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STATE OF WISCONSIN  
IN SUPREME COURT

Case No. 2020AP160-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERIC P. ENGEN,

Defendant-Appellant-Petitioner.

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PETITION FOR REVIEW

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## ISSUE PRESENTED

1. After the circuit court ordered the involuntary administration of medication to return Eric Engen to competency under Wis. Stat. § 971.14, Engen initiated an appeal and moved for an automatic stay of the medication order pending appeal. Did the circuit court properly interpret and apply the automatic stay/motion to lift procedure prescribed by *State v. Scott*, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141? If so, did the circuit court violate Engen's right to due process under the 14<sup>th</sup> Amendment?

The circuit court assumed that a defendant had to file a motion for an “automatic” stay. It then granted an “automatic” stay, encouraged the State to make an oral motion to lift the stay, and then lifted the stay all in at the same hearing. The court of appeals granted Engen's request for relief from the involuntary medication order on separate grounds. But the court of appeals rejected Engen's request for relief from the order lifting the stay and did not reach the merits of his due process claim.

## CRITERIA FOR REVIEW

All individuals have a “significant’ constitutionally protected ‘liberty interest’ in ‘avoiding the unwanted administration of antipsychotic drugs.” *State v. Scott*, 2018 WI 74, ¶44, 382 Wis. 2d 476, 914 N.W.2d 141. (quoting *Sell v. United States*, 539 U.S. 166, 177 (2003) and *Washington v. Harper*, 494 U.S. 210, 221 (1990)). Recognizing the gravity of the liberty interest

involved, this Court created a procedure to ensure that circuit court errors do not nullify this vital constitutional right by holding that involuntary medication orders are automatically stayed pending appeal. *Id.* *Scott* also created a procedure and legal standard that the State must follow to successfully lift the stay. *Id.*, ¶¶45-48.

Important questions that seek to clarify the procedures and legal standard in *Scott* remain unresolved. First, this Court was equally divided and could not provide an answer to the question of what triggers the “automatic” stay in *State v. Fitzgerald*, 2019 WI 69, ¶1, 387 Wis. 2d 384, 929 N.W.2d 165. Then, the court of appeals approved a procedure for lifting the stay that conflicts with *Scott* in *State v. Green*, 2021 WI App 18, ¶¶64-75, \_\_ Wis. 2d \_\_, \_\_ N.W.2d \_\_.<sup>1</sup> Finally, despite acknowledging significant due process concerns with the procedure used by the circuit court, the court of appeals pointed to *Green* and denied Engen’s request to vacate the order lifting the stay in a footnote. *State v. Engen*, No. 2020AP160-CR, unpublished slip op., ¶29 (Wis. Ct. App., March 18, 2021) (App. 114).

This case presents a chance for this Court to resolve the question left unanswered in *Fitzgerald*, resolve the conflict between *Green* and *Scott*, and provide guidance on a recurring question of constitutional significance.

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<sup>1</sup> The State petitioned for review in *Green* requesting review on whether a circuit court may toll the statutory time limits for treatment to competence. The petition is pending.

## STATEMENT OF FACTS AND STATEMENT OF THE CASE

The circuit court issued three orders that prompted Engen's appeal. First, the court ordered the administration of involuntary medication. (R.153; App. 154). Then, the circuit court simultaneously issued orders granting the state's motion to lift the automatic stay and tolling the statutory time to bring Engen to competence. (R.158; App. 214). In the court of appeals, Engen requested that the court vacate each of the three orders.

The court of appeals granted partial relief by reversing and remanding to the circuit court because the circuit court erred by entering the involuntary medication order and tolling order. *Engen*, 2020AP160-CR, ¶30. (App. 115). But the court rejected Engen's request to vacate the order lifting the stay. *Id.*, ¶29 n.14. (App. 114). Thus, for the purpose of this petition, the significant facts relate to the circuit court's decision to simultaneously stay and lift the order for involuntary medication.

The court ordered involuntary medication at a hearing on January 16, 2020. (App. 151-52). Right after the hearing, defense counsel filed an Emergency Motion for Automatic Stay of Involuntary Medication and a Notice of Appeal in the circuit court. (R.154, 155; App. 156-57). The motion alerted the court to the fact that Engen was entitled to an automatic stay of involuntary medication pending his appeal as a matter of right under *Scott*.

On January 17th, the State filed a Motion to Toll Statutory Time to Bring Defendant to Competence. (R.156; App. 159-65). In that motion,

the State explained that it was not moving to lift the stay at that time. (App. 164).

The court held another hearing on January 21, 2020, where the State conceded that Engen had a right to appeal and a right to an automatic stay. (App. 169-70). The State also explained that it did not move to lift the stay because *Scott* ¶47 appears to show that the motion must be filed in the court of appeals and § 808.075 does not empower the circuit court to lift the stay. (App. 174-75).

The court asked the State if it wanted to make a motion to lift the stay. The State replied that it wasn't sure that it could because of § 808.075 and *Scott*. (App. 186-87). But after receiving the court's blessing, the State argued for lifting the stay. (App. 187-94).

Defense counsel argued that the State's surprise oral motion to lift the stay violated Engen's right to procedural due process. He had no notice of the State's arguments and no chance to prepare a defense to them. (App. 198-205). Defense counsel argued that the motion was a surprise because the State's motion to toll conveyed that it was not requesting a lift of the automatic stay at that time. (App. 200-01). Yet the court insisted that it would decide the issue of the stay and the lifting of the stay simultaneously. (App. 201-02).

The circuit court called Engen's appeal a "sham," "granted" the "automatic" stay and then immediately lifted it because the State's argument was "unrefuted and extremely, extremely strong." (App. 206-10).

Engen filed an Amended Notice of Appeal to include the order lifting the stay and granting the motion to toll. (R.159). Engen also moved for Emergency Temporary Relief and Motion for Stay Pending Appeal in the court of appeals. The court of appeals granted Engen's motion and reinstated the automatic stay pending Engen's appeal of the circuit court's involuntary medication order. (App. 215-20). Contrary to the circuit court, the court of appeals held that the State failed to show that it was likely to succeed on the first *Sell* factor or that Engen would not suffer irreparable harm without a stay. (App. 219-20).

This petition follows. Engen seeks this Court's review of the decision of the court of appeals denying Engen's request to vacate the order lifting the automatic stay.

## ARGUMENT

### **I. This Court Should Grant Review and Hold that the Circuit Court Violated *Scott* and the Rules of Appellate Procedure and Denied Engen's Right to Procedural Due Process.**

Given the important liberty interest at stake—as recognized *Sell*, *Scott*, and *Fitzgerald*—involuntary medication orders should be the rare exception, not the rule. *Scott* acknowledges this and assumes that an erroneous involuntary medication order, like the order entered here, harms a defendant. Thus, a stay pending appeal should be—and under *Scott* is—automatic and the State must prove to the court of appeals that “the defendant will not suffer

irreparable harm if the stay is lifted.” *Scott*, 2018 WI 74, ¶47, 382 Wis. 2d 476, 914 N.W.2d 141. The procedure employed by the circuit court violated due process and undermines both the purpose and language of *Scott*.

A. The circuit court violated *Scott* and the rules of appellate procedure.

On appeal, the State conceded that the circuit court entered an involuntary medication order that was unconstitutional. But—without an established procedure clarifying *Scott*—to obtain the “automatic” stay he was entitled to, Engen had to file a notice of appeal, file and argue an emergency motion in circuit court, and file and argue an emergency motion in the court of appeals.

Because involuntary medication is unique, *Scott* created a new procedure for stay pending appeal that is unique. *Scott*, 382 Wis. 2d 476, ¶¶44-48. First the stay is automatic. Then, as the party aggrieved by the order staying involuntary medication, the State may seek relief in the court of appeals under § 809.12. According to *Scott* and § 809.12, if the State wishes to exercise this option, it may do so by filing a motion in court of appeals. It is the court of appeals that has discretion to grant or deny the motion based on factors modified from *State v. Gudenschwager*, 191 Wis. 2d 431, 529 N.W.2d 225 (1995).

Despite the fact that Engen filed a notice of appeal and requested an automatic stay, rather than simply granting the “automatic” stay, the circuit court reconvened for a hearing. Then, despite the state’s concession that a stay is automatic and



explanation that circuit courts lack the authority to lift it under paragraph 48 in *Scott* and § 808.075, the court invited the State's oral motion to lift the "automatic" stay anyway. (App. 174-75). After labeling Engen's ultimately meritorious appeal a "sham," the circuit court lifted the stay. (App. 209-10).

This practice places an extraordinary burden on defendants to take immediate action in the circuit court and then immediate action in the court of appeals to prevent the nullification of a significant constitutional right. It defies this Court's proclamation that a stay is "automatic," the State must make a motion to lift it, and the discretion for lifting the stay resides in the court of appeals:

Whether to grant *the State's motion* is a discretionary decision, and as we explained above, 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).

Yet The court of appeals approved this procedure in *Green* and again in Engen's case. In *Green*, the court of appeals rejected Greens argument that the language in *Scott* and Wis. Stat. § 809.12 require that a motion to lift the automatic stay must be filed in the court of appeals. *Green*, 2021 WI 18, ¶¶71-74. The court of appeals noted that "*Scott* contains no language specifying in which court a motion to lift the automatic stay in an involuntary medication case must be filed." *Id.*, ¶71. This observation ignores the explicit language in paragraph 48 of *Scott* and fails to recognize *Scott*

correctly presumes that—based on §§ 808.07, 809.12, and 808.075—the State may only get relief from a stay pending appeal ordered by the circuit court by filing a motion in the court of appeals.

The court rejected Green’s statutory argument was “incomplete and raised for the first time on reply.” *Id.*, ¶74. The court of appeals rejected Engen’s argument based on its decision in *Green*.<sup>2</sup> (App. 114). In both cases, the court of appeals overlooked the fact that the statutory argument is implicit in this Court’s decision in *Scott*.

In Engen’s case, the State recognized that *Scott*’s rule fits within the broader context of a statutory scheme that establishes the procedures that parties must follow to obtain relief pending appeal and grants circuit court limited authority to act pending appeal. The prosecutor noted that paragraph 48 in *Scott* specifically says that “the court of appeals must explain its discretionary decision to grant or deny the State’s motion.” (App. 174). The prosecutor also said that he “would have loved to have found” authority for the circuit court to lift a stay under § 808.075 but he looked and “didn’t find it.” (App. 175).

*Scott* presumes that defendants are irreparably harmed by involuntary medication orders so this Court designed a stay/lift procedure that is in harmony with the statutory scheme and is aimed at avoiding a situation in which a defendant’s rights are

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<sup>2</sup> Unlike *Green*, Engen made a complete argument based on § 809.12 in his appellant’s brief. But the court of appeals denied it based on its decision in *Green*, which erroneously interpreted *Scott* ¶47.

nullified by being forcibly medicated under a constitutionally deficient circuit court order. Yet the government medicated Green under such an order. *See Green*, 2021 WI 18, ¶10. In both *Green* and in Engen’s case, the circuit court’s procedures forced defendants to race to the court of appeals to prove that they would be irreparably harmed by erroneous involuntary medication orders.

The court of appeals erred by misinterpreting the language and purpose of *Scott* in *Green* and imposed that error onto Engen’s case. To avoid repetition of this error, this Court should grant review and instruct the lower courts that *Scott* means what it says.

B. The circuit court’s order violated procedural due process

In denying Engen’s request to vacate the order lifting the stay of involuntary medication, the court of appeals noted that procedure employed by the circuit court “all but invited a due process challenge.” (App. 114). Indeed, the circuit court violated the “fundamental requirement” of due process which is “the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)(quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

*Scott* does not relieve the State of its obligations under §§ 809.12 and 809.14. If the State seeks relief pending appeal or relief from a circuit court stay order, it “shall file a motion.” The State did not file a motion. It made the motion orally at the circuit court’s invitation. Engen’s counsel had no notice and no chance to prepare a thoughtful

response. In the context of an involuntary medication order, the written motion requirement is not a trivial matter.

In this case and in *Fitzgerald* the circuit courts entered automatic stays, invited the State to move to lift the stay, and lifted the stay all within minutes of each other. *Fitzgerald*, 387 Wis. 2d 384, ¶9. That procedure defeats Scott's purpose and places a defendant's constitutionally protected freedom from involuntary medication at great risk of erroneous deprivation in violation of due process. See *Matthews v. Eldridge*, 424 U.S. 319 (1976). This Court should grant review to clarify and reinforce the requirements of due process in proceedings involving involuntary medication.

## CONCLUSION

For the reasons stated above, Mr. Engen respectfully requests that this Court accept review and hold that the circuit court violated *Scott* and due process, and hold that the order lifting the stay of involuntary medication should be vacated.

Dated this 19th day of April.

Respectfully submitted,

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### **CERTIFICATION AS TO FORM/LENGTH**

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 2,407 words.

### **CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)**

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 19th day of April, 2021.

Signed:

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DAVID J. SUSENS  
Assistant State Public Defender

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