No. 16AP2017



# In the Supreme Court of Wisconsin

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

*v.*

ANDRE L. SCOTT,
DEFENDANT-APPELLANT

On Appeal From An Involuntary Medication Order
Entered By The Milwaukee County Circuit Court,
The Honorable Jeffrey A. Kremers, Presiding,
Case No. 2009-CF-136

## BRIEF AND SUPPLEMENTAL APPENDIX OF THE STATE OF WISCONSIN

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## ISSUES PRESENTED

1. Whether the circuit court's involuntary medication order to render Scott competent to participate in postconviction proceedings violated *Debra A.E.* or Scott's constitutional rights.

The Court of Appeals did not answer this question, given that this Court granted Scott's petition for bypass.

2. Whether postconviction medication orders are immediately appealable, and if so, how.

The Court of Appeals denied Scott's petition for interlocutory appeal, but allowed his appeal as of right under Wis. Stat. § 808.03(1).

3. Whether the Court of Appeals erred by denying Scott's request for a stay pending appeal.

## INTRODUCTION

This case presents the question of what to do when a convicted defendant becomes incompetent during post-conviction proceedings. This Court answered that question in *State v. Debra A.E.*, 188 Wis. 2d 111, 523 N.W.2d 727 (1994), setting forth a "process . . . [to] manage the postconviction relief of alleged incompetent defendants," *id.* at 129, a process that allows most claims "to go forward," either through the efforts of postconviction counsel alone or through the cooperation of counsel and a guardian ad litem, *id.* at 133–35. As a result, this process "ordinarily . . . need not include a court order for treatment to restore competency." *Id.* at 129–30. *Debra A.E.*'s process has become the gold standard: it tracks the American Bar Association's recommendations, ABA, *Criminal Justice Standards On Mental Health*, § 7-8.8(b) (2016), *available at* http://goo.gl/uKDb53, most jurisdictions follow similar procedures, *infra* pp. 21–24, and one State has even expressly "adopt[ed] the Wisconsin approach," *Council v. Catoe*, 597 S.E.2d 782, 787 (S.C. 2004) (citing *Debra A.E.*).

In this case, however, rather than apply *Debra A.E.*, the circuit court ordered Defendant Andre Scott to be medicated to competence—at the State's request, but over Scott's and his counsel's objection—so that he could participate in pursuing postconviction relief. The State initially defended that order on appeal, but upon further review has concluded that the order short-circuited *Debra A.E.*'s process for determining

whether Scott's postconviction claims could "go forward" without his assistance. Accordingly, this Court should hold that the order was premature and violated *Debra A.E.* Because *Debra A.E.* was not applied, the question of whether and when involuntary medication during postconviction proceedings might be appropriate is not presented here and is not ripe for consideration. This Court should leave that question for a case (that may never arise) in which *Debra A.E.*'s procedures appear insufficient for some reason.

Because the order violated state law (a point on which both parties agree), there is also no need to address Scott's alternative argument that the order was unconstitutional. Indeed, there are compelling reasons to avoid addressing it. However, if this Court is inclined to reach the constitutional question, it should decide the issue as narrowly as possible and hold only that an order entered at an early stage, without any indication that *Debra A.E.*'s process will be insufficient, is unconstitutional. Anything more would require this Court to develop the constitutional standard for medication during postconviction proceedings—a novel, difficult, and purely academic question that, as far as the State is aware, has never arisen in a Wisconsin case and is likely never to arise.

Finally, the State agrees with Scott that postconviction medication orders should be immediately appealable and generally should be stayed pending appeal. Both concessions are justified by the same essential point: once a defendant "ha[s] undergone forced medication—the very harm that he

seeks to avoid"—that harm "cannot [be] undo[ne]." *Sell v. United States*, 539 U.S. 166, 176–77 (2003).

## ORAL ARGUMENT AND PUBLICATION

By granting Scott's petition for bypass and ordering the case to be scheduled for argument in due course, this Court has indicated that the case is appropriate for oral argument and publication.

## STATEMENT OF THE CASE

### A. Legal Background

In *Debra A.E.*, this Court "fashion[ed]" a mandatory process for "manag[ing] the postconviction relief of alleged incompetent defendants," designed to "satisf[y] the interests of . . . defendants and the public in expediting postconviction relief and reaching a final determination on the merits." 188 Wis. 2d at 119, 129–35. This process begins with a competency determination. As soon as there is "a good faith doubt about a [client's] competency to seek postconviction relief," defense counsel should promptly "advise the appropriate court of this doubt on the record and move for a ruling on competency." *Id.* at 131. Lower courts "shall honor the request when [there is] reason to doubt a defendant's competency." *Id.* To determine competency, courts "may order an examination" and "hold a hearing." *Id.* at 131–32. The test for competency during postconviction proceedings is whether the defendant "is unable to assist counsel or to make decisions committed by law to the defendant with a

reasonable degree of rational understanding." *Id.* at 126. For defendants found incompetent under this standard, this Court crafted procedures for three different categories of possible postconviction claims. *See id.* at 130–35.

The first category comprises postconviction "issues [that] rest on the trial court record and involve no risk to the defendant" (such as a Fourth Amendment argument in support of a suppression motion). *Id.* at 130. Most postconviction claims fit this description. For these issues, "defense counsel [can] proceed with postconviction relief on a defendant's behalf, even if the defendant is incompetent." *Id.*

The second category of claims involves some "risk" to the defendant (for example, where a retrial could lead to a longer sentence). *Id.* at 133. These claims require the defendant's "decisionmaking" because "whether to file an appeal and what objectives to pursue" are decisions "committed by law to the defendant." *Id.* at 126, 133–34. For this category, this Court provided two procedures: if the defendant is likely to "attain[ ] competency" in the near future, a circuit court may grant "a continuance or enlargement of time for filing the necessary notices or motions for postconviction relief." *Id.* at 134 & n.24. Otherwise, a court may "appoint[ ] [ ] a guardian to make decisions that the law requires the defendant to make." *Id.* at 135.

The third category covers issues that cannot be raised without a competent defendant because they require the defendant's "assist[ance] . . . [to] develop[ ] a factual

foundation" (some ineffective-assistance claims, for example). *Id.* at 126. These issues can be "raise[d] . . . at a later proceeding" "in a sec. 974.06 motion" if the defendant regains competency. *Id.* at 135. Although *State v. Escalona-Naranjo*, 185 Wis. 2d 169, 517 N.W.2d 157 (1994), held that "sec. 974.06 [can]not be used to review issues which were or could have been litigated on direct appeal," *id.* at 172, this Court held that *Escalona* "will not bar an incompetent defendant from invoking sec. 974.06 after being restored to competency" to raise issues that "could not have been raised earlier because of incompetency," *Debra A.E.*, 188 Wis. 2d at 135.

An early ruling on competency is important to the procedures described above because it "sets the stage for defense counsel to seek appointment of a temporary guardian," and "creates a record of a defendant's mental capacity" to avoid the "difficulty [of] proving prior incompetency" when a defendant who regains competency seeks to raise a new issue that could not have been raised earlier due to incompetency. *Id.* at 131–33.

This Court concluded that these procedures appropriately balance "incompetent defendants' right to meaningful postconviction relief" and "the public's interest in . . . reaching a final determination on the merits," *id.* at 119, and, as a result, "a court order for treatment to restore competency" will "ordinarily" be unnecessary, *id.* at 130.

### B. Factual Background

Two weeks after Scott's girlfriend broke up with him, Scott went to her new home to deliver a check, and while there, became angry, punched her in the face, and then attacked her brother and sister. R. 87:37–50. He eventually left, but five days later he followed her from a McDonald's to her apartment and assaulted her again. R. 87:51–64. When someone called the police, Scott forced her into a storage unit and hid with her there under a dirty mattress, threatening to hurt her if she called for help. R. 87:65–69. After six to eight hours, Scott took his ex-girlfriend to his sister's house and made her stay there with him overnight. R. 87:70–80. The police arrived the following morning and arrested Scott. R. 87:80–81.

On September 3, 2009, a jury convicted Scott of battery, kidnapping, and disorderly conduct. R. 7.[1] The Milwaukee County circuit court sentenced Scott to 13 years and three months in prison followed by ten years of extended supervision. R. 18. To date, Scott has served approximately eight years of his sentence. He is currently housed at the Wisconsin Resource Center due to "mental health issues." R. 92:3.[2]

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[1] Scott was found competent to stand trial, R. 84:4–5, and does not challenge that finding.

[2] The Wisconsin Resource Center provides "specialized . . . supervision" for inmates who have particular "mental health needs." Wis. Stat. § 46.056. The Department of Corrections "may transfer an

On October 20, 2009, Scott filed a timely notice of intent to pursue postconviction relief. R. 17; *see* Wis. Stat. § (Rule) 809.30(2)(b). Yet Scott did not actually file an appeal or motion for postconviction relief at the time. Scott's appointed attorney ordered the record and transcripts, *see* Wis. Stat § (Rule) 809.30(2)(e), but the court reporters never served them, *see id*. § (Rule) 809.30(2)(g), and, almost two years later, Scott's second attorney (to whom his case had been transferred) closed his case, R. 24:2. In February 2015, the State Public Defender's Office determined that Scott's attorney had abandoned him and appointed a new attorney, John Breffeilh, to represent him. R. 24:3–4. Breffeilh requested a "1,914 day extension" of the court reporters' transcript deadline, R. 24:1, which the Court of Appeals granted, thereby reinstating Scott's deadlines for filing an appeal or motion for postconviction relief, R. 26.

Breffeilh's initial "conversations [with Scott] led [him] to doubt Mr. Scott's [competency]," R. 58:1, so he followed *Debra A.E.*'s instruction and promptly "move[d] for a ruling on competency," 188 Wis. 2d at 131, *before* filing any postconviction motion or appeal. Breffeilh presumably

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inmate from a prison . . . to the Wisconsin Resource Center if there is reason to believe that the inmate is in need of individualized care." Wis. Stat. § 302.055. The Center also houses those who have been committed under Chapter 51, *see* Wis. Stat. § 51.37(5)(a), but the Department of Corrections determined that it could not involuntarily medicate Scott under that Chapter because he is not "sufficient[ly] dangerous[ ] for civil commitment," R. 62:3.

requested the competency determination for the reasons this Court suggested in *Debra A.E.*: to "set[ ] the stage . . . [for] appointment of a temporary guardian," if necessary, and to "create[ ] a record of [Scott's] mental capacity" to allow future claims that his incompetency prevented him from raising. 188 Wis. 2d at 132–33; *see* R. 93:22 ("[A] finding here today would allow [Scott] to raise [certain] issues in the future."). The circuit court suspended postconviction proceedings and ordered a competency evaluation. R. 92:4.

Dr. Robert Rawski evaluated Scott, diagnosing him with schizoaffective disorder. R. 62:5. He observed that Scott "became extremely rapid, hyperverbal, and pressured," as well as "severely disorganized and delusional," "whenever discussing anything about his incarceration or his legal case," such that Dr. Rawski could not "understand what he was saying." R. 62:4–5, 7. He concluded that Scott "lack[ed] [ ] substantial capacity to coherently explain his understanding of the legal proceedings, and was substantially incapable of assisting in his defense." R. 62:7. Dr. Rawski also opined that Scott's competency could "be restored with . . . appropriate psychotropic treatment," but that Scott was "substantially incapable of understanding and applying the advantages, disadvantages and alternatives to psychotropic treatment to his particular condition." R. 62:7.

At a competency hearing, the court asked Scott if "[he] th[ought] that [he was] competent to proceed." R. 93:4. Scott responded, "Yes. The situation — return with a notice of

intent to pursue postconviction relief. We're claiming that that victim in this case, 2009-CF-136 matter was adult, the incident date, and told me to come over to the residence of her sister." R. 93:4. The court responded, "Okay. I'm just asking if you think you're competent to proceed"; Scott said, "Yes, I do." R. 93:4. Breffeilh "prefer[red] not to take a position" on Scott's competence. R. 93:5. Dr. Rawski testified and reaffirmed his conclusion that Scott was not competent to participate in postconviction proceedings or to refuse medication. R. 93:8–13. After Dr. Rawski testified, Scott informed Breffeilh "that he [did] not disagree with anything that Mr. Rawski said," so Breffeilh "le[ft] [the court] with that." R. 93:15. The circuit court "f[ound] that [ ] Scott [was] not presently competent to proceed." R. 93:15.

The assistant district attorney then urged the court to enter an involuntary medication order on the belief that the only "alternative [was] leaving the appeal in limbo potentially for the remainder of [Scott's] sentence," and that the "legal proceeding . . . need[ed] to have some finality." R. 93:14, 21–22. Breffeilh responded that "[an incompetency determination] would not leave the appeal in limbo." R. 93:22. "*Debra A.E.*['s] . . . solution," he explained, "is to continue the proceedings" "on issues that wouldn't have any kind of negative effect on the defendant." R. 93:17, 21. Therefore, "[t]he appeal could proceed and there would be statutory deadlines." R. 93:22.

The circuit court acknowledged that it did not "know what the status of [Scott's appeal] [was]" or "how much ha[d]

actually even been identified." R. 93:17. But the court expressed concern about the "cruel[ty]" of "keep[ing] somebody locked up in a confined setting who we know is not competent." R. 93:17. Ultimately, the court ordered involuntary medication, R. 69, because it was "not willing to sanction a process that says we keep somebody confined who's not competent to proceed . . . a process that says we leave Mr. Scott in this state of not being competent to understand what's going on, . . . to really participate in and assist in his postconviction proceedings," R. 93:23.

Scott petitioned for leave to file an interlocutory appeal, *see* Petition for Leave to Appeal, *State v. Scott*, No. 2016AP1792 (filed Sep. 15, 2016), but the Court of Appeals denied the request, R. 74. Then, after "reviewing the procedural history of [ ] *Debra A.E.*," Breffeilh concluded that the involuntary medication order was a "final order in a special proceeding" under Wis. Stat. § 808.03(1) and filed a second appeal as of right. *See* R. 75:3 (emphasis removed); Opening Br. 20. The Court of Appeals did not dismiss the appeal. After the briefs were filed, Scott petitioned for bypass, which this Court granted. Dkt. Entries 5-31-2017 & 9-12-2017, No. 2016AP2017.

Scott had also sought a stay of the medication order pending appeal, R. 76, and an extension of the deadline to file for relief on the merits (direct appeal or postconviction motion) until resolution of his appeal of the involuntary medication order, R. 75. The Court of Appeals denied the

stay, but extended the deadline for postconviction relief on the merits until 30 days after this appeal is decided. R. 78. As a result, the Department of Health Services began to medicate Scott, and the Circuit Court found him competent on May 8, 2017. R. 96, 97. While Scott is not presently subject to an involuntary medication order (the court's order only allowed treatment for up to 12 months or until Scott became competent, R. 69, 97:3–4), the Circuit Court warned Scott that it "could order [him] to submit to treatment" again should he stop taking medication and "revert to being not competent." R. 97:5.[3] On December 7, 2017, Scott's current counsel (who replaced Breffeilh) filed another motion for a competency evaluation in the Circuit Court. *See* Mot. for Competency Evaluation, *State v. Scott*, No. 2009-CF-136 (Milwaukee Cty. Cir. Ct. Dec. 7, 2017). Finally, because the Court of Appeals extended the deadlines for postconviction relief on the merits, to this day Scott has yet to file any postconviction motion or appeal, and the nature of his postconviction claims is still unknown.

[3] The State has not taken the position that this renders the case moot. Given the circuit court's statement, the time-limited duration of the circuit court's prior order, and the importance of the issues at stake, this case qualifies under the "exception to the general mootness rule" for issues capable of repetition, yet evading review. *See In re Marriage of Meister*, 2016 WI 22, ¶ 18 n.10, 367 Wis. 2d 447, 876 N.W.2d 746; *Washington v. Harper*, 494 U.S. 210, 218–19 (1990).

## STANDARD OF REVIEW

This Court reviews "question[s] of law," both of state law and constitutional law, "de novo." *E.g.*, *Matter of Mental Commitment of J.W.J.*, 2017 WI 57, ¶ 15, 375 Wis. 2d 542, 895 N.W.2d 783; *State v. Lemberger*, 2017 WI 39, ¶ 15, 374 Wis. 2d 617, 893 N.W.2d 232. This Court reviews the grant or denial of a stay "under an erroneous exercise of discretion standard." *State v. Gudenschwager*, 191 Wis. 2d 431, 439, 529 N.W.2d 225 (1995).

## SUMMARY OF ARGUMENT

I.A. *Debra A.E.*'s process for managing the postconviction relief of alleged incompetent defendants allows most claims to proceed despite the defendant's incompetency. This Court held that following this process will "ordinarily" make involuntary medication unnecessary. The Circuit Court in this case violated *Debra A.E.* by ordering medication without first exhausting *Debra A.E.*'s procedures or finding some reason to believe that they would be insufficient.

B. This Court should not sua sponte reconsider *Debra A.E.* It was correctly decided, it has served Wisconsin well for over twenty years, and numerous courts around the country follow similar procedures.

C. Given that the order violated *Debra A.E.*, this Court should decline to address Scott's constitutional arguments. *See* Pet. for Bypass 2, No. 2016AP2017 (Ct. App. May 31, 2017) (asking Court to address constitutional issues only if it

rejects Scott's *Debra A.E.* argument). They are difficult, unnecessary to resolving this case, and may never arise in any future case if *Debra A.E.* is properly followed.

D. If this Court does reach the constitutional questions, it should hold narrowly that it violates the Constitution to order involuntary treatment without some reason to believe that *Debra A.E.*'s procedures will be insufficient to protect either the defendant's interest in meaningful postconviction relief or the State's interest in finality.

II. Medication orders during postconviction proceedings should be immediately appealable. Such an order probably qualifies as a "final order" in a "special proceeding" appealable "as of right" under Wis. Stat. § 808.03(1). *See In re Commitment of Alger*, 2015 WI 3, ¶¶ 29–30, 360 Wis. 2d 193, 858 N.W.2d 346. More clearly, such orders should be immediately appealable under Wis. Stat. § 808.03(2) as a "matter of course." *See Arneson v. Jezwinski*, 206 Wis. 2d 217, 220, 556 N.W.2d 721 (1996).

III. The Court of Appeals improperly denied a stay pending appeal. The potential harm to Scott was irreparable, given that forced medication "cannot [be] undo[ne]," *Sell*, 539 U.S. at 177, Scott had a significant likelihood of success on appeal, given this Court's holding that involuntary treatment is "ordinarily" unnecessary during postconviction proceedings, *Debra A.E.*, 188 Wis. 2d at 129–30, and the State neither opposed the stay nor presented any immediate need

for treatment. Most appeals of medication orders will warrant a stay for similar reasons.

## ARGUMENT

### I. The Medication Order Was Unlawful

#### A. The Premature Order Violated *Debra A.E.*

As described in more detail above, *supra* pp. 4–6, *Debra A.E.* created a mandatory process to "manage the postconviction relief of alleged incompetent defendants." 188 Wis. 2d at 129. The very first step of that process is to determine competency, if there is any "reason to doubt" it. *Id.* at 131. If the defendant is found incompetent, this Court provided three different approaches, which depend on the category of claim. First, defense counsel can proceed with any postconviction claims that are solely record based and involve no risk to the defendant. *Id.* at 130. Second, when potential claims present some "risk" or require the defendant's "decisionmaking," defense counsel may seek appointment of a temporary guardian or request a continuance if the defendant is likely to regain competency. *Id.* at 133–35 & n.24. Third, for claims that depend on the defendant's memory or require the defendant to assist in factual development (claims which may or may not be known), the defendant may bring these claims in the future if and when the defendant becomes competent. *Id.* at 135.

In this case, analysis under *Debra A.E.*'s procedures did not fail or stall; it never began. The Circuit Court ordered

involuntary medication at the competency hearing—the very first step of *Debra A.E.*'s process—without any investigation into the types of claims Scott might have. *See* R. 93:17. And the nature of his claims is *still* unknown, given that Scott has not yet filed any appeal or motion for postconviction relief (he has until 30 days after the resolution of this appeal, R. 78:2).

To justify the treatment order, the Circuit Court appears to have accepted the assistant district attorney's view that the appeal would remain "in limbo," R. 93:21, without a medication order, and that Scott would remain "confined" with potential meritorious claims unresolved, *see* R. 93:23 ("I am just not willing to sanction a process that says we keep somebody confined who's not competent to proceed . . . that says we leave Mr. Scott in this state.").

But that concern was misplaced if all (or most) of Scott's viable postconviction claims fall into the first two *Debra A.E.* categories. Under *Debra A.E.,* Scott's counsel could have simply proceeded with any record-based claims that did not involve any "risk" to Scott (category 1) and requested a guardian ad litem to make decisions "committed by law to [Scott]" for claims that did involve some "risk" or require "decisionmaking" (category 2). 188 Wis. 2d at 125–26, 132–35. Breffeilh's comments at the competency hearing suggest that he believed most (if not all) claims could proceed. R. 93:22 ("I just want to be clear. This [incompetency determination] would not leave the appeal in limbo. The appeal could proceed and there would be statutory deadlines."); *supra* p. 10.

The only claims that would remain "in limbo" are those that require Scott's "assist[ance] . . . [to] develop[ ] a factual foundation" (category 3). *Debra A.E.*, 188 Wis. 2d at 126. But this Court does not yet know whether any such claims will be raised here. At this point, neither Breffeilh nor Scott's current counsel has yet identified any potential claims to determine whether they are the type that can proceed (categories 1 & 2) or the type that require the defendant's competence (category 3).

In any event, even category 3 claims do not "ordinarily" justify an involuntary medication order. *Id.* at 130. In *Debra A.E.*, this Court held that the proper approach for dealing with such claims *is* to leave them in limbo, allowing them to be brought in the future should the defendant regain competency. *Id.* at 135. This is "ordinarily" sufficient to "protect" both the State's interest in "final[ity]" and the defendant's interest in "meaningful postconviction relief." *Id.* at 119, 130. And it is sufficient to protect both of those interests here. *See infra* pp. 18–20.

Given that Scott's potential claims have not yet been identified, the only possible argument for involuntary medication was the mere possibility of so-called "unknown unknowns"[4]: claims that Scott's counsel would be unaware of

[4] *See* Errol Morris, *The Certainty of Donald Rumsfeld*, N.Y. Times (Mar. 25, 2014), https://opinionator.blogs.nytimes.com/2014/03/25/the-certainty-of-donald-rumsfeld-part-1/ (describing the provenance and meaning of this term).

even after reviewing the record because they require a competent defendant's memory or assistance to identify (for example, an ineffective-assistance claim, unknown and unknowable to appellate counsel, that trial counsel disregarded some important evidence that defendant provided to counsel). But this argument has two fatal defects: First, unknowable claims are always a possibility when a defendant is incompetent—by definition, they are unknowable. If the specter of such claims justifies an involuntary treatment order, then an involuntary treatment order will always be justified, rendering *Debra A.E.* a dead letter. Second, *Debra A.E.* itself recognizes that such unknown claims are always possible, and it provides that they may be "raise[d] . . . at a later proceeding" "in a sec. 974.06 motion" if the defendant regains competency. *Debra A.E.*, 188 Wis. 2d at 135. In the meantime, counsel (or counsel and a guardian) can pursue all other claims immediately.

The State can conceive of two possible scenarios—neither presented here—in which involuntary medication during postconviction proceedings *might* be appropriate.[5] First, involuntary medication arguably might be justified *in the defendant's interest* if defense counsel can identify a

[5] To be clear, the State is not suggesting that these scenarios *would* warrant involuntary medication; nor is it proposing any standard. The State provides these examples to show that the issue of when and whether involuntary medication might be appropriate during postconviction proceedings is difficult and should be reserved for a future case that squarely presents it, if such a case ever arises.

memory-dependent issue that is both significant and reasonably likely to be meritorious. Given that no claims have yet been identified here, this possible interest could not support the treatment order. Second, the State's interest in finality arguably might, in some future case, justify an involuntary treatment order to prevent the "unknown unknown" claims from hanging "in limbo"—for example, if the crime is particularly serious, the victims have an especially strong need for closure, or significant evidence is likely to become stale. There is no such justification in this case, which is why the Court need not (and should not) decide whether these arguable interests would merit involuntary medication.

Because it is unclear at this stage into which *Debra A.E.* categories Scott's potential claims fit, the Circuit Court's involuntary treatment order was premature. Hence this appeal does not present an appropriate factual and procedural background for this Court to define when involuntary medication might be appropriate in other, hypothetical postconviction cases. *See State v. Steffes*, 2013 WI 53, ¶ 27, 347 Wis. 2d 683, 832 N.W.2d 101 ("[C]ourts do not sit to decide abstract, hypothetical, or contingent questions." (citation omitted)); *PRN Assocs. LLC v. State Dept. of Admin.*, 2009 WI 53, ¶¶ 25, 29, 317 Wis. 2d 656, 766 N.W.2d 559 ("Appellate courts generally decline to reach" issues that "have [been] rendered purely academic" and have no "practical effect on the existing controversy." (citation omitted)). Accordingly, this Court should hold only that the treatment order violated *Debra*

*A.E.*, and leave for another day (should that day ever come) the proper bounds of involuntary treatment postconviction.[6]

### B. *Debra A.E.* Remains Good Law And Should Not Be Reconsidered Sua Sponte

In the State's view, *Debra A.E.* should be retained for several reasons. Indeed, the State *proposed* most of the procedures that the *Debra A.E.* Court ultimately adopted. *See* 188 Wis. 2d at 130. Notably, the State had argued that even a competency hearing was unnecessary (to say nothing of involuntary medication), since defense counsel could continue to "litigate on the defendant's behalf any meritorious issues which can be litigated on the existing record," and could "seek appointment of a guardian" to make any "weighty, lifechanging decisions." Br. of the State of Wisconsin, *State v. Debra A.E*, No. 92-2974-CR, 1992 WL 12034295, at *28–29 & n.4 (Wis. 1992).

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[6] Scott's brief also challenges the incompetency finding on the ground that Dr. Rawski and the circuit court used the wrong standard for incompetency. Opening Br. 9–10. Scott forfeited this argument by failing to raise it before the circuit court. *State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997); *see* R. 93:5, 15 (Scott's counsel twice declining to address Scott's competency), and by failing to develop or even identify this issue in his Petition for Bypass, *see generally* Pet. for Bypass 2 (arguing on the merits merely that it was unlawful for the court to forcibly medicate Scott "to competency"). There are compelling reasons not to revive this forfeited issue, since (as the State concedes) the medication order violated *Debra A.E.* Given that the postconviction process would proceed if this Court vacates the order, the only effect of the incompetency finding is to allow Scott to bring certain claims in the future that might otherwise be barred by *Escalona*. *See supra* pp. 5–6.

First, the State's interest in the predictability of settled procedural law favors *Debra A.E.*'s retention. Lower courts thus far have had little difficulty following *Debra A.E.*'s procedures. *E.g.*, *State v. Reese*, No. 2014AP1593, 2015 WL 13134244, at *2 (Ct. App. July 10, 2015) (unpublished) (guardian ad litem appointed for an incompetent defendant);[7] *State v. Smith*, 2014 WI App 98, ¶ 23 n.7, 357 Wis. 2d 582, 855 N.W.2d 422 (same), *rev'd on other grounds by* 2016 WI 23, 367 Wis. 2d 483, 878 N.W.2d 135; *State v. Howard*, No. 2013AP41, 2013 WL 12183253, at *1 & n.1 (Ct. App. July 19, 2013) (unpublished) (same); *State v. Pierce*, 204 Wis. 2d 112 at *1–3, 552 N.W.2d 899 (Ct. App. 1996) (unpublished) ("proceed[ing] with [a] no merit evaluation" under Wis. Stat. § (Rule) 809.32 despite a defendant's incompetency, and, finding no meritorious issues on the record, noting that the defendant "would not be foreclosed from later raising new issues that he could not have raised at this time due to his incompetency").

What is more, *Debra A.E.*'s principles and procedures have become a model for courts around the country, *see, e.g.*, *Catoe*, 597 S.E.2d at 786–87 ("adopt[ing] the Wisconsin approach"). Consistent with *Debra A.E.*, numerous courts

[7] The State cites these unpublished opinions only as examples of lower courts following *Debra A.E.*'s procedures. Copies of these opinions are included in an appendix, consistent with Wis. Stat. § (Rule) 809.23(3)(c).

have held that most postconviction[8] claims can proceed despite the defendant's incompetence (*Debra A.E.*'s category 1). In *Ryan v. Gonzales*, 568 U.S. 57 (2013), for example, the Supreme Court held that prisoners do not have a "right to competence" during federal habeas proceedings because "[a]ttorneys are quite capable of reviewing the state-court record, identifying legal errors, and marshaling relevant arguments, even without their clients' assistance." *Id.* at 65–68. Many state courts of last resort have held the same, both for claims raised during a direct appeal, *Dugar v. Whitley*, 615 So. 2d 1334, 1335 (La. 1993) ("Counsel may proceed with an appeal on petitioner's behalf despite the district court's finding of incompetence."); *Fisher v. Oklahoma*, 845 P.2d 1272, 1277 (Okla. Crim. App. 1992) (incompetency does not "halt state appellate proceedings"); *California v. Kelly*, 822 P.2d 385, 412–14 (Cal. 1992); *Arizona v. White*, 815 P.2d 869, 878 (Ariz. 1991), *abrogated in part on other grounds by Arizona v. Salazar*, 844 P.2d 566 (Ariz. 1992), and for claims

[8] In *Debra A.E.*, this Court used the word "postconviction" to refer to a direct appeal from a conviction, a pre-appeal motion filed with the circuit court under Wis. Stat. §§ 974.02; (Rule) 809.30(2)(h), or an appeal from the denial of such a motion. 188 Wis. 2d at 118 n.2, 122–24. Most of the out-of-state cases cited in the text below this footnote use the word "postconviction" to refer to proceedings after the completion of a direct appeal (equivalent to a motion under Wis. Stat. § 974.06). To avoid confusion, this portion of the Brief will use "appeal" or "appellate proceedings" to refer to a direct appeal and any motions filed in a trial court prior to an appeal, "state habeas proceedings" to refer to any relief sought after a direct appeal, and "postconviction proceedings" as a catch-all for both.

raised in state habeas proceedings, *Fitzgerald v. Myers*, 402 P.3d 442, 449 (Ariz. 2017) ("[C]ompetence [is not required] before a capital petitioner's [state habeas] proceeding may advance."); *Haraden v. Maine*, 32 A.3d 448, 453 (Me. 2011) ("[P]roceeding on the merits despite the convicted person's incompetence is the appropriate vehicle for resolving viable postconviction claims . . . ."); *Reid v. Tennessee*, 197 S.W.3d 694, 705–06 (Tenn. 2006) ("[P]urely legal claims and factual claims that do not require the petitioner's input [can] proceed."); *Carter v. Florida*, 706 So. 2d 873, 876 (Fla. 1997) ("[C]laims raising purely legal issues that are of record and claims that do not otherwise require the defendant's input must proceed."); *Ex parte Mines*, 26 S.W.3d 910 (Tex. Crim. App. 2000); *Illinois v. Owens*, 564 N.E.2d 1184, 1190 (Ill. 1990).

Perhaps recognizing that certain postconviction claims require the defendant's "decisionmaking" (*Debra A.E.*'s category 2), multiple courts, including the United States Supreme Court, have also held that a third party can make decisions on behalf of incompetent defendants when necessary. *See*, *e.g.*, *Whitmore v. Arkansas*, 495 U.S. 149, 162 (1990) (noting that guardians ad litem can "appear in court on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves"); *Reid*, 197 S.W.3d at 706 ("[T]he trial court should appoint, if necessary, a 'next friend' or guardian ad litem to pursue the action on behalf of the petitioner.");

*Pennsylvania v. Haag*, 809 A.2d 271, 280 (Pa. 2002) (requiring "a next friend to pursue relief while a prisoner is incompetent"); *Carter*, 706 So. 2d at 876 ("Collateral counsel . . . [can] adequately represent the inmate's best interest, to determine which claims must be raised, and to make all decisions necessary to the proceedings.").

Finally, a few state courts of last resort have recognized that some claims are "undiscoverable due to [ ] incompetence" (*Debra A.E.*'s category 3), and, like *Debra A.E.*, hold that a previously incompetent defendant who "regains competency [ ] may seek review of any [such] claims" "through a second [postconviction] petition." *Haag*, 809 A.2d at 280; *see Haraden*, 32 A.3d at 453 ("creat[ing] a modified procedure in which an incompetent post-conviction petitioner has an opportunity to renew his post-conviction challenge if he later regains his competence"); *Catoe*, 597 S.E.2d at 787 ("fact-based claim[s] of ineffective assistance of counsel" that "incompetency prevented" from being discovered can be "raise[d] . . . in a subsequent proceeding"); *Owens*, 564 N.E.2d at 366 (a petitioner who regains competency "will not be barred [ ] from raising claims that were dependent upon personal information known only to the petitioner").

The State is aware of only one case[9] authorizing involuntary medication during postconviction proceedings,

[9] This is most likely because the government rarely seeks involuntary medication during postconviction proceedings. In most of the cases

*Pennsylvania v. Sam*, 952 A.2d 565 (Pa. 2008), but the context was very different. *Sam* was a death-penalty case, where an attorney who was neither "retained by [the defendant], nor [ ] appointed by any Pennsylvania court to represent him" initiated state habeas proceedings on behalf of an incompetent defendant on death row. *Id.* at 568. Pennsylvania requested involuntary medication to determine whether the defendant actually "want[ed] an . . . appointed next friend to [pursue state habeas relief] on his behalf," given that the defendant "ha[d] repeatedly expressed . . . his preference to be executed rather than to spend the rest of his life in prison." *Id.* at 576. The Pennsylvania Supreme Court found two interests that justified involuntary medication. First, involuntary medication was "in [*the defendant's*] interest," "so that he c[ould] decide whether to pursue [state habeas] relief." *Id.* at 579 (emphasis in original). Second, the State's interest in finality is "[p]articularly [strong] in capital cases," and was even stronger given that the "[state habeas] petition, which [defendant] never authorized," was being used "as a roadblock to the execution of a lawful judgment." *Id.* at 577. And, for reasons unique to that case, the court concluded that appointment of a "next friend" was not a workable

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discussed above, including *Debra A.E.*, the *defendant* sought treatment, a competency hearing, or a stay of proceedings during incompetency, and the government argued that these were unnecessary because most claims could proceed.

solution. *Id.* at 578. Neither justification for involuntary medication in *Sam* is present here.

### C. This Court Should Decline To Address Scott's Constitutional Arguments

Scott raises constitutional arguments as a backup, asking this Court to address them "if" it holds *Debra A.E.* was not violated (which the State concedes). *See* Pet. for Bypass 2. Specifically, Scott asks this Court to hold that, under the Due Process Clauses of both the federal and state Constitutions, *see Sell*, 539 U.S. 166, the order was unconstitutional as applied, Opening Br. 12–15, 17–19, and the statute that the Circuit Court "look[ed] at" for guidance, Wis. Stat. § 971.14(4)(b); *see* R. 93:21, is unconstitutional on its face, Opening Br. 15–17. The State agrees with Scott's suggestion that "*if*" this Court agrees the medication order violated *Debra A.E.*, it need not address these arguments because the order could be vacated for that reason alone. Indeed, for multiple reasons, the Court should not address Scott's constitutional arguments.

First, this Court "does not normally decide constitutional questions if the case can be resolved on other grounds," *Adams Outdoor Advert., Ltd. v. City of Madison*, 2006 WI 104, ¶ 91, 294 Wis. 2d 441, 717 N.W.2d 803 (citation omitted). And when the constitutional questions are "*difficult* and *novel*," this Court is even more hesitant to "expend[ ] 'scarce judicial resources'" where it "will 'have no effect on the outcome of the case.'" *Marks v. Houston Cas. Co.*, 2016 WI 53, ¶ 79 n.34, 369 Wis. 2d 547,

881 N.W.2d 309 (emphases added) (quoting *Ashcroft v. al–Kidd*, 563 U.S. 731, 735 (2011)). The questions that Scott's constitutional arguments present are "difficult and novel" because the constitutional standard for involuntary medication in the postconviction context is an open question. The holding of *Sell v. United States*, which Scott relies upon, does not control here. In *Sell*, the Supreme Court held that involuntary treatment to render a defendant competent to stand trial is permissible if four requirements are met: (1) "important governmental interests" are at stake; and involuntary medication (2) "significantly further[s] those . . . interests; (3) is "necessary to further those interests"; and (4) is "medically appropriate." 539 U.S. at 180–181 (emphasis removed). The Court "emphasize[d]," however, that "these standards" apply to "a particular governmental interest, namely, the interest in rendering the defendant *competent to stand trial*," and suggested that different standards govern "forced medication . . . for a *different* purpose." *Id.* At least one state court of last resort has indicated that the analysis of involuntary treatment during postconviction proceedings might differ significantly from the analysis pretrial. *Sam*, 952 A.2d at 574–75. The Pennsylvania Supreme Court observed that the "purpose of forced medication [at the pretrial stage that *Sell* considered is] to render the defendant competent to stand trial, an outcome the defendant . . . [typically] d[oes] not desire." *Id.* But postconviction proceedings exist primarily "for the benefit of [the] convicted," and forced medication would "enable

[incompetent defendants] to pursue [postconviction] relief . . . [and] vindicate [their] interests." *Id.* In such a situation, the State "[would] not [be] seeking an end that is against [the incompetent defendant's] interest," so the "strict" *Sell* standard arguably should not apply. *Id.* Whether or not *Sam* was correctly decided, it shows that, contrary to Scott's suggestion, the question of whether the logic of *Sell* applies here is unsettled.

Another reason to avoid reaching Scott's constitutional issues is that they are likely to remain purely academic, so long as *Debra A.E.* is consistently and faithfully applied in postconviction proceedings. *See Steffes*, 2013 WI 53, ¶ 27; *PRN Assocs.*, 2009 WI 53, ¶ 29. Indeed, it has been twenty-three years since *Debra A.E.*, and this is the first time (that the State is aware of) that a court in Wisconsin has ordered involuntary medication to render a defendant competent to pursue postconviction relief. *See supra* p. 21 (citing multiple cases applying *Debra A.E.*'s procedures without ordering involuntary medication). The State expects that, in the vast majority of cases, the question of whether to forcibly medicate simply will not come up because the defendant's claims either will be of the kind that counsel can handle alone, could be litigated by counsel and a guardian together, or could fairly be litigated by the defendant himself at some future date, should he regain competency. *See supra* pp. 15–18.

Finally, resolving Scott's argument that Wis. Stat. § 971.14(4)(b) is facially unconstitutional is not only

unnecessary to deciding this case (because the order violated state law, *supra* Part I), it is also not properly presented (and could never be presented) in a *postconviction* case. This Court has held, and neither party disputes, that "section 971.14 applies only to defendants who have not yet been sentenced." *Debra A.E.*, 188 Wis. 2d at 128 n.14; *State v. Daniel*, 2015 WI 44, ¶ 33, 362 Wis. 2d 74, 862 N.W.2d 867. At most, Section 971.14 serves as "guidance" for incompetency issues during postconviction proceedings. *Daniel*, 2015 WI 44, ¶ 33; *Debra A.E.*, 188 Wis. 2d at 132. Because this case involves only a *postconviction* order for treatment, whether Section 971.14(4)(b) adheres to *Sell*'s standard for *pretrial* medication orders is not at issue.

### D. If This Court Does Address Scott's Constitutional Argument, It Should Hold The Order Unconstitutional Given The Unique Circumstances In This Case

Although the appropriate constitutional test for involuntary medication during postconviction proceedings is far from straightforward, *see supra* pp. 26–27, it is clear that "an individual has a 'significant' constitutionally protected 'liberty interest' in 'avoiding the unwanted administration of antipsychotic drugs,'" *Sell*, 539 U.S. at 178 (quoting *Harper*, 494 U.S. at 221–22); *In re Melanie L.*, 2013 WI 67, ¶ 43, 349 Wis. 2d 148, 833 N.W.2d 607, and that there must be *some* justification for overriding that interest, such as "bringing to trial an individual accused of a serious crime," *Sell*, 539 U.S.

at 180, or preventing "danger[ ] to [the individual] or others," *Harper*, 494 U.S. at 227.

In the context of postconviction proceedings, two interests that could possibly justify involuntary treatment are the defendant's interest in "meaningful postconviction relief" (e.g., ensuring that most claims are reviewed) and the "public's interest in expediting postconviction relief and reaching a final determination on the merits." *Debra A.E.*, 188 Wis. 2d at 119. As described thoroughly above, *supra* Facts Part I, Argument Part I.A, *Debra A.E.* created a process that already "satisfies the[se] interests" without requiring a treatment order by allowing most claims to proceed despite the defendant's incompetency. *Debra A.E.*, 188 Wis. 2d at 130, 136.

Here, since there is no reason at this early stage to believe that *Debra A.E.*'s procedures will be insufficient, *supra* pp. 17–20, no arguable interest in meaningful postconviction relief nor the State's interest in finality can justify the involuntary treatment order. For this reason, and because there is no other known rationale for the order, the order was—without more—unjustified and therefore unconstitutional. *See State v. Wood,* 2010 WI 17, ¶ 17, 323 Wis. 2d 321, 780 N.W.2d 63 (recognizing that government action that impinges upon a constitutional interest must be justified); *Sell*, 539 U.S. at 178; *Harper*, 494 U.S. at 221–22; *In re Melanie L.*, 2013 WI 67, ¶ 43. In other words, in the narrow circumstances of this case, because the Circuit Court

did not exhaust *Debra A.E.*'s procedures or have a reason to believe those procedures would be insufficient, the order unconstitutionally burdened Scott's "liberty interest in avoiding the unwanted administration of antipsychotic drugs." *Sell*, 539 U.S. at 178 (citation omitted).

## II. Involuntary Medication Orders Should Be Immediately Appealable

Scott next urges this Court to hold that an involuntary medication order is "a final order in a special proceeding that is appealable as a matter of right under Wis. Stat. § 808.03(1)." *See* Opening Br. 19–21. The State agrees that involuntary medication orders must be immediately appealable for the reasons the Supreme Court identified in *Sell*: once a defendant "ha[s] undergone forced medication—the very harm he seeks to avoid"—that harm "cannot [be] undo[ne]." 539 U.S. at 176–77.

As Scott proposes, this Court could hold that a medication order is a "final order" in a "special proceeding," appealable "as of right." Wis. Stat. § 808.03(1). The Court of Appeals in *Debra A.E.* "issued an order . . . concluding [ ] that the competency order was a final order appealable as of right," *see* Br. of Defendant-Appellant 4, *State v. Debra A.E.*, No. 92AP2974 (Ct. App. Feb. 15, 1993); R. 75:3, and this Court did not question that order. This Court's recent opinion in *Alger* explained that special proceedings are "stand-alone" proceedings, and listed a "motion to intervene" as an example. 2015 WI 3, ¶ 29 (citing *Wellens v. Kahl Ins. Agency, Inc.*, 145 Wis. 2d 66, 69, 426 N.W.2d 41 (Ct. App. 1988)). Like a motion

to intervene, competency proceedings "stand alone" in the sense that they are conducted separately from the merits of any postconviction relief and serve to establish a new fact (postconviction competency) that is relevant to, but distinct from, the related postconviction proceedings. *See Debra A.E.*, 188 Wis. 2d at 131–33. On the other hand, *Alger* held that a "Chapter 980 discharge petition[ ]" was not a "special proceeding" because it "could not exist without the initial commitment[ ] and [was] a part of the initial commitment[ ]." 2015 WI 3, ¶ 31 (citation omitted). The involuntary medication order here was entered solely to render Scott competent to participate in postconviction proceedings, so it arguably was "a part of" those proceedings and "could not exist without the[m]." *Id.* If that is the relevant test from *Alger*, then a medication order would not be a "final order in a special proceeding." *Id.*[10]

[10] Aside from *Debra A.E.* and this case, the State was unable to find any other case where a medication order or competency determination was appealed as of right. Every example the State could find involved either a permissive, interlocutory appeal, *see*, *e.g.*, *State v. Daniel*, 2014 WI App 46, ¶ 5 n.3, 354 Wis. 2d 51, 847 N.W.2d 855 (appeal of order finding defendant competent to pursue postconviction relief); *In re Commitment of Luttrell*, 2008 WI App 93, ¶ 1, 312 Wis. 2d 695, 754 N.W.2d 249 (appeal of order denying a motion for a competency evaluation); *In re Commitment of Smith*, 229 Wis. 2d 720, 722 n.2, 600 N.W.2d 258 (Ct. App. 1999) (appeal of order denying defendant's request to stay trial while incompetent), or an appeal of the final judgment of conviction, *see*, *e.g.*, *State v. Byrge*, 2000 WI 101, ¶¶ 22–25, 237 Wis. 2d 197, 614 N.W.2d 477 (defendant challenging, in main appeal, whether he was competent to stand trial).

More straightforwardly, rather than decide whether competency proceedings are "special proceedings," this Court should follow *Arneson* and instruct the Court of Appeals to grant petitions for interlocutory appeal for all involuntary medication orders. 206 Wis. 2d at 220. This ground offers better legal support for a holding of immediate appealability. That is because appeals of involuntary medication orders fall squarely within the criteria for an interlocutory appeal. *See* Wis. Stat. § 808.03(2)(b) (authorizing any interlocutory appeal that will "[p]rotect the petitioner from substantial or irreparable injury"). In *Arneson*, this Court considered whether the Court of Appeals should, "as a matter of course," grant a petition for interlocutory appeal from an order denying a qualified immunity claim. 206 Wis. 2d at 220. The Court declined to "consider whether such an order constitute[d] a final order under § 808.03(1)." *Id.* at 224–25. Instead, the Court used its "constitutional superintending power" to "direct the Court of Appeals to grant every petition of this kind," because such petitions "will always fall within the criteria of Wis. Stat. § 808.03(2)(a) and (b)." *Id.* at 220. Without interlocutory review, the defendant would "lose the primary benefit of qualified immunity if the case wrongly proceeds"—"the official cannot be 're-immunized' if erroneously required to stand trial." *Arneson*, 206 Wis. 2d at 227 (brackets omitted, citations omitted). Likewise, a petitioner who has "undergo[ne]

medication against his will . . . cannot undo that harm." *Sell*, 539 U.S. at 176–77.[11]

## III. The Court Of Appeals Improperly Denied A Stay Pending Appeal

Finally, Scott argues that the Court of Appeals "erred in denying a stay" pending appeal in this case, and that in future appeals medication orders should be "automatically stay[ed]." Opening Br. 22–27 (capitalization altered). The State agrees with Scott that a stay should have been granted in this case and should be granted in most appeals of involuntary medication orders, although not necessarily all.

As this Court explained in *State v. Gudenschwager*, 191 Wis. 2d 431, a primary reason to grant a stay is the prospect that the movant "will suffer irreparable injury." *Id.* at 440–42. Incompetent defendants have "a constitutionally protected liberty interest in avoiding the unwanted administration of antipsychotic drugs," and the "harm" of "hav[ing] undergone forced medication" (assuming it was done erroneously) "cannot

[11] Scott suggests in the alternative that this Court could hold that "competency proceeding[s] fall[ ] into *Alger*'s third category of proceedings," a category that, he claims, allows for a "final [appealable] 'order within an existing matter.'" Opening Br. 21 (citing *Alger*, 2015 WI 3). Yet *Alger* said nothing about a "third category of proceedings," so it is unclear what the basis for this theory is. Perhaps Scott is inferring this "third category" from the fact that this Court in *Alger* allowed the appeal of the discharge petition to proceed—but that is because a Wisconsin statute specifically provides that discharge petitions "can be appealed immediately." *Alger*, 2015 WI 3, ¶ 69 (Abrahamson, C.J., dissenting); Wis. Stat. § 930.095(3). There is no similar provision for involuntary medication orders during postconviction proceedings.

[be] undo[ne]." *Sell*, 539 U.S. at 176–178 (citation omitted); *see also In re Melanie L.*, 2013 WI 67, ¶ 43.

Stay applicants must also establish "more than the mere 'possibility' of success on the merits," but the greater "the amount of irreparable injury the plaintiff will suffer absent a stay," the less "probability of success" is needed. *Gudenschwager*, 191 Wis. 2d at 441. Given that this Court has held that involuntary medication "ordinarily" will be inappropriate during postconviction proceedings, *Debra A.E.*, 188 Wis. at 130, this element will usually be met.

In his motion for a stay pending appeal, Scott explained that he was "likely to succeed on appeal" because the order "conflict[ed] with the procedure set forth in *Debra A.E.*,"[12] R. 76:3; *see supra* Part. I.A, that he would "suffer irreparable injury" by being medicated against his will, and that, from the State's perspective, there was "no imminent need for medication" (the State did not oppose the stay request), R. 76:3–5. In a case like this, that should be enough to warrant a stay. Nevertheless, the Court of Appeals denied it with little explanation. R. 78:2.

The State also agrees with Scott that it would be helpful for this Court to explain that stays should generally be granted during appeals of medication orders, for the reasons discussed

[12] Although Scott's argument that he was "likely to succeed on appeal" was short, he referred the court to his petition for interlocutory appeal where he "more thoroughly developed" the arguments. R. 76:4 n.2.

above. The State does not agree that stays should be "automatic[ ]." The standard for a stay pending appeal balances the potential harms to either side, along with the merits of the appeal. *See Gudenschwager*, 191 Wis. 2d at 440. A future case may arise where there is an "imminent need" to begin medication immediately, *see* R. 76:5, or where the issue raised on appeal is clearly meritless. It is enough to hold that stays are generally warranted without foreclosing any possible exception.

## CONCLUSION

The circuit court's involuntary medication order should be vacated with instructions to proceed under *Debra A.E.*

Dated: December 18, 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), (c) for a brief produced with a proportional serif font. The length of this brief is 8,611 words.

Dated: December 18, 2017.

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**CERTIFICATE OF COMPLIANCE**
**WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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: December 18, 2017.

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