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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 2020AP160-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIC P. ENGEN,

Defendant-Appellant.

ON APPEAL FROM INVOLUNTARY MEDICATION ORDER, ENTERED IN THE CIRCUIT COURT FOR DANE COUNTY, THE HONORABLE ELLEN BERZ PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Responding to a court order, the Department of Corrections provided Defendant-Appellant Eric Engen's mental health records to the court. Engen refused to release the records to his legal counsel. State law allows an individual's legal counsel access to his medical records for Chapter 971 proceedings. Under federal law, medical records may be disclosed in response to a court order. The circuit court refused to give Engen's counsel access to the record due to Engen's refusal.

This Court should reverse. Defense counsel was entitled to access to Engen's mental health records under both state and federal law.

2. Under *Sell v. United States*, a mentally ill defendant who is incompetent to stand trial may be involuntarily medicated in order to bring him to trial competency provided the State proves and the circuit court finds that four factors have been satisfied. Here, the court issued an involuntary medication order that Engen contends does not satisfy any of the four *Sell* factors.

This Court should vacate the order. The first *Sell* factor was satisfied. However, the other three factors were not. Therefore, the case should be remanded for further proceedings.

3. Pursuant to *State v. Scott*, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141, a defendant is entitled to an automatic stay of an involuntary medication order. The State has a corresponding opportunity to file a motion to lift that stay. Here, the State orally moved to lift the stay in the circuit court and the circuit court lifted the stay. Engen asks three questions:

- Was the circuit court the proper venue for the motion to lift the stay? This Court should answer yes.

- Was the State's motion to lift the stay improper because it was not in writing? This Court should answer no.

- Were Engen's due process rights violated by the court's consideration of the State's oral motion? This Court should decline to address this question because it is moot.

4. Wisconsin Stat. § 971.14(5)(a)1. provides that, following an involuntary medication order, the Department of Health Services has a maximum period of 12 months to provide "appropriate treatment" to the defendant in order to bring him to competency. Where, as here, a defendant appeals and the Court stays the involuntary medication order, the defendant cannot be provided "appropriate treatment" until the stay is lifted. Therefore, the circuit court tolled the statutory treatment period pending appeal.

This Court should affirm the tolling order. There is no legal barrier to the order. Moreover, tolling the treatment period is consistent with the purpose and design of the statute.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

STATEMENT OF THE CASE

Defendant-Petitioner Eric Engen was convicted of two counts of felony stalking and two misdemeanor counts of violating a harassment restraining order in 2013. (R. 124.) He received consecutive jail and prison sentences followed by a five-year period of probation. (R. 124.) After Engen had reportedly violated the terms of his probation, a revocation

hearing was scheduled. (R. 170:2–3.) The Administrative Law Judge requested a competency evaluation. (R. 138; 170:2–3.)

Pursuant to a court order, Engen was evaluated by the Wisconsin Forensic Unit of the Department of Health Services (DHS) to ascertain whether he was competent to proceed with the revocation hearing. (R. 140.) Dr. Nancy Elliott, Ph.D., submitted a written competency evaluation. (R. 140.) The circuit court held a competency hearing on September 23, 2019, at which Dr. Elliott testified. (R. 141.)[1]

On September 30, the court found that Engen was not competent to proceed with his revocation proceeding. (R. 142; 171:23.) The court ordered Engen's commitment "for treatment to competency." (R. 171:24.) The court wanted the "psychiatrists [to] check him out." (R. 171:24.) It found that the legal criteria for involuntary medication had not yet been satisfied, but if the psychiatrists found "that an involuntary administration of medication is the only appropriate way to proceed, they can come back here." (R. 171:24.)

Engen was committed to the Wisconsin Resource Center (WRC). (R. 147:1.) He was evaluated by the Wisconsin Forensic Unit, and John Pankiewicz, M.D., a consulting forensic psychiatrist. (R. 147:1–3.) Dr. Pankiewicz filed a written report with the circuit court on December 30, 2019. (R. 147:1–3.)

Dr. Pankiewicz concluded that Engen had not regained competency to stand trial during his time at the WRC. (R.

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[1] In her report, Dr. Elliott informed the circuit court that her evaluation was stymied by her inability to gain access to Engen's medical records. (R. 140:2.) This began a series of events underlying Engen's first claim of error on appeal, i.e., the circuit court's denial of defense counsel's access to Engen's medical records. The State will set out the summary of those events in the Argument section of this brief instead of the Statement of the Case.

147:3.) He offered the opinion that Engen suffered from delusional ideation and an involuntary medication order would restore Engen to competency and satisfied the four criteria set out in *Sell v. United States*, 539 U.S. 166 (2003).[2] (R. 147:3.)

Relying on Dr. Pankiewicz's report, the State filed a Motion for Involuntary Administration of Medication to Bring Defendant to Competence on January 2, 2020. (R. 148.) The court held a hearing on January 16, 2020. (R. 172.)

Engen appeared in person with his counsel. (R. 172:3.) Immediately, Engen complained about counsel: "After missing four court appearances, he now shows up." (R. 172:3.) In response to the court's admonition that he would be removed from the courtroom if he decided to "speak up again," Engen said: "That's fine. Take that fucking shit. Fuck you, bitch. You fucking cunt. Die, you miserable bitch. Die. You die. You can't even answer my mail?" (R. 172:3.) Engen was removed from the courtroom. (R. 172:3.) The judge explained: "Mr. Engen has decided that he's not going to appear for this hearing . . . . His behavior and words constitute a waiver of his appearance." (R. 172:3–4.)

The court received Dr. Pankiewicz's report into evidence and invited Engen's counsel to cross-examine. (R. 172:4.) Counsel told the court he did not consider Dr. Pankiewicz's report sufficient. He was concerned that he could not "even cross-examine the doctor on his medical conclusions" due to the lack of medical records and Department of Corrections (DOC) records. (R. 172:6.) He also stated that he had "no information about Mr. Engen's medical condition." (R. 172:6.) In response to a question from the court, counsel admitted that Engen had refused to sign a release to give him access to his medical records. (R. 172:6–7.)

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[2] *See infra* at 9–11.

He also conceded that he had not "been able to follow what [he] understand[s] to be the procedures in order to obtain that information from the Department of Corrections, protected medical information." (R. 172:7.) He continued, "I don't know if the Court's [Order for Production of Medical Records[3]] changes the need to do that, and, quite frankly, I haven't pursued that route at this point." (R. 172:7.) The court responded: "I understand and empathize with your situation, but it is of your client's doing that you do not have access to his records, and he's allowed to do that." (R. 172:8.)

Engen's counsel went on to cross-examine Dr. Pankiewicz, and argued in closing that the State's evidence did not satisfy the *Sell* criteria. (R. 172:11–14, 23–34.)

The court asked Engen's counsel two follow-up questions. With respect to the important governmental interest (the first of the four *Sell* criteria), the court asked whether, because of the short time remaining in his sentence, Engen should just "be released into the community and that the Department of Corrections no longer supervise him?" (R. 172:30.) The judge recalled that Engen had said she "should die" that very morning. (R. 172:30.) Clearly, as long as Engen was incompetent, he could not go through a revocation proceeding. (R. 172:31.)

The court found that all of the *Sell* factors had been satisfied. (R. 172:36–37.) The court signed form CR-206, Order of Commitment for Treatment (Incompetency), and checked Section 3B, which spells out the *Sell* criteria. (R. 153.)

Engen immediately filed an Emergency Motion for Automatic Stay of Involuntary Medication and a Notice of Appeal. (R. 154; 155.)

The next day, the State filed a Motion to Toll Statutory Time to Bring Defendant to Competence. (R. 156.) Under Wis.

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[3] That order was entered on November 4, 2019. (R. 146.)

Stat. § 971.14(5)(a)1., a defendant is committed to the custody of the Department of Health Services for treatment to competence "for a period not to exceed 12 months, or the maximum sentence specified for the most serious offense . . . charged, whichever is less." The State observed that the intent of this statutory period is that the defendant be brought to competence. Where the defendant exercises his right to appeal, he forestalls treatment to competence. (R. 156:3.) Here, four of the statutory twelve months had already passed (since the original commitment on September 23, 2019), leaving only eight months in the commitment period for treatment to competency. (R. 156:5.) The State asserted that it is "common knowledge and experience that an appeal takes more than eight months." (R. 156:5.) Therefore, the State asked the court to toll the statutory time limits for restoring Engen to competency for the duration of the appeal. (R. 156:6.)

The court held a hearing on both motions on January 21, 2020. (R. 173.) Engen was again ejected from the hearing because of inappropriate outbursts towards his attorney, the court, and the prosecutor. (R. 173:5–9.)

The court granted Engen's stay motion. (R. 173:41.) The court also granted the State's motion to toll the statutory time limit. (R. 173:42.)

The State had not filed a written motion to lift the automatic stay; the court asked if the State wanted to make that motion. (R. 173:21–22.) The State then made an oral motion to lift the automatic stay, which the court granted. (R. 173:25–29, 45.)

Engen came to this Court and appealed the order lifting the automatic stay. (R. 159.) On March 2, 2020, this Court granted his motion to vacate the order lifting the stay and reinstating the automatic stay pending appeal of the involuntary medication order.

Engen subsequently filed a brief in support of his Notice of Appeal on May 26, 2020. In response, the State confessed error and filed a Motion to Vacate Order of Involuntary Medication of Defendant and to Remand for Further Proceedings on July 2, 2020. Engen opposed the State's motion. On July 29, this Court denied the motion and ordered the State to file a brief in response to Engen's brief. This is the State's response.

STANDARD OF REVIEW

Issues I and IV: Statutory interpretation is a question of law this Court reviews de novo. *See State v. Shoeder*, 2019 WI App 60, ¶ 6, 389 Wis. 2d 244, 936 N.W.2d 172.

Issue II: Wisconsin courts have not yet determined a standard of appellate review for *Sell* orders. However, most federal courts reviewing *Sell* challenges have applied the following standard of review: "We review a district court's determinations with respect to the first *Sell* factor de novo. And we review a district court's determinations with respect to the remaining three *Sell* factors for clear error." *United States v. Gillenwater*, 749 F.3d 1094, 1100–01 (9th Cir. 2014) (citation omitted).

Issue III: Questions of venue are reviewed by this Court de novo. *See United States v. Salinas*, 373 F.3d 161, 164 (1st Cir. 2004).

ARGUMENT

I. The circuit court's denial of access to Engen's mental health records to defense counsel was erroneous under Wis. Stat. § 51.30 and the Health Insurance Portability and Accountability Act (HIPAA).

In the competency report prepared prior to the September 23 hearing, Dr. Nancy Elliott stated that she was unable to assess whether Engen's "symptoms may be

ameliorated with appropriate psychotropic medications," due to her inability to gain access to his medical records. (R. 140:2.)

Consequently, the State filed a Motion to Compel Production of Health Care Records on October 23, 2019. (R. 143.) As relief, the State asked the Court to grant its motion "and distribute such records the Court receives to Dr. Elliott and the parties as the Court sees fit for the purpose of meeting the legal requirement of a basis upon which to order involuntary administration of medication to restore the Defendant to competence." (R. 143:4.)

The circuit court thereby ordered Crystal Powers, the Health Information Supervisor and HIPAA Compliance Officer for the Department of Corrections – Bureau of Health Services to provide to the court any and all records regarding Engen's mental health treatment.[4] (R. 146.) The order was dated November 4, 2019.

At an involuntary medication hearing held on January 16, 2020, defense counsel informed the court that he had not been able to review Engen's treatment records. Engen had refused to sign a release to give him access to the medical records. (R. 172:6–7.)

The court said the normal procedure is for an attorney to get a release from his client to look at the client's records.

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[4] For purposes of this appeal, the mental health treatment records do not include substance abuse disorder (SUD) records, commonly referred to as alcohol and other drug abuse (AODA) records. The circuit court order here may not comply with more robust protects governing the release of SUD records. *See* 42 U.S.C. § 290dd-2(a), (b), (e); 42 C.F.R. § 2.1. Issues related to a court order compelling the release of SUD records is presently at issue in *State v. Jendusa* before the Wisconsin Supreme Court. *State v. Jendusa*, No. 2018AP2357-LV, *petition for review granted* (Wis. Jan. 23, 2020). This Court need not address it here and may assume the mental health records do not include SUD information.

(R. 172:7.) The court observed: "I don't think you want me to violate your client's HIPAA by releasing medical documentation that your client does not want released." (R. 172:7.) The court concluded that it would not give defense counsel access to Engen's records. (R. 172:8.) "I understand and empathize with your situation, but it is of your client's doing that you do not have access to his records, and he's allowed to do that." (R. 172:8.)

Under Wis. Stat. § 51.30(4)(b), treatment records are confidential unless a specific statutory exception applies. One exception allows access to "the subject individual's counsel" for any proceeding relating to "admission, commitment, or patients' rights" under Wis. Stat. ch. 971. Wis. Stat. § 51.30(4)(b)11. The present proceeding is a chapter 971 proceeding. Therefore, Engen's defense counsel was entitled to access to his client's treatment records under Wisconsin law.

That access is not limited by HIPAA. Under HIPAA, confidential medical records may be disclosed for purposes of judicial proceedings in "response to an order of a court." 45 C.F.R. § 164.512(e)(1)(i). The circuit court's order was just such an order allowing access under HIPAA.

Therefore, the circuit court erred in refusing to give defense counsel access to Engen's records on the ground that Engen refused to grant him access.

II. Engen's involuntary medication order did not comply with *Sell v. United States*.

A. *Sell* criteria for granting an involuntary medication order.

A defendant who is incompetent to stand trial may be subject to an involuntary medication order to bring him to competency. *See Sell*, 539 U.S. 166. Due process requires that a trial court may issue such an order only if it makes four specific findings or conclusions. *Sell*, 539 U.S. at 178–81.

Those findings or conclusions pertain to: (1) an important governmental interest; (2) involuntary medication furthering the interest; (3) the necessity of medication; and (4) the medical appropriateness of the medication. *Id*. at 180–81. In *State v. Fitzgerald*, our supreme court confirmed the applicability of the *Sell* test to involuntary medication orders in Wisconsin. 2019 WI 69, ¶¶ 14–18, 387 Wis. 2d 384, 929 N.W.2d 165.

Neither *Sell* nor *Fitzgerald* provided the necessary guidance for what the government must do to satisfy the four-factor test. Several decisions from other jurisdictions have fleshed out the *Sell* criteria somewhat. For example, in *United States v. Chavez*, 734 F.3d 1247, 1254 (10th Cir. 2013), the court vacated an involuntary medication order because it did not include an individualized treatment plan specifying the proposed drugs that may be administered, the dosages, and the duration of treatment. An individualized treatment plan is the necessary first step to fulfilling the second, third, and fourth *Sell* requirements. *See id.* (second and fourth factors); *Barrus v. Mont. First Judicial Dist. Court*, 456 P.3d 577, 579–80, 585–86 (Mont. 2020) (third factor). The State's review of the cases in this area indicates that an individualized treatment plan is a universal requirement.

Importantly, *Sell* and its progeny insist that a trial court—not a government agency or a medical facility—must determine whether the *Sell* factors have been met before the defendant may be involuntarily medicated. *See United States v. Evans*, 404 F.3d 227, 241 (4th Cir. 2005); *Warren v. State*, 778 S.E.2d 749, 764 (Ga. 2015) ("[T]rial courts [must not] cede oversight of such a significant constitutional matter to the State . . . ."). "[J]udicial oversight" is key. *See Chavez*, 734 F.3d at 1254. Thus, a reviewing court must determine whether the involuntary medication order signed by the trial court demonstrates that the court, not the agency treating the defendant, is the entity deciding whether the defendant's

involuntary medication treatment comports with *Sell*. Beyond this, there is no specific form the order must take. As long as the order shows both that the court is watching over the defendant's treatment and that the four *Sell* factors are satisfied, this Court should affirm the involuntary medication order.

B. The State satisfied the first *Sell* factor but did not satisfy the other three.

1. The State satisfied the first *Sell* factor.

The court found an important governmental interest. (R. 172:36–37; 153.) That finding was correct. Engen was convicted of stalking in 2013, a Class I felony, which involved plans for kidnapping and sexual assault. (R. 124; 173:21.) Due to unspecified violations of his probation, he was subject to a revocation proceeding. (R. 171:7.) The court knew that Engen had been convicted of stalking (R. 172:35–36), a crime of violence. *See United States v. Nicklas*, 623 F.3d 1175, 1180 (8th Cir. 2010) (explaining that sending threats through the mail is a crime of violence for *Sell* purposes): *State v. Warbleton*, 2009 WI 6, ¶ 36, 315 Wis. 2d 253, 759 N.W.2d 557 (explaining the violent nature of stalking). It also knew that he faced reconfinement for a relatively brief period. (R. 172:25–26.)

Based on his ugly, vehement, and inappropriate outbursts in court, in which he threatened the judge with violence and excoriated his own defense counsel, the court feared the consequences of releasing Engen into the community without supervision for the remainder of his sentence instead of going through a revocation proceeding. (R. 172:30–31.) The court directly experienced verbally hostile behavior—including threats of physical violence—from a mentally ill defendant who had been convicted of a violent crime. This combination of factors rightly put the court on alert that Engen's release into the community posed a danger

that could only be mitigated by a fully litigated revocation proceeding. The court's assessment of the importance of the governmental interest was based not simply on the severity of Engen's statutory violations, but also on the danger of additional threatening behavior during the balance of his probation period.

Engen argues in response that there is no evidence in the record of Engen's probation violation, that the court failed to consider that "he had already been confined for a significant period of time," and that the State's interest in prosecuting him "has largely been achieved." (Engen's Br. 24–26.)

The State acknowledges that its case would be stronger if the facts of the probation violation were in the record, but does not concede that the information is necessary. The other two arguments ignore the fact that this Court reviews this issue de novo. *See Gillenwater*, 749 F.3d at 1100–01. This Court knows from the record that Engen was convicted of felony stalking with intent to kidnap and sexually assault the victim. This Court knows that a criminal sentence consists not only of confinement time but of extended supervision as well. *See* Wis. Stat. § 973.01. There is a reason for extended supervision—to allow the DOC time to supervise the defendant with restrictive conditions before returning him to the community. Thus, even if, as here, the defendant is at or close to the end of his confinement time, the State continues to have an interest in keeping him on supervision in accordance with his sentence. This is particularly true where, as here, the defendant is potentially dangerous to a member of the community, i.e., his stalking victim.

2. The State failed to satisfy the second, third, and fourth *Sell* factors.

The State concedes that the circuit court order does not satisfy the other three *Sell* factors because the State did not

provide an individualized treatment plan. As noted, an individualized treatment plan provides the foundation for the second, third, and fourth *Sell* factors. Without an individualized treatment plan, the other factors cannot be satisfied, because the plan guides the court's decisions about whether involuntary medication will further the State's interest, is necessary to achieve those interests, and is medically appropriate. *See Chavez*, 734 F.3d at 1254; *Barrus*, 456 P.3d at 579–80, 585–86.

Engen opposed the State's Motion to Vacate and Remand for Further Proceedings in part to provide guidance in his case and other future *Sell* proceedings. (Engen's Mot. Resp. 4–5.) But beyond imposing an individualized-treatment-plan requirement, and directing the circuit court to analyze the last three *Sell* factors in light of that plan, this Court should not use this case to develop Wisconsin's *Sell* case law.

Here, Engen argues and the State concedes that the State's evidence in this case was inadequate. But this Court cannot determine from this argument and concession the evidence that will be adequate in all cases. Like any other evidence-based proceeding, there is no cookie-cutter body of evidence that will satisfy the evidentiary standard in every involuntary medication proceeding. For example, in one case, extensive information about a defendant's personal experience with the recommended antipsychotic medications will obviate the need for general peer-reviewed studies about the use of those medications. In another case, such studies may, if available, bolster the State's case where historical treatment information about the individual defendant is not available. Thus, the evidence that will be adequate in those two hypothetical cases will necessarily be different. The courts must develop the governing standards based on actual cases. To declare evidentiary requirements on the basis of

what is here an uncontested record would be tantamount to an advisory opinion.

The same is true for declaring what the circuit court's order must sanction and contain. Ideally, the court's order should approve a definitive and permanent treatment plan for the defendant. But, depending on the state and quality of the evidence the State is able to present at the involuntary medication hearing, the court might approve the State's motion subject to further medical assessment and judicial oversight. With strict controls, such an order could be a valid exercise of judicial oversight under *Sell* even if it fails to meet the standard of an ideal order. As long as the order ensures judicial oversight of the defendant's treatment, it should be affirmed. *See Chavez*, 734 F.3d at 1254; *Evans*, 404 F.3d at 241; *Warren*, 778 S.E.2d at 764.

3. Engen's reliance on federal case law regarding defendants with Delusional Disorder, Grandiose Type and Persecutory Type are irrelevant because Engen has not been diagnosed with either disorder.

Engen cites several cases in which the federal courts have vacated *Sell* orders for defendants diagnosed with Delusional Disorder, Grandiose Type and Persecutory Type. These cases should be disregarded by this Court for two reasons.

First, Engen has been given neither of these specific diagnoses. In *United States v. Ruiz-Gaxiola,* the Ninth Circuit explained that Delusional Disorder, Grandiose Type must be distinguished (for therapeutic purposes) from delusional aspects or thought processes of other forms of mental illness. 623 F.3d 684, 700 (9th Cir. 2010). Importantly, the court noted, delusional thinking as a symptom of schizophrenia may be amenable to treatment with antipsychotics, even if

Delusional Disorder, Grandiose Type cannot be. *Id.* And, even if someone has a "delusional disorder," he may not have one of the allegedly untreatable types, as there are multiple forms of delusional disorder. *See United States v. Baschmann*, No. 10-CR-300-A, 2015 WL 346719, at *4 (W.D.N.Y. Jan. 23, 2015) (granting involuntary medication order for defendant with "mixed type" delusional disorder). The closest Engen comes to a relevant diagnosis is Dr. Pankiewicz's comment that Engen suffers from "a psychotic disorder. . . . most likely . . . delusional disorder." (R. 172:13.) This falls short of the full-blown diagnosis central to the cases Engen relies on.

Second, the courts have not uniformly accepted the premise that these disorders are untreatable in the *Sell* context, as Engen suggests. In *United States v. Mackey*, 717 F.3d 569, 575–76 (8th Cir. 2013), the court rejected the argument that Delusional Disorder, Grandiose Type is untreatable. *See also United States v. Dillon*, 738 F.3d 284, 297 (D.C. Cir. 2013) (rejecting argument that Delusional Disorder, Grandiose Type is untreatable based on study finding that "73.3% of defendants with Delusional [Disorder] were restored to competency"). Several courts have rejected the argument that Delusional Disorder, Persecutory Type is untreatable. *See*, *e.g.*, *Barrus*, 456 P.3d at 586; *Gillenwater*, 749 F.3d at 1099, 1105.

For these reasons, Engen's discussion of the Delusional Disorder cases is irrelevant.

III. The circuit court's lifting the automatic stay in response to the State's oral motion did not violate *State v. Scott*, the rules of appellate procedure, or Engen's due process rights.

In *State v. Scott*, 2018 WI 74, ¶ 43, 382 Wis. 2d 476, 914 N.W.2d 141, the supreme court held that a defendant is entitled to an automatic stay pending appeal of an involuntary medication order. It also held that the State has

a corresponding right to move to lift that stay provided it meets a modified *Gudenschwager* test. *Id.* ¶ 45 (citing *State v. Gudenschwager*, 191 Wis. 2d 431, 529 N.W.2d 225 (1995)).

Here, the circuit court entered an automatic stay of the involuntary medication order. (R. 173:41.) The State had not filed a written motion to lift the automatic stay, but the court invited the State to make that motion. (R. 173:21–22.) The State then made an oral motion to lift the automatic stay. (R. 173:25–29.) The court granted the oral motion to lift the stay. (R. 173:45.) Engen sought emergency relief in this Court, asking it to vacate the order lifting the automatic stay and reinstate the stay. (R. 159.) This Court granted the requested relief on March 2, 2020.

Regarding the motion and order lifting the automatic stay, Engen asserts three points of error. First, he asserts that the order conflicts with *Scott*, because the circuit court had no jurisdiction to hear the motion, which must be filed (according to Engen) in this Court. Second, the State did not file a written motion, which (Engen argues) violates the governing statutes. Third, the court's issuing the order without a written motion violated Engen's due process rights (in his view). Engen is wrong on all three points.

A. The State's motion to lift an automatic stay may be filed in and decided by the circuit court.[5]

As noted, *Scott* provided the State with an opportunity to move to lift an automatic stay of an involuntary medication

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[5] Because this Court has already granted Engen relief from the circuit court's order lifting the stay, this issue is moot. *See State ex rel. Lindell v. Litscher*, 2005 WI App 39, ¶ 8, 280 Wis. 2d 159, 694 N.W.2d 396. However, the State addresses Engen's argument on the merits and does not argue mootness here because it believes one or more of the exceptions to the mootness doctrine are

order. 382 Wis. 2d 476, ¶¶ 45–48. It explained that, to succeed, the State must satisfy a modified version of the *Gudenschwager* test. *Id.* ¶ 47. What the *Scott* court did not do is specify whether the State's motion must be filed in the circuit court, must be filed in this Court, or may be filed in either court. The issue was not squarely presented in *Scott* itself. That is because *Scott* invented the automatic stay and stay-lifting procedure; therefore, the proper venue for these proceedings was not before the court on appeal.

Nevertheless, although the *Scott* procedures were not yet in effect, the question of whether Scott's involuntary medication order should be stayed was litigated in both the circuit court and this Court. First, the circuit court sua sponte stayed Scott's involuntary medication order pending an interlocutory appeal. *Id.* ¶ 17. Scott then filed a petition for leave to appeal. This Court denied the petition and lifted the stay imposed by the circuit court. *Id.* ¶ 18. Later, appealing as of right, Scott filed in this Court an emergency motion to stay the medication order pending appeal, which this Court denied without explanation. *Id.* ¶ 19. The State filed no motions relating to a stay of the order.

Engen asserts that paragraph 48 of *Scott* "indicated that the court of appeals [not the circuit court] was to decide a motion to lift the stay." (Engen's Br. 37.) He bases this claim not on any explicit mandate in the *Scott* opinion, but on the court's statement that "the *court of appeals* must explain its discretionary decision to grant or deny the State's motion." *Scott*, 382 Wis. 2d 476, ¶ 48 (emphasis added). This sentence cannot support the weight Engen puts on it. Without any clear directive in the opinion mandating venue, *Scott*'s requirement that a discretionary decision "must [be] explain[ed]" by this Court cannot be interpreted to mean that

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applicable. *See State v. Fitzgerald*, 2019 WI 69, ¶ 22, 387 Wis. 2d 384, 929 N.W.2d 165.

a motion to lift a stay must be filed in this Court. Instead, this language must be understood in the context of the *Scott* proceedings.

In *Scott*, the decision not to stay the challenged order pending appeal was made by this Court, and was made without explanation. Therefore, in announcing the new procedures, the *Scott* court told this Court to explain its reasoning because it was this Court that had failed to provide its reasoning in that case. It is reasonable to assume that if the circuit court had refused to stay proceedings without analysis, the *Scott* would have similarly directed the circuit court to explain its exercise of discretion. Thus, *Scott* left the venue question unanswered.

The supreme court might have provided clarity on this question in *Fitzgerald*. There, pursuant to *Scott*, the circuit entered an automatic stay, "but indicated that it would immediately lift the stay on the State's motion." 387 Wis. 2d 384, ¶ 9. Fitzgerald filed a petition for supervisory writ, among other things "challenging the circuit court's plan to lift the automatic stay." *Id.* This Court denied the petition, finding that the circuit court was the appropriate venue for the State's motion, and Fitzgerald appealed the denial to the supreme court. *Id.* ¶ 10. The court was equally divided on the issues presented, so this Court's order was affirmed and the proper venue for filing a stay-lifting motion was left unresolved. *Id.* ¶ 34.

Together, *Scott* and *Fitzgerald* do not answer the venue question, except to establish that Engen's contention that *Scott* clearly puts the sole authority to entertain a motion to lift the automatic stay in this Court is wrong.

In fact, the circuit court is the more appropriate venue for the State's motion to lift the automatic stay.

Scott indicates that the State's motion to lift the automatic stay is a modified *Gudenschwager* motion. 382 Wis.

2d 476, ¶¶ 45–47. A *Gudenschwager* motion typically originates in the circuit court. *See*, *e.g.*, *Gudenschwager*, 191 Wis. 2d at 439–40. So, like a motion for a stay pending appeal under *Gudenschwager*, a motion to lift a stay pending appeal under *Scott* is appropriately heard by the circuit court in the first instance rather than this Court "unless it is impractical to seek relief in the trial court." Wis. Stat. § (Rule) 809.12. As with the more familiar *Gudenschwager* motion, the circuit court is in a better position than this Court is to weigh *Scott*'s fact and equity inquiries, i.e., whether the defendant will suffer irreparable harm if the automatic stay is lifted, whether other interested parties will suffer substantial harm, and whether the public interest will suffer any harm. *See Scott*, 382 Wis. 2d 476, ¶ 45.

Either party can appeal the circuit court's order on the *Scott* stay-lifting motion to this Court. "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 [of appeals]." Wis. Stat. § (Rule) 809.12. Importantly, section 809.12 should not be interpreted to require the State to file a *Scott* stay-lifting motion in this Court rather than the circuit court. After all, an automatic stay under *Scott* is not "an order of the trial court" because the circuit court has no discretion to grant or deny the stay; as Engen points out, it arises by operation of law. (*See* Engen's Br. 35.) Therefore, the State is not "aggrieved by an *order* of the trial court." Wis. Stat. § (Rule) 809.12. Moreover, if a *Scott* stay-lifting motion must originate in this Court, the only avenue of appellate review from the first judicial consideration of the motion would be a petition for review to the supreme court. That process would create judicial inefficiencies and needlessly crowd the supreme court docket with appellate motion practice more appropriate to this Court.

For all these reasons, this Court should hold that the State may file a motion to lift an automatic stay under *Scott*

in the circuit court, and the circuit court may decide such a motion.

B. Engen's complaint that the State's motion to lift the stay was improper because it was not in writing is meritless.[6]

Engen complains that the State's oral motion to lift the automatic stay was improper because it was not in writing. (Engen's Br. 37.) Engen bases this purported written-motion requirement on Wis. Stat. §§ (Rules) 809.12 and 809.14, which state that a party "shall file a motion." (Engen's Br. 37 (emphasis omitted).) He provides no other support for his argument.

Scott provides that the State "shall have the opportunity to *move* to lift the stay"; it does not require that such a motion be a written or filed document. 382 Wis. 2d 476, ¶ 45 (emphasis added). And, as a general rule, "[a]n application to the court for an order shall be by motion which, *unless made during a hearing or trial*, shall be made in writing." Wis. Stat. § 802.01(2)(a).

Here, the parties were before the circuit court at a motion hearing, at which the parties argued and the court decided the automatic stay and tolling motions. (R. 173.) In the course of that hearing, at the court's invitation, the State made an oral motion to lift the automatic stay. (R. 173:25–29.) The oral motion was permissible under section 802.01(2)(a) because it was made "during a hearing." Therefore, Engen's claim of error on this ground is meritless.

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[6] Because this Court has already granted Engen relief from the circuit court's order lifting the stay, this issue is moot. However, the State addresses Engen's argument on the merits and does not argue mootness here.

C. Engen's complaint that the circuit court's consideration of and ruling on the State's oral motion to lift the stay violated his due process right is arguably meritorious but moot.

Engen also complains that, because the State orally moved to lift the automatic stay without prior notice to Engen, Engen's right to procedural due process was violated. The State concedes that there is arguable merit to this contention. However, this Court has already granted "relief from the circuit court order lifting the automatic stay." (Order 2, Mar. 2, 2020.) Therefore, the issue is moot because Engen has already received the requested relief. *State ex rel. Lindell v. Litscher*, 2005 WI App 39, ¶ 8, 280 Wis. 2d 159, 694 N.W.2d 396. The exceptions to the mootness doctrine do not warrant the Court's review of this issue. *See Fitzgerald*, 387 Wis. 2d 384, ¶ 22.

IV. The tolling order was legally permissible and consistent with the purpose of the statute.

A. The tolling order entered on January 22 will be moot if this Court vacates the involuntary medication order.

In the January 22 order lifting the automatic stay of the involuntary medication order, the circuit court also ordered that, if the order lifting the stay were to be overturned, the statutory time limit for the State to treat Engen to competency would be tolled "and will remain tolled until the Defendant's appeals from the order to involuntarily administer medications to restore the Defendant's competence are completed." (R. 158:2.) Because this Court overturned the order lifting the stay on March 2, 2020, the tolling order went into effect on that day. It will remain in effect unless and until the involuntary medication order is vacated.

The State moved to vacate the involuntary medication order and remand for further proceedings. This Court denied that motion. The Court may, however, nevertheless grant the relief requested by the State after the parties brief the issues. In the State's view, the vacation of the involuntary medication order would render the tolling order moot. That is because the existing tolling order runs with the existing involuntary medication order. Once the latter order is vacated, the former order is unnecessary and meaningless.

Nevertheless, the State will address the legality of the tolling motion and order.

B. The tolling authority is within the circuit court's legal authority and is necessary to realize the intent of the statute.

Engen argues that the court had no authority to enter the tolling order for several reasons. (Engen's Br. 42–45.) The State knows of no statute or case law prohibiting a circuit court from tolling a statutory time limit and Engen cites none. Instead, he presents a series of meritless arguments. Several are non-legal, treatment-related, speculative, and ignore the reasons for the tolling motion and order. The State will not respond to those arguments. More pertinently, Engen argues that the governing statute does not provide for tolling, that the tolling mechanism leads to absurd results, and that Engen should not be punished for appealing the order. The State will show that all these arguments fail.

Engen is correct that the statute does not explicitly provide for tolling, but he provides no authority or developed argument that such authority is necessary before a circuit court may enter a tolling order. Given his failure to provide legal authority or develop his argument, this Court should ignore it. *See Mount Horeb Cmty. Alert v. Vill. Bd. of Mount Horeb,* 2002 WI App 80, ¶ 19, 252 Wis. 2d 713, 643 N.W.2d 186 ("Propositions unsupported by legal authority are

inadequate, and we will not consider them."); *State v. Jones*, 2002 WI App 196, ¶ 38 n.6, 257 Wis. 2d 319, 651 N.W.2d 305 (undeveloped argument merits no response and court need not address it).

Moreover, tolling is in fact necessary to achieve the statutory purpose. Section 971.14(5)(a)1. provides the time available for the State to bring a defendant to trial competency through "appropriate treatment" authorized by the court:

> If the court determines that the defendant is not competent but is likely to become competent within the period specified in this paragraph *if provided with appropriate treatment*, the court shall . . . commit the defendant to the custody of the department *for treatment* for a period not to exceed 12 months, or the maximum sentence specified . . . whichever is less.

Wis. Stat. § 971.14(5)(a)1. When the defendant exercises his right to appeal, he short-circuits—at least temporarily—the State's ability to provide "appropriate treatment" to him as ordered by the court within the time limits prescribed by statute.

The statutory language unambiguously sets a maximum time period that a defendant will be in DHS "custody . . . for treatment." Wis. Stat. § 971.14(5)(a)1. "[T]reatment" in this phrase means "appropriate treatment" as "determine[d]" by the court. *Id.* It does not mean warehousing the defendant in a DHS facility without the treatment prescribed by the circuit court while the appellate courts determine the order's legality. But, without a tolling order, a defendant will not be *treated* during the pendency of his appeal, he will instead be *warehoused*. Here, the "appropriate treatment" for Engen as determined by the circuit court was involuntary medication. (R. 153.) Left in a DHS facility without appropriate treatment, Engen will not

only languish, but will take up precious treatment space that could be effectively used by another patient.

Through his appeal, Engen attempted to prevent DHS from providing him the treatment the court ordered him to receive. Without the tolling order, the time available for DHS to restore Engen to competency would be reduced to a fraction of the 12 months contemplated by statute. Had the court entered no tolling order, the 12-month period would likely be completely absorbed by the appeals process. Thus, Engen's interpretation of the statute—that the statutory time limit cannot be tolled—undermines the statutory purpose and leads to an absurd result. According to Engen, a defendant can effectively nullify a legislatively designed process for competency restoration by filing an appeal (either meritorious or frivolous). Absurd results are, of course, disfavored. *See State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110.

In his effort to support his contention that the State's interpretation leads to absurd results, Engen argues that "[s]ection 971.14(6)(a) provides the mechanism . . . . If the State cannot restore a defendant's competence within the prescribed commitment period the court must 'discharge and release' the defendant, unless the State initiates a Chapter 51 proceeding." (Engen's Br. 44.) This provision does nothing to resolve the present dispute. Section 971.14(6)(a) tells the court that it must discharge and release the defendant when prescribed treatment has failed within the statutory time limit. The provision *assumes* that the defendant has actually received appropriate treatment in accordance with section 971.14(5)(a)1. It is only when that appropriate treatment fails that the discharge and release mechanism of section 971.14(6)(a) comes into play.

Engen asserts that a tolling order could allow a defendant to be held "possibly longer than his maximum sentence." (Engen's Br. 44.) That hypothetical outcome is

precluded by the Due Process Clause and Wisconsin case law. *E.g.*, *State ex rel. Hager v. Marten*, 226 Wis. 2d 687, 698, 594 N.W.2d 791 (1999). Moreover, such a result could not happen in this case. Engen is on probation. (R. 170:2–3.) If he does not become competent to participate in his revocation proceeding before the end of his probation term, he will be released into the community when his probation expires because there will be no revocation hearing. And, regardless, defendants committed under section 971.14(5) are entitled to sentence credit. *See* Wis. Stat. §§ 971.14(5)(a)3., 973.155(1).

Punishment of Engen for appealing the involuntary medication order is neither the purpose nor the effect of the tolling order. The Legislature intended to benefit both defendants and the public through section 971.14. People are constitutionally entitled to be tried in criminal court only when they are competent; section 971.14 provides a path to competency and a constitutionally permissible trial for the defendant. The public is entitled to justice for victims and defendants and the effective prosecution of criminal trials; section 971.14 provides a path to justice. The tolling order merely preserves this legislative purpose and design.

The tolling order should be affirmed. If a defendant is in custody but not receiving "appropriate treatment," the statutory time limits simply do not come into play under the plain language of the statute.

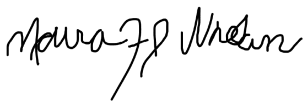
CONCLUSION

For the reasons stated, the State agrees that the involuntary medication order should be vacated and requests that this Court remand the case to the circuit court for further proceedings.

Dated this 28th day of August 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin



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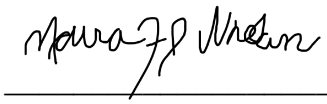
CERTIFICATION

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 6,998 words.

Dated this 28th day of August 2020.



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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).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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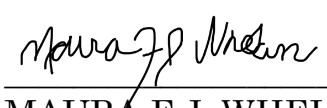

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