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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 1 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)

REPLY BRIEF AND APPENDIX OF PETITIONER-PETITIONER

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INTRODUCTION

The United States Supreme Court has declared that a defendant has a significant constitutionally-protected liberty interest in avoiding the involuntary administration of antipsychotic medications. *Sell v. United States*, 539 U.S. 166, 178 (2003). The government may forcibly administer those medications to render him competent to proceed only if it first meets a very stringent, 4-part test. *Id*. at 180-182. Last term, this Court held that a defendant may appeal this type of involuntary medication order as a matter of right, and it designed an automatic stay/lift procedure to protect both the defendant's liberty interest and right to appeal. *State v. Scott*, 2018 WI 74, ¶¶27-48, 382 Wis. 2d 476, 914 N.W.2d 141. The question *Scott* did not address is what triggers the automatic stay—the involuntary medication order or the filing of the notice of appeal.

Contrary to the circuit court's Response, the answer cannot be to err on the side of medicating the defendant in order to move the trial along. *Sell* teaches that the involuntary administration of medication should occur rarely—only when it will significantly further an important government interest and only after careful consideration of the proposed medications and their effects upon the defendant. *Sell*, 539 U.S. at 180-182. With *Sell* and *Scott* as guides, this Court should exercise its superintending authority to clarify and effectuate

Scott's stay/lift procedure along the lines set forth in his Initial Brief at 16-21 and his Reply Brief at 9-12.

ARGUMENT

I. The court of appeals erred in denying Fitzgerald's petition for supervisory writ.

Fitzgerald petitioned for a supervisory writ because the circuit court stayed its order for the involuntary administration of antipsychotic medication, orally lifted that stay and directed the State to submit a written order to that effect—all without addressing *Scott*'s 4 requirements for lifting a stay. (Reply App.101-104). To obtain the writ, Fitzgerald had to show that: (1) the circuit court violated, or intended to violate, a clear and plain duty; (2) irreparable harm would result from inaction; (3) an appeal would be an inadequate remedy; 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. Fitzgerald's petition, based on the undisputed record, satisfied all of these requirements.

On June 18th the circuit court entered an Order of Commitment for Treatment (Incompetency), which included an involuntary medication order. (App.109-111). On June 25th, Fitzgerald filed both a notice of intent to pursue postdisposition relief and notice of automatic stay, per *Scott*. (R.23, R.24). These documents established his intent to appeal the June 18th order.

On June 27, 2018, at 1:30 p.m., the circuit court stayed its involuntary medication order, and within minutes, reversed course. It orally lifted the stay and ordered the State to file a proposed written order to that effect by the end of the day. (App.147-148).

It is undisputed that the circuit court could not lift the stay unless it first found that the State: (1) made a strong showing that it was likely to succeed on the merits of the appeal; (2) showed that the defendant would not suffer irreparable harm if the stay was lifted; (3) showed that no substantial harm would come to other interested parties; and (4) showed that a stay would do no harm to the public interest. *Scott*, ¶47. It is also undisputed that the circuit court did not address *any of those factors before* it orally lifted the stay, directed the State to submit a written order, and for good measure added:

> So the record will reflect that 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, fine*. (App.148). (Emphasis supplied).

Fitzgerald did not want the medication. He took the circuit court's threat very seriously. Within hours, he filed a petition for supervisory writ arguing that: (1) the circuit court had just violated a clear and plain duty (orally lifting the stay without addressing the *Scott* factors) and intended to violate a clear and plain duty (by entering a written order lifting the stay without addressing the *Scott* factors). He also

argued that: (2) irreparable harm would have resulted from inaction and (3) an appeal would be an inadequate remedy because DHS could forcibly medicate Fitzgerald before he could file an appeal.[1] He also argued that (4) his petition was prompt. He filed it after the oral ruling but before the circuit court could sign the State's written order, the entry of which would allow DHS to begin forcibly administering antipsychotic medication. (Reply App.101-107).

Fitzgerald could not predict that after he filed his petition for supervisory writ on June 28th, the circuit court would call an impromptu hearing, decline to sign the State's order, tell him that he had two weeks to file an appeal or it would lift the stay, and tell him that it would apply *Scott*'s lift factors but only if he filed an appeal. (App.152-153). Again, Fitzgerald took the circuit court very seriously. Even though he had previously filed a notice of intent, he did as told and filed a notice of appeal on July 9th in order to protect himself from involuntary medication. (R.31).

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[1] His petition cited *State v. Scott*, 2018 WI 74, ¶44, 382 Wis. 2d 476, 914 N.W.2d 141 ("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." *Sell v. United States*, 539 U.S. 166, 177 (2003) (quoting *Washington v. Harper*, 494 U.S. 210, 221 (1990)). (Reply App.103).

On July 10th, Fitzgerald responded to a court of appeals' request for more information about the status of the case and transcripts. (Reply App.108-109). Fitzgerald's appellate lawyer, who was not at the June 27th and June 28th hearings, was able to provide a copy of the June 27th transcript, but the June 28th transcript was still being prepared. (Reply App.110-115). She also requested briefing on the petition for supervisory writ. (Reply App.115).

On July 12th, the court of appeals denied Fitzgerald's petition without briefing based on several conclusions of law. Fitzgerald agrees with some of those conclusions, but others are erroneous.

First, the court of appeals held that Wis. Stat. Rule 809.30 "does not govern commencement of an appeal from the involuntary medication order. Rather, Wis. Stat. Rule 809.10 applies." (App.105). Fitzgerald and the circuit court agree that Rule 809.30 does not apply to an appeal from a §971.14 involuntary medication order. (Response 10). By its plain language, Rule 809.30 applies only to "Appeals in s. 971.17 proceedings and in criminal, ch. 48, 51, 55, 938, and 980 cases." A §971.14 proceeding is a special proceeding related to, but separate from, the underlying criminal case. *Scott*, ¶33. Because Rule 809.30 does not apply to §971.14 appeals, the general rule, §808.04(1), applies. Section 808.04(1) gives the defendant 45 or 90 days to file a notice of appeal, depending upon whether the State files a notice of entry of judgment.

Fitzgerald disagrees with the next statement in the court of appeals' holding: "*Rather*, Wis. Stat. Rule 809.10 applies." (App.105). (Emphasis supplied). Rule 809.10 does in fact apply to Rule 809.30 appeals. *See* Wis. Stat. Rule §809.30(2)(j). ("A notice of appeal filed under this section shall conform to the requirements of s. 809.10.") This Court should reverse the court of appeals on this point of law.

Second, citing *Scott*, the court of appeals held that its authority to lift an automatic stay derives from Wis. Stat. §808.07 and Wis. Stat. Rule 809.12. (App.106). Consequently, the State must file its motion to lift the stay in the circuit court, unless it is impractical to do so. (App.106). Fitzgerald does not oppose this holding.

Third, the court of appeals held that Fitzgerald was not even entitled to an automatic stay on the day he petitioned for a supervisory writ. He was not entitled to one "*until he actually had a pending appeal*, and that did not happen until he filed the notice of appeal on July 9, 2018." (App.105). (Emphasis supplied). Fitzgerald disagrees with this holding. A stay pending appeal is a type of "relief pending appeal." *See* Wis. Stat. §808.07; Wis. Stat. Rule 809.12. A circuit court may grant relief pending appeal *before* a notice of appeal has been filed. Section 808.075(1) clearly 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). The only change *Scott* made was to require an "automatic stay" when the order at

issue was for the involuntary administration of medication.[2] This Court should reverse the court of appeals on this point.

There are good reasons why a stay "pending appeal" must be possible before an appeal is pending.[3] Sometimes the immediate execution of a judgment or order will cause irreparable harm—the disclosure of a trade secret, the razing of a building, the pollution of stream, for example. When the consequences are irreversible, the losing party requests the stay at the hearing where the court made the decision—before he has drafted or filed a notice of appeal. His goal is to preserve the status quo so the appeal does not become moot. With an involuntary medication order, this is imperative. Without a stay, the government can invade a person's body and mind with potent medications that can cause serious side effects or death. *Washington v.*

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[2] *Arneson v. Jezwinski*, 206 Wis. 2d 217, 229, 556 N.W.2d 721 (1996) provides a helpful analogy. *Arneson* held that the court of appeals should, as a matter of course, grant a petition for leave to appeal an order denying a claim of qualified immunity from a 42 U.S.C. §1983 action. Section 808.03(2) still governs the petition. *Arneson* simply requires the court of appeals to grant it. Likewise, §808.07 and Rule 809.12 still govern all motions for any type of relief pending appeal. When the order to be appealed is an involuntary medication order, *Scott* simply holds that the relief (a stay) is automatic.

[3] Regarding whether a notice of appeal is a prerequisite for a stay, the circuit court spends almost two pages responding to an argument about docketing statements that Fitzgerald did not make. (Response 19-20).

Harper, 494 U.S. 210, 230 (1990)(discussing the effects of medication). The appeal becomes pointless.

The State argues that *Scott*'s stay/lift procedure does not apply to pre-trial involuntary medication orders at all. (Response 11). *Scott* does not limit itself in that way. In a unanimous decision using broad, mandatory language *Scott* held: "Involuntary medication orders are subject to an automatic stay pending appeal, which can be lifted upon a successful motion by the State." *Scott*, ¶13. The circuit court has already conceded that the *Scott* applies "whether or not we're talking about a postconviction motion or a pre-conviction motion which is what our case is about." (App.155). This Court should reject the circuit court's attempt to retract its concession.

In summary, this Court should reverse the court of appeals' decision denying Fitzgerald's petition because (a) he in fact satisfied all of the requirements for a supervisory writ, and (b) the decision rests on multiple errors of law.[4]

[4] The Court may reverse and grant the writ even if subsequent proceedings arguably rendered the circuit court order moot. *See e.g. State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶4, 233 Wis. 2d 685, 608 N.W.2d 425 (issuing the extraordinary writ of habeas corpus even though prisoner had already been released, in order to clarify the law for trial courts).

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

Fitzgerald's petition for review asked the Court to take this case in order to exercise its superintending authority and clarify *Scott*'s stay/lift procedure—in particular the triggering event for the automatic stay. (Fitzgerald's Petition for Review 1-2). The circuit court waived its right to respond. (*See* DOJ's August 20, 2018 letter to Ms. Sheila Reiff; *see also* Reply App.131). Its arguments opposing the exercise of superintending authority should fail for that reason alone.

Scott explains why clarification of the stay/lift procedure is worthy of this Court's superintending authority. If the lower courts misunderstand it, if circuit courts err on the side of involuntary medication, then the defendant's "'significant' constitutionally protected 'liberty interest' in 'avoiding the unwanted administration of antipsychotic drugs' is rendered a nullity." *Scott*, ¶44 (citing *Sell,* 539 U.S. at 177 and *Harper*, 494 U.S. at 221).

Fitzgerald asks this Court to exercise its superintending control over circuit courts and hold:

1. When the circuit court orders involuntary medication to restore a defendant's competency to proceed in a case, it must: (a) orally inform the defendant of his right to appeal the order, and (b) stay the involuntary medication pending further

court order. (Initial Brief 17). This ensures that everyone understands that the involuntary administration of medication cannot begin immediately. It gives the defendant time to consider the pros and cons of appealing the order. It gives the parties time to do research. And, if the defendant wants to appeal, it gives the State Public Defender time to find an appellate lawyer for him. (Initial Brief 17-18). The circuit court does not respond to these practical reasons for pausing after the circuit court orders involuntary medication.

Instead, the circuit court stresses the possible consequences of delaying forcible medication. It puts the criminal trial on hold. It implicates victims' rights. The defendant may not communicate his decision to forgo an appeal to DHS. (Response 17). None of these arguments has merit. Once a circuit court finds a defendant incompetent to stand trial, the case will be delayed for a long time—whether there is a stay or not. DHS may choose to start with months of competency education or therapy. And where involuntary medication is administered, the defendant will not become competent the following day or week. It takes considerable time for medication to work. Some defendants never become competent. As for notifying DHS of the defendant's decision not to appeal, defense counsel can relay this information. Or, if the defendant fails to file an appeal within 45/90 days, then the State (on DHS's behalf) can move to lift the stay.

2. Assuming that this Court agrees with Fitzgerald's first request, then he also asks this Court to order the revision of Mandatory Circuit Court Form CR-206 so that it indicates prominently that the involuntary administration of medication is stayed pending further court order. (Initial Brief 17-18). A court may lift the stay if: (a) the State wins an order to lift the stay;[5] (b) the defendant waives his right to appeal the involuntary medication order; or (c) the defendant exhausts his appeal rights.[6]

3. Fitzgerald asks this Court to clarify that if the State moves 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 the transcript of the involuntary medication hearing with its motion. Requiring a written motion gives the defendant advance notice of the arguments he must meet and creates a record for appellate review. It will prevent circuit courts from acknowledging the automatic stay and then lifting it in the next breath. Requiring the State to order the transcript is also important. The State bears the burden of proving the stay should be

[5] By this Fitzgerald means that the State obtains an order lifting the stay and prevails on any appeal from that order. Defendants should have the right to appeal an order lifting the stay, and forcible medication should not begin until that appeal has concluded.

[6] Here, Fitzgerald is referring to the scenario where the circuit court orders involuntary medication, the automatic stay kicks in, the defendant appeals, but the State does not move to lift the stay. Again, forcible medication should not begin until the defendant's appeal has concluded.

lifted, so it will have to refer to the evidence presented at the involuntary medication hearing. By the time the State files the motion, the State Public Defender may have appointed appellate counsel for the defendant. Appellate counsel cannot determine the merits of the State's motion to lift (or the defendant's possible appeal) without a transcript. *In the Interest of J.D.*, 106 Wis. 2d 126, 132, 315 N.W.2d 365 (1982).

The circuit court responds that if the State must file and serve transcripts prior to moving to lift the stay, then it will bear the cost of transcripts in every case even though it prevailed at the involuntary medication hearing. (Response 22). That is incorrect. The State is not required to file a motion to lift the stay. In fact, if the State is truly worried about delay, it should save motions to lift for exceptional cases. This is consistent with *Sell* holding that the situations requiring the involuntary administration of antipsychotic mediation to restore competency should be rare. *Sell*, 539 U.S. at 180. If the State refrains from moving to lift, then the defendant, as the appellant, will be responsible for ordering transcripts, and the appeal will be resolved on the merits more quickly.

Fitzgerald proposes the above clarifications to help ensure that *Scott*'s stay/lift procedure works as intended. They are not burdensome. In fact, this Court has required similar steps in other cases. (Initial Brief 16-19).

CONCLUSION

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

Dated this 17th day of January, 2019.

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 2,941 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 17th day of January, 2019.

Signed:

COLLEEN D. BALL
Assistant State Public Defender

CERTIFICATION AS TO REPLY 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 17th day of January, 2019.

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REPLY APPENDIX

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