STATE OF WISCONSIN
IN SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAYTRELL K. FITZGERALD,

Defendant-Appellant-Petitioner,

APPEAL No. 2018-AP-1296-CR
Milwaukee County Case No. 2016-CF-4475

BRIEF OF *AMICI CURIAE*

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ARGUMENT

I. Forced Antipsychotic Medication Implicates the Defendant's Constitutional Rights.

This case, like *Sell* v. *United States*, 539 U.S. 166 (2003), concerns a person accused of a crime, incompetent to stand trial, and unwilling to take antipsychotic medications the State says might restore competency to proceed. These circumstances implicate at least three significant, constitutionally-protected liberty interests of the defendant.

The defendant has a Fifth and Fourteenth Amendment right to be free from bodily intrusion initiated by the government. *Id.* at 177-178; *Riggins* v. *Nevada*, 504 U.S. 127, 137 (1992) (quoting *Washington* v. *Harper*, 494 U.S. 210, 229 (1990)).

Because antipsychotic drugs affect how a person's brain functions, the government's coercive use of them undermines the defendant's freedom of thought protected by the First and Fourteenth Amendments. *Stanley* v. *Georgia*, 395 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.")

Antipsychotic drugs can also undermine a defendant's Sixth and Fourteenth Amendment fair trial rights by altering demeanor, slowing reactions in the courtroom, and rendering the defendant unable or unwilling to assist counsel. *Riggins* at 142 (Kennedy, J., concurring).

Sell designed a four-part test balancing the government's interest in prosecuting serious crimes with the defendant's rights to be free from government intrusion into his body and to a fair trial. The State may administer antipsychotic medications to restore a defendant's competence for trial in "rare" circumstances. *Sell* at 180.

First, the State must prove "important governmental interests are at stake." This element scrutinizes the seriousness of the alleged crime and the defendant's special circumstances—e.g., whether he has been detained for the length of his likely sentence or is facing a lengthy commitment. *Id.* at 180.

Second, the State must prove antipsychotic medications will "significantly further" the government's interest. This requires proof that administering antipsychotics "is substantially likely to render the defendant competent to stand trial" and "substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair." *Id.* at 181.

This element recognizes that antipsychotic medications do not correct all mental illnesses or even all types of psychoses.[1] Therefore, the government must show a particular antipsychotic drug is substantially likely to address a defendant's particular condition. *Id.* The sedative effects of these medications can dampen a defendant's will to engage with counsel and create a flat affect, making him look bored, cold, unfeeling and unresponsive to the jury. *Riggins* at 143-144.

Third, the State must prove antipsychotic medication is necessary to further the government's interest. *Sell* at 181. This requires proof that all less intrusive means to restore competency have failed, so antipsychotic medication is forcibly administered only as a last resort. Often, rigorous attention to this factor will yield less intrusive outcomes. In this case, for example, it appears Mr. Fitzgerald ultimately became competent to stand trial without medication.

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[1] *See* D. L. Elm and D. Passon, *Forced Medication after United States v. Sell: Fighting a Client's War on Drugs*, 32 THE CHAMPION 26 (2008).

Fourth, the State must prove the administration of antipsychotics "is medically appropriate, *i.e.*, in the patient's best medical interest in light of his medical condition." *Id.* at 181.

A robust review of medical appropriateness will examine specific kinds of drugs, their level of success, and their different side effects. *Id.* There are first generation antipsychotics (Thorazine, Haldol, Mellaril, Serentil, and Prolixin) and second generation antipsychotics (Risperdol, Geodon, Abilify, Olanzapine, Zyprexa and Seroquel). Both types are sedatives.[2] Both can cause neuroleptic malignant brain syndrome (sudden muscular rigidity, cognitive impairment, high fever, coma), tardive (irreversible) psychosis; dystonias (shuffling legs and cogwheeling arms); tardive dyskinesia (permanent involuntary movements like grimacing, tics, random movements of tongue, lips, fingers, toes or eyes; akathisia (inability to sit still); and parkinsonism. First-generation antipsychotics carry greater risk of these side effects, which doctors attempt to minimize with additional medication that produces *more* side effects. Second-generation antipsychotics carry high risk of diabetes and metabolic syndrome.[3]

Per *Sell*, only with all this evidence can the court make the constitutionally-required judgment: "Has the Government, in light of the efficacy, the side effects, the possible alternatives, and the medical appropriateness of a particular source of antipsychotic treatment, shown a need for that treatment sufficiently important to overcome the individual's protected interest in refusing it?" *Sell* at 183.

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[2] *Id.* at 30-31.

[3] *Id. See also State ex rel Jones* v. *Gerhardstein*, 141 Wis. 2d 710, 727 (1987), describing these and other "substantial" side effects.

II. Section 971.14's Involuntary Medication Provisions Are Incompatible with *Sell*.

The State contends § 971.14 is a "procedural statute" to be applied in conjunction with *Sell*: the statute does not prescribe the substantive standard circuit courts must apply before ordering involuntary antipsychotic medication to restore a defendant's competency for trial. (Response Br. at 22-25). A brief review of Wisconsin statutory history and case law shows otherwise: § 971.14 *does* prescribe the substantive test for ordering involuntary medication to restore a defendant's competency for trial. And that test is incompatible with *Sell*.

Before 1987, when a circuit court committed a mentally ill person under Chapter 51, the Department of Health Services (DHS) could administer treatment or medication against his will. This Court explained that status quo as follows:

> Involuntarily committed individuals are denied the right of informed consent regarding the administration of psychotropic drugs, even if they are competent to refuse such drugs, and when they pose no immediate emergency danger to themselves or others in the institutional setting.

Jones, *supra* n.3, at 731; *see also Melanie L.* v. *Outagamie County*, 2013 WI 67, ¶¶ 42-55. An exception existed for persons detained for possible commitment: if deemed competent to refuse psychotropic medication, they could refuse it. Wis. Stat. § 51.61(1)(g) (1985-1986).[4] Otherwise, DHS determined the type and amount of treatment or medication to administer to persons in its custody.

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[4] An individual could also refuse medication for religious reasons. Wis. Stat. § 51.61(1)(4) (1985-1986).

When this Court decided *Jones*, § 971.14 likewise distinguished between defendants detained for examination of their competence to stand trial and defendants committed for competency restoration. A defendant detained for examination could refuse medication. *See* Wis. Stat. § 971.14 (1985-1986). By contrast, if a court declared a person incompetent to proceed in a criminal case, it simply committed him to DHS for competency restoration. Wis. Stat. § 971.14(5) (1985-1986). Such defendants could not refuse treatment or medication, and DHS determined the type and amount of treatment or medication without court oversight.

Then came *Jones*, which recognized a person could be mentally ill and in need of commitment but still competent to refuse medication or treatment. *Jones* held that Wisconsin law violated the Equal Protection Clause because it gave persons detained for a commitment the right to refuse medication but denied that right to persons actually committed. *Jones* at 737, 742-743. *Jones* identified several Wisconsin statutes that drew similar distinctions, including § 971.14(5). *Jones* then prescribed the substantive legal standard for involuntary administration of psychotropic medication in Wisconsin. Either the administration of those drugs must be necessary to prevent serious physical harm to the patient or others, or there must be probable cause to believe that:

> The individual is not competent to refuse medication because of mental illness, developmental disability, alcoholism or drug dependence so that the individual is incapable of expressing an understanding of the advantages, and disadvantages and alternatives to accepting the particular treatment offered, after the advantages, disadvantages and alternatives have been explained to the individual.

Jones at 745 (quoting Wis. Stat. § 51.61(1)(g) (1985-1986)) (internal punctuation omitted).

Responding to *Jones*, the legislature amended Chapter 971, including § 971.14, in three important ways. *See* 89 Wis. Act 31, §§ 2848h, 2848t, and 2850m. (Am-App. 4–5). First, it created § 971.14(3)(dm), which provides that if the examiner evaluating the defendant's trial competence has sufficient information, he must also assess the defendant's competence to refuse medication or treatment.

Second, the legislature added similar language to § 971.14(4)(b), governing the competency hearing conducted on the examiner's report. If the court found the defendant incompetent to proceed, the State could offer evidence that he was incompetent to refuse medication or treatment. If the State succeeded, the court ordered that he was incompetent to refuse medication or treatment and "whoever administers the medication or treatment to the defendant shall observe appropriate medical standards."

Third, the legislature created § 971.14(5) to address the defendant committed for competency restoration, but whose competency to refuse medication or treatment has not yet been determined. The new provision required DHS to file a motion "under the standard specified in sub 3(dm)" and the court to hold a hearing to decide the defendant's competence to refuse medication or treatment. (Am-App. 5).

To summarize, in 1989 the Wisconsin legislature added a substantive involuntary medication standard to § 971.14. Under the revised statute, if the circuit court found a defendant in a criminal case was neither competent to proceed in the case nor competent to refuse treatment or medication, the court entered an involuntary medication order allowing DHS to administer it. This statute remains Wisconsin's standard today.[5]

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[5] The legislature later amended § 971.14 to add an alternative test for determining a defendant's right to refuse medication. *See* 1995 Wis. Act 268, § 6.

Standing alone, § 971.14 authorizes involuntary medication in violation of *Sell* and the Fourteenth Amendment. Even when construing a statute to save it from constitutional attack, courts cannot override the legislature's intent or judicially rewrite the statute. *See Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 941 (1986). When the Wisconsin legislature revised § 971.14 in 1989, its purpose was to allow circuit courts to authorize involuntary medication to restore competency based on the defendant's incompetency to refuse it. The provisions governing examiners' reports, commitment for competency restoration, and motions for involuntary medication do not implement the *Sell* standard announced six years later.

This Court should declare § 971.14's involuntary medication provisions unconstitutional because they do not comply with *Sell*. This will prevent Wisconsin circuit courts from applying the longstanding, plain language of § 971.14 in lieu of *Sell*. It will also underscore the need to bring § 971.14 into compliance with the United States Constitution.

III. This Court Should Instruct Circuit Courts to Conduct Thorough *Sell* Hearings.

Federal courts have substantial experience conducting *Sell* hearings. An example of one that truly satisfies *Sell* may assist this Court in describing the breadth and depth of evidence the parties should present at an involuntary medication hearing.

Federal competency proceedings are governed by 18 U.S.C. § 4241. If there is reasonable cause to believe a defendant is mentally ill and incompetent to proceed in a criminal case, the court orders a psychiatric or psychological examination and holds a hearing. *Id.* § 4241(a)-(c). If the court finds the defendant incompetent to proceed, it commits him to the custody of the Attorney General, who hospitalizes him for up to four months to determine whether it is substantially probable that in the foreseeable future he will attain capacity to proceed in his case. *Id.*

§ 4241(d)(1) and (2). If so, the Attorney General may hold him for an additional reasonable time for that purpose. *Id.* § 4241(d)(2). If not, the court considers discharge. 18 U.S.C. § 4246.

The federal statute contains no provisions—at all—regarding involuntary administration of antipsychotic medications to restore a defendant's competency to stand trial. That process is entirely governed by *Sell* and federal case law.[6] It begins when a doctor at the facility where the defendant is detained informs the prosecution that the defendant could be restored to competency with antipsychotic medications, but has refused them. The prosecutor—bearing the burden of proof—then files a *Sell* motion and requests an evidentiary hearing. *See* Am-App. 8–12; *Forced Medication*, *supra* n.1, at 29-30. Before the hearing, the parties conduct discovery. *Id.* at 30 (noting defense counsel should demand a complete copy of client's medical records from treatment facility; obtain resumes, reports, publications and prior testimony of defendant's treating clinicians; and retain defense experts).

At the hearing, the government must prove it has an "important governmental interest" in prosecuting the defendant. *Sell*, 539 U.S. at 180. The court considers factors including the seriousness of the crime, the maximum or recommended sentence for the crime, and whether the defendant has essentially served his sentence or is facing a long civil commitment.

Notably, many *Sell* motions fail at this first step. *See, e.g.*, *U.S.* v. *Berry*, 911 F.3d 354 (6th Cir. 2018) (government lacked sufficient interest to prosecute defendant for planting fake bomb due to lack of violence and length of time already served); *U.S.* v. *White*, 620 F.3d 401 (4th Cir. 2010) (fraud and theft are serious but not violent crimes, so government lacked important interest in prosecuting them); *U.S.* v. *Dument*, 295 F. Supp. 2d 131 (D. Me.

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[6] The Code of Federal Regulations does not govern involuntary medication to restore a defendant's competency for trial. That must be decided by a court. *See* 28 C.F.R. § 549.46(b)(2).

2004) (mentally ill person's possession of a gun was not sufficiently serious to force medication).

If the government satisfies its burden to prove an important governmental interest, then it must present a treatment plan for restoring the defendant's competency. The plan must specify the defendant's mental illness, the type and dosages of antipsychotic medications it proposes to use, and how they might affect the defendant's health. *Sell* at 166 (specific drugs and side effects matter); *see also U.S.* v. *Rivera-Guerrero*, 426 F.3d 1130, 1139, n.5 (9th Cir. 2005) (government can't just list possible drugs; it must specify course of treatment); *U.S.* v. *Evans*, 404 F.3d 227, 240 (4th Cir. 2005) (same).

Then—and only then—the court takes evidence on the second, third, and fourth *Sell* factors. The attached transcript from the Arizona District Court's *Sell* hearing in *U.S.* v. *Curran*, in which the defendant was charged with taking nine hostages and using a firearm in a violent crime, shows the kind of evidence the parties submit regarding these factors. (Am-App. 13–84).

The government called Curran's treating psychologist and the Chief of Psychiatry at the Federal Medical Center in Springfield, Missouri. They testified that:

- Curran suffered from a psychosis called delusional disorder, which interfered with his ability to assist his lawyer. (Am-App. 17).

- Curran refused medication, so staff tried individual cognitive behavioral therapy and group therapy, but he had not improved. (*Id.* 18–19).

- Staff had tried all non-medication options available at the Center to restore Curran's competency. (*Id.* 20).

- Two studies showed it is standard practice to treat delusional order with a combination of psychotherapy and psychiatric medication. (Am-App. 21, 32).

- Antipsychotics were medically appropriate for Curran. (*Id.* 32).

- The psychiatrist would prescribe Abilify or Geodon and start with a low dose to ensure Curran could tolerate it. (*Id.*)

- Abilify and Geodon can cause dry mouth and eyes, upset stomach, bowel difficulties, and severe headaches. All antipsychotics can cause tardive dyskinesia, but it is less common with these drugs. (*Id.* 33). However, these drugs can cause diabetes. (*Id.* 34).

- The Center monitors patients for side effects 24 hours per day. (*Id.* 34).

Through cross-examination of the government's witnesses and direct examination of its own expert, the defense presented the following evidence:

- Antipsychotics are not appropriate for all forms of psychoses. (Am-App. 47).

- Delusional disorder can resolve on its own without treatment. (*Id.* 27).

- Studies show that 63% of people with delusional disorder can recover without medication. (*Id.* 67, 69).

- Forcing medication upon a delusional person who feels persecuted by the government can make him more resistant to recovery. (*Id.* 27, 69).

- When a person refuses medication, a team of officers wearing bullet-proof vests and helmets administer it forcibly. They may use pepper spray and four-point holds to restrain the person. Then the patient is placed in a locked unit and this process is repeated for several days until either he cooperates or officers determine he can tolerate a long-term injectable drug. (Am-App. 52–53, 69). In that case, officers administer first-generation drugs like Haldol, which carry the risk of serious side effects. (*Id.* 51–52).

- Even with antipsychotic medication, delusions will persist. (*Id.* 28, 48).

- Curran had never received antipsychotics before, so his reaction to them was unknown. (*Id.* 28).

- The Center had little experience restoring the trial competence of someone with delusional disorder. (*Id.* 38).

- Second-generation antipsychotics can cause diabetes. The Center's psychiatrist had not checked Curran's medical history for risk of this disease. (*Id.* 57–58).

- Studies claiming antipsychotics are effective in treating delusional disorder are based on anecdotal reports, which are less reliable than randomized, blind or controlled studies. (*Id.* 38–40, 64–65). The only existing controlled study showed that antipsychotics make no difference in the treatment of delusional disorder. (*Id.* 67).

- The FDA has not approved Abilify or Geodon to treat delusional disorder. (*Id.* 41).

- The most effective way to treat delusional disorder is to give the patient a psychologist with whom he can develop a trusting relationship. The opportunity for such a therapeutic relationship is optimized by bringing in an outside psychologist for private sessions. (*Id.* 70–71).

Having considered the evidence summarized above, the district court denied the government's motion to medicate Curran. It ordered the government to try alternative, less intrusive means first. (Am-App. 85–101).

The *Curran* transcript shows what a thorough *Sell* hearing looks like. It stands in stark contrast to Fitzgerald's involuntary medication proceeding, which the State defends by bending and stretching a report and six pages of testimony aimed at § 971.14 to fit the *Sell* factors. (Response Br. 26-30). This Court should impress upon circuit courts the detailed evidence required to satisfy *Sell* and the robust nature of an involuntary medication hearing.

CONCLUSION

The Wisconsin Supreme Court should declare § 971.14 unconstitutional and vacate the circuit court's order for involuntary medication.

Respectfully submitted this 4th day of March, 2019.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) as to form and length for a brief and appendix produced with a proportional serif font. The length of this brief, including footnotes, is 2,999 words.

Zachary T Eastburn

CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief filed as of this date.

Zachary T Eastburn

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March, 2019, I caused a copy of this brief to be served upon each of the following persons via U.S. Mail, First Class:

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