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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP1214-W

STATE ex rel. RAYTRELL K. FITZGERALD,

Petitioner-Petitioner,

v.

CIRCUIT COURT FOR MILWAUKEE COUNTY
and HON. DENNIS R. CIMPL, presiding,

Respondents-Respondents.

Appeal from a Memorandum Opinion Entered by the District I Court of Appeals, Denying a Petition for Supervisory Writ Directed to the Milwaukee County Circuit Court, which Entered an Amended Order of Commitment for Treatment (Incompetency)

BRIEF AND APPENDIX OF PETITIONER-PETITIONER

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ISSUE PRESENTED

> *State v. Scott*, 2018 WI 74, ¶43, 382 Wis. 2d 476, 914 N.W.2d 141 held that "involuntary medication orders are subject to an automatic stay pending appeal." Which event triggers the automatic stay—the entry of the involuntary medication order or the filing of a notice of appeal? Either way, must the circuit court *enter* an "automatic stay" order?

The circuit court held that it did not know the triggering event. The court of appeals held that the administration of involuntary medication is not stayed until the defendant files a notice of appeal.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This appeal presents an issue of first impression for Wisconsin and asks this Court to exercise its superintending authority. As suggested by the decision to grant review, it is worthy of oral argument and a published decision.

STATEMENT OF THE CASE AND FACTS

On October 5, 2016, the State charged Raytrell K. Fitzgerald with one count of possession of a firearm contrary to a harassment injunction in violation of §941.299(1m)g and §939.50(3)(g). The complaint alleged that Harbor Freight Tools had

obtained a harassment injunction against Fitzgerald, its former employee in Case No. 2016CV2114.[1] (R.1:3). It did not allege that Fitzgerald had access to a weapon or used a weapon in the incident at issue. The court set bail, which Fitzgerald paid, and he was released and returned to the community. (R.2-3).

The case continued. Among other things, the circuit court found Fitzgerald not competent to proceed, and he was placed in an Outpatient Competency Restoration Program. (R.11, 12, 14). On May 7, 2018, the circuit court remanded Fitzgerald to DHS's custody for an inpatient competency evaluation. (R.18). Two weeks later, Dr. Ana Garcia, a psychologist at Mendota Mental Health Institute, filed a report concluding that Fitzgerald was not competent to proceed to trial. (R.20). At that point, Fitzgerald was not under a medication order, but staff at Mendota had been trying to medicate him, and he was declining the medication. (App.118).

On June 18, 2018, the court held an involuntary medication hearing. The State called Dr. Garcia, and she testified that Fitzgerald had continued to exhibit indications of psychotic symptoms like responding to internal preoccupations, expressing disorganized thoughts, appearing paranoid and displaying an inability to discuss his

[1] There is no appellate record for this appeal, which began by way of Fitzgerald's petition for supervisory writ. This brief therefore cites to the appellate record for *State v. Raytrell K. Fitzgerald*, Appeal No. 2018AP1296-CR, which arises from the same circuit court case.

charges in a reasonable way. She testified that when Fitzgerald stops taking medication, these symptoms worsen. (App.118). She also said that he does not understand the need for medication, does not cooperate with taking medication, and has hidden medications in his cheek to avoid taking them. (App.117-118). She clarified that Mendota sought the ability to administer medication intramuscularly as needed. (App.118).

On cross-examination, Dr. Garcia admitted that she had had no contact with Fitzgerald after May 23rd. Her interactions with him (including the competency evaluation) totaled about two and a half hours. She said that as a psychologist she cannot prescribe medication, but she knew that he had been prescribed Seroquel during his admission. (App.119-121). When asked if she had ever actually seen Fitzgerald on medication, she could not answer yes. In fact, she could not speak with certainty to a history of compliance or noncompliance with taking medication. (App.122).

Dr. Garcia did not testify that Fitzgerald was dangerous and did not opine that he needed medication due to dangerousness. (R.20; App. 116-122).

Fitzgerald also testified. He stated that he has been misdiagnosed and expressed concern about the dosage of medication that Mendota had been trying to give him. In his opinion, it was too much. (App.124-125).

At the close of testimony, the State urged the court to order involuntary medication simply because Fitzgerald's behavior allegedly had become worse, and he had been cheeking pills. (App.126). Defense counsel responded that the State had failed to meet its burden of proof. The State could medicate Fitzgerald against his will only if he was dangerous or to restore competency after proving the four factors required by *Sell v. United States*, 539 U.S. 166 (2003). The State had failed to prove that: (1) an important government interest was at stake; (2) involuntary medication would significantly further that interest; (3) involuntary medication was necessary to further that interest; and (4) the administration of drugs was medically appropriate for Fitzgerald. (App.127-129).

The State had not requested the administration of involuntary medication based on Fitzgerald's alleged dangerousness, and Dr. Garcia had not testified that he was dangerous. Nevertheless, the court noted that her report had summarized third-party reports of dangerous and violent behavior by Fitzgerald in 2010, 2011, and 2013. (App.135). It also noted that staff at Mendota described Fitzgerald as grossly disorganized, laughing to himself, agitated, calling peers names, pushing a staff person, and once flushing large amounts of toilet paper down the toilet. (App.136). The court held:

> All of those things that I've read into the record I think exhibit that Mr. Fitzgerald is dangerous, while not on prescribed medications, is dangerous to himself or others. There is physical

> violence; however . . . so I think the State prevailed on that prong, but I think they've also prevailed on the second prong with regard to *Sell*, and that is that there is an important government interest at stake here and that is the fact that he is charged with a serious felony. It may be a status offense, but the fact is he is alleged to be carrying a gun while under a prohibition for carrying a gun . . . And so, therefore, that is in my opinion an important government interest, the furtherance of this felony.
>
> The fact that he does not take his medication is not facilitating him to be restored to competency. That is what this is all about so he can stand trial on whether or not he is guilty of this very serious offense; therefore, the fact that he's not taking his meds and has to be given them involuntarily does further that interest and I think it's also a necessary reason to further that interest. (App.136-137).

The court then signed an Order and an Amended Order of Commitment for Treatment (Incompetency).[2] This form Order permits the circuit court to order involuntary treatment based either on the defendant's "current risk of harm to self or others" or on the *Sell* factors. The circuit court authorized the involuntary administration of medication based upon the *Sell* factors, not on

[2] The caption on the original Order misspelled Fitzgerald's named. The circuit court entered an Amended Order (just page 1) which corrected the caption.

Fitzgerald's current risk of harm to self or others. (App.109-111).

On June 20, 2018, this Court issued the decision in *State v. Scott*. On June 25, 2018, Fitzgerald filed both a notice of intent to pursue postdisposition relief from the June 18th order and a letter notifying the circuit court that, pursuant to *Scott*, he was entitled to an automatic stay of the involuntary medication order. (R.23, R.24).

On June 27, 2018, the circuit court held a hearing and criticized defense counsel for not filing a motion to stay the involuntary medication order. (App.142). Defense counsel tried to explain that per *Scott* the stay was automatic. He also noted that the ADA was not contesting the stay and that, under *Scott*, the State could file a motion to lift the stay. (App.143-146). The court then prompted the ADA:

> The Court: Well, he's moving that I do it now. I would assume, Mr. Dague.
>
> Mr. Dague: Yes.
>
> The Court: He's—in other words, you're asking that I impose the stay, and he's asking that I lift it because of the dangerousness that we got off the testimony. When I took the testimony from—it wasn't Dr. Collins. It was Dr. Ana, A-N-A-Garcia on June 18. And I recall the testimony.
>
> Mr. McGinn: Okay. And it was my position that there wasn't any testimony from Dr. Garcia as to Mr. Fitzgerald's dangerousness. I know that we –

> The court: It was in the report, which was part of the record.[3]

Defense counsel stressed that he had filed a notice of intent to pursue postdisposition relief. (App.147). But the court held:

> The Court: You can file a motion [in the court of appeals] to stay it, but I'm imposing a stay, and then on motion of the State, lifting the stay so that he gets medicated because that's the only way we're going to move this case along if he's not going to be restored to competency until this is over.
>
> And what this appears to me is to be a delaying tactic so that he's up at Mendota until the statute runs because I don't think you're going to file an appeal.
>
> Mr. McGinn: Okay.
>
> The Court: So the record will reflect I'm granting the motion of the defense to stay it and then granting the motion of the State to lift the stay, and he will be involuntarily medicated. You file your appeal, and you get the court of appeals to reverse me. (App.148).

The court signed defense counsel's proposed order imposing the stay (App.112), but before it could sign a written order lifting it, Fitzgerald filed a petition for supervisory relief in the court of appeals

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[3] Dr. Garcia's report was not admitted into evidence. (App.141-150).

challenging the circuit court's implementation of *Scott's* automatic stay procedure.

On June 28th the circuit court called counsel back to court and vacated the previous day's proceedings. The court noted that it had read *Scott* and:

> . . . the question I had is does the automatic stay come in after the appeal is filed or is it automatic when there's a notice of intent to appeal filed or is it automatic if there's merely an allegation that the defendant is going to file an appeal? I don't know. That issue is not—or that question is not answered as far as I could find, so I'm going to err on the side of caution and issue the stay today. (App.152).

The court added that Fitzgerald had two weeks to file an appeal. If he did not file an appeal, it would lift the stay "because then clearly the *Scott* case doesn't apply." (App.152). If Fitzgerald filed an appeal, then the State could move to lift the stay. (*Id.*).

On July 9th, Fitzgerald filed a notice of appeal from the June 18th involuntary medication order.[4] (R.31). On July 11th, the transcript of the June 28th hearing became available. (App.161). Then on July 12th, two events happened almost simultaneously.

[4] This generated *State v. Raytrell K. Fitzgerald*, Appeal No. 2018AP1296-CR, which challenges the circuit court's involuntary medication order and the constitutionality of §971.14. Fitzgerald filed a Petition for Bypass, which is pending before this Court.

Both the court of appeals and the circuit court made rulings regarding the automatic stay.

The court of appeals issued a memorandum opinion denying Fitzgerald's petition for supervisory writ. (App.101). It held that Fitzgerald was not entitled to an automatic stay "until he actually had an appeal pending and that did not happen until he filed the notice of appeal on July 9, 2018. A notice of intent did not suffice." (App.105). It held that "Wis. Stat. Rule §809.30, which governs appeals in NGI proceedings, criminal cases, and certain other case types not applicable here, does not govern commencement of an appeal from the involuntary medication order. Rather, Wis. Stat. Rule §809.10 applies." (App.105).[5]

The court of appeals held that its power to grant relief pending appeal derives from §808.07 and §809.12, so the State's request to lift the stay of an involuntary medication order should, like other motions for relief pending appeal, be directed to the circuit court first. (App.106). Because §809.30 did not apply, the circuit court did not lose power to hold further proceedings once the notice of appeal was

[5] Actually, Rule 809.10 governs Rule 809.30 appeals. *See* Wis. Stat. §809.30(2)(j). The court of appeals may have meant that Rule 809.30, which is a special rule for specific kinds of appeals, does not apply to appeals from involuntary medication orders. This would mean that §808.04(1)'s general rule applies. Under §808.04(1), a person initiates an appeal by filing a notice of appeal under the 45/90 day rule rather than a §809.30(2)(b) notice of intent within 20 days.

filed. It retained the power to act until the record was transmitted to the court of appeals. (App.105 n.3). The circuit court could thus entertain the State's motion to lift the stay. (App.107).

Meanwhile, unaware of the court of appeals' decision, the circuit court held that because an appeal had been filed, it could not proceed in this case. (App.159).

ARGUMENT

I. The court of appeals misunderstood *Scott* and thus erroneously denied Fitzgerald's petition for supervisory writ.

A. The requirements for a supervisory writ.

To obtain a supervisory writ, Fitzgerald had to show that: (1) an appeal was an inadequate remedy; (2) irreparable harm would result from inaction; (3) the circuit court's duty was plain and the court violated it or intended to violate that duty; and (4) his request was prompt. *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶80, 363 Wis.2d 1, 866 N.W.2d 165. The court of appeals denied Fitzgerald's petition for supervisory based solely on the "plain duty" requirement. This Court should reverse the court of appeals' decision because it misunderstood what *Scott* requires.

B. Scott's automatic stay is not contingent upon the filing of a notice of appeal.

Scott held that a competency proceeding is not part of the defendant's underlying criminal case. *Scott*, ¶33. While the two proceedings are "connected" or "related," the competency proceeding is "treated as being commenced independently of any other action or proceeding." *Id*. (citing *State v. Alger*, 2015 WI 3, ¶76, 360 Wis. 2d 193, 858 N.W.2d 346.)). *Scott* thus concluded that an order determining incompetency and mandating involuntary medication or treatment to restore competency "is a final order issued in a special proceeding and is appealable as a matter of right pursuant to Wis. Stat. §808.03(1)." *Id*., ¶34. *Scott* also held that "involuntary medication orders are subject to an automatic stay pending appeal." Otherwise, the defendant's constitutionally-protected liberty interest in avoiding unwanted antipsychotic medications is rendered a nullity. *Scott*, ¶44.

Scott did not expressly state what event triggers the automatic stay—the entry of the involuntary medication order or the filing of a notice of appeal. However, the answer is clear. The court of appeals itself recognized that the power to grant "relief pending appeal" derives from §808.07 and Rule 809.12. (App.106). The relevant parts of these statutes do not require a party to file a notice of appeal before moving the circuit court for relief pending appeal:

809.12 Rule (Motion for relief pending appeal). A person seeking relief under s. 808.07 shall file a motion in the trial court unless it is impractical to seek relief in the trial court. A motion in the court must show why it is impractical to seek relief in the trial court or, if a motion had been filed in the trial court, the reasons given by the trial court for its action. A person aggrieved by an order of the trial court granting the relief requested may file a motion for relief from the order with the court. A judge of the court may issue an ex parte order granting temporary relief pending a ruling by the court on a motion filed pursuant to this rule. A motion filed in the court under this section must be filed in accordance with s. 809.14

808.07 Relief pending appeal.

(1) Effect Of Appeal. An appeal does not stay the execution or enforcement of the judgment or order appealed from except as provided in this section or as otherwise expressly provided by law.

(2) Authority Of A Court To Grant Relief Pending Appeal.

(a) During the pendency of an appeal, a trial court or an appellate court may:

1. Stay execution or enforcement of a judgment or order;

2. Suspend, modify, restore or grant an injunction; or

> 3. Make any order appropriate to preserve the existing state of affairs or the effectiveness of the judgment subsequently to be entered.

The filing of a notice of appeal is not a statutory prerequisite for circuit court relief pending appeal. Section 808.075(1) plainly states: "In any case, *whether or not an appeal is pending*, the circuit court may act under . . . ss. 808.07(1) and (2) and 809.12." (Emphasis supplied). This makes sense. When the stakes are high—when the execution of an order or judgment could cause irreparable harm—the aggrieved party moves for a stay to preserve the status quo at the conclusion of the circuit court hearing before a notice of appeal is even drafted. For example, at the hearing where the circuit court ordered involuntary medication in *Scott*, the defendant requested, and the circuit court granted, a 30-day stay so that he could seek appellate relief. *Scott*, ¶2 n.2. *See also Flynn v. Department of Administration*, 216 Wis. 2d 521, 533, 576 N.W.2d 245 (1998)(noting that the circuit court granted an interim stay, and then the defendants filed their notice of appeal).

Likewise, *Scott* did not impose a "notice of appeal" requirement. That would make it harder to obtain an "automatic stay" than it is to get a discretionary stay under normal procedures. Instead, *Scott* relieved the defendant of an impossible burden—scrambling to file a motion for relief pending appeal and imploring a court to grant it before the involuntary administration of antipsychotic medication begins and before a transcript is

prepared. It made the stay "automatic" because the defendant's "significant, constitutionally-protected liberty interest in avoiding the unwanted administration of antipsychotic medication" is at stake, and a circuit court error would render the defendant's appeal a nullity. *Scott*, ¶44

The court of appeals' decision—making the automatic stay contingent on the filing of a notice of appeal—turns *Scott* on its head and will generate unnecessary appeals. Like Fitzgerald, some defendants attend their competency hearings by video while detained at the institution where they were examined and will be treated. (App.115). Others are immediately transported from the courthouse to the institution. As soon as a circuit court faxes a signed order to DHS, it may inject the defendant with a 30-day dose of psychotropic medication. Trial counsel has no time to do legal research, order a transcript, consult appellate counsel, or determine the pros and cons of appealing the involuntary medication order. Trial counsel must arrive at the hearing armed with a notice of appeal to file as soon as the court signs the involuntary medication order. The failure to do so could result in irreparable harm to his client and a malpractice or ineffective assistance of counsel claim.

Furthermore, when a circuit court enters a Form CR-206 Order of Commitment for Treatment (Incompetency) it gets distributed to DHS. (App.110, distribution list). If the filing of the notice of appeal triggers an automatic stay, how is DHS to be notified

of this fact? Is trial counsel supposed to fax a copy of the notice of appeal to DHS and hope that it has read *Scott*? Or, after trial counsel files a notice of appeal, is the circuit court supposed to enter a separate "automatic stay" order and distribute it to DHS? If so, how quickly? The court of appeals' interpretation of *Scott* would put the defendant in the very bind it was designed to prevent. Thus, contrary to the court of appeals' decision, a circuit court has a plain duty to effectuate *Scott*'s automatic stay before the defendant files a notice of appeal.

C. *Scott* requires the circuit court to make specific findings before lifting the stay.

The court of appeals further held that because Rule 809.30 does not govern an appeal from an involuntary medication order, a circuit court retains the power to decide a State's motion to lift the automatic stay. (App.105 n.3)(citing Wis. Stat. §808.075(3)). It then approved the process that occurred in Fitzgerald's case. The circuit court acknowledged the *Scott* automatic stay, invited the State to move to lift the stay, orally lifted the stay, and directed the State to file a written order by the end of the day—all within minutes at the June 27th hearing.

On the morning of June 28th, Fitzgerald filed a petition for supervisory writ arguing that the circuit court violated its plain duty by orally lifting the stay without requiring the State to make the required showing. *See Scott*, ¶47. Specifically, the circuit court failed to find that the State had: (1) made a strong

showing that it was likely to succeed on the merits of the appeal; (2) shown that the defendant would not suffer irreparable harm if the stay was lifted; (3) shown that no substantial harm would come to other interested parties if the stay was lifted; and (4) shown that lifting the stay would do no harm to the public's interest. (App.141-149). On June 27th, the circuit court made an oral ruling in violation of its plain duty under *Scott*, and it was poised to enter a written order to the same effect.

II. This Court should exercise its superintending authority to ensure that *Scott* works as intended.

"Pursuant to Article VII, Section 3 of the Wisconsin Constitution, this court has superintending authority 'that is indefinite in character, unsupplied with means and instrumentalities, and limited only by the necessities of justice.'" *Scott*, ¶43 (quoting *Arneson v. Jeznewski*, 206 Wis. 2d 217, 225, 556 N.W.2d 721 (1996)). This Court may use that authority to "control the course of ordinary litigation in inferior courts." *State ex rel. Universal Processing Services of Wisconsin, LLC v. Circuit Court for Milwaukee County*, 2017 WI 26, ¶47, 374 Wis. 2d 26, 892 N.W.2d 267.

There are three simple fixes to the big problems created by the court of appeals decision in this case. They require no change to *Scott*. They are familiar to the bench and bar. And they are within this Court's superintending authority to control the litigation of involuntary medication orders in the lower courts.

1. This Court should hold that a circuit court must advise the defendant that he has a right to appeal an Order of Commitment for Treatment (Incompetency) and that it is automatically stayed pending further court order.[6] Many circuit courts have presumed that a finding of incompetency automatically requires involuntary medication to restore competency.[7] *Scott* reversed that presumption by recognizing and protecting a defendant's right to appeal this type of order. *Scott*, ¶34. This advisement will ensure that everyone at the involuntary medication hearing is made aware of the defendant's right to appeal and the automatic stay.

Making execution of the involuntary medication order contingent upon further court order ensures that the defendant's right to appeal is not "rendered a nullity." *Scott*, ¶44. This contingency prevents unnecessary litigation by giving the defendant and counsel time to consider whether it makes sense to appeal. Some defendants may accept medication in order to proceed to a plea hearing, trial or sentencing as quickly as possible. Some may prefer

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[6] *See e.g.* Wis. Stat. §973.18 (requiring a trial judge to personally inform a criminal defendant of his right to appeal). *See also Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, 299 Wis. 2d 723, 728 N.W.2d 670 (requiring circuit courts to clearly state that a document is the final document from which an appeal may be taken).

[7] *See* the list of circuit court cases on pages 11-13 of Fitzgerald's Petition for Bypass pending in Appeal No. 2018AP1296-CR.

medication in lieu of a lengthy commitment in an institution for the mentally ill. *Sell*, 539 U.S. at 180. This contingency also gives trial counsel time to communicate with the State Public Defender about the need for appointing appellate counsel to order a transcript and determine whether there are meritorious grounds for appeal. A court may lift the stay when, for example, the defendant waives his right to appeal, the State prevails on a motion to lift, the defendant fails to file a timely notice of appeal under §808.04(1)'s 45/90 day rule, or the defendant exhausts his appeal rights.

2. This Court should require the revision of Mandatory Circuit Court Form CR-206, Order of Commitment for Treatment (Competency) to indicate prominently that the involuntary administration of antipsychotic medication is automatically stayed pending further court order.[8] DHS is not a party to a competency proceeding, but these Orders are always distributed to DHS. (App.110, distribution list). This revision ensures that DHS receives notice of the automatic stay.

3. This Court should hold that the State must: (a) file a motion to lift the automatic stay

[8] *See e.g. State v. Hemp*, 2014 WI 129, ¶35, 359 Wis. 2d 320, 856 N.W.2d 811, where this Court directed the revision of Mandatory Circuit Court Form CR-266 regarding the procedure for obtaining expunction of a conviction.

pursuant to Rule 809.12, §808.07, and §808.075[9]; and (b) file and serve the pertinent transcripts before doing so. Requiring the *filing* of a motion ensures that the defendant receives advance notice of the State's arguments for lifting the stay and an opportunity to research and respond to those arguments. *See State v. Thompson*, 2012 WI 90, ¶46, 342 Wis. 2d 674, 818 N.W.2d 904 (quoted source omitted)("The elements of procedural due process are notice and an opportunity to be heard, or to defend or respond, in an orderly proceeding, adapted to the nature of the case in accord with established rules.") Allowing the State to make, and the circuit court to grant, an oral motion to lift the automatic stay as soon as it takes effect defeats the very purpose of the stay/lift procedure that *Scott* imposed.

Requiring the State to order the relevant transcripts is necessary because defense counsel will likely change between the involuntary medication hearing and the filing of the motion to lift. Appellate counsel will need a transcript to determine, among other things, whether the State has satisfied the first *Scott* factor—a strong showing that it is likely to succeed on the merits of the appeal. *See In the Interest of J.D.*, 106 Wis. 2d 126, 132, 315 N.W.2d 365 (1982)("There is no way appellate counsel can determine if there is arguable merit for the appeal without either having been the trial attorney or

[9] Whether the State files a motion to lift the stay in the circuit court or the court of appeals will be determined by §808.075, which governs permitted court actions pending appeal.

reading the transcript.") Furthermore, if the circuit court lifts the stay, then the defendant might seek immediate temporary relief in the court of appeals, which will be reluctant to act without, at a minimum, a transcript of the involuntary medication hearing.

In summary, an order for the involuntary administration of antipsychotic medication to restore competency overrides a defendant's significant, constitutionally-protected liberty interest. These orders are the exception not the rule, and defendants have the right to appeal them before they are rendered moot. *See Sell*, 539 U.S. at 176, 180. *Scott* designed a stay/lift procedure to protect these rights. This Court should supplement *Scott* so that the process works like this:

- When a circuit court enters a Mandatory Circuit Court Form CR-206 Order of Commitment for Treatment (Incompetency) it must advise the defendant of his right to appeal and the automatic stay.

- Mandatory Circuit Court Form CR-206 Order of Commitment for Treatment (Incompetency) should prominently state that it is automatically stayed pending further court order.

- A court may lift the stay if the defendant waives his right to appeal, if the State prevails on a motion to lift, if the defendant fails to file a notice of appeal with the time prescribed by

§808.04(1), or when the defendant exhausts his appeal rights.

- If the State seeks to lift the stay, it must file a written motion following Rule 809.12, §808.07, and §808.075, and it must file and serve a transcript of the involuntary medication hearing with its motion.

These proposed additions above will help ensure that *Scott*'s stay/lift procedure works as intended.

CONCLUSION

For the reasons stated above, Raytrell K. Fitzgerald respectfully requests that this Court reverse the court of appeals' decision and effectuate the stay/lift procedure imposed by *Scott*.

Dated this 12th day of November, 2018.

Respectfully submitted,

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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 4,608 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 12th day of November, 2018.

Signed:

_____

COLLEEN D. BALL
Assistant State Public Defender

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 including 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 12th day of November, 2018.

Signed:

COLLEEN D. BALL
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APPENDIX

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APPENDIX

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