STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP2017-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDRE L. SCOTT,

Defendant-Appellant.

ON APPEAL FROM ORDER AUTHORIZING INVOLUNTARY MEDICAL TREATMENT, ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE JEFFREY A. KREMERS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. The circuit court ordered that Andre Scott be involuntarily medicated to render him competent to participate in postconviction proceedings. Scott contends that the order violated *State v. Debra A.E.*, 188 Wis. 2d 111, 523 N.W.2d 727 (1994). Did the order violate *Debra A.E.*?

The order did not violate *Debra A.E.* This court should affirm the involuntary medication order.

2. Did the involuntary medication order violate Scott's substantive due process rights?

This argument was not presented to the circuit court. This Court should therefore not reach it because it was forfeited. If the Court decides not to impose the forfeiture rule, it should remand the case to the circuit court to apply the substantive due process analysis.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are unnecessary because the issues presented are fully briefed and may be resolved by applying well-established legal principles to undisputed facts.

INTRODUCTION

There is no controlling law on the standards and procedures applicable to the involuntary medication of an incompetent person to render him competent to participate in postconviction and direct appeal proceedings. However, the circuit court can utilize the involuntary medication procedures set out in Wis. Stat. § 971.14(4)(b). Section 971.14 governs competency determinations in pretrial, trial, and sentencing proceedings, and does not cover postconviction proceedings. Nevertheless, our supreme court concluded in

Debra A.E. that the framework in that statute could be applied to competency determinations at the postconviction stage. Similarly, this Court can apply the statute's framework for ordering involuntary medication to postconviction proceedings. The involuntary medication order in this case comports with sec. 971.14(4)(b) and should therefore be affirmed.

The involuntary administration of psychotropic drugs to render an incarcerated person competent may raise substantive due process concerns. In *Sell v. United States*, 539 U.S. 166 (2003), the Court set out a four-part test for determining whether the involuntary medication of an incompetent defendant comports with substantive due process. On appeal, Scott argues that the *Sell* test controls here, and that the circuit court failed to apply it properly in this case. Scott forfeited the issue by not raising it in the circuit court. This Court should therefore either decline to address the issue or remand the case to the circuit court to determine whether the involuntary medication order met the *Sell* standards.

STATEMENT OF THE CASE

Andre Scott was convicted of battery, disorderly conduct, and kidnapping in 2009. (R. 7.) Because he was abandoned by his postconviction counsel, this Court reinstated his postconviction and direct appeal rights in 2015. (R. 24–25.)

On June 9, 2016, Scott's counsel, Assistant State Public Defender John Breffeilh, filed a Motion for Postconviction Competency Evaluation. Conversations he had with Scott led Breffeilh "to doubt Mr. Scott's ability to assist him in postconviction matters and make postconviction-related [decisions]." (R. 58:1.) At that time, Scott was housed in the Wisconsin Resource Center due to "mental health issues."

(R. 92:3.) The circuit court ordered the competency evaluation on June 21, 2016. (R. 60.)

Robert Rawski, M.D., a Wisconsin Forensic Unit psychiatrist, conducted Scott's competency evaluation. (R. 62.) In a written evaluation he filed with the circuit court on July 22, 2016, Rawski described his interview with Scott on July 18. Although Scott was lucid at certain points, he "became severely disorganized and delusional whenever discussing anything about his incarceration or his legal case." (R. 62:4.) Rawski and Scott discussed the issues Scott wanted to raise on appeal, but Rawski was unable to follow or understand Scott's goals or reasoning. (R. 62:5–7.) He "became extremely rapid, hyperverbal and pressured whenever shifting into a discussion of anything related to his criminal justice history, the original offense or the other areas of law." (R. 62:5.) "He was floridly disorganized . . . when making several attempts to explain to me what he was talking about in terms of his appeals case . . . ." (R. 62:5.) "Insight and judgment regarding his legal case was impaired by untreated mental illness." (R. 62:5.)

Dr. Rawski diagnosed Scott as suffering from Schizoaffective Disorder. (R. 62:5.) He concluded "to a reasonable degree of medical certainty that the defendant, Andre Scott, is currently not competent to participate in appeals proceedings." (R. 62:7.) Furthermore, his "competency to proceed can be restored with institution of appropriate psychotropic treatment. Competency restoration will require the institution of appropriate antipsychotic and mood-stabilizing medications in an effort to improve thought organization and decrease mental speed, so as to allow for a more rational appreciation and capacity for explaining himself." (R. 62:7.) Finally, Rawski concluded that Scott was "currently substantially incapable of understanding and applying the advantages, disadvantages and alternatives to psychotropic treatment to his particular condition so as to

make an informed choice as to whether to accept or refuse such medications for the purposes of competency restoration." (R. 62:7–8.)

ASPD Breffeilh filed a letter response on Scott's behalf. He advised the court that Scott wished to challenge Dr. Rawski's conclusions. (R. 64:1.) He further advised that, "if Mr. Scott is found incompetent, I will not seek the appointment of a guardian ad litem." (R. 64:2.)

The court held a competency hearing on August 17, 2016. At the opening of the hearing, Scott told the court that he considered himself to competent to proceed with the postconviction proceedings. (R. 93:4–5.) ASPD Breffeilh declined to take a position on Scott's competence. (R. 93:5.) The State agreed with Rawski's report. (R. 93:5.)

Dr. Rawski testified. He concluded that Scott was not competent to refuse medication based on "Scott's reports that he does not suffer from any symptoms of illness at a current time warranting any psychotropic treatment" despite persistently "exhibit[ing] symptoms of schizophrenia and/or schizoaffective disorder." (R. 93:10.) "[T]he symptoms he has demonstrated are reflective of a treatable condition." (R. 93:10.) He has declined such treatment "due to a lack of insight into his illness and need for treatment." (R. 93:12.) Because he would not accept such treatment voluntarily, "he's not receiving medications to help with the chemical imbalance that is . . . at the heart of the schizoaffective disorder." (R. 93:12.)

Through ASPD Breffeilh, Scott informed the court that he did "not disagree with anything that Mr. Rawski has said." (R. 93:15.) Breffeilh chose not to make any argument that Scott was in fact competent. (R. 93:15.)

Based on Rawski's report and testimony, the court found that Scott "is not presently competent to proceed in this

matter but he is likely to become competent if provided with treatment." (R. 93:15–16.)

On Scott's behalf, ASPD Breffeilh informed the court that Scott did not want to be medicated. (R. 93:20.) He argued that the court did not have the authority to enter "a forced medication order." (R. 93:16.) He noted that "[t]his is an entirely a voluntary decision by Mr. Scott to pursue an appeal. And should he make that decision, I don't think that necessarily means that he becomes subject to a forced medication order if he's not competent to follow through with that." (R. 93:16.) Breffeilh declined to reveal what issues Scott might raise on appeal other than to say he "wants a lesser conviction." (R. 93:19.) Breffeilh specifically argued that an involuntary medication order would be inconsistent with the supreme court's decision in *State v. Debra A.E.*, 188 Wis. 2d 111, 523 N.W.2d 727 (1994). (R. 93:16–17, 19–20.) He did not object on substantive due process grounds.

The State agreed that this was "uncharted territory. But I believe it's appropriate at this point, given that the Court has made a finding regarding his competency, given that there is a legal proceeding that does need to have some finality for the Court to enter the medication order." (R. 93:22.) "I don't think an acceptable alternative of leaving the appeal in limbo potentially for the remainder of his sentence is a good alternative." (R. 93:21.)

The court expressed concern about "keep[ing] somebody locked up in a confined setting who we know is not competent," concluding that such an approach is "kind of cruel." (R. 93:17.) The court stressed "the humanity of saying we shouldn't be locking people up who are not competent to understand what's going on." (R. 93:18.)

The court ordered that Scott be medicated to render him competent to participate in his appeal.

> I am just not willing to sanction a process that says we keep somebody confined who's not competent to proceed, who is not competent to understand what's going on, but could be restored to competency with appropriate medical intervention . . . . I'm just not willing to sanction, from the Court's perspective, a process that says we leave Mr. Scott in this state of not being competent to understand what's going on, not being competent and able, therefore, to really participate in and assist in his postconviction proceedings, appellate proceedings. I'm just not willing to sanction that. . . .
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> So I am going to make the finding that Mr. Scott is not only not competent at the present time but also that he is not competent to refuse medication and treatment. And I'm going to order that that be part of the order that he take part in and . . . be medicated and treated for his current status.

(R. 93:23–24.)

The court entered a written order on September 1, 2016. (R. 69.) The order authorized the Department of Health Services "to administer medication or treatment to the defendant for an indeterminate period not to exceed 12 months." (R. 69:1.)

This appeal follows.

STANDARD OF REVIEW

The trial court's determination of a defendant's competency to participate in postconviction proceedings should be reviewed under the clearly erroneous standard. *See State v. Garfoot*, 207 Wis. 2d 214, 225, 558 N.W.2d 626 (1997). The identification and construction of the applicable legal standard is reviewed de novo. *See Matter of Mental Commitment of Helen E.F.*, 2012 WI 50, ¶ 10, 340 Wis. 2d 500, 814 N.W.2d 179.

Whether an involuntary medication order violates a person's substantive due process rights is reviewed de novo. *See State v. Wood*, 2010 WI 17, ¶ 15, 323 Wis. 2d 321, 780 N.W.2d 63.

ARGUMENT

I. The involuntary medication order did not violate *State v. Debra A.E.*

A. Although there is no statutory provision that governs involuntary medication of an incompetent person to render him competent to participate in postconviction proceedings, Wis. Stat. § 971.14(4)(b) provides a suitable framework that can be used at the postconviction stage.

The right to a competency determination extends to postconviction proceedings. *State v. Daniel*, 2015 WI 44, ¶ 29, 362 Wis. 2d 74, 862 N.W.2d 867. A defendant is incompetent to pursue postconviction relief if "he or she is unable to assist counsel or to make decisions committed by law to the defendant with a reasonable degree of rational understanding." *Debra A.E.*, 188 Wis. 2d at 126.

The decisions the defendant must make in the postconviction setting include, first and foremost, whether to pursue postconviction relief at all. "The client must decide whether to file an appeal and what objectives to pursue, although counsel may decide what issues to raise once an appeal is filed." *Id.* at 125–26. Although counsel may be able to frame and develop purely legal issues for appellate review, "the defendant may be required to assist counsel in raising new issues and developing a factual foundation for appellate review." *Id.* at 126.

In Wisconsin, "there is currently no statute directly governing postconviction competency proceedings." *Daniel*, 362 Wis. 2d 74, ¶ 33. In the absence of specific statutory direction, our supreme court has derived guidance from Wis. Stat. § 971.14, which governs competency proceedings in criminal cases from the pretrial period through sentencing. *Daniel*, 362 Wis. 2d 74, ¶ 33 n.9. The supreme court's goal was "to fashion a process through which circuit courts and counsel can manage the postconviction relief of alleged incompetent defendants while protecting defendants' fair opportunity for postconviction relief and promoting the effective administration of the judicial system." *Debra A.E.*, 188 Wis. 2d at 129–30. The *Debra A.E.* court "prescribe[d]" a five-step process to achieve these goals. 188 Wis. 2d at 131.

First, defense counsel or counsel for the State may move for a competency ruling based on a good faith doubt about the defendant's competency to seek postconviction ruling. *Id.* If the court finds a reason to doubt the defendant's competency, it shall determine the method for evaluating it, e.g., by "order[ing] an examination of the defendant by a person with specialized knowledge." *Id.* at 132. The court noted that a postconviction competency ruling served several important purposes. One such purpose was to "set[] the stage for defense counsel to seek appointment of a temporary guardian to make decisions that are committed by law to the defendant personally, not to counsel." *Id.*

Second, after a determination of incompetency, "defense counsel should initiate or continue postconviction relief on a defendant's behalf when any issues rest on the circuit court record, do not necessitate the defendant's assistance or decisionmaking, and involve no risk to the defendant." *Id.* at 133. Requiring defense counsel to go forward with such issues ensures that the alleged incompetent "will not suffer from the delay of meritorious claims." *Id.* at 134.

Third, where defense counsel "cannot initiate or continue postconviction relief on the defendant's behalf because issues necessitate defendant's assistance or decisionmaking, defense counsel may request a continuance or enlargement of time for filing notices or motions for postconviction relief." *Debra A.E.*, 188 Wis. 2d at 134.

Fourth, if a defendant is ruled incompetent, defense counsel may request the appointment of temporary "guardian to make decisions that the law requires the defendant to make." *Id.* at 135.

Fifth, the court held that defendants "incompetent at the time they seek postconviction relief should, after regaining competency, be allowed to raise issues at a later proceeding that could not have been raised earlier because of incompetency." *Id.* at 135.

Debra A.E. did not address the issue of whether a circuit court may order that an incompetent defendant be involuntarily medicated at the postconviction stage except to say that "ordinarily this process need not include a court order for treatment to restore competency." *Id.* at 130. Section 971.14, which governs the pretrial through sentencing phases, does address this issue and can provide guidance here. *Cf. Daniel*, 362 Wis. 2d 74, ¶ 33.

An examiner appointed to assess a criminal defendant's competency for trial shall include in his report an "opinion on whether the defendant needs medication or treatment and whether the defendant is not competent to refuse medication or treatment." Wis. Stat. § 971.14(3)(dm). The defendant is not competent to refuse if, because of mental illness (or other enumerated condition) and after "the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained," the defendant either cannot "express an understanding" of what has been

explained to him, or cannot "make an informed choice as to whether to accept or refuse medication or treatment." *Id.*

At an evidentiary hearing on the competency issue, the court shall determine the defendant's competence as follows:

> 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 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) [quoted above], the court shall make a determination without a jury and issue an order that the defendant is not competent to refuse medication or treatment of the defendant's mental condition and that whoever administers the medication or treatment to the defendant shall observe appropriate medical standards.

Wis. Stat. § 971.14(4)(b).

In the absence of any controlling statutory authority, this Court should analyze involuntary medication orders issued during postconviction proceedings within the framework provided by sec. 971.14(4)(b).

B. The involuntary medication order in this case did not violate *Debra A.E.* and was consistent with Wis. Stat. § 971.14(4)(b).

The involuntary medication order did not violate *Debra A.E.*, but was consistent with that decision and Wis. Stat. § 971.14(4)(b).

The first step of *Debra A.E.*'s five-step process was satisfied here. *See Debra A.E.*, 188 Wis. 2d at 131–32. Defense counsel raised a concern about Scott's postconviction competency and the court ordered an expert evaluation of

Scott's competency. (R. 58:1–2; 60.) Dr. Rawski conducted the evaluation and concluded that Scott was not competent to participate in his postconviction proceedings. (R. 62:7.) Scott challenges that conclusion now. (Scott's Br. 9.) But, at the hearing, Scott agreed with Rawski's conclusions. (R. 93:15.)[1] Twice, ASPD Breffeilh explicitly forfeited his opportunity to be heard on the basic competency issue on Scott's behalf. (R. 93:5, 15.) Therefore, this Court should not consider this issue further. *See State v. Caban,* 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997).

If the Court forgives Scott's forfeiture of this issue, it should nevertheless reject his contention that Dr. Rawski (and thus the circuit court) applied the wrong standard. Rawski informed Scott at the beginning of their interview that its purpose was to determine his competency to participate in the appeals process. (R. 62:1.)

Rawski specifically observed that Scott

> became extremely rapid, hyperverbal and pressured whenever shifting into a discussion of anything related to his criminal justice history, the original offense or the other areas of law. . . . He was floridly disorganized, however, when making several attempts to explain to me what he was talking about in terms of his appeals case . . . . Insight and judgment regarding his legal case was impaired by untreated mental illness.
>
> . . . [He has] delusional beliefs about his criminal case . . . .
>
> . . . He stated his current appeals attorney wants him to take his case to trial. He then launched into a disorganized rapid listing of details he felt made the case for overturning his conviction. . . . It appears that he wanted his kidnapping conviction to be vacated,

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[1] That was after Rawski testified. At the beginning of the hearing, Scott informed the court that he considered himself competent to proceed. (R. 93:4–5.)

> and instead to be convicted of domestic disorderly conduct or domestic battery. When asked why his attorney wanted a new trial, Mr. Scott simply repeated that he did not want a trial. When asked if he understood the risk of a new trial, he stated it was possible he would come back to prison with a larger sentence. When asked if his attorney explained that to him, he stated his attorney disagrees with him and "just wants to argue" . . . .
>
> . . . I asked Mr. Scott if he was interested in re-arguing the evidence resulting in his original conviction. He stated he was. I explained that revisiting the evidence was not done at the Appellate court level, but rather that the Appellate court would decide whether or not the case should be returned to the trial court level with an order to vacate the conviction and conduct a new trial. . . .

(R. 62:5–6.) Scott also spoke incoherently about "material witnesses." (R. 62:6.) Rawski concluded that Scott did not understand what the implications of seeking postconviction relief were and did not appear to agree with what he believed defense counsel's strategy was. "He appears to be convinced that his attorney wants him to take his case to a new trial against his wishes, thereby exposing him to a greater potential sentence, even thought that may be the only plausible way to seek a different outcome in conviction and sentence." (R. 62:7.)

Scott's confusion about the appellate process satisfied the *Debra A.E.* standard for postconviction incompetency. *See Debra A.E.*, 188 Wis. 2d at 125–26. Although he wanted to seek postconviction relief, he did not understand what it would entail or what the possible consequences would be. He seemed to distrust defense counsel's goals or strategy, and did not agree with defense counsel on the objectives to pursue on appeal. His random reference to "material witnesses" (R. 62:6) raises the question of whether there were factual foundations for appeal that he would be unable to communicate to defense counsel.

With respect to the second and third *Debra A.E.* steps, the record is silent. The record does not disclose whether defense counsel initiated or continued postconviction proceedings on Scott's behalf to the extent he could without Scott's competent participation, as recommended by the second *Debra A.E.* step. *See Debra A.E.*, 188 Wis. 2d at 134. Nor does it reveal whether he sought a continuance or extension of time to file postconviction pleadings with respect to issues that "necessitate defendant's assistance or decisionmaking," in accord with the third *Debra A.E.* step. *Id.*

Defense counsel specifically informed the court that he had no intention of following the fourth *Debra A.E.* step, which permitted him to request the appointment of a temporary "guardian to make decisions that the law requires the defendant to make." *Debra A.E.*, 188 Wis. 2d at 135. (R. 64:2.) Here, Dr. Rawski concluded that Scott was not competent to make the medication decision or to refuse medication. (R. 93:11.) Whether a mentally incompetent person should be medicated to restore his competency is among the decisions that a guardian is authorized to make. *See* Wis. Stat. § 54.25(2)((d)2.ab. That a guardianship order was not considered in this case is the responsibility of Scott's counsel.

The final *Debra A.E.* step allows an incompetent person who ultimately regains competency to "raise issues at a later proceeding that could not have been raised earlier [during the statutory period for filing postconviction motions and direct appeals] because of incompetency." *Debra A.E.*, 188 Wis. 2d at 135. In Scott's case, any consideration of whether he will be permitted to raise issues at a later time beyond the statutory deadlines for postconviction motions and direct appeals is obviously premature.

The involuntary medication order did not contravene any of the *Debra A.E.* prescriptions. *Debra A.E.* was completely silent on the question of involuntary medication.

However, just as *Debra A.E.* looked to Wis. Stat. § 971.14 (governing pretrial, trial, and sentencing proceedings) for guidance on how to structure competency proceedings at the postconviction stage, this Court can look to that same statute for guidance on whether and when to order that a person be involuntarily medicated at the postconviction stage. Here, consistent with sec. 971.1.4(4)(b), Dr. Rawski explained that Scott is "not competent to refuse medication or treatment" in accordance with the statutory standard. (R. 62:7–8; 93:10–12.)

This Court should affirm the involuntary medication order because it did not violate *Debra A.E.* and was consistent with Wis. Stat. § 971.15(4)(b).

II. The involuntary medication order did not violate Scott's substantive due process rights.

A. An incarcerated person's liberty interest in being free from involuntary medication may be outweighed by an important governmental interest under some circumstances.

An incarcerated person "possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." *Washington v. Harper*, 494 U.S. 210, 221–23 (1990). However, there are exceptions, including where the state relies on prison safety and security to justify the forced imposition of medication on a prison inmate, which requires the state to prove that the prisoner is dangerous to himself or others. *Id.* at 223, 226–27.

An incompetent defendant may be involuntarily medicated to render him competent for trial. *Riggins v. Nevada*, 504 U.S. 127, 137–38 (1992). In these circumstances, the State need not prove dangerousness, but must show an "essential state policy" or an "overriding justification and a

determination of medical appropriateness." *Id.* at 135, 138. For example, a state might be "able to justify medically appropriate, involuntary [drug] treatment . . . by establishing that it could not obtain an adjudication of [a defendant's] guilt or innocence by using less intrusive means." *Id.* at 135.

Involuntary medication of a defendant to secure trial competence is permissible if four criteria are met. *Sell v. U.S.*, 539 U.S. 166, 180 (2003).[2] First, the court must find that an important governmental interest is at stake. *Id.* "Second, the court must conclude that involuntary medication will *significantly further* those concomitant state interests." *Id.* at 181. The court must find that the medication is both substantially likely to render the defendant competent for trial, and substantially unlikely to have side effects that will interfere with the defendant's ability to participate in his own defense. *Id.* Third, the court must find that the medication is necessary to further those interests, and that any alternative less intrusive methods are unlikely to achieve the same results. *Id.* Fourth, the court must find that the drugs to be administered are "*medically appropriate, i.e.*, in the patient's best medical interest in light of his medical condition." *Id.* In short, the court must determine whether "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, [has] shown a need for that treatment sufficiently important to overcome the individual's protected interest in refusing it." *Id.* at 183.

The Wisconsin Supreme Court summarized the holdings in *Harper*, *Riggins*, and *Sell* as follows: a person has

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[2] The *Sell* court, instead of determining whether an involuntary medication order should be analyzed under one of the familiar brands of constitutional scrutiny (strict, intermediate, or rational basis), set forth this test to use in involuntary medication cases. *See United States v. Loughner*, 672 F.3d 731, 747 (9th Cir. 2012).

a significant liberty interest in avoiding forced psychotropic medication (*Harper*); the State must demonstrate an overriding justification for administering the drugs and a determination of medical appropriateness (*Riggins*); if the State's justification is to render a non-violent defendant competent to stand trial, "a finding that the administration of drugs will affect the defendant's rights to a fair trial is sufficient" (*Sell*). *Wood*, 323 Wis. 2d 321 at ¶ 25.

B. This Court should not reach the constitutional issue because Scott did not preserve the issue in the court below; alternatively, the Court should remand the case to allow the circuit court to determine whether the involuntary medication order comports with *Sell*.

There is no basis for concluding that the involuntary medication order here violated Scott's substantive due process rights. Scott argues the circuit court failed to conduct a *Sell* analysis, and therefore did not make a record of the constitutionality of the involuntary medication order.

As a threshold matter, the Court should not address the issue because Scott failed to present it in the court below. "It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal. The party who raises an issue on appeal bears the burden of showing that the issue was raised before the circuit court." *State v. Huebner,* 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727 (plurality opinion; citations omitted). Because the circuit court did not have an opportunity to address the issue, this Court should not address it either.

This case illustrates the importance of enforcing the forfeiture rule. Any failure of the circuit court's involuntary medication order to meet all four *Sell* criteria could have easily

been prevented had Scott made his due process objection during the involuntary medication proceedings. If this Court concludes that a finding of forfeiture is not appropriate in this case, it should not reverse the circuit court's order, but remand the case to give the State the opportunity to provide the necessary proof and argument on the *Sell* criteria and allow the circuit court to make all four *Sell* findings.

Despite Scott's failure to bring the *Sell* criteria to the court's attention, the court did address the first issue, that an important governmental interest was at stake. *See Sell*, 539 U.S. at 180. Addressing the fact that Scott would remain incompetent if left unmedicated, the court expressed its unwillingness to "keep somebody confined who's not competent to proceed," when, with appropriate medical intervention, he might be restored to competency. (R. 93:23.) As the State had argued, the alternative was to "leav[e] the appeal in limbo potentially for the remainder of his sentence." (R. 93:21.) The court agreed that such an approach would be "cruel" and inhumane. (R. 93:17–18.)

In the competency report prepared for the court, Dr. Rawski explained that "[c]ompetency restoration will require the institution of appropriate antipsychotic and mood-stabilizing medications in an effort to improve thought organization and decrease mental speed, so as to allow for a more rational appreciation and capacity for explaining himself." (R. 62:7.) Had Scott brought the *Sell* test to the court's attention, the parties and the court could have asked Rawski to explain whether his findings satisfied the second, third, and fourth *Sell* factors, i.e., whether the medication he had in mind would significantly further the State's interests, whether the medication was necessary to further those interests or whether alternatives were available, and whether the drugs to be administered were medically appropriate. *Sell*, 539 U.S. at 181.

Scott complains that neither Dr. Rawski, the State, nor the court identified the specific psychotropic drugs that would

be administered to him. (Scott's Br. 14.) Had the parties examined Rawski on this issue, and the circuit court ruled on it, this Court would be in a position to determine whether the recommended drugs were identified with enough specificity. *See Sell*, 539 U.S. at 181.

In sum, this Court should not consider the constitutional issue because Scott failed to preserve it in the court below. In the alternative, the Court should remand the case to give the circuit court the opportunity to apply the *Sell* factors.

CONCLUSION

For the reasons stated, the State of Wisconsin respectfully requests that this Court affirm the judgment and order from which this appeal is taken.

Dated this the 17th day of May, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5044 words.

Dated this 17th day of May, 2017.

MAURA FJ WHELAN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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