Schoenecker testified that whether Mendota would proceed with the Haldol treatment plan proposed by the State, or a different treatment plan, would be determined by treatment providers at Mendota based on information from Green's medical records.

¶27 Asked whether less intrusive treatments were likely to achieve substantially the same results as the proposed Haldol treatment, Schoenecker testified: "It's my opinion, to a reasonable degree of medical certainty, that non-medication interventions are unlikely to restore the defendant's capacities."

¶28 The circuit court determined that the State had an important interest in bringing Green to trial (first ***Sell*** factor). It found, "based on the doctor's testimony and expertise," that: the administration of Haldol would be substantially likely to render Green competent to stand trial and Haldol was unlikely to have side effects that would interfere significantly with Green's "ability to conduct a trial defense" (second ***Sell*** factor); because Green "does not believe he's mentally ill," no method less intrusive than involuntary medication was likely to achieve substantially the same results (third ***Sell*** factor); and the Haldol treatment plan was in Green's best interests in light of his medical condition because "if left untreated, the situation gets worse" and Haldol "has minimal side effects on this level of dosage for this limited time frame" (fourth ***Sell*** factor). The court ordered that Green accept the medication as stated in the State's treatment plan or be found in contempt, and that if he did refuse the medication then "Mendota would be entitled to forcibly administer the medication."

C. Analysis

¶29 We now examine whether the circuit court's determinations that the second through fourth ***Sell*** factors were met are supported by the evidence in the record. To repeat, the second factor is whether involuntary medication will "significantly further" the governmental interest in prosecuting Green because it is substantially likely to render him competent to stand trial and substantially unlikely to have side effects that interfere with the defense; the third factor is whether the order is necessary to further the governmental interest, meaning that there are no other less intrusive alternatives; and the fourth factor is whether the medication is "medically appropriate," meaning that it is in Green's best medical interest in light of his medical condition. ***Sell***, 539 U.S. at 180-81; ***Fitzgerald***, 387 Wis. 2d 384, ¶¶13-18. As we explain, we conclude that the evidence in the record supports the court's determination that the third factor was met but does not support the court's determinations that the second and fourth factors were met. Because our analysis and the parties' arguments on the second and fourth factors intertwine, we discuss those factors after we discuss the third factor.

*1. Third **Sell** Factor*

¶30 As to the third factor, we conclude that the evidence supports the circuit court's determination that an involuntary medication order was necessary because there were no less intrusive alternatives likely to achieve substantially the same result. That evidence is comprised primarily of Schoenecker's testimony that "non-medication interventions are unlikely to restore the defendant's capacities." We now explain why we reject Green's argument to the contrary.

8** ¶31 Green argues that, by simultaneously ordering both that Green take the medication voluntarily or be found in contempt and that involuntary medication could be administered if Green refused to voluntarily take the medication, the circuit court "made an explicit finding" that a less intrusive method (the contempt power) was available. However, this argument ignores the circuit court's reliance on evidence that Green "does not believe he's mentally ill" and was therefore unlikely to voluntarily accept medication. The court obeyed ***Sell**'s** command that a circuit 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." ***Sell***, 539 U.S. at 181. By entering an involuntary medication order that would become effective only after the contempt power had failed, the circuit court insured that Green would be involuntarily administered medication only if "necessary." ***Id.*** The record, therefore, does not support Green's argument as to the availability of less intrusive methods than those ordered by the court.

*2. Second **Sell** Factor*

¶32 As to the second factor, we conclude that the evidence in the record does not support the circuit court's determination that involuntary administration of Haldol as proposed by the State would significantly further the government's interest in bringing Green to trial because it was substantially likely to render Green competent and substantially unlikely to have side effects that interfere with the defense. Schoenecker's testimony that "on paper Haldol would be an appropriate treatment" to render Green competent was offered as a general opinion that had no connection to Green individually, in that Schoenecker declined to opine as to Green's individual response both with regard to a return to competency and to interference with the defense. His opinion was not based on a review of Green's medical history or treatment records. He had not evaluated Green for the purpose of prescribing medication for him, nor could he prescribe medication for Green without having done so.

¶33 While the ***Sell*** standard does not require certainty but rather asks the court to make a determination about whether it is "substantially likely" that the administration of drugs will render the defendant competent, ***Sell***, 539 U.S. at 181, such a "substantial likelihood" must reasonably be founded on evidence specific to the individual being involuntarily medicated.

¶34 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. Rather, the circuit court must consider the defendant's particular circumstances and medical history to assess the underlying factual questions of whether a particular medication is substantially likely to render a particular defendant competent and substantially unlikely to have side effects that interfere with that defendant's ability to participate in his or her own defense. "Whether a particular drug will tend to sedate a defendant, interfere with communication with counsel, prevent rapid reaction to trial developments, or diminish the ability to express emotions are matters important in determining the permissibility of medication to restore competence." ***Sell***, 539 U.S. at 185. Simply matching a general treatment plan for a condition to the defendant's diagnosed condition does not satisfy ***Sell***'s high standard. Such a practice 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." ***Sell***, 539 U.S. at 180.

¶35 The reasoning of federal circuit courts that have reached the same determination strengthens our conclusion. *See, e.g.*, ***United States v. Evans***, 404 F.3d 227, 242 (4th Cir. 2005) (the government must demonstrate that "the proposed treatment plan, *as applied to this particular defendant*, is 'substantially likely' to render the defendant competent to stand trial.") (emphasis in original); ***United States v. Watson***, 793 F.3d 416, 424 (4th Cir. 2015) ("Merely showing a proposed treatment to be 'generally effective' against the defendant's medical condition is insufficient" to meet the government's burden on second ***Sell*** factor) (quoted source omitted); ***United States v. Rivera-Guerrero***, 426 F.3d 1130, 1137 (9th Cir. 2005) ("Subsequent to ***Sell***, we held that in light of the importance of judicial balancing, and the implication of deep-rooted constitutional rights, a court that is asked to approve involuntary medication must be provided with a complete and reliable medically informed record, based in part on independent medical evaluations, before it can reach a constitutionally balanced ***Sell*** determination.").

9** ¶36 We now explain why we reject the State's argument that the second ***Sell factor was satisfied.

¶37 The State concedes that, under ***Sell*** case law, "an individualized treatment plan is a universal requirement" and "[a]n individualized treatment plan is the necessary first step to fulfilling the second, third, and fourth ***Sell*** requirements." The State asserts that it provided such an individualized treatment plan at the second hearing[13] and that Schoenecker's testimony at that hearing regarding the State's treatment plan satisfied the State's burden to show by clear and convincing evidence that involuntary medication was "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" as required by the second ***Sell*** factor. ***Sell***, 539 U.S. at 181.

¶38 As the State explains, ***Sell*** requires an individualized treatment plan that, "[a]t 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...." ***United States v. Chavez***, 734 F.3d 1247, 1253 (10th Cir. 2013) (citing ***United States v. Hernandez-Vasquez***, 513 F.3d 908, 916-17 (9th Cir. 2008)). However, it is not enough that the State merely presents a treatment plan that identifies the medication,

dosage, and duration of treatment. *Cf.* ***Evans***, 404 F.3d at 241–42 ("While it is necessary for the government to set forth the particular medication and dose range of its proposed treatment plan, such a description alone is not sufficient to comply with ***Sell***."). Instead, the court must consider the individualized treatment plan as applied to the particular defendant. The 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. *Cf.* ***Watson***, 793 F.3d at 424 (courts must consider "not only [the defendant's] medical condition, but also his [or her] age and the nature and duration of his [or her] delusions.").

¶39 Here, Schoenecker testified to side effects, such as sedation and slurred speech, that, if "severe," would tend to make it unlikely that Green would be rendered competent to stand trial. The State did not present any evidence as to whether Green in particular would be likely to have severe side effects. Schoenecker did not review Green's medical records and the record lacks even basic physical health information such as Green's height, weight, vitals, and current medications. The circuit court was therefore unable to consider whether Green already took other medications that tended to sedate him or whether the dosage was appropriate for someone of Green's age and weight and medical history. Schoenecker's initial competency report documents Green's statement that he had previously been prescribed an antipsychotic medication that "made [him] psychotic," yet the record is bereft of any information about the type or dosage of Green's previous antipsychotic medication or if and how such medication may have worsened his symptoms of psychosis. The record shows that Schoenecker was unable to form an opinion "that the proposed treatment plan, *as applied to this particular defendant*, [was] 'substantially likely' to render the defendant competent to stand trial." ***Evans***, 404 F.3d at 242 (emphasis in original). Accordingly, we reject the State's argument that the second ***Sell*** factor was satisfied.

*3. The Fourth **Sell** Factor*

***10** ¶40 As to the fourth factor, we conclude that the evidence in the record does not support the circuit court's determination that the proposed treatment plan was medically appropriate for Green. The record on which the circuit court relied shows that it was not possible to evaluate whether the treatment plan was medically appropriate for Green because there is no evidence that it had been formulated by someone who had met or evaluated Green with knowledge of Green's medical history, comorbid medical conditions, and risk factors for side effects. As Schoenecker testified, whether Haldol at the proposed dose was medically appropriate for Green could be determined only after a treating psychiatrist and internist met Green "face to face," at which point the treating providers would make a determination about whether the "specifics" of the proposed treatment plan were medically appropriate for Green "based on that data" about his medical history and conditions.

¶41 We conclude that the record on which the circuit court relied to order involuntary medication—comprising testimony from a non-treating psychiatrist who interviewed Green 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—did not provide enough information for the court to evaluate whether "administration of the drugs is medically appropriate, i.e., in the patient's best medical interest in light of his [or her] medical condition." ***Fitzgerald***, 387 Wis. 2d 384, ¶17 (citing ***Sell***, 539 U.S. at 181) (emphasis in original). We now explain in turn why we reject each of the State's three arguments to the contrary.

¶42 The State argues that the circuit court appropriately relied on testimony from Schoenecker to conclude that antipsychotics were likely to have a positive effect on Green's health. However, Schoenecker'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." ***Fitzgerald***, 387 Wis. 2d 384, ¶17 (citing ***Sell***, 539 U.S. at 181). ***Sell*** speaks of "the patient," not of a general class of persons with the patient's condition, and explains that "[t]he specific kinds of drugs at issue may matter here as elsewhere." ***Sell***, 539 U.S. at 181. Whether administration of a *particular* drug is in a *particular* patient's best interests requires, as Schoenecker testified, consideration of the particular patient's medical history and conditions. It is precisely because of the need for an individualized assessment that, as Schoenecker testified, it would be "outside of professional guidelines and standards of care to prescribe medication to someone independent of some form of assessment and/or treatment relationship."

¶43 The State next argues that the circuit court's order "will fully protect Green's rights under ***Sell***" because it orders involuntary medication only upon additional assessment at Mendota. Specifically, the State argues that the order was medically appropriate because the court directed that the treating provider was "to determine in his or her own professional judgment whether the approved treatment plan is medically appropriate for Green. Treatment will go forward according to the order *only* if the provider determines that the treatment plan approved by the court is medically appropriate." This argument is unpersuasive because, as the State concedes, ***Sell*** requires the *court* to determine whether the treatment plan is medically appropriate, and the State also concedes that the circuit court ordered in these circumstances that any change to the treatment plan must be approved by the circuit court.

¶44 Circuit courts are required to determine whether the ***Sell*** factors have been met before ordering involuntary medication. ***Fitzgerald***, 387 Wis. 2d 384, ¶33. Courts cannot delegate this responsibility to a treating provider. If courts could render an order for involuntary medication compliant with ***Sell*** merely by directing the treating providers to comply with the order "only if the provider determines that the treatment plan approved by the court is medically appropriate," all medication orders would satisfy ***Sell***. Nothing in ***Sell*** would support this kind of pro-forma review by the circuit courts. Such review would result in outcomes that would be contrary to the admonition that "individuals have 'a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs...' " and therefore " 'administration of drugs solely for trial competence purposes ... may be rare.' " ***Fitzgerald***, 387 Wis. 2d 384, ¶13; ***Sell*** 539 U.S. at 180.

***11** ¶45 Finally, the State argues that Wisconsin competency procedure is different from federal procedure and that we should not apply federal standards to Wisconsin procedure. Specifically, the State asserts that in the federal system the defendant, after being found incompetent, is evaluated for four months by treating medical staff who develop a particularized treatment plan that is then presented to the court for a hearing on involuntary medication. The State asserts that Wisconsin procedure differs because both competency and involuntary medication are considered at a single hearing, and the evaluation is conducted on a shorter timeline by a contracted psychiatrist who does not treat the defendant.

¶46 This argument does not persuade, first because it ignores the dispositive issue of whether the procedure in this case satisfies ***Sell***, and second because it mischaracterizes Wisconsin statutory procedures.

¶47 As the State concedes, the dispositive issue is "does the Wisconsin case at bar protect the defendant's liberty interest, by ensuring judicial oversight and satisfaction of the four ***Sell*** factors?" Our supreme court has ruled that statutory provisions that do not comply with ***Sell*** are unconstitutional. ***Fitzgerald***, 387 Wis. 2d 384, ¶32. Although the State is correct that no authority suggests that Wisconsin "must jettison all its statutory procedures," Wisconsin procedures must comply with ***Sell*** under the due process clause of the Fifth and Fourteenth amendments. The State does not offer any substantive argument that the two interviews here with a non-treating physician who did not consider the defendant's medical history, comorbidities, or individualized risks are sufficient to allow the circuit court to determine whether a particular medication is in the best interests of this particular defendant. It is not the constitutional standards that must bend to accommodate Wisconsin statutory procedures, as proposed by the State, but the procedures that must bend to comply with constitutional standards. *See* ***Bonnett v. Vallier***, 136 Wis. 193, 116 N.W. 885 (1908) (Courts are "duty bound to test a legislative enactment by all constitutional limitations bearing thereon and condemn it if it be found illegitimate and thus uphold the Constitution as superior to legislative will.").

¶48 However, we do not here conclude that Wisconsin's statutes are constitutionally infirm. Contrary to the State's argument, the Wisconsin statutes governing involuntary medication to render a defendant competent do not require that the circuit courts rely on such insubstantial evaluation. We construe statutes to determine the legislature's intent. ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶38, 271 Wis. 2d 633, 681 N.W.2d 110. We begin with the plain language of the statute. ***Id.***, ¶37. "If the language is plain and unambiguous, our analysis stops there." ***Wisconsin Dep't of Workforce Dev. v. Wisconsin Lab. & Indus. Rev. Comm'n***, 2015 WI App 56, ¶7, 364 Wis. 2d 514, 869 N.W.2d 163 (citing ***Kangas v. Perry***, 2000 WI App 234, ¶8, 239 Wis. 2d 392, 620 N.W.2d 429).

¶49 The State cites WIS. STAT. § 971.14 for the proposition that the Wisconsin evaluator must complete in fifteen or thirty days the work for which the federal examiner has four months. That statute indeed requires that a competency report be issued fifteen days after an order for an inpatient examination, with the option for one additional fifteen-day extension for good cause, or that the report be issued within thirty days after an order for an

outpatient examination. Sec. 971.14(2)(c). The examiner's report must include "the examiner's opinion regarding the defendant's present mental capacity to understand the proceedings and assist in his or her defense" and "the examiner's opinion regarding the likelihood that the defendant, if provided treatment, may be restored to competency within the time period permitted" by statute. Sec. 971.14(3)(c)-(d).

***12** ¶50 However, WIS. STAT. § 971.14 does not require the examiner to make a determination regarding whether the defendant requires medication to be restored to competency. Rather, it provides that "*if sufficient information is available* to the examiner to reach an opinion" on the issue, then the report shall include "the examiner's opinion on whether the defendant needs medication or treatment[.]" Sec. § 971.14 (3)(dm) (emphasis added).[14] The State's argument that "the Wisconsin examiner cannot be expected to acquire the same level of detail or knowledge of the defendant's needs in 15 or 30 days that the federal examiner can in four months" is therefore unavailing, as the statute does not require the Wisconsin examiner to develop a specific treatment plan within that short time frame. As Green correctly notes, "the legislature recognized that there may not be sufficient time for an examiner to reach an informed opinion regarding the involuntary administration of medication and provided that in such circumstances, an opinion on that subject was not necessary." An examiner does not have sufficient information to form an opinion as to medication absent a medically informed record.

¶51 For the foregoing reasons, we conclude that nothing in the statutory provisions on which the State relies conflicts with the circuit court's obligation to consider particularized information about the defendant in determining whether the second and fourth ***Sell*** factors are satisfied.[15]

II. Tolling Order

¶52 Green argues that the circuit court lacked authority to grant the State's motion to toll the statutory period to bring Green to competency. This argument requires that we interpret WIS. STAT. § 971.14(5)(a)1., the commitment provision of Wisconsin's competency statute. Statutory interpretation presents a question of law that we review de novo. ***State v. Stewart***, 2018 WI App 41, ¶18, 383 Wis. 2d 546, 916 N.W.2d 188, *review denied*, 2018 WI 107, ¶18, 384 Wis. 2d 774, 921 N.W.2d 510. As we explain, we conclude that the plain language of the statute does not allow for tolling.

¶53 The following are well-established principles of statutory construction in addition to those set forth in ¶48 above. "Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute." ***Kalal***, 271 Wis. 2d 633, ¶44. Thus, "[s]tatutory interpretation 'begins with the language of the statute.' " ***Id.***, ¶45 (quoted source omitted). "Statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole." ***Kalal***, 271 Wis. 2d 633, ¶46. Wisconsin courts "consult our own prior decisions that examined the same statute as part of our plain meaning analysis." ***Adams v. Northland Equip. Co, Inc.***, 2014 WI 79, ¶30, 356 Wis. 2d 529, 850 N.W.2d 272.

¶54 WISCONSIN STAT. § 971.14(5)(a)1. provides in pertinent part:

> If the court determines that the defendant is not competent but is likely to become competent within the period specified in this paragraph if provided with appropriate treatment, the court shall suspend the proceedings and commit the defendant to the custody of the department for treatment for a period not to exceed 12 months, or the maximum sentence specified for the most serious offense with which the defendant is charged, whichever is less.

The text unambiguously states that commitment to bring a defendant to competency is not to exceed twelve months from the date the defendant is committed to the department, even in cases where the maximum sentence specified for the most serious offense with which the defendant is charged exceeds twelve months. Construing the plain language of the statute to "determine the legislature's intent," ***Kalal***, 271 Wis. 2d 633, ¶38, we conclude that the legislature intended to limit the period for which a defendant can be committed to bring him or her to competency to a maximum of twelve months.

***13** ¶55 Reading WIS. STAT. § 971.14(5)(a) 1 "as part of a whole," *Kalal*, 271 Wis. 2d 633, ¶46, our interpretation is confirmed by the structure of surrounding provisions in WIS. STAT. § 971.14. Section 971.14(5)(b) requires that the defendant be reexamined at three months, six months, nine months, and within 30 days prior to the expiration of commitment and that the examiner issue his or her opinion regarding whether the defendant has become competent or is likely to become competent "within the remaining commitment period." Sec. 971.14(5)(b). Section 971.14(6)(a) requires that, if the circuit court determines that "it is unlikely that the defendant will become competent within the remaining commitment period, it shall discharge the defendant from the commitment and release him or her." These provisions confirm that an incompetent defendant may be committed for no more than twelve months and that he or she must be discharged from commitment after that period.

¶56 Our case law also confirms this reading. Our supreme court explained in *State v. Moore*, 167 Wis. 2d 491, 481 N.W.2d 633 (1992):

> [W]e conclude that the object to be accomplished by sec. 971.14(5)(a), Stats., is to provide treatment to an incompetent person so that he or she may regain competency and face the pending criminal charges. The commitment is in no way punitive, for there has been no determination of guilt.

Moore, 167 Wis. 2d at 498. Consistent with *Moore* and the plain language of the statute, we conclude that the legislature's intent in enacting § 971.14(5)(a)1. was to limit the time of this non-punitive commitment for the purposes of bringing a defendant to competency to no more than twelve months from the date the defendant is committed to the department.

¶57 This choice reflects the legislature's policy position in balancing the State's interest in bringing a defendant to trial with a defendant's liberty interest in his or her own freedom. Subjecting a person to confinement when there has been no determination of guilt implicates profound due process concerns. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) ("[A] person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future."). *Cf. State ex rel. Porter v. Wolke*, 80 Wis. 2d 197, 202-03, n.5, 257 N.W.2d 881 (1977) ("an accused found incompetent to stand trial must be released if it appears that he will not attain or regain competency within a reasonable time") (citing *Jackson*, 406 U.S. at 738). In limiting the period of commitment to bring a defendant to competency to a maximum of twelve months, the legislature has given the State an opportunity to bring defendants to competency while simultaneously ensuring that no defendant determined to be incompetent will be locked up for longer than a year on charges of which he or she has had no opportunity to prove himself or herself innocent.

¶58 "[O]ur role is not to justify the legislative action or to substitute our judgment for that of the legislature. Rather, our role is to examine and interpret the legislative language." *Braverman v. Columbia Hosp., Inc.*, 2001 WI App 106, ¶24, 244 Wis. 2d 98, 629 N.W.2d 66. Because tolling the statutory period for commitment may result in a defendant being held for a period longer than twelve months, such tolling is a violation of the statute's unambiguous command that commitment to bring a defendant to competency be limited to "a period not to exceed 12 months, or the maximum sentence specified for the most serious offense with which the defendant is charged, whichever is less." WIS. STAT. § 971.14(5)(a)1. We therefore show "deference to the policy choices enacted into law by the legislature," *Kalal*, 271 Wis. 2d 633, ¶44, and conclude that a circuit court lacks authority to toll the statutory period set out by § 971.14(5).

***14** ¶59 We now explain why we reject the State's two arguments to the contrary.

¶60 First, the State argues that no statute or case law prohibits a circuit court from tolling a statutory time limit. We reject this argument because the statute here, which grants the circuit courts authority to commit an individual to bring him or her to competency, at the same time conditions that authority on compliance with specific statutory criteria. These criteria include a probable cause determination, WIS. STAT. § 971.14(1r)(c); examination of the defendant, § 971.14(2); a competency hearing, § 971.14(4); and time limits, § 971.14(5). Just as the circuit court would not be free

to ignore the statute's requirement of a probable cause determination, it is not free to ignore the statute's time limit requirements. The circuit court's role is to apply the statute as written. ***State v. Chagnon***, 2015 WI App 66, ¶11, 364 Wis. 2d 719, 870 N.W.2d 27. " 'In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute.' " ***Kalal***, 271 Wis. 2d 633, ¶46 (quoting ***State v. Pratt***, 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967)). The statute does not need to "prohibit" tolling because the statute contains an unambiguous time limit that the circuit court is not free to disregard.

¶61 Second, the State argues that tolling is necessary to achieve the statutory purpose of Wisconsin's competency procedure because, for the period during which an order for treatment is stayed, the defendant does not receive the treatment that is designed to bring him or her to competency. It argues that "[i]f a defendant is in custody but not receiving 'appropriate treatment,' the statutory time limits simply do not come into play under the plain language of the statute." We reject this argument because it mischaracterizes the statute. WISCONSIN STAT. § 971.14 does not provide that the State has twelve months to deliver "appropriate treatment," as the State asserts. Rather, it provides that, if the defendant "is likely to become competent within the period specified in this paragraph if provided with appropriate treatment," he or she may be committed "to the custody of the department" for a period not to exceed twelve months. Sec. 971.14(5)(a)1. The statute does not create an exception allowing the court to commit the defendant to custody for longer than twelve months because, during some portion of that time, the defendant is not receiving "appropriate treatment." Although the custody under § 971.14 must be for purposes of treatment, it is the custody, not the treatment, that may not exceed twelve months.[16] This is further demonstrated in other provisions of the statute that refer to the "commitment period" rather than the "treatment period." Sec. 971.14(6); Secs. 971.14(5)(b)-(d).

***15** ¶62 As explained, the purpose of WIS. STAT. § 971.14 is to give the State the opportunity to bring a defendant to competency while limiting to no more than twelve months the period in which a defendant may be held without any chance to prove his or her innocence as to the crimes charged. Tolling the statutory limits, therefore, is not only unnecessary to achieve the statute's purpose but is counter to the statute's purpose.

¶63 For the foregoing reasons, we conclude that the circuit court lacked authority to toll the statutory period to bring a defendant to competency under WIS. STAT. § 971.14. As noted, the court ordered Green's commitment on February 10, 2020. Because more than twelve months have elapsed since then, we direct the circuit court to discharge Green from that commitment on remand.[17]

III. Motion to Lift Stay in Circuit Court

¶64 Green argues that the circuit court "lacked authority" to hear the State's motion to lift the automatic stay of the involuntary medication order. We construe Green's argument as addressing whether the circuit court had competency to proceed with hearing the motion that the State filed in that court. *See* ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶¶8-10, 273 Wis. 2d 76, 681 N.W.2d 190 (The circuit court's competency refers to its "ability to exercise the subject matter jurisdiction vested in it" by Article VII, Section 8 of the Wisconsin Constitution). Whether a court has competency presents a question of law that we review independently. ***Mikrut***, 273 Wis. 2d 76, ¶7.

¶65 We first summarize pertinent legal principles to provide context for our analysis of Green's argument. Stays of circuit court orders and relief from such stays are generally governed by WIS. STAT. § 808.07 and WIS. STAT. RULE 809.12. Section 808.07 provides that either a circuit court or an appellate court may stay execution or enforcement of a judgment or order. Sec. 808.07(2)(a)1. However, RULE 809.12 directs that a party seeking a stay under § 808.07 "shall file a motion in the [circuit] court unless it is impractical to seek relief in the [circuit] court." RULE 809.12. Then, once the circuit court has decided the motion, "[a] person aggrieved by an order of the [circuit] court granting the relief requested may file a motion for relief from the order with the court [of appeals]." RULE 809.12.

¶66 Generally, the party seeking the stay must: (1) make a strong showing that it is likely to succeed on the merits of the appeal; (2) show that it will suffer irreparable injury if a stay is not granted; (3) show that no substantial harm will come to other interested parties; and (4) show that a stay will do no harm to the public interest. ***State v. Gudenschwager***, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995) (interpreting WIS. STAT. § 809.12). That standard was modified by ***State v. Scott***, 2018 WI 74, ¶46-47, 382 Wis. 2d 476, 914 N.W.2d 141 for motions regarding orders for involuntary medication.

¶67 Under ***Scott***, the party seeking a stay of an involuntary medication order pending appeal is automatically entitled to one, without any burden to prove the ***Gudenschwager*** factors, and the party seeking to *lift* the automatic stay, after it has been entered, must show that a modified version of the ***Gudenschwager*** factors has been met. ***Scott***, 382 Wis. 2d 476, ¶¶42-47. The party seeking to lift the stay under ***Scott*** must show that: (1) it is likely to succeed on the merits on appeal; (2) the defendant will not suffer irreparable harm if the stay is lifted; (3) no substantial harm will come to other interested parties if the stay is lifted; and (4) lifting the stay will do no harm to the public interest. ***Id.***, ¶47. Whether to grant the State's motion to lift the automatic stay is a discretionary decision. ***Id.***, ¶48.

16** ¶68 Green argues that the circuit court lacked competency to hear the State's motion to lift the automatic stay of the court's involuntary medication order for two reasons, one based on language in ***Scott and one based on language in WIS. STAT. RULE 809.12. We now address each argument in turn.

¶69 We turn first to Green's reliance on ***Scott***. In ***Scott***, the defendant appealed a circuit court's involuntary medication order and also filed with the court of appeals an emergency motion to stay the order, which the court of appeals denied without explanation. ***Scott***, 382 Wis. 2d 476, ¶19. There is no indication that the State filed any motions relating to the stay or motion. ***Id.***, ¶¶13-20. The supreme court granted the defendant's petition to bypass and reached four holdings: (1) courts must follow the automatic stay and stay-lifting standard set forth above; (2) an involuntary medication order is a final order for purposes of appeal; (3) the court of appeals erroneously exercised its discretion when it denied without explanation the defendant's motion to stay the involuntary medication order pending appeal; and (4) "[i]nvoluntary medication orders are subject to an automatic stay pending appeal, which can be lifted upon a successful motion by the State." ***Id.***, ¶11.

¶70 As to the last ruling, the court stated, "[W]hether to grant the State's motion is a discretionary decision, and as we explained above, the court of appeals must explain its discretionary decision to grant or deny the State's motion." ***Id.***, ¶48. It is on this language that Green relies to support his argument that "it is the court of appeals, not the circuit court, that decides the state's motion to lift the automatic stay[.]"

¶71 We reject Green's reliance on ***Scott*** for the following reasons. First, ***Scott*** contains no language specifying in which court a motion to lift the automatic stay in an involuntary medication case must be filed. Rather, the ***Scott*** court's directive to the court of appeals followed only from the fact that the defendant filed his motion to stay in the court of appeals, so that in that case any motion by the State to lift the stay would have also been filed in the court of appeals. Accordingly, it was for the court of appeals to explain its discretionary decision of the motion before it.

¶72 Second, because ***Scott*** created the rule that the stay must be entered automatically and that it is the State which bears the burden of satisfying a modified ***Gudenschwager*** test in its motion to lift the stay, no motion to lift such an automatic stay had ever been addressed prior to ***Scott***. Green points to no language in ***Scott*** either barring the State from filing such a motion to lift an automatic stay in the circuit court or barring the circuit court from hearing such a motion. We agree with the State that ***Scott***'s requirement that the court of appeals explain a discretionary decision regarding a motion before it cannot be read to require that the State must only file a motion to lift an automatic stay of an involuntary medication order with the court of appeals.

¶73 We turn next to Green's reliance on WIS. STAT. RULE 809.12. Green points to the statutory language providing that "[a] person aggrieved by an order of the trial court granting the relief requested [under WIS. STAT. § 808.07] may file a motion for relief from the order with the court [of appeals]." RULE 809.12. Green explains that the State is aggrieved by the automatic stay and, therefore, it may file a motion to lift the stay in the court of appeals. However, Green points to no language in the statute or elsewhere directing that a party so aggrieved *must* file a motion to lift a stay in the court of appeals rather than in the circuit court. *See* ***Heritage Farms, Inc. v. Markel Ins. Co.***, 2012 WI 26, ¶32, 339 Wis. 2d 125, 810 N.W.2d 465 ("we generally construe the word 'may' as permissive").

17** ¶74 We reject whatever argument Green means to make based on the above-quoted statutory language as both incomplete and raised for the first time on reply. *See* ***Clean Wis., Inc. v. Public Serv. Comm'n of Wis., 2005 WI 93, ¶180 n.40, 282 Wis. 2d 250, 700 N.W.2d 768 ("We will not address undeveloped arguments."); ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 ("It is a well-established rule that we do not consider arguments raised for the first time in a reply brief.").

¶75 In sum, Green fails to point to any authorities indicating that the circuit court lacked competency to hear

the State's motion to lift the automatic stay of the circuit court's involuntary medication order.

CONCLUSION

¶76 For the reasons stated, we conclude that the circuit court properly heard the State's motion to lift the automatic stay of the involuntary medication order. We also conclude that the State failed to show by clear and convincing evidence that the involuntary medication order was substantially likely to render Green competent to stand trial and unlikely to have side effects that would interfere significantly with Green's ability to assist counsel in conducting a trial defense, as required by the second ***Sell*** factor, or that the order was medically appropriate for Green, as required by the fourth ***Sell*** factor. Finally, we conclude that the circuit court erred in tolling the statutory period to bring Green to competency. Consistent with these conclusions, we vacate this court's previous order lifting the automatic stay in denying Green's motion for relief pending appeal, and we reverse and remand for the circuit court to discharge Green from his commitment to the Department of Health Services.

By the Court.—Orders reversed and cause remanded with directions.

Recommended for publication in the official reports.

All Citations

Slip Copy, 2021 WL 727744

Footnotes

1 All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

2 In ***State v. Fitzgerald***, our supreme court held that "circuit courts may order involuntary medication to restore trial competency under WIS. STAT. § 971.14 only when the order complies with the [four-factor] ***Sell*** standard." ***State v. Fitzgerald***, 2019 WI 69, ¶¶2, 26-29, 387 Wis. 2d 384, 929 N.W.2d 165 (referencing ***Sell v. U.S.***, 539 U.S. 166 (2003)).

3 The circuit court ordered on February 10, 2020, that Green be committed to the Department of Health Services "for an indeterminate term not to exceed 12 months," consistent with WIS. STAT. § 971.14(5) which provides that "[i]f the court determines that the defendant is not competent but is likely to become competent within the period specified in this paragraph if provided with appropriate treatment, the court shall suspend the proceedings and commit the defendant to the custody of the department [of health services] for a period not to exceed 12 months."

4 Green makes a fourth argument, that the circuit court erred in reopening the evidence regarding the involuntary medication order at the hearing on the State's motion to lift the automatic stay of that order. In light of our conclusions as to the three issues stated in the text, we need not and do not address this argument. *See* ***League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker***, 2013 WI App 77, ¶93 n.13, 348 Wis. 2d 714, 834 N.W.2d 393 ("appellate courts need not address non-dispositive issues").

5 In addition, we also vacate this court's previous order lifting the automatic stay in denying Green's motion for relief pending appeal.

6 This same issue is also currently before this court in ***State v. Engen***, No. 2020AP160-CR.

> We will consider a moot point if 'the issue has great public importance, a statute's constitutionality is involved, or a decision is needed to guide the trial courts.' Furthermore, we take up moot questions where the issue is 'likely of repetition and yet evades review' because the situation involved is one that typically is resolved before completion of the appellate process.

State ex rel. Olson v. Litscher, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425 (quoted sources omitted). We take up the moot issue presented by this case because the constitutional rights at stake are of statewide

importance, and the issue is likely to recur in future cases where an order for involuntary medication is entered to bring a defendant to competency and the State moves to lift the automatic stay of that order.

7 In ***State v. Scott***, our supreme court held "that involuntary medication orders are subject to an automatic stay pending appeal." ***State v. Scott***, 2018 WI 74, ¶43, 382 Wis. 2d 476, 914 N.W.2d 141.

8 These are the factors that the State must show on a motion to lift an automatic stay pending appeal of an involuntary medication order. ***Scott***, 382 Wis. 2d 476, ¶47.

9 The only question here is whether Green should be medicated for purposes of bringing him to competency. As noted in ***Fitzgerald***, and quoting ***Sell***, our supreme court recognizes that a different test applies to the question of whether Green may be forced to take medication for a purpose such as his dangerousness under WIS. STAT. § 971.14(2)(f). ***Fitzgerald***, 387 Wis. 2d 384, ¶18 (majority opinion) and ¶42 (Roggensack, C.J., concurring).

10 The "clear and convincing" standard of proof is an "intermediate" standard of proof (between the "beyond a reasonable doubt" of criminal proceedings and the "preponderance of the evidence" of most civil proceedings), applied in this context to "protect particularly important individual interests" where the outcome of the proceeding is "of such weight and gravity" that due process under the Fourteenth Amendment requires the State to meet a "proof more substantial than a mere preponderance of the evidence." ***Addington v. Texas***, 441 U.S. 418, 424, 427 (1979). All ten federal circuit courts that have considered the question agree that the "the government must provide clear and convincing evidence under the four-prong test before an accused may be forcibly medicated." ***United States v. James***, 938 F.3d 719, 723 (5th Cir. 2019) (noting, "Nine of our sister circuits take the same view today," and cataloguing federal cases, ***id.***). *See also* ***Matter of D.K.***, 2020 WI 8, ¶¶28-29, 390 Wis. 2d 50, 937 N.W.2d 901 (due process demands the clear and convincing standard for civil commitment cases).

11 *See also* ***United States v. Mikulich***, 732 F.3d 692, 696 (6th Cir. 2013) (holding that first ***Sell*** factor is reviewed de novo and remaining factors are reviewed under clearly erroneous standard); ***United States v. Grape***, 549 F.3d 591, 598 (3rd Cir. 2008) (same); ***United States v. Palmer***, 507 F.3d 300, 303 (5th Cir. 2007) (same); ***United States v. Evans***, 404 F.3d 227, 236 (4th Cir. 2005) (same); ***United States v. Diaz***, 630 F.3d 1314, 1331 (11th Cir. 2011) (same); ***United States v. Gillenwater***, 749 F.3d 1094, 1101 (9th Cir. 2014) (same); ***United States v. Fazio***, 599 F.3d 835, 839–40 (8th Cir. 2010) (same). *But see* ***United States v. Bradley***, 417 F.3d 1107, 1113–14 (10th Cir. 2005) (holding that ***Sell*** factors one and two are legal questions reviewed de novo, whereas factors three and four are factual findings reviewed under clearly erroneous standard).
The federal clearly erroneous review standard is meaningfully the same as Wisconsin's clearly erroneous review standard. The clearly erroneous standard of review in federal courts comes from Federal Rule of Civil procedure 52(a), which provides: "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed. R. Civ. P. 52. The Wisconsin Rules of Civil Procedure contain an almost identical rule: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." WIS. STAT. § 805.17(2).
"A finding is clearly erroneous if it is against the great weight and clear preponderance of the evidence." ***State v. Arias***, 2008 WI 84, ¶12, 311 Wis. 2d 358, 752 N.W.2d 748 (internal citations and quotation marks omitted).

12 ***Langlade County v. D.J.W.***, 2020 WI 41, ¶2, 391 Wis. 2d 231, 942 N.W.2d 277, is a Chapter 51 civil commitment case. The issue on appeal was whether D.J.W. was "dangerous" under the statute; more specifically, whether D.J.W. was currently dangerous because, if treatment were withdrawn, he would still meet one of the statutory standards of dangerousness. ***Id.***, ¶¶48-50. Our supreme court stated: "At the outset of our examination of this question, we

observe that the court of appeals in this case applied a clearly erroneous standard to a determination of dangerousness.... A determination of dangerousness is not a factual determination, but a legal one based on underlying facts. The Court of Appeals thus erred by applying the standard of review for findings of fact to a legal determination of dangerousness." ***D.J.W.***, 391 Wis. 2d 231, ¶47.

13 Specifically, the State asserts that here, after conducting a three-month update of his evaluation of Green, Schoenecker "had developed an individualized treatment plan." That assertion is not supported by the record. As noted above, the treatment plan is signed by the assistant district attorney. Schoenecker testified that he spoke with Mendota about the treatment plan, but there is no evidence indicating who developed the treatment plan.

14 ***Fitzgerald***, 387 Wis. 2d 384, ¶32, held that certain language in WIS. STAT. § 971.14(3)(dm) is unconstitutional under ***Sell***, but that language is unrelated to the statutory procedure discussed here.

15 With our reversal of the involuntary medication order, the appeal challenging whether the circuit court properly lifted the automatic stay of that order is moot, and we therefore do not address it, except for the issue of whether the circuit court properly heard the motion to lift the stay, which we do address in the last section below.

16 It is not only an automatic stay that may prevent a defendant from receiving treatment during the twelve-month commitment period. As Green correctly notes, he was placed on a lengthy wait list for treatment at Mendota Mental Health; and he would have been unable to receive treatment during the 98 days during which his involuntary medication order was stayed even if there had been no stay. Nothing in the statute indicates that the legislature intended to allow the State to hold defendants in custody for months while they await treatment and then hold them for another twelve months once treatment has begun. Rather, custody itself is limited to twelve months from the date the defendant is committed to the department. WIS. STAT. § 971.14(5)(a)1.

17 As Green notes, the discharge of Green from commitment under WIS. STAT. § 971.14(5)(a) does not preclude the circuit court from ordering, under § 971.14(6)(b), that Green be taken immediately into custody and delivered to a facility for a commitment under Chapter 51 or Chapter 55.

End of Document

STATE OF WISCONSIN CIRCUIT COURT ____ COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. _____

_____,

Defendant.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the defendant in the above-captioned case appeals to the Court of Appeals, District _ from the Order [insert name of order] entered on ___, 2021, in the Circuit Court for _____ County, wherein the Honorable ___, presiding, ordered the involuntary administration of medication for the defendant.

This is not an appeal within Wis. Stat. § 752.31(2).

This is not an appeal to be given preference pursuant to statute.

The transcript of the commitment hearing is being ordered.

Dated this __ day of __, 2021.

Electronically signed by [attorney name]
ATTONREY NAME
ADDRESS

Attorney for Defendant

cc: Sheila T. Reiff
Clerk, Court of Appeals

STATE OF WISCONSIN CIRCUIT COURT _____ COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. _____

_____,

Defendant.

DEFENSE COUNSEL'S MOTION TO COMPEL PRODUCTION OF TREATMENT RECORDS

Pursuant to §51.30(4)(b)11, §51.30(4)(b)4 and 45 C.F.R. §164.512(e)(i), counsel for ___moves for an order compelling the Department of Corrections and the Department of Health Services to provide him/her with copies of: (1) ___'s treatment records for the period of ___ , and (2) any other treatment records that DOC or DHS provides to any examiner appointed to evaluate ___'s competency to proceed and/or need for involuntary medication or treatment. The grounds for this motion are:

1. This court has ordered an examination of ___'s competency to proceed and/or need for medication or treatment, pursuant to §§971.14(1r), (2), and (3). The examiner must file a written report with the circuit court, and the court must conduct a hearing on the matter. Wis. Stat. §§971.14(3) and (4).

2. Counsel cannot assess ___'s competency, determine or challenge the accuracy of the examiner's report, or represent __'s interests in proceedings relating to his competency and/or involuntary medication or treatment unless counsel can review his treatment records, including the treatment records that the examiner reviews to form his or her opinion.

3. ___ will not authorize the release of his treatment records to counsel.

4. Section 51.30(4)(b)11 authorizes the release of a person's treatment records without his informed consent to defense counsel "without modification, at any time in order to prepare for . . . actions relating to the detention, admission, commitment**,** or patient's rights under this chapter or ch. 48, ***971***, 975, or 980." (Emphasis supplied).

5. Furthermore, §51.30(4)(b)4 authorizes the release of a person's treatment records "pursuant to lawful order of a court of record." Similarly, HIPPA, 45 CFR §164.512(e)(1)(i) permits release of protected health information during the course of a judicial proceeding, pursuant to a court order.

For the reasons stated above, the undersigned counsel respectfully requests that the circuit court order DOC and DHS to provide him/her with copies of: (a) ____'s treatment records from ___ to ___, and (b) any additional treatment records that they provide to the examiner appointed to evaluate ___'s competency to proceed and/or need for medication or treatment.

Dated ____, 2021,

Signed:

Electronically signed by [Attorney]
ATTORNEY
ADDRESS
Counsel for _____