STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP1214-W

STATE OF WISCONSIN ex rel.
RAYTRELL K. FITZGERALD,

Petitioner-Petitioner,

v.

CIRCUIT COURT FOR MILWAUKEE COUNTY
and the HONORABLE DENNIS R. CIMPL,
PRESIDING,

Respondent-Respondent.

ON APPEAL FROM A DENIAL OF A PETITION FOR SUPERVISORY WRIT, THE WISCONSIN COURT OF APPEALS, DISTRICT I, PRESIDING

RESPONSE BRIEF AND SUPPLEMENTAL APPENDIX OF RESPONDENT-RESPONDENT

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ISSUES PRESENTED

1. In order to obtain a supervisory writ, a petitioner must show that an appeal is inadequate, irreparable harm would follow inaction, the lower court violated a plain duty, and the petitioner's request is prompt. Fitzgerald has failed to show a plain duty violation, irreparable harm, or an appeal's inadequacy. Did the court of appeals erroneously exercise its discretion in denying his petition?

The court of appeals did not answer this question.

This Court should answer, "No."

2. This Court has superintending and administrative authority over all courts, but the Court will not invoke such authority where there is another adequate remedy, or where the conduct of the trial court does not threaten seriously to impose a significant hardship upon a citizen. Fitzgerald asks this Court to use its superintending authority to promulgate detailed procedures for implementing an automatic stay of involuntary medication orders. But he fails to explain why he lacks another adequate remedy, and identify a credible and significant hardship. Should the Court exercise its superintending authority in this case?

The court of appeals did not answer this question.

This Court should answer, "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests oral argument and publication.

INTRODUCTION

This case is before us in the context of a petition for a supervisory writ. Fitzgerald challenges the court of appeals' decision to deny him a supervisory writ based on his failure

to show a violation of a plain duty. More specifically, the court of appeals held that, since an appeal of an involuntary medication order is a final order from a special proceeding, the circuit court did not have a "plain duty" to refrain from hearing the State's motion to lift the automatic stay, because the circuit court retained the power to act on all matters until the record on appeal is transmitted to the court of appeals. (A-App. 107.) But in so holding, the court of appeals noted that Fitzgerald was not entitled to an automatic stay until he filed a notice of appeal. (A-App. 105.) It is this comment in the court of appeals' denial of his supervisory writ petition, not the substantive issue before the court of appeals, which Fitzgerald has made the focus of this Court's review.

As discussed below, the court of appeals decision should be affirmed because it properly denied Fitzgerald's petition for a supervisory writ. Fitzgerald fails to identify a plain duty that the circuit court violated, fails to show irreparable harm related to that duty, and fails to show that an appeal would be inadequate.

The court of appeals should also be affirmed because on appeal Fitzgerald completely abandons his arguments in favor of a supervisory writ. Instead, Fitzgerald changes course and argues that the automatic stay established in *State v. Scott*, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141, should be triggered by the medication order, not the notice of appeal. This argument was not developed in Fitzgerald's supervisory writ petition in the court of appeals. And since it was not the substantive issue for the supervisory writ, it cannot be the basis for affirming or reversing the court of appeal's denial of the writ. Instead, Fitzgerald's appeal is more properly viewed as a request for this Court to exercise superintending authority and direct that the automatic stay in *Scott* is triggered by the medication order. But neither

justice, nor its due administration, require an exercise of superintending authority on this issue.

Finally, Fitzgerald also asks this Court to exercise its superintending authority to promulgate specific procedures for implementing the automatic stay in *Scott,* but he does not identify a sufficient reason for this Court to do so. In fact, what Fitzgerald asks this Court to do would unnecessarily delay criminal proceedings, deny constitutionally-protected victims' rights, and unreasonably burden the State.

STATEMENT OF THE CASE

Fitzgerald was charged with possession of a firearm contrary to a harassment injunction. (A-App. 102–03.) On June 18, 2018, the circuit court determined that Fitzgerald was incompetent to stand trial and ordered him committed for treatment to competency. (A-App. 102–03.) Fitzgerald then filed a notice of intent to pursue postconviction relief. (A-App. 102–03.)

On June 27, 2018, the circuit court held a hearing and entered an order automatically staying the involuntary medication order pursuant to *Scott*. (A-App. 102–03.) But at the hearing, the circuit court also invited the State to make an oral motion to lift the stay, which the State did, and the circuit court indicated it would grant the request. (A-App. 102–03.) The court then directed the State to draft an order for the court's signature. (A-App. 102–03.) But the court never signed that order.

On June 28, Fitzgerald filed a petition for a supervisory writ in the court of appeals; he alleged that, in light of the *Scott* case, the circuit court violated its plain duty by allowing the State to make an oral motion to lift the automatic stay and ruling on that motion. (R-App. 101.)

The court of appeals denied Fitzgerald's petition, holding that the circuit court did not violate a plain duty by entertaining the State's motion to lift the stay because, under *Scott*, such a request is properly made to the circuit court first, unless impractical to do so. (A-App. 104–07.) Although not material to its holding, the court of appeals also noted that, under *Scott*, "Fitzgerald was not entitled to an automatic stay until he actually had a pending appeal, and that did not happen until he filed a notice of appeal." (A-App. 105.)

Fitzgerald then petitioned this Court for review, challenging the court of appeals' interpretation of *Scott* as to the triggering event for an automatic stay.

STANDARD OF REVIEW

"The decision to issue a supervisory writ involves an exercise of discretion." *Madison Metropolitan School Dist. v. Circuit Court for Dane County*, 2011 WI 72, ¶ 34, 336 Wis. 2d 95, 800 N.W.2d 442. "A discretionary determination is reviewed for an erroneous exercise of that discretion." *Id.*

ARGUMENT

I. The court of appeals did not abuse its discretion in denying Fitzgerald a supervisory writ.

A. Applicable law

1. Supervisory writs

"A supervisory writ is 'a blending of the writ of mandamus and the writ of prohibition.'" *State ex rel. Dep't. of Nat. Res. v. Wisconsin Court of Appeals, District IV*, 2018 WI 25, ¶ 8, 380 Wis. 2d 354, 909 N.W.2d 114 (citation omitted). "The court traditionally uses the writ of prohibition 'to keep an inferior court from acting outside its jurisdiction when there [is] no adequate remedy by appeal or otherwise.'" *Id.* (citation omitted). "The writ of mandamus, on the other hand,

directs 'a public officer to perform his plain statutory duties.'" *Id*. (citation omitted). "Thus, the supervisory writ 'serves a narrow function: to provide for the direct control of lower courts, judges, and other judicial officers who fail to fulfill non-discretionary duties, causing harm that cannot be remedied through the appellate review process.'" *Id.* (citing *State ex rel. Kalal v. Circuit Court for Dane Cty*., 2004 WI 58, ¶ 24, 271 Wis. 2d 633, 681 N.W.2d 110). "A supervisory writ is 'an extraordinary and drastic remedy that is to be issued only upon some grievous exigency.'" *Id*. (citation omitted). And an appeals court will not invoke "supervisory control over the trial court to compel a discretionary act." *State ex rel. Dressler v. Circuit Court for Racine County, Branch 1*, 163 Wis. 2d 622, 640, 472 N.W.2d 532 (Ct. App. 1991).

To justify a supervisory writ, a petitioner must show that "(1) an appeal is an inadequate remedy; (2) grave hardship or irreparable harm will result; (3) the duty of the trial court is plain and it . . . acted or intends to act in violation of that duty; and (4) the request for relief is made promptly and speedily." *Dep't. of Nat. Res.,* 380 Wis. 2d 354, ¶ 9.

2. Pretrial competency and involuntary medication order procedures

Pretrial competency proceedings are governed by Wis. Stat. § 971.14. Pursuant to the statute, the court shall order a competency examination of a defendant if, after finding probable cause that the defendant committed the crime of which he stands accused, the court has "reason to doubt a defendant's competency to proceed." Wis. Stat. § 971.14(1r)(a). The court shall then appoint one or more examiners to assess the defendant's competency. Wis. Stat. § 971.14(2)(a).

The examiner shall prepare a written report, and submit that report to the court. Wis. Stat. § 971.14(3). The

court shall then hold a hearing. Wis. Stat. § 971.14(4). "At the commencement of the hearing, the judge shall ask the defendant whether he or she claims to be competent or incompetent." Wis. Stat. § 971.14(4)(b). The defendant's answer will determine the applicable burden of proof. Wis. Stat. § 971.14(4).[1]

The parties may waive their opportunity to present evidence in addition to the written report. Wis. Stat. § 971.14 (4)(b). If they do, "the court shall promptly determine the defendant's competency and, if at issue, competency to refuse medication or treatment." Wis. Stat. § 971.14(4)(b). Otherwise, the court shall hold an evidentiary hearing. Wis. Stat. § 971.14(4)(b). If the defendant is found incompetent and "the state proves by evidence that is clear and convincing that the defendant is not competent to refuse medication or treatment," the court shall "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." Wis. Stat. § 971.14(4)(b).

The actual commitment of an incompetent defendant is governed by section 971.14(5):

> If the court determines that the defendant is not competent but likely to become competent within the period specified in this paragraph if provided with appropriate treatment, the court shall suspend the

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[1] "If the defendant stands mute or claims to be incompetent, the defendant shall be found incompetent unless the state proves by the greater weight of the credible evidence that the defendant is competent. If the defendant claims to be competent, the defendant shall be found competent unless the state proves by evidence that is clear and convincing that the defendant is incompetent." Wis. Stat. § 971.14(4)(b).

> proceedings and commit the defendant to the custody of the department for treatment for a period not to exceed 12 months, or the maximum sentence specified for the most serious offense with which the defendant is charged, whichever is less.

Wis. Stat. § 971.14(5)(a)1.

If the Department of Health Services (DHS) concludes that a defendant not subject to an involuntary medication order should be, it may move for a hearing under the standards of section 971.14(3), and the court shall conduct a hearing under the standards of section 971.14(4). Wis. Stat. § 971.14(5)(am).

A committed defendant shall be periodically reexamined by DHS examiners. Wis. Stat. § 971.14(5)(b). The outcome of such reexamination may lead to the defendant's continued commitment, resumption of criminal proceedings, or discharge. Wis. Stat. § 971.14(5)(c). If the criminal proceeding of a defendant receiving medication is resumed, "the court may make appropriate orders for the continued administration of . . . proceedings." Wis. Stat. § 971.14(5)(d).

3. *State v. Scott* and postconviction competency proceedings

In *Scott*, this Court addressed the procedures for review of postconviction competency proceedings and clarified that, in the postconviction context, the circuit court is required to follow the procedures set forth in *State v. Debra A.E.*, 188 Wis. 2d 111, 523 N.W.2d 727 (1994). *Scott*, 382 Wis. 2d 476, ¶ 21. But the Court also held 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 of right pursuant to Wis. Stat. § 808.03(1)." *Id.* ¶ 34. The Court then used its superintending authority, pursuant to Article VII, Section 3

of the Wisconsin Constitution, to order that "involuntary medication orders are subject to an automatic stay pending appeal." *Id.* ¶ 44.

The Court reasoned that "if involuntary medication orders are not automatically stayed pending appeal, the defendant's 'significant' constitutionally protected 'liberty interest' in 'avoiding the unwanted administration of antipsychotic drugs' is rendered a nullity." *Scott*, 382 Wis. 2d 476, ¶ 44 (quoting *Sell v. United States*, 539 U.S. 166, 177 (2003)). And the Court explained that the State would then have the opportunity to move to lift the stay. *Id.* ¶ 45.

The Court explained that the merits of the State's motion to lift the stay are governed by the legal standards set forth in *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). The Court then revised the Gudenschwager standards to fit the context of the automatic stay, directing the State to:

> (1) make a strong showing that it is likely to succeed on the merits of the appeal;
>
> (2) show that the defendant will not suffer irreparable harm if the stay is lifted;
>
> (3) show that no substantial harm will come to other interested parties if the stay is lifted; and
>
> (4) show that lifting the stay will do no harm to the public interest.

Scott, 382 Wis. 2d 476, ¶¶ 46–47. And finally, the Court held that whether to grant the State's motion is a discretionary decision. *Id.* ¶ 48.

B. Fitzgerald did not establish the requisite elements for a supervisory writ.

The court of appeals reasonably denied Fitzgerald a supervisory writ because he failed to establish the requisite factors.

The circuit court issued an involuntary medication order two days prior to this Court's decision in *Scott*. (A-App. 111.) But in light of *Scott,* the circuit court held a hearing, at which it signed an order automatically staying the medication order, allowed the State to orally move to lift the order, and indicated that it intended to grant the State's motion to lift the stay. (R. 23, 24; A-App. 141.)[2] Fitzgerald then filed a petition for a supervisory writ in the court of appeals, alleging that the circuit court violated its plain duty under *Scott*. (R-App. 101) Fitzgerald's petition was properly denied because he failed to satisfy the necessary elements.

1. Fitzgerald did not show a violation of a plain duty.

The court of appeals properly denied the petition because it correctly found that the circuit court had authority to entertain the State's motion to lift the stay and, therefore, did not violate a plain duty.

In his petition before the court of appeals, Fitzgerald alleged that the circuit court violated a plain duty by entertaining and ruling on the State's motion to lift the automatic stay. (R-App. 101.) And Fitzgerald went on to state that, "If it signs the State's proposed order, the order will violate *Scott* and Fitzgerald's right to substantive due process." (R-App. 103–04.) But Fitzgerald did not indicate

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[2] Citations to "R" reference the appellate record in *State v. Raytrell K. Fitzgerald*, Appeal No. 2018AP1296-CR.

whether the circuit court did sign the order, and he did not explain how signing the order would conflict with the applicable statues or the *Scott* case. (R-App. 101.)

The court of appeals interpreted Fitzgerald's petition for supervisory writ as challenging the circuit court's authority to hear the State's motion, and correctly found that the circuit court retained the power to act on that motion. (A-App. 104–05.)

Pretrial competency proceedings are governed by Wis. Stat. § 971.14, so they are not part of the underlying criminal case, and they are not appealed through Wis. Stat. § (Rule) 809.30. *See* Wis. Stat. § (Rule) 809.30; *Scott*, 382 Wis. 2d 476, ¶ 11. Therefore, the circuit court retains the power to act on all issues, even after the notice of appeal is filed, until the record has been transmitted to the court of appeals. Wis. Stat. § 808.075(3). (A-App. 105.) The court of appeals correctly came to this conclusion and determined that the circuit court did not violate a plain duty by entertaining the State's motion to lift the stay. (A-App. 105.) Notably, Fitzgerald does not even argue this point on appeal, so it should be deemed abandoned. *See A.O. Smith Corp. v. Allstate Ins. Companies*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (issues raised below but not renewed on appeal are deemed abandoned); *see also State v. Huebner*, 2000 WI 59, ¶ 8, 235 Wis. 2d 486, 611 N.W.2d 727 (addressing Wisconsin's waiver rule).

The court of appeals also correctly found that the circuit court did not violate a plain duty related to the automatic stay. It noted that the last order in the circuit court is the order automatically staying the medication order. (A-App. 105.) So, to the extent that Fitzgerald argued that the circuit court had a plain duty to issue the automatic stay, it satisfied that duty as well. (A-App. 105.) Again, Fitzgerald seems to

abandon this argument on appeal, so it should be disregarded. *See A.O. Smith Corp.*, 222 Wis. 2d at 491.

Next, the only actual "plain duty" argument Fitzgerald raises before this Court is his claim that he is entitled to a supervisory writ because the circuit court violated its "plain duty" to ensure that the State made the requisite showing before granting its motion to lift the stay. (Fitzgerald's Br. 15–16.) But this argument fails because it overlooks the fact that whether to grant the State's motion is a discretionary decision, not a plain duty. *Scott*, 382 Wis. 2d 476, ¶ 48. And an appeals court will not invoke "supervisory control over the trial court to compel a discretionary act." *Dressler*, 163 Wis. 2d at 640. And although the circuit court indicated it was inclined to lift the stay, it never actually did so. (A-App. 147–48.) Fitzgerald cannot identify an actual violation of a plain duty on this issue.

Finally, not only did Fitzgerald fail to show the circuit court violated a plain duty as established in *Scott,* but Fitzgerald does not bother to show that the *Scott* case even applies here. The *Scott* case involved competency evaluations in *post*conviction proceedings, not *pre*trial competency proceedings. *Scott*, 382 Wis. 2d 476, ¶ 14. And the Court explained in *Scott* that, unlike pretrial competency, the "instances in which a defendant may be involuntarily medicated to competency for purposes of appeal will be rare." *Id.* ¶ 23. In pretrial cases like Fitzgerald's, it is much easier for the State to show that competency is needed because a defendant's participation is necessary at trial. Another critical difference between the *Scott* case and this case is that in pretrial competency cases like Fitzgerald's, there is an express statutory scheme for determining the need for involuntary medication. *See* Wis. Stat. § 971.14. Fitzgerald's failure to show why *Scott* should even apply here undermines

his whole argument and provides yet another reasonable basis for the court of appeals' decision.

The court of appeals properly denied Fitzgerald's petition because he failed to show that the circuit court violated a plain duty by entertaining the states motion to lift the automatic stay.

2. Fitzgerald has failed to show irreparable harm, or that an appeal is inadequate.

Fitzgerald's writ petition was properly denied because he did not show a violation of a plain duty. But he also failed to show two other requisite elements for a supervisory writ. Fitzgerald did not show that irreparable harm would occur if the circuit court were able to entertain the State's motion to lift the stay, or that an appeal would be inadequate. *Dep't. of Nat. Res.,* 380 Wis. 2d 354, ¶ 9. In light of these deficiencies, the court of appeals properly denied his petition.

First, as to harm, all Fitzgerald argued in his writ petition is that the *Scott* case established that a defendant's liberty interest in not being medicated would be rendered a nullity if the medication order is not stayed pending appeal. (R-App. 103.) But this potential harm does not relate to the duty Fitzgerald claims was violated. The circuit court stayed Fitzgerald's case pending appeal, and never entered an order lifting the stay, so Fitzgerald was never at risk of the harm he cites. (A-App. 105.) And Fitzgerald does not go on to explain how entertaining the State's motion to lift that stay caused irreparable harm. Finally, Fitzgerald once again abandons this argument on appeal, making no claim of irreparable harm before this Court. *See A.O. Smith Corp.*, 222 Wis. 2d at 491.

Next, Fitzgerald also fails to convincingly explain why an appeal is inadequate.[3] He argued in his petition that if a circuit court grants the State's motion to lift the automatic stay, the defendant would be required to move for a stay of that decision pending appeal, and that would inappropriately shift the burden of proof to the defendant. (R-App. 104.) But this argument fails to recognize that in such situations—where a State has moved to lift the stay and the court has granted that motion—the circuit court's decision to grant the State's motion shows the State will have already met its burden of proof. Put differently, the State will already be in the winning posture, and it will be the *defendant* who is seeking review.

So, unless Fitzgerald is arguing that the State should not be able to challenge the automatic stay, the process is necessarily going to involve shifting burdens. And this does not render the appeals process inadequate. Finally, Fitzgerald once again abandons this argument on appeal and provides no explanation to this Court why an appeal is an inadequate remedy. *See A.O. Smith Corp.*, 222 Wis. 2d at 491.

Fitzgerald has not shown the requisite factors for a supervisory writ, and the court of appeals properly denied his petition.

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[3] Notably, this Court has granted review of Fitzgerald's direct appeal of the underlying competency determination in Appeal Number 2018AP1296.

II. This Court should decline to exercise its superintending authority.

A. Applicable law

1. Superintending authority

This court has "superintending and administrative authority over all courts." Wis. Const. art. VII, § 3. And this power is "as broad and as flexible as necessary to insure the due administration of justice in the courts of this state." *Koschkee v. Evers*, 2018 WI 82, ¶ 8, 382 Wis. 2d 666, 913 N.W.2d 878. But this Court's supervisory authority is not to be invoked lightly. *Id.* ¶ 12. "This court will not exercise its superintending power where there is another adequate remedy . . . or where the conduct of the trial court does not threaten seriously to impose a significant hardship upon a citizen." *Arneson v. Jezwinski*, 206 Wis. 2d 217, 226, 556 N.W.2d 721 (1996).

Whether the Court chooses to exercise its supervisory authority in a given situation is a matter of judicial policy rather than one relating to the power of this Court. *Evers,* 382 Wis. 2d 666, ¶ 8.

2. Appellate procedure

A final circuit court order is appealable as of right. Wis. Stat. § 808.03(1). A final circuit court order is defined in Wis. Stat. § 808.03(1) as "a judgment, order or disposition that disposes of the entire matter in litigation as to one or more of the parties . . . ."

"A party must file a notice of appeal to initiate an effective appeal. Wis. Stat. § (Rule) 809.10(1)(a)." *In re Commitment of Sorenson*, 2000 WI 43, ¶ 16, 234 Wis. 2d 648, 611 N.W.2d 240. "A notice of appeal is a signed paper that contains certain required pieces of information and alerts the

opposing party, the circuit court, and the court of appeals of a party's intention to seek recourse from a court judgment or order." *Id.*

Wisconsin Stat. § (Rule) 809.10(1)(a) indicates that an appeal is initiated by filing a notice of appeal with the clerk of the circuit court. The statute directs that the notice of appeal shall include:

> **1.** The case name and number.
>
> **2.** An identification of the judgment or order from which the person filing the notice intends to appeal and the date on which it was entered.
>
> **3.** A statement of whether the appeal arises in one of the types of cases specified in s. 752.31(2).
>
> **4.** A statement of whether the appeal is to be given preference in the circuit court or court of appeals pursuant to statute.
>
> **5.** If the appeal is under s. 809.30 or 809.32, a statement of the date of service of the last transcript or copy of the circuit court case record if no postconviction motion is filed, the date of the order deciding postconviction motions, or the date of any other notice-of-appeal deadline that was established by the court of appeals.
>
> **6.** If counsel is appointed under ch. 977, a copy of the order appointing counsel.

Wis. Stat. § (Rule) 809.10(1)(b).

In most civil cases, an appellant must send the clerk of the court of appeals a copy of the notice of appeal, along with a docketing statement. Wis. Stat. § (Rule) 809.10(1)(c)–(d). The docketing statement is a form that asks the appellant to establish jurisdiction, and identify the parties and issues on appeal. (R-App. 109.) But the form expressly indicates that, as long as you are not intentionally withholding information,

failure to include an issue in the docketing statement does not constitute waiver of that issue on appeal. (R-App. 109.)

B. This Court should decline to use its superintending authority to make the automatic stay in *Scott* take effect immediately upon an involuntary medication order for pretrial competency.

Fitzgerald's main argument before this Court is that the automatic stay established in *Scott* should be triggered by the medication order, not the notice of appeal. This argument was not developed in Fitzgerald's supervisory writ petition in the court of appeals. Fitzgerald makes this argument in response to a comment in the court of appeals decision denying his writ petition. But since it was not the substantive issue for the supervisory writ, it cannot be the basis for affirming or reversing the court of appeal's denial of the writ. Instead, Fitzgerald's appeal is more properly viewed as a request for this Court to exercise superintending authority and direct that the automatic stay in *Scott* is triggered by the medication order. But neither justice, nor its due administration, require an exercise of superintending authority on this issue.

1. *Scott* reflects that an automatic stay should trigger at the filing of a notice of appeal.

In *Scott,* this Court held that involuntary medication orders are final appealable orders, separate from a defendant's underlying criminal case. *Scott*, 382 Wis. 2d 476, ¶ 34. And the Court held that such orders are subject to an automatic "stay[ ] pending appeal." *Id.* ¶ 44. But the Court did not specifically articulate what event triggers the automatic stay.

Since an appeal is not initiated until a defendant files a notice of appeal, the court of appeals here reasoned that the automatic stay is not triggered until the notice of appeal is filed. *See* Wis. Stat. § (Rule) 809.10(1)(a); (A-App. 105.) The court of appeals correctly came to this conclusion, and this Court should decline to exercise its superintending authority to direct otherwise.

The court of appeals' interpretation of *Scott* is consistent with Wis. Stat. § (Rule) 809.10(1)(a), which directs that an appeal is not initiated until a party files a notice of appeal. Wis. Stat. § (Rule) 809.10(1)(a); *Sorenson*, 234 Wis. 2d 648, ¶ 16. It is the notice of appeal that "alerts the opposing party, the circuit court, and the court of appeals of a party's intention to seek recourse from a court judgment or order." *Sorenson*, 234 Wis. 2d 648, ¶ 16. The court of appeals' holding is also consistent with the Black Law Dictionary definition of "pending," which means, "begun but not yet completed." *Pending*, Blacks Law Dictionary, available online at: https://thelawdictionary.org/pending/ (last visited December 17, 2018). Since the stay in *Scott* is an automatic stay *pending* appeal, the court of appeals in this case correctly found that the appeal must be initiated, or begun, prior to the stay taking effect. *Scott*, 382 Wis. 2d 476, ¶¶ 42–47.

2. Fitzgerald's proposal—that the automatic stay should trigger upon entry of the circuit court's involuntary medication order—is untenable.

Additionally, the court of appeals' interpretation of *Scott* is also consistent with the State's obligation to ensure a speedy disposition of a defendant's criminal trial. Fitzgerald's medication order was the result of pretrial competency proceedings, pursuant to Wis. Stat. § 971.14. (A-App. 111.) And the intent of such proceedings is to render a defendant competent to stand trial. Wis. Stat. § 971.14.

Since the underlying criminal trial is put on hold pending pretrial competency proceedings, delay implicates the rights of the victims. Wisconsin Stat. § 950.04(1v)(k) "assures victims a 'speedy disposition' of cases to 'minimize the length of time they must endure the stress of their responsibilities' in a criminal matter." *Gabler v. Crime Victims Rights Board*, 2017 WI 67, ¶ 14, 376 Wis. 2d 147, 897 N.W.2d 384.

Fitzgerald's position—that the stay is triggered by the circuit court's medication order—would result in confusion and unnecessary delays in both treatment and in the underlying criminal proceedings. Fitzgerald's approach would require every involuntary medication order be stayed, at least temporarily, even if no appeal is ever pursued. This approach is unworkable because many defendants will not want to appeal, but may not communicate that to DHS, so DHS will be forced to delay court-ordered treatment until the appeal deadline passes. This would prevent the speedy disposition of many criminal cases, even when a defendant has no intention of appealing his medication order.

Fitzgerald disagrees with the court of appeals on this issue. He argues that the automatic stay of involuntary medication orders should be triggered by the order itself. Fitzgerald argues that, since filing a notice of appeal is not a prerequisite to requesting relief pending appeal, pursuant to Wis. Stat. §§ 808.075(1), 808.07, and (Rule) 809.12, it should not be a prerequisite to obtaining an automatic stay under *Scott*. (Fitzgerald's Br. 13.)

Fitzgerald's logic is faulty, and his argument ignores the fact that discretionary relief pending appeal is very different than *Scott's* automatic stay pending appeal. While it is true that the statutes governing motions for discretionary relief pending appeal do not make a notice of appeal a prerequisite, those statutes do not make relief automatic.

There is no guarantee that a circuit court will actually grant the discretionary relief pending appeal. Since the stay in *Scott* is automatic pending appeal, it makes sense that the process would be slightly different than that for discretionary relief.

In other words, all that Wis. Stat. §§ 808.075(1), 808.07, and (Rule) 809.12 tell us is that a defendant can request a discretionary stay pending appeal prior to filing a notice of appeal. But they do not speak to the automatic stay process under *Scott*. And it makes sense that an automatic stay pending appeal would require the defendant to formally put his intent to appeal in a notice of appeal prior to the automatic stay of a court order taking effect.

Fitzgerald goes on to argue that, if the Court requires a notice of appeal to trigger the automatic stay, it will render the automatic stay harder to get than a discretionary stay. (Fitzgerald's Br. 13.) But this argument is also unpersuasive. Just because a defendant can move for a discretionary stay prior to filing a notice of appeal does not mean the circuit court is going to grant it. Whereas, the automatic stay in *Scott* merely requires a defendant to file a notice of appeal—a much simpler document than a motion showing cause. The defendant is then automatically entitled to the stay pending appeal. So, the automatic stay process in *Scott* does not, in fact, make the stay harder to get than a discretionary stay.

Finally, Fitzgerald argues that making a notice of appeal a prerequisite to the automatic stay of involuntary medication orders is logistically burdensome, especially given the fact that a docketing statement is required in civil proceedings. (Fitzgerald's Br. 14.) But notices of appeal and docketing statements are not burdensome documents, and they are both capable of being prepared prior to a medication hearing. A notice of appeal only requires basic information, such as the case name, case number, and the judgment from which the party appeals. Wis. Stat. § (Rule) 809.10(1)(b). And

"there is no requirement that the date of entry of the judgment be set forth in the notice of appeal." *Rhyner v. Sauk County*, 118 Wis. 2d 324, 326, 348 N.W.2d 588 (Ct. App. 1984). "All that is necessary is that the judgment or order be sufficiently identified that there can be no doubt what is appealed from. *Id.* So, if a defendant wishes to appeal an adverse ruling, a defendant can easily have a draft notice of appeal ready prior to a court's involuntary medication decision.

And a docketing statement is a form that asks the appellant to provide certain facts in order to establish jurisdiction, as well as to identify the parties and issues on appeal. (R-App. 109.) But the form does not require detailed descriptions of the arguments on appeal, and it expressly explains that, as long as you are not intentionally withholding information, "failure to include an issue in the docketing statement does not constitute waiver of that issue on appeal." (R-App. 109.) Given the simplistic nature of the notice and docketing statement, defendants who anticipate the need for an appeal can have them ready to file immediately upon an adverse ruling. And though this requires defendants to make extra preparations, it is much less burdensome than staying *every* involuntary medication order, regardless of an intent to appeal, and leaving court-ordered treatment in limbo until the appeal deadline passes.

Fitzgerald has not shown that justice requires this Court to exercise its superintending authority and stay every involuntary medication order at the time the order is entered.

C. Fitzgerald's remaining suggestions do not warrant this Court's superintending authority.

In addition to reinterpreting *Scott,* Fitzgerald now asks this Court to exercise its superintending authority to:

1) require the circuit court to advise defendants both of their right to appeal involuntary medication orders and that such orders are automatically stayed pending further court order; 2) revise the Order of Commitment for Treatment form to indicate that the order is automatically stayed pending further court order; and 3) direct that, in order to lift the stay, the State is required to file a written motion, and file and serve the pertinent transcripts prior to doing so. (Fitzgerald's Br. 16–19.) The Court should decline all of Fitzgerald's requests.

First, Fitzgerald's first two requests should be declined because they rely on the premise that the involuntary medication order itself triggers the automatic stay. And, as discussed above, that is not what the *Scott* case holds or what justice requires. *See* Section II.B, *supra*. It is also not sound policy because in many cases it would unnecessarily delay critical, court-ordered treatment.

Next, Fitzgerald's request that the State be required to file and serve transcripts before moving to lift the stay is an unprecedented and unnecessary requirement. In most cases, if the State wishes to lift the automatic stay, it will make that motion soon after the notice of appeal triggers it. And since the circuit court retains authority to act on the motion up until the record is transmitted to the court of appeals, the State will likely be filing its motion with the circuit court. Wis. Stat. § 808.075(3). Requiring the State to pay for, file, and serve transcripts before making a motion to the circuit court is highly unusual. Since the stay established in *Scott* is automatic upon appeal, and does not require a motion, if the State files a motion to lift the stay, it will essentially be a motion for relief pending appeal. And nothing in Wis. Stat. § (Rule) 809.12 requires a movant to file and serve transcripts with such a motion.

Further, the practical consequences of Fitzgerald's position are unworkable, and his proposal conflicts with Wis. Stat. § (Rule) 809.11(4). If every involuntary medication order is automatically stayed at the time of the order, and the State is required to file and serve transcripts prior to even moving to lift the stay, court-ordered treatment and the underlying criminal trial will be unnecessarily delayed, even where the defendant has no intention of appealing. And the State will have to bear the cost of securing transcripts in every case, regardless of the fact that the State prevailed at the medication hearing. This approach is inconsistent with Wis. Stat. § (Rule) 809.11(4), which expressly requires the appellant to request and pay for the necessary transcripts. In cases where the State is moving to lift the automatic stay of an involuntary medication order, the State will be the prevailing party on the substantive issues and should not have to secure transcripts in all of those cases.

Finally, transcripts often take months to secure and file, so forcing the State to file and serve transcripts before moving to lift the stay would, in many cases, effectively prevent the State from being able to make such a motion. Wis. Stat. § (Rule) 809.11(4).

None of Fitzgerald's requests are deserving of this Court's superintending authority.

CONCLUSION

This Court should affirm the court of appeals and decline to exercise its superintending authority.

Dated this 3rd day of January, 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,033 words.

Dated this 3rd day of January, 2019.

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ABIGAIL C. S. POTTS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 this 3rd day of January, 2019.

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ABIGAIL C. S. POTTS
Assistant Attorney General

Supplemental Appendix

State of Wisconsin ex rel. Raytrell K. Fitzgerald v. Circuit Court for Milwaukee County and the Honorable Dennis R. Cimpl, Presiding

Case No. 2018AP1214-W

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

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 first names and last initials 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.

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ABIGAIL C. S. POTTS
Assistant Attorney General

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I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § 809.19(13).

I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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Dated this 3rd day of January, 2019.

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