STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP2017-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDRE L. SCOTT,

Defendant-Appellant-Petitioner.

On Appeal from an Order Authorizing Involuntary Medication or Treatment, Entered by the Milwaukee County Circuit Court, the Honorable Jeffrey A. Kremers Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

COLLEEN D. BALL
Assistant State Public Defender
State Bar No. 1000729

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-3110
ballc@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

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1. Whether the circuit court violated ***State v. Debra A.E.***, 188 Wis. 2d 111, 523 N.W.2d 727 (1994) and Scott's right to substantive due process by ordering him to be involuntarily medicated to competency pursuant to §971.14(4)(b) and in violation of ***Sell v. U.S.***, 539 U.S. 166 (2003)?[1]

2. Whether an order requiring an inmate to be involuntarily treated to competency is a final order that is appealable as a matter of right via Wis. Stat. §808.03(1)?

3. Whether the court of appeals exercised its discretion erroneously when it denied Scott's motion to stay the circuit court's involuntary treatment order; if so, what avenues for relief does a movant have in this situation?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This appeal presents issues of first impression for Wisconsin. As suggested by this Court's decision to grant bypass, it is worthy of oral argument and a published decision.

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[1] The order is for involuntary treatment or medication. (App.101). This brief uses the term "involuntary medication" when the context or law so requires.

STATEMENT OF CASE AND FACTS

In 2009, a jury found Andre L. Scott guilty of battery, disorderly conduct, and kidnapping. (R.7). The circuit court sentenced him to 13 years and 3 months of initial confinement and 10 years of extended supervision. (R.18). Scott filed a timely notice of intent to pursue postconviction relief, but his attorney abandoned him. In 2015, the court of appeals re-instated Scott's postconviction/appellate deadlines, and the State Public Defender appointed a new attorney, John Breffeilh, to represent him. (R.24-25).

Attorney Breffeilh had concerns about Scott's ability to assist with postconviction proceedings and to make the decisions that are within his sphere of control. Attorney Breffeilh thus requested a competency evaluation. (R.58). The circuit court held a hearing and ordered the Wisconsin Forensic Unit to conduct the evaluation. (R.92).

On July 18, 2016, Dr. Robert Rawski evaluated Scott and noted that he has a history of depression and schizophrenia. (App.139). Dr. Rawski's report indicates that Scott was incarcerated at Stanley Correctional Institution in 2009 and then transferred to the Wisconsin Resource Center in January 2012. In November 2012, he was sent to Oshkosh Correctional Institution. Three years later he was returned to the Wisconsin Resource Center where he remains today. (App.141). The doctors and staff who evaluated Scott at Stanley Correctional, Wisconsin Resource Center, and Oshkosh Correctional did not find him to be dangerous and thus did not medicate him against his will. (App.141-142).

Dr. Rawski diagnosed Scott with schizoaffective disorder. He notes that Scott has been untreated since about 2007. "Attempts at providing involuntary treatment in prison have failed largely because of his lack of acute

dangerousness." (App.143). According to Dr. Rawski, Scott "appears to have no insight into his acute psychotic symptoms or need for treatment." (App.143).

Dr. Rawski quizzed Scott about his case and his litigation goals and recorded Scott's answers. Dr. Rawski's report describes Scott's thoughts as "floridly disorganized" but notes that he accurately reported how he pled, how his case proceeded, the jury verdict, and his sentence. (App.143). Scott indicated dissatisfaction with the outcome of his trial, a desire to appeal, and the hope for a conviction of a less serious crime that would have a maximum sentence of 18 months. (App.143-145). He correctly reported that a new trial carried the risk of a longer sentence and seemed to not want that result. According to Dr. Rawski, Scott expressed these thoughts during 45 minutes of rapid, disorganized remarks that were hard to follow. (App.143-145).

Dr. Rawski concluded in part that:

> Mr. Scott demonstrated a lack of substantial capacity to coherently explain his understanding of the legal proceedings, and was substantially incapable of assisting in his defense. (App.145).
>
> He is routinely described by DOC staff to be chronically psychotic but insufficiently dangerous to medicate involuntarily. From a competency standpoint, he demonstrated gross thought disorganization with some delusional remarks regarding the legal proceedings that never allowed me to clearly understand what he was trying to request or what he expected to receive through the appeals process. (App.145).
>
> Even though he has not been treated for the last nine years, it is more likely than not that Mr. Scott's 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. (App.145).
>
> I believe that Scott is currently substantially incapable of understanding and applying the advantages, disadvantages and alternatives to psychotropic treatment[2] to his particular condition so as to make an informed choice as to whether to accept or refuse such medication for the purposes of competency restoration. (App.145-146).

On August 17, 2016, the circuit court held a hearing where Scott said that he considered himself "competent to proceed." (App. 106). Dr. Rawski testified and confirmed that Scott has schizophrenia or schizoaffective disorder, his symptoms are treatable, but he has declined medication because he lacks insight into his illness and the need for treatment. (App.112-114). The Department of Corrections had tried to obtain an involuntary medication order but failed because Scott is not dangerous. (App.113). Dr. Rawski testified that he met with Scott for about 70 minutes. Half the time he could not understand what Scott was talking about. However, he did not regard Scott as dangerous or threatening. (App.114-115).

The circuit court held that Scott was not competent to proceed and not competent to refuse medication and treatment. (App.125-126). Postconviction counsel asked the court to follow ***Debra A.E.***, which authorizes an appeal to

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[2] Dr. Rawski's report does ***not*** indicate that he ever discussed psychotropic medications or the advantages, disadvantages and alternatives to them with Scott. (App.139).

proceed in this situation. The court declined and said that doing so would be "cruel" and "inhumane":

> . . . What if the situation is he—sort of hypothetical. You can't regain competency without treatment.[3] And he won't accept voluntary treatment. Are we going to keep someone locked up in a confined setting who we know is not competent? Doesn't that seem kind of cruel? (App.119).

Defense counsel explained that Scott did not want an involuntary medication order and likely would not have pursued an appeal if one were required. (App.119). The court replied:

> But now he's started an appeal . . . And once he's started the clock on the appellate process, doesn't the Court have a right to say, "Wait a minute, we need to protect the integrity of the process," as well as what—what I thought my question was going to—the humanity of saying we shouldn't be locking people up who are not competent to understand what's going on. That's the whole point of the competency statutes in the first place. (App.119-120).

When postconviction counsel noted that Scott had never been found to be dangerous to himself or anyone else, the court replied:

> I understand that. I guess I have a larger concern, and it—this is gonna have to be decided by a higher court. I am just not willing to sanction a process that says we keep somebody confined who is not competent to proceed, who is not competent to understand what is

[3] Dr. Rawski opined that, more likely than not, Scott can be restored to competency with appropriate psychotropic medications. He did not indicate which non-medication alternatives, if any, might be used to restore competency. (App.145).

> going on, but could be restored to competency with appropriate medical intervention; which, though I know from my own judicial experience of hearing testimony, there are people who don't like the side effects of psychotropic medications for legitimate reasons and actual reasons. But 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. If an appellate court wants to tell me or tell us that nope, sorry you can't do that, then they can do that. But I'm not willing to do that. (App.125).

Following the hearing, the circuit court ordered that:

> [T]he Department of Health Services is authorized to administer medication or treatment to the defendant for an indeterminate period not to exceed 12 months at an institution of its choice. The institution 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 expiration of this order. (App.101).

The circuit court stayed its order for 30 days so that Scott could seek appellate relief. (App.102). Scott filed a petition for leave to appeal, and the court of appeals extended the stay of the medication order until October 14, 2016. But on October 7, 2016, the court of appeals denied leave to appeal without explanation and lifted the stay. (App.152).

On October 11, 2016, Scott appealed the involuntary medication order as a matter of right and filed an emergency motion to stay the medication order pending appeal. (App.147). Three days later, on October 14, 2016, the court of

appeals denied the stay of medication without explanation but extended the deadline for filing a postconviction motion or notice of appeal of the criminal judgment of conviction until 30 days after this appeal is decided. (App.153-154). As a result, the Department of Health Services began medicating Scott, and Dr. Rawski began filing periodic competency reports.

Several months later, the undersigned attorney became successor counsel for Scott. On May 8, 2017, the circuit court found Scott competent to participate in postconviction proceedings and reinstated his appeal. The circuit court informed Scott that if he refused medication and became incompetent again, it could enter another order for involuntary treatment to competency. Furthermore, once he became competent, it could require him to stay on medication in order to maintain his competency. (App.132-133).

ARGUMENT

I. The Circuit Court Violated ***Debra A.E.*** and Scott's Right to Substantive Due Process When It Ordered Him to Be Involuntarily Medicated to Competency Pursuant to §971.14(4)(b) and in violation of ***Sell***.

A. The standard of review is *de novo.*

The first issue requires the Court to apply ***Debra A.E.*** to undisputed facts. This is a question of law that the Court reviews *de novo*. ***State v. Daniel***, 2015 WI 44, ¶20, 362 Wis. 2d 74, 862 N.W.2d 867. The first issue further requires the Court to determine whether Scott's right to substantive due process was violated and whether §971.14(4)(b) is unconstitutional on its face. These are also questions of law that the Court reviews *de novo*. ***State v. Wood***, 2010 WI 17,

¶15, 323 Wis. 2d 321, 780 N.W.2d 63 (constitutionality of statute); ***State v. Harenda Enterprises, Inc***., 2008 WI 16, ¶28, 307 Wis. 2d 604, 746 N.W.2d 25 (substantive due process violation).

B. The circuit court violated ***Debra A.E.***

Debra A.E. acknowledged that Wisconsin has no statute governing competency at the postconviction stage. It thus designed a framework for protecting an incompetent defendant's due process right to appeal his conviction. According to ***Debra A.E.***, a defendant is incompetent to pursue postconviction/appellate relief "when he or she is unable to assist counsel or to make decisions committed by law to the person with a reasonable degree of rational understanding." ***Debra A.E.***, 188 Wis. 2d at 127. Those decisions include whether to proceed with or forgo postconviction relief, whether to file an appeal, and what objectives to pursue. Those decisions do not include selecting the issues to appeal; that is for counsel to decide. A defendant may assist counsel "in raising new issues and developing a factual foundation for appellate review." ***Id***. at 126.

If a convicted defendant is found incompetent during postconviction proceedings, defense counsel should be permitted to "go forward with postconviction relief to the extent feasible" to ensure that the incompetent defendant "will not suffer from the delay of meritorious claims." ***Id.*** at 133-134. If defense counsel cannot initiate or continue postconviction relief without the defendant's assistance then he "may request a continuance or enlargement of time for filing the necessary notices or motions for postconviction relief." ***Id.*** at 134. Defense counsel may also request the appointment of a guardian to make the decision that the law requires the defendant to make. ***Id.*** at 135. And, after

regaining competency, the defendant should be permitted "to raise issues at a later proceeding that could not have been raised earlier because of incompetency. ***Id***. The Wisconsin Supreme Court explicitly concluded:

> ***[O]rdinarily this process need not include a court order for treatment to restore competency***. Meaningful postconviction relief can be provided even though a defendant is incompetent.

Id. at 130. (Emphasis supplied).

Debra A.E.'s use of the word "ordinarily" is correct because the situations where the Government may medicate an inmate against his will are rare. According to the United States Supreme Court, the Government must first show an "essential" or "overriding" state interest. ***Sell v. United States***, 539 U.S. 166, 178-179 (2003)(citing ***Riggins v. Nevada***, 504 U.S. 127, 135 (1992) and ***Washington v. Harper***, 494 U.S. 210, 227 (1990)). No Wisconsin or United States Supreme Court case holds that rendering a defendant competent to participate in his direct appeal automatically qualifies as an "essential" or "overriding" state interest. In fact, ***Debra A.E.*** suggests that it ordinarily would not qualify because "[m]eaningful postconviction relief can be provided even though a defendant is incompetent." ***Debra A.E.***, 188 Wis. 2d at 130.

The circuit court violated ***Debra A.E.*** in at least three ways. First, it applied the wrong legal standard. It held that Scott was "not competent to proceed" based on Dr. Rawski's report and testimony. (App.114). Dr. Rawski opined that Scott was not competent "to participate in appeals proceedings" because he "demonstrated a lack of substantial capacity to coherently explain his understanding of the legal proceedings, and was substantially incapable of assisting in

his defense." (App.135). But that is the test for competency to stand trial. ***Daniel***, ¶27.

The correct standard for deciding competency to pursue postconviction relief is whether Scott "is unable to assist counsel or to make decisions committed by law to the defendant to a reasonable degree of rational understanding." ***Daniel***, ¶50 (quoting ***Debra A.E.***, 188 Wis. 2d at 126). It is a distinction with meaning because the test for competency "depends upon the mental capacity that the task at issue requires." ***Debra A.E.*** at 125. Postconviction, a defendant's tasks include: (1) deciding whether to seek postconviction relief, (2) assisting counsel in developing a factual foundation for appellate review, (3) deciding whether to appeal, and (4) deciding what objectives to pursue. However, counsel is entitled to decide which issues to raise in order to meet the client's objectives, and counsel may not pursue issues that have no merit. ***Id.*** at 125-126; ***Flores v. State***, 183 Wis. 2d 587, 606-607, 516 N.W.2d 362 (1994); ***Jones v. Barnes***, 463 U.S. 745, 751 (1983).

Dr. Rawski reported, among other things, that Scott wanted an appeal but not a new trial because it could result in a longer sentence. (App.144). But Dr. Rawski did not base his evaluation on ***Debra A.E.***'s postconviction competency standard. The court simply adopted Dr. Rawski's conclusion, so it made the same mistake. (App.125-126).

Second, the circuit court ordered Scott to be involuntarily medicated or treated until he was competent to participate in postconviction proceedings. "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." (App.125). This Court approved that very process as appropriately balancing the interests of the incompetent defendant and the public. ***Debra A.E.***, 188 Wis. 2d at 130.[4] The circuit court had no prerogative to ignore binding precedent and order Scott to be involuntarily treated or medicated until he is competent to participate in postconviction proceedings.

Third, ***Debra A.E.*** noted that "ordinarily" the postconviction process need not include an order for treatment to restore competency. ***Debra A.E.***, 188 Wis. 2d at 130. Neither the State (which bore the burden of proof) nor the circuit court identified anything extraordinary about Scott's appeal that would justify an "involuntary treatment to competency" order. Indeed, the circuit court appears to believe that it may order treatment to competency in the ordinary postconviction case. It declared that once Scott invoked his right to appeal, it had the right to protect the appellate process by involuntarily medicating him. (App.119-120). That is a clear violation of ***Debra A.E.*** *Cf.* ***United States v. Watson***, 793 F.3d 416, 419 (4th Cir. 2015)(courts must be vigilant to ensure that forcible medication orders, "which carry an unsavory pedigree," do not become routine)(citation omitted).

The circuit court should have followed standard procedure—*i.e.* ***Debra A.E.*** It should have applied the postconviction test for incompetency. If it found Scott incompetent under that test, then it should have allowed postconviction proceedings to continue on all issues that rest on the trial record and that do not require Scott's input. If any

[4] The American Bar Association has also sanctioned this process. *See* ABA Criminal Justice Mental Health Standard 7-8.8(b)(2016).

decisions do require Scott's input, then counsel could ask the postconviction court to appoint a temporary guardian. If Scott regains competency after his direct appeal is over, then he should be permitted to raise issues that he was unable to raise earlier due to his incompetence. The Court should reverse the circuit court's order staying postconviction proceedings and forcing Scott to be involuntarily treated to competency.

C. The circuit court violated Scott's right to substantive due process by ordering him to be involuntarily medicated to competency pursuant to §971.14(4)(b) and in violation of ***Sell.***

1. The substantive due process requirements for an order to involuntarily medicate a defendant to restore competency for trial.

All people, including prison inmates, have a protected liberty interest in being free from involuntary psychiatric treatment in a mental hospital. ***Vitek v. Jones***, 445 U.S. 480, 494-495 (1980). An inmate also has a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the 14th Amendment of the United States Constitution and Article 1, §1 of the Wisconsin Constitution. ***Harper***, 494 U.S. at 221-222; ***Wood***, ¶17. While these drugs have therapeutic benefits, they can also have serious or fatal side effects. ***Harper***, 494 U.S. at 229-230. Consequently, the Government may not treat an inmate with antipsychotic drugs against his will unless there is an "essential" or "overriding" state interest to do so. Otherwise, the government violates the inmate's right to substantive due process. ***Riggins***, 504 U.S. at 135.

The Government has an "essential" or "overriding" state interest to subject an inmate to involuntary treatment

where he is dangerous to himself or others and the medication is in his medical interest. ***Id.*** at 135. In limited circumstances, the Government may also have an "essential" or "overriding" state interest in medicating an inmate to competency so that he can stand trial. The United States Supreme Court explained:

> 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 trial-related interests.
>
> This standard will permit involuntary administration of drugs solely for trial competence purposes in certain instances. ***But those instances may be rare***.

Sell, 539 U.S. at 179-180. (Emphasis supplied). *See also* ***Winnebago County v. Christopher S***., 2016 WI 1, ¶¶68-71, 366 Wis. 2d 1, 878 N.W.2d 109 (acknowledging ***Harper***, ***Riggins***, and ***Sell***); ***Wood***, ¶¶24-25 (same).

Sell lists four factors a court must consider before ordering a defendant to be treated to competency for trial, and it describes in detail the information a court must weigh in applying the factors:

"First, a court must find that ***important*** governmental interests are at stake." ***Sell***, 539 U.S. at 180. (Emphasis in original). The court must consider whether the person is accused of a serious crime. If so, the court must consider the Government's interest in prosecuting the crime. The

defendant's failure to take drugs voluntarily may mean, for example, that he will be confined in an institution for the mentally ill, which would diminish the risks that he would be freed without punishment. The court should also consider the length of time the defendant has already served and its interest in assuring the defendant a fair trial. ***Id***.

"Second, the court must conclude that involuntary medication will ***significantly further*** those concomitant state interests." ***Id***. at 181. (Emphasis in original). It must find that administering drugs is substantially likely to render the defendant competent to stand trial and substantially unlikely to have side effects that will interfere significantly with his ability to assist counsel in conducting a defense. ***Id***.

"Third, the court must conclude that involuntary medication is ***necessary*** to further those interests." ***Id***. (Emphasis in original). This requires further findings that "alternative, less intrusive treatments are unlikely to achieve substantially the same results." ***Id.*** "And the court must consider less intrusive means for administering drugs, *e.g*. a court order to the defendant backed by the contempt power, before considering more intrusive methods." ***Id***.

"Fourth . . . the court must conclude that the administration of drugs is ***medically appropriate*** *i.e.* in the patient's best medical interest in light of his medical condition." ***Id***. (Emphasis in original). This factor requires the court to consider the specific kinds of drugs the Government wants to administer. "Different kinds of antipsychotic drugs may produce different side effects and enjoy different levels of success." ***Id***.

According to ***Sell***, weighing the four factors above should help a court decide the constitutional question: "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?" ***Id***. at 183.

Ordering involuntary medication to competency without finding and weighing clear and convincing evidence of all four ***Sell*** factors requires reversal. *See e.g*. ***United States v. Chatmon***, 718 F.3d 369 (Cir. 2013)(failure to mention or analyze less intrusive alternatives to medication); ***United States v. Debenedetto***, 757 F.3d 547 (7th Cir. 2014)(failure to consider the seriousness of the defendant's crime, effectiveness of medication, less intrusive means, appropriateness of medication); ***State v. Holden***, 110 A.3d 1237 (Conn. Super. Ct. 2014)(failure to show involuntary medication would significantly further State's interests); ***United States v. Watson***, 793 F.3d 416 (4th Cir. 2015)(failure to show that proposed medication is substantially likely to render defendant competent); ***Cotner v. Liwski***, __P.3d__, 771 Ariz. Adv. Rep. 4 4 (Ct. App. 2017)(state's general interest in expeditious prosecutions insufficient to establish important governmental interest); ***United States v. Onuoha***, 820 F.3d 1049 (9th Cir. 2016)(failure to find proposed treatment plan was in defendant's best medical interest).

2. Section 971.14(4)(b)'s involuntary medication provision is unconstitutional on its face.

The State urged the circuit court and court of appeals to apply §971.14(4)(b), Wisconsin's pre-trial competency statute, to determine whether Scott should be involuntary medicated to competency for postconviction and appellate proceedings. (App.116)(COA Response Br. 1). Scott did not ask the circuit court to declare the statute unconstitutional on

its face. However, a facial challenge to the constitutionality of a statute is a matter of subject matter jurisdiction and cannot be waived. ***Christopher S.***, ¶4.

The Court must presume that §971.14(4)(b) is constitutional. Scott must prove that it is unconstitutional beyond a reasonable doubt. He must show that the law cannot be enforced under any circumstance. ***Id***.

Section 971.14(4)(b) provides in relevant part:

> . . . 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.

Section 971.14(3)(dm) in turn provides in relevant part:

> . . . 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.

The Wisconsin legislature enacted the current version of §971.14(4)(b) via 1989 Wis. Act 31, §2848t, before the United States Supreme Court decided ***Harper***, ***Riggins***, and ***Sell***. Consequently, §971.14(4)(b) does not comply with those cases. It authorizes circuit courts to order an incompetent defendant to be involuntarily medicated to competency if he is simply incapable of expressing or applying the advantages, disadvantages and alternatives to treatment in choosing to accept or refuse treatment. It does not require the State to prove, or the circuit court to find, by clear and convincing evidence that: (1) the government has an important interest at stake, (2) involuntary medication will significantly further that government interest in that drugs are substantially likely to render the defendant competent to stand trial, (3) involuntary medication is necessary to further those interests, and less intrusive means will not work; and (4) the specific drugs proposed are medically appropriate.

Any order to involuntarily medicate a defendant to competency that relies on the plain language of §971.14(4)(b) violates ***Sell*** and substantive due process. The Court should declare §971.14(4)(b) unconstitutional on its face.

3. The circuit court violated Scott's right to substantive due process.

At the time of the competency hearing. Scott had obtained reinstatement of his direct appeal, but he had not yet filed a postconviction motion or notice of appeal. Scott's lawyer informed the circuit court that he might not have pursued an appeal if an involuntary medication order were

required. The circuit court did not care. It said that once Scott started the appeal he had to be treated to competency. It applied §971.14(4)(b) as written. It did not apply ***Sell***.

First, neither the State nor the circuit court identified a ***state interest*** in forcing psychotropic medications upon any defendant in the postconviction setting. Nor did they identify a state interest in forcing medications upon Scott when he was not sure he would pursue an appeal if required to take them.[5] The only interest the court mentioned was the "inhumanity" of not treating Scott, a person who the DOC says does not qualify for involuntary commitment and medication.[6] According to ***Debra A.E.***, allowing counsel to seek postconviction/appellate relief to the extent feasible, while reserving the defendant's right to raise additional issues if and when he regains competency, strikes the appropriate balance between the State's interests and the defendant's interests. ***Debra A.E.*** 188 Wis. 2d at 134-35.

Second, the State failed to identify, and the circuit court failed to find, any State interest that could be "significantly furthered" by involuntarily medicating Scott to competency. Nor did anyone (the State, Dr. Rawski or the circuit court) identify which psychotropic drugs Scott should be treated with, what their side effects might be, or whether they might interfere with his ability to assist his lawyer and make the decisions required for appeal.

Third, Dr. Rawski did not opine, the State did not show, and the circuit court did not find, that alternative, less

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[5]Recently the United States Supreme Court held that a prisoner on death row does not have a statutory right to be competent during federal habeas proceedings. ***Ryan v. Gonzales***, 568 U.S. 57, 70 (2013).

[6] Presumably the DOC was referring to the Chapter 51 standards, but the record is silent on this issue. (App.112, 141-142).

intrusive treatments would be substantially unlikely to restore Scott to competency. Dr. Rawski never identified any form of treatment for Scott's condition other than psychotropic treatment in the generic sense. Nor did the State show, or the circuit court find, that less intrusive means could not be used for administering medication to Scott.

Fourth, the State did not show, and the circuit court did not find, that involuntary medication was in Scott's best medical interests in light of his medical condition. Nobody identified which drug Scott should be treated with, its efficacy, or its side effects.

The Court should hold that the circuit court's involuntary medication order violated Scott's right to substantive due process.

II. This Court Should Hold that an Order for Involuntary Medication or Treatment to Restore Competency Is a Final Order Appealable as a Matter of Right.

Section 971.14 does not prescribe the procedure for appealing an order for involuntary treatment to restore competency. Nor does any published Wisconsin case. Lacking guidance, Scott initially challenged the order here via a petition for interlocutory appeal, pursuant to Wis. Stat. §809.50. The court of appeals denied the petition without explanation. (App.152). Scott then filed an appeal as a matter of right, which the court of appeals allowed to proceed, but without a stay of the involuntary medication order. (App. 153).

Sell holds that a pre-trial order for involuntary medication to restore competency conclusively determines the disputed question, resolves an issue completely separate from the merits of the action, and is effectively unreviewable

on appeal from a final judgment. Once a defendant is forced to undergo medication to stand trial, he cannot undo the harm, even if he is acquitted. It therefore concluded that the order was a "collateral order" appealable as a matter of right. ***Sell***, 539 U.S. at 176-177.

Wisconsin does not appear to follow the federal collateral order doctrine. ***State v. Jenich***, 94 Wis. 2d 74, 97, 292 N.W.2d 348 (1974). However, this Court should nevertheless achieve the same result in one of two ways.

This Court could hold that an order for involuntary medication or treatment to restore competency is a final order in a special proceeding that is appealable as a matter of right under Wis. Stat. §808.03(1). "Historically, special proceedings included only those proceedings that were not an action at law or equity under traditional common law or equity practice." ***Ryder v. Society Insurance***, 211 Wis. 2d 617, 565 N.W.2d 277 (Ct. App. 1997). This Court has also explained:

> The 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. The latter two belong to the special class and the other does not.

Voss v. Stoll, 141 Wis. 267, 271, 124 N.W. 89 (1910). Meanwhile, a "final" order in a special proceeding "is one that determines and disposes finally of the proceeding—one which so long as it stands, precludes any further steps therein." ***State v. Lamping***, 36 Wis. 2d 328, 337, 153 N.W.2d 23 (1967).

Under this test, a competency proceeding arguably is "merely connected with" postconviction or appellate

proceedings. In Scott's case, for example, his appeal rights had been reinstated but no postconviction motion or appeal was pending when the circuit court conducted competency proceedings. The order declaring him incompetent and requiring treatment to competency was "final" in the sense that nothing remained to be done other than subjecting Scott to involuntary medication.

Alternatively, this Court could hold that an order for involuntary medication or treatment to restore competency is a final "order within an existing matter" per ***State v. Alger***, 2015 WI 3, 360 Wis. 2d 193, 858 N.W.2d 346. ***Alger*** did not overrule ***Voss***, ***Ryder***, or ***Lamping***. But it did hold that an "action" refers to an entire proceeding, not to one or more parts within a proceeding, whereas a "special proceeding" involves a separate filing outside of an action. ***Id***. at ¶¶28-29. Applying this test, ***Alger*** held that a Chapter 980 discharge proceeding is a proceeding within an existing action because it does not stand alone or exist entirely outside the original commitment. ***Id***., ¶31. The denial of a discharge is a final appealable order under §808.03(1).

Arguably, a competency proceeding falls into ***Alger***'s third category of proceedings, which yield final, appealable orders. Like the "collateral order" in ***Sell***, an order for involuntary medication or treatment to restore competency conclusively determines the question of whether the defendant should be treated to competency, resolves an issue separate from the prosecution or postconviction proceeding, and is effectively unreviewable on appeal because once the defendant is forced to undergo involuntary medication or treatment the harm cannot be undone.

Scott and the State now agree that an order for involuntary medication or treatment to restore competency is

a final order appealable as a matter of right pursuant to Wis. Stat. §808.03(1). (Response to Bypass Petition at 9). This Court should make the point clear in its decision so the bench and the bar know the proper procedure for initiating an appeal in future cases

III. This Court Should Hold that the Court of Appeals Erred in Denying a Stay Without Explaining its Reasons and Prescribe the Appellant's Recourse When a Stay Is Denied.

A. This Court should hold that the court of appeals must explain its reasons for granting or denying relief pending appeal.

During the pendency of an appeal, a trial court or an appellate court may grant relief. Either court may: (1) stay the execution or enforcement of a judgment or order, (2) suspend, restore or grant an injunction, or (3) enter an order appropriate to preserve the status quo and the effectiveness of the judgment subsequently to be entered. Wis. Stat. §808.07(2)(a). The party seeking relief should first move the circuit court for relief. If that fails, he may file a motion with the court of appeals. Wis. Stat. §809.12.

A decision to grant or deny relief pending appeal requires a court to exercise its discretion. ***Weber v. White***, 2004 WI 63, ¶18, 272 Wis. 2d 121, 681 N.W.2d 137 (an appellate court reviews a motion for stay for an erroneous exercise of discretion). A discretionary decision "is not the equivalent of unfettered decision-making." ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). A circuit court must explain the reasons for its discretionary decision. ***Id***. Specifically, it must show that it examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to arrive at a conclusion that a

reasonable judge would make. ***Weber***, ¶18. A circuit court decision that fails to explain its exercise of discretion is, by definition, an erroneous exercise of discretion. ***Johnson v. Williams***, 114 Wis. 2d 354, 356-357, 338 N.W.2d 320 (1983).

The State concedes that circuit court decisions and court of appeals decisions are governed by the same standards. (Response to Petition for Bypass at 10). Here, the court of appeals identified the proper legal standard for a stay—the ***Gudenschwager*** test—but failed to explain what facts and substantive law it relied upon and the process it used to reach the conclusion that Scott was not entitled to a stay of the circuit court's order. (App.153).[7] The decision was clearly an erroneous exercise of discretion under ***Johnson***. This Court should reverse the court of appeals order denying a stay and hold that when deciding motions for relief pending appeal, the court of appeals must explain its exercise of discretion.

B. The Court should establish the appellant's recourse once the court of appeals denies a motion for relief pending appeal.

When the court of appeals denies a motion for relief pending appeal, the appellant is left in a difficult position. He may only petition this Court for review of the decision that finally disposes of his case in the court of appeals. A decision on a motion for stay pending appeal is not a final decision. ***Henderson v. Rock County Dep't of Social Services***, 85 Wis. 2d 444, 446, 270 N.W.2d 581 (1978).

[7] ***State v. Gudenschwager***, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995).

Once the court of appeals issues a decision on the merits, the appellant may file a petition for review accompanied by a motion for relief pending appeal. However, by that point he may have suffered irreparable harm. He may have been medicated against his will. His building may have been razed. He may have lost the companionship of a child. He may have gone bankrupt.

When an appellant loses a stay motion in the court of appeals, one possible recourse might be a motion for reconsideration via Wis. Stat. §809.14. However, unless he knows why the court of appeals denied his stay motion, he cannot show why reconsideration is in order.

Gudenschwager's procedural history suggests, but does not expressly address, another avenue for relief. In that case, the State filed a notice of appeal from a decision to dismiss a petition to commit the defendant under Chapter 980. It asked the court of appeals to stay the defendant's release pending appeal. The court of appeals denied the stay, so the State filed a "petition for emergency stay of relief" with this Court. ***Gudenschwager***, 191 Wis. 2d at 228. This Court "issued an order construing the State's request as a petition for supervisory writ." ***Id***. Generally, a petition for supervisory writ is not available to obtain review of discretionary acts. ***State ex rel. Dressler v. Circuit Court for Racine County***, 163 Wis. 2d 622, 632, 472 N.W.2d 532 (Ct. App. 1991). ***Gudenschwager*** seems to recognize an exception to that rule. This Court should therefore hold that when the court of appeals denies a motion for relief pending appeal, the moving party may petition this Court for supervisory relief.

C. The Court should direct lower courts to stay orders for involuntary medication to restore competency pending appeal.

Declaring that the subject of an involuntary treatment order may file an appeal as a matter of right under §808.03(1) is worthless unless either the circuit court or the court of appeals issues a stay. The court of appeals cannot review the order without a transcript. Once the appellant files a statement on transcript, the court reporter has 60 days to file and serve the transcript on the parties. Wis. Stat. §809.11(7). The clerk of circuit court then has 20 days to file the record with the court of appeals, and briefing could consume another 85 days. Wis. Stat. §§809.15(4), 809.19(1), (3) and (4). An appeal from an involuntary treatment order is not one entitled to preference by statute. *See* Michael S. Heffernan, ***Appellate Practice and Procedure***, §15.5 (State Bar of Wisconsin 2011). Thus, without a stay, the person challenging an involuntary treatment order could be administered psychotropic medications against his will for close to a year before he receives a decision on his appeal.

Consider what happened in this case. Scott filed a 5-page Emergency Motion for Stay Pending Appeal addressing all of the legal requirements for a stay. He explained that (1) he was likely to succeed on the merits of his appeal; (2) without a stay, he would suffer irreparable injury in the form of involuntary medication; (3) the State had not opposed any of his requests for a stay; and (4) the public has an interest in ensuring that prisoners are not unconstitutionally medicated. (App.147). Without waiting to hear from the State, the court of appeals denied the motion without analysis:

> We will grant a stay pending appeal when the moving party: (1) makes a strong showing that is likely to prevail on the merits; (2) shows that unless a stay is granted it

> will suffer irreparable harm; (3) shows there will be no substantial harm to the other parties; and (4) shows there will be no harm to the public interest. ***State v. Gudenschwager***, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). Scott has not shown that he meets these criteria. (App.153).

The court of appeals effectively denied Scott's appeal on the merits without briefing. Due to the court of appeals' cursory, autopilot order, Scott has been medicated with psychotropic medications against his will for months even though, according to his lawyer, he may have forgone an appeal if he had known medication would be required.

Pursuant to Wis. Const. Art. VII, §3, this Court has superintending authority "that is indefinite in character, unsupplied with means and instrumentalities, and limited only by the necessities of justice." ***Arneson v. Jezwinski***, 206 Wis. 2d 217, 225, 556 N.W.2d 721 (1996). This authority allows the Court to control the course of litigation in lower courts. It is as broad and as flexible as necessary to insure the due administration of justice. ***Id***. at 225-226.

In ***Arneson***, this Court used its superintending authority to control the course of litigation involving qualified immunity claims. Normally, a circuit court decision denying a motion for summary judgment is reviewed on an appeal from the final judgment in a case. ***Arneson*** held that when a circuit court denies an official's motion for summary judgment claiming that he is immune from suit, he may file a petition for interlocutory appeal, and the court of appeals must grant it. Otherwise, if the case wrongly proceeds to trial, the official will lose the primary benefit of qualified immunity. He cannot be "re-immunized." ***Id***. at 226-227.

By this same reasoning, this Court should exercise its superintending authority to control the course of litigation involving orders to treat a defendant against his will until he is competent to proceed in a case. An erroneous involuntary medication order violates the defendant's significant, constitutionally protected liberty interest in avoiding the unwanted administration of antipsychotic drugs. The issue is effectively unreviewable on appeal. *See* ***Sell,*** 539 U.S. at 177-178 (applying this reasoning to authorize an immediate appeal of a pre-trial involuntary medication order). The Court should therefore hold that when a defendant appeals such an order, the circuit court or the court of appeals should automatically stay the administration of involuntary treatment or medication.

If the lower courts apply ***Sell*** and ***Debra A.E.*** properly, there should be few appeals requiring an automatic stay. ***Sell***, 539 U.S. at 180 (the instances in which a defendant may be involuntarily medicated to competency may be rare); ***Debra A.E.***, 188 Wis. 2d at 130 (ordinarily an order finding that a defendant is incompetent for appeal need not include an order to treatment to restore competency).

CONCLUSION

For the reasons stated above, Andre L. Scott respectfully requests that the Wisconsin Supreme Court reverse the circuit court's order for involuntary treatment to competency, reverse the court of appeals order denying relief pending appeal, and establish the procedures requested herein.

Dated this 18th day of October, 2017.

Respectfully submitted,

COLLEEN D. BALL
Assistant State Public Defender
State Bar No. 1000729

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-3110
ballc@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,052 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 18th day of October, 2017.

Signed:

COLLEEN D. BALL
Assistant State Public Defender
State Bar No. 1000729

Office of State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-3110
ballc@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 18th day of October, 2017.

Signed:

COLLEEN D. BALL
Assistant State Public Defender
State Bar No. 1000729

Office of State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-3110
ballc@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

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