STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP298-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JOSEPH G. GREEN,

Defendant-Appellant.

ON APPEAL FROM AN ORDER FOR COMMITMENT AND INVOLUNTARY MEDICATION ENTERED IN DANE COUNTY CIRCUIT COURT, THE HONORABLE VALERIE BAILEY-RIHN, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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INTRODUCTION

The State gets *one* chance to bring an incompetent criminal defendant to trial competency. That is a significant interest, especially where, as here, the State seeks to prosecute a murder. *See Sell v. United States*, 539 U.S. 166, 180 (2003). The problem is that this Court's decision in *State v. Scott*, 2018 WI 74, ¶ 43, 382 Wis. 2d 476, 914 N.W.2d 141, holding that "involuntary medication orders are subject to an automatic stay pending appeal," interferes with the State's single chance to restore trial competency.

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 to bring him to competency. Meanwhile, the defendant is entitled to a direct appeal of an involuntary medication order, as well as a stay of the order pending appeal. Where the defendant appeals and the circuit court stays the involuntary medication order, the defendant cannot be provided "appropriate treatment" until the stay is lifted. Appeals often take 12 months to reach decision. Therefore, if the statutory time limit is not tolled, an appeal will eat up all or most of the time allotted for the "appropriate treatment" the circuit court found necessary to bring the defendant to trial competency.

This case involves an order for involuntary medication to bring an incompetent homicide defendant, Joseph G. Green, to trial competency. The State requested, and the circuit court granted, an order tolling the statutory treatment period pending appeal. Green appealed the tolling order, arguing that it was not legally authorized. The court of appeals agreed.

This Court should reverse and rule that the circuit court had the authority to toll the statutory time limit. The State concedes that the Legislature did not contemplate the use of

tolling orders in section 971.14—it neither authorized nor foreclosed tolling. But the Legislature did not foresee the automatic stay procedure that this Court enunciated in *Scott*. Unquestionably, *Scott* disrupted the structure the Legislature built to bring defendants to competency by breaking down the time limits.

That section 971.14(5)(a)1. does not expressly authorize tolling is not game over for the State, as Green and the court of appeals believe. Because a tolling order is plainly necessary to achieve the statutory purpose, there are several routes that this Court may take under established legal doctrine to permit tolling without rewriting the statute. First, this Court may conclude that circuit courts have inherent authority to toll the statutory time limit. Second, this Court may create an exception to the rule of strict adherence to the statute. Third, this Court may borrow a page from *Scott* and exercise its superintending authority to create a tolling rule.

Bottom line: just as the defendant in *Scott* sought to protect his important liberty interest in avoiding unwanted medication, the State here seeks to safeguard its significant, competing interest in "bringing to trial an individual accused of a serious crime." *Sell*, 539 U.S. at 180. The rights and interests of crime victims are worthy of protection.

ISSUE PRESENTED

Where a defendant obtains an automatic stay pending appeal of an involuntary medication order under *Scott*, can a circuit court toll the 12-month statutory time limit for bringing an incompetent criminal defendant to trial competency?

The circuit court answered, "yes."

The court of appeals answered, "no."

This Court should answer, "yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests oral argument and publication.

STATEMENT OF THE CASE

In December 2019, the State charged Green with first-degree intentional homicide for killing his sister on Christmas Eve. (R. 2.)

A few days later, defense counsel questioned Green's competency to stand trial. (R. 39:2.) The circuit court found probable cause and ordered a competency evaluation. (R. 39:2.) It appointed Dr. Craig Schoenecker to examine Green. (R. 40:3.)

Dr. Schoenecker examined Green, prepared a competency report, and testified at a competency hearing held on February 10, 2020. (R. 40:3–15.) At the hearing, he confirmed the opinions and conclusions in his report. Diagnostically, he reported that Green met "DSM-5 criteria for the diagnosis of Other Specified Schizophrenia and other Psychotic Disorder." (R. 12:2.) Dr. Schoenecker opined that Green "would regain competency within the timeframe allowed by statute[1] if afforded treatment at one of the State mental health institutes." (R. 40:6.) The primary treatment that would render Green competent would be "[a]ntipsychotic-type medication." (R. 40:7.) Dr. Schoenecker emphasized that "an order to treat [was] necessary" because at their evaluation meetings Green said "that he had been historically misdiagnosed with schizophrenia, and was quite adamant that he was not in need of any mental health treatment, including psychotropic medication." (R. 40:8.)

[1] Dr. Schoenecker was referring to the 12-month treatment-to-competency period in Wis. Stat. § 971.14(5)(a)1.

After Dr. Schoenecker's testimony and the attorneys' arguments, the circuit court found that Green was incompetent to stand trial but was likely to become competent with treatment. (R. 40:21.) The court also concluded that the State had satisfied the *Sell* factors for involuntary medication.[2] (R. 40:21–22.) The court entered an order committing Green for treatment, including involuntary administration of medication, that same day on February 10. (R. 13.)

Green appealed the involuntary medication order on February 11, 2020. (R. 16.)

Three days later, per *Scott*, Green moved for and the circuit court granted an automatic stay pending appeal of the involuntary medication order. (R. 18; 41:2.) Under *Scott*, the State is entitled to a corresponding right to move to lift the stay if certain criteria are met. *Scott*, 382 Wis. 2d 476, ¶¶ 45–47. The State accordingly moved to lift the automatic stay. (R. 19.)

The State also filed a Motion to Toll Statutory Time to Bring Defendant to Competence. (R. 26.) The State argued that the automatic stay pending appeal of the involuntary medication order prevented it from appropriately treating Green to competency. (R. 26:1–2.) Yet, the 12-month clock for treating Green to competency under Wis. Stat. § 971.14(5)(a)1.[3] had been running for months. (R. 26:3–4.)

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[2] Under *Sell v. United States,* 539 U.S. 166, 180–81 (2003), before an involuntary medication order may be entered, the State must prove and the court must find: (1) an important governmental interest; (2) involuntary medication furthering the interest; (3) the necessity of the involuntary medication; and (4) the medical appropriateness of the medication. *See also State v. Fitzgerald*, 2019 WI 69, ¶¶ 14–18, 387 Wis. 2d 384, 929 N.W.2d 165.

[3] Under this provision, the Department of Health Services has the lesser of either 12 months or the maximum sentence the defendant faces to bring him to competency.

Recognizing that an appeal typically takes "more than 8 months" to resolve and that Green's appeal "ha[d] not even started due to an evidentiary hearing needing to be heard," the State asked the circuit court to toll the time it had to bring Green to competency. (R. 26:3–4.) It explained that it wanted to protect its "very significant interest" in prosecuting Green for murder. (R. 26:4.)

On May 20, 2020, the circuit court granted the State's motion to lift the automatic stay. (R. 35:1.) As part of the order lifting the automatic stay, the court also tolled the statutory time limits under Wis. Stat. § 971.14(5)(a)1. for bringing Green to competency. (R. 35:2.) Specifically, "the Statutory time limits to bring the Defendant to competency [were] tolled from the date of the Defendant's appeal, February 12, 2020, until the signing of [the] order." (R. 35:2.) Because the order was signed on May 20, the time added to the statutory treatment period was 98 days.

Green filed an amended notice of appeal on May 21, 2020. (R. 37.) He moved for emergency temporary relief and a stay pending appeal in the court of appeals. (A-App. 106.) The court of appeals granted the temporary stay and ordered the parties to file briefs. (A-App. 106.) On July 10, 2020, it denied Green relief pending appeal and lifted the temporary stay of the involuntary medication order. (A-App. 106.) Per CCAP, Green then filed a Petition for Supervisory Writ and/or Petition for Review in this Court asking for a reinstatement of the stay.[4] This Court denied relief on July 27, 2020.

On February 25, 2021, the court of appeals issued its decision on Green's appeal of the involuntary medication order. (A-App. 101.) Relevant here, it agreed with Green's contention that the circuit court lacked authority to toll the

[4] This Court may take judicial notice of CCAP records. *Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶ 5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

statutory period to bring him to competency.[5] (A-App. 126–32.)

The court of appeals adopted Green's argument that "the plain language of [Wis. Stat. § 971.14(5)(a)1.] does not allow for tolling." (A-App. 126.) In its view, the Legislature "intended to limit the period for which a defendant can be committed to bring him or her to competency to a maximum of twelve months," regardless of whether the defendant receives "appropriate treatment" during that time. (A-App. 127–32.)

In rejecting the State's argument that no statute or case law prohibits the tolling order, the court of appeals said, "[Wis. Stat. § 971.14(5)(a)1.] does not need to 'prohibit' tolling because the statute contains an unambiguous time limit that the circuit court is not free to disregard." (A-App. 130.)

Further, the court of appeals disagreed with the State's position that tolling is necessary to achieve the purpose of Wis. Stat. § 971.14(5)(a)1., which is to treat an incompetent defendant to trial competency. (A-App. 130–31.) The court of appeals concurred that the purpose of the statute "is to give the State the opportunity to bring a defendant to competency" within a certain time. (A-App. 131.) That opportunity must involve "appropriate treatment," Wis. Stat. § 971.14(5)(a)1., but a *Scott* stay pending appeal prohibits "appropriate treatment" during the relevant timeframe. Nevertheless, the

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[5] Green also argued that the State failed to satisfy the second, third, and fourth *Sell* standards for involuntary medication. The court of appeals held that the State satisfied the third *Sell* standard but had not met the other two. (Pet-App. 106–26.) Green argued in addition that, under *Scott*, the State was required to file its motion to lift the automatic stay of the order in the court of appeals, because the circuit court lacked competency to hear it. The court of appeals held that the circuit court had competency to hear the State's motion to lift the stay. (Pet-App. 132–36.) These issues are not before this Court.

court of appeals concluded that "[t]olling the statutory limits" is "unnecessary to achieve the statute's purpose." (A-App. 131.) It also determined that tolling "is counter to the statute's purpose" because it might result in a commitment longer than 12 months. (A-App. 131.)

This Court granted the State's petition for review on the tolling issue.

STANDARD OF REVIEW

This Court's review is de novo. This case involves statutory interpretation, which presents a question of law. *See State v. Shoeder*, 2019 WI App 60, ¶ 6, 389 Wis. 2d 244, 936 N.W.2d 172. Similarly, this Court independently decides questions about a court's inherent authority to act, whether to apply an exception to the rule of strict adherence, or whether justice requires the exercise of this Court's superintending authority. *See State v. Schwind,* 2019 WI 48, ¶ 11, 386 Wis. 2d 526, 926 N.W.2d 742; *State v. Zimbal*, 2017 WI 59, ¶¶ 40–48, 375 Wis. 2d 643, 896 N.W.2d 327; *Scott*, 382 Wis. 2d 476, ¶¶ 43–44.

ARGUMENT

This Court should hold that a circuit court may toll the 12-month statutory time limit for bringing an incompetent criminal defendant to trial competency during a *Scott* stay.

The *Scott* stay—though necessary to protect the defendant's important liberty interest in avoiding unwanted medication—has created a problem and justice requires a solution. The State begins by identifying the problem. It then provides this Court with several ways under established legal principles to solve the problem without rewriting section 971.14(5)(a)1. Finally, the State explains why Green's proposed solutions are no solutions at all. This Court should hold that a circuit court may toll the 12-month statutory time

limit for bringing an incompetent criminal defendant to trial competency during a *Scott* stay.

A. The problem: the *Scott* stay interferes with the State's one chance to bring an incompetent criminal defendant to trial competency.

Section 971.14(5)(a)1. limits to 12 months[6] 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[7] *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. The "object to be accomplished by sec. 971.14(5)(a), Stats., is to *provide treatment* to an incompetent person so that he or she may regain competency and face the pending criminal charges." *State v. Moore*, 167 Wis. 2d 491, 498, 481 N.W.2d 633 (1992) (emphasis added).

Where a *Scott* stay exists, the circuit court has determined that involuntary medication is *the* "appropriate treatment" likely to bring the incompetent defendant to trial competency within 12 months. Wis. Stat. § 971.14(5)(a)1.

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[6] In full, the statute provides for a maximum "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. In this brief, the State refers to the treatment period as "12 months" generally, because that was the period Green faced.

[7] The "department" is the Department of Health Services (DHS). Wis. Stat. § 971.14(1g).

That is because a court may only order involuntary medication if it is "substantially likely to render the defendant competent to stand trial," "medically appropriate" for the defendant, and "necessary"—meaning that there are no "alternative, less intrusive treatments" to achieve competency and no "less intrusive means for administering the drugs." *Sell,* 539 U.S. at 181; *see also State v. Fitzgerald*, 2019 WI 69, ¶¶ 14–18, 387 Wis. 2d 384, 929 N.W.2d 165.

The 12-month treatment-to-competency clock starts running when the circuit court enters the order for commitment and involuntary medication. *See* Wis. Stat. § 971.14(5)(a)1.; (R. 13:2.) Under *Scott*, an involuntary medication order is a final order appealable as of right under Wis. Stat. § 808.03(1). *Scott*, 382 Wis. 2d 476, ¶ 34. If the defendant exercises his right, the order is "subject to an automatic stay pending appeal." *Id.* ¶ 43. The reasoning is that "the defendant's 'significant' constitutionally protected 'liberty interest' in 'avoiding the unwanted administration of antipsychotic drugs' is rendered a nullity" if "involuntary medication orders are not automatically stayed pending appeal." *Id.* ¶ 44 (citation omitted).

Plainly, a *Scott* stay prohibits the Department of Health Services (DHS) from providing the "appropriate treatment" likely to restore trial competency within 12 months. Wis. Stat. § 971.14(5)(a)1. Yet, the treatment-to-competency clock keeps ticking while a *Scott* stay exists. In most cases, the defendant's appeal of the involuntary medication order will not be resolved until much—or all—of the 12-month treatment period has expired. So, under *Scott*, defendants not only received the ability to avoid unwanted medication pending the appeal of an involuntary medication order. They received the opportunity to effectively nullify the legislatively designed process for competency restoration by filing an appeal (either meritorious or frivolous).

To be clear, the State gets one opportunity to bring an incompetent criminal defendant to trial competency. If the competency commitment under section 971.14(5)(a)1. has not been (or is not likely to be)[8] successful at restoring the defendant to trial competency, the circuit court must "discharge the defendant from the commitment and release him or her, except as provided in par. (b)." Wis. Stat. § 971.14(6)(a). Paragraph (b) permits the court to "order that the defendant be immediately taken into custody" and delivered to a facility while Chapter 51 or Chapter 55 proceedings are contemplated. Wis. Stat. § 971.14(6)(b). Upon discharge from the competency commitment, the circuit court may order the defendant to return to court for a "redetermination" or examination of his competency to proceed to trial. *See* Wis. Stat. § 971.14(6)(a) and (d). But neither section 971.14(6)(a) nor (6)(d) affords the State another opportunity to treat the defendant to trial competency.

In short, the State doesn't get a do-over where treatment to competency is concerned, making a solution to the *Scott*-stay problem imperative.

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[8] Wisconsin Stat. § 971.14(5)(b) requires that during the competency commitment, the defendant be reexamined and a report from that reexamination be furnished to the court every three months. If "the defendant has not made such progress that attainment of competency is likely within the remaining commitment period," the circuit court must proceed "under sub. (4)." Wis. Stat. § 971.14(5)(b)–(c). Subsection (4), in turn, states that "[i]f the court determines that the defendant is not competent and not likely to become competent within the time period provided in sub. (5)(a), the proceedings shall be suspended and the defendant released, except as provided in sub. (6)(b)." Wis. Stat. § 971.14(4)(d).

B. The solution: permit tolling of the treatment-to-competency clock under one of three approaches.

Again, the purpose of section 971.14(5)(a)1.—plain from the face of the statute—is to give the State a single "opportunity" to treat a defendant to trial competency. (A-App. 131); *Moore*, 167 Wis. 2d at 498. Where DHS cannot provide the "appropriate treatment" likely to restore competency while the treatment-to-competency clock ticks away pending appeal, it receives no real "opportunity" at all. Wis. Stat. § 971.14(5)(a)1.; (A-App. 131.)

To achieve the statutory purpose of section 971.14(5)(a)1., this Court should approve and permit the tolling procedure at issue in this case. There are at least three well-established ways to do so without rewriting the statute. First, this Court may conclude that circuit courts have inherent authority to toll the statutory time limit. Second, this Court may create an exception to the rule of strict adherence to the statute. Third, consistent with *Scott*, this Court may exercise its superintending authority to create a tolling rule. The State addresses each approach in turn.

1. Inherent authority.

Wisconsin courts have inherent authority to act. *See Schwind*, 386 Wis. 2d 526, ¶ 12. Inherent "powers are those that are necessary to enable courts to accomplish their constitutionally and *legislatively mandated functions*." *State v. Henley*, 2010 WI 97, ¶ 73, 328 Wis. 2d 544, 787 N.W.2d 350 (emphasis added). Inherent authority is "implicit in the Wisconsin Constitution." *Schwind*, 386 Wis. 2d 526, ¶ 13.

"Inherent authority of the court derives from the doctrine of separation of powers, and allows the judiciary to preserve its role as a coequal branch of government." *Schwind*, 386 Wis. 2d 526, ¶ 14. Exercising inherent authority too broadly or narrowly threatens the separation of powers

among the government branches. *Id.* ¶ 14. Too broad and the courts "risk infringing upon the authority of the legislative or executive branches by replacing their policy preferences with [the courts'] own." *Id.* But too narrow, a court risks impeding its ability to carry out constitutionally mandated functions. *Id.*

Generally, courts have exercised inherent authority in three areas: "(1) to guard against actions that would impair the powers or efficacy of the courts or judicial system; (2) to regulate the bench and bar; and (3) to ensure the efficient and effective functioning of the court, and to fairly administer justice." *Henley*, 328 Wis. 2d 544, ¶ 73.

Only the third area— "ensuring that the court functions efficiently and effectively to provide the fair administration of justice," *City of Sun Prairie v. Davis*, 226 Wis. 2d 738, 749–50, 595 N.W.2d 635 (1999)—is relevant here.

This Court considers "historical practices when determining whether a certain power is inherent in the judiciary." *Schwind*, 386 Wis. 2d 526, ¶ 13. Here, this Court doesn't need to dig too deep because courts historically have had the power to toll statutory time limits when justice requires it, assuming that tolling is "not inconsistent with the legislative purpose." *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 559 (1974); *see also State ex rel. Nichols v. Litscher*, 2001 WI 119, ¶¶ 13–24, 247 Wis. 2d 1013, 635 N.W.2d 292 (collecting cases) (applying a tolling rule to pro se petitioners who file petitions for review in this Court); *Zimbal*, 375 Wis. 2d 643, ¶¶ 65–66 (Roggensack, C.J., concurring) (discussing the equitable tolling doctrine).

Principles of equitable tolling are instructive. "It is hornbook law that limitations periods," those that "prescribe[ ] a period within which certain rights . . . may be enforced," "are customarily subject to 'equitable tolling.'" *Young v. United States*, 535 U.S. 43, 47, 49 (2002) (citation

omitted). In *Young*, the Supreme Court considered whether the government was entitled to the benefit of equitable tolling to preserve its rights under the Bankruptcy Code. *Id.* at 44–47.

As Justice Scalia explained the issue, "A discharge under the Bankruptcy Code does not extinguish certain tax liabilities for which a return was due within three years before the filing of an individual debtor's petition." *Young*, 535 U.S. at 44. "This is commonly known as the 'three-year lookback period.'" *Id.* at 46. But there appeared to be a loophole. *Id.* Because the Code did "not prohibit back-to-back Chapter 13 and Chapter 7 filings . . . a debtor [could] render a tax debt dischargeable by first filing a Chapter 13 petition, then voluntarily dismissing the petition when the lookback period for the debt ha[d] lapsed, and finally refiling under Chapter 7." *Id.* The reason why a bankruptcy petitioner could successfully "run down the lookback period" was that an *automatic stay* "disabled" the IRS "from protecting its claim during the pendency of the Chapter 13 petition." *Id.* at 46, 50.

A unanimous Supreme Court found this result untenable and applied equitable tolling to afford the government relief. *Young*, 535 U.S. at 47, 50–51. Aside from the obvious inequity of the situation, the Supreme Court noted that "nothing in the Bankruptcy Code preclude[d] equitable tolling of the lookback period." *Id.* at 47.

Similarly, "Wisconsin appellate courts have tolled statutory deadlines as an equitable solution for harsh results that would follow from a required action outside of defendant's control." *Zimbal*, 375 Wis. 2d 643, ¶ 66.

For example, in *State ex rel. Steldt v. McCaughtry*, 2000 WI App 176, ¶ 17, 238 Wis. 2d 393, 617 N.W.2d 201, the court of appeals held that the 45-day deadline for a prisoner to file a petition for a writ of certiorari is tolled while a court determines a fee waiver, because that decision "is out of the

prisoner's control." Without the tolling order, the court of appeals reasoned, "many [indigent prisoners would] be effectively denied an opportunity to petition for certiorari review," which would be unfair and contrary to legislative intent. *See Steldt*, 238 Wis. 2d 393, ¶¶ 16–17.

In *State ex rel. Walker v. McCaughtry*, 2001 WI App 110, ¶ 18, 244 Wis. 2d 177, 629 N.W.2d 17, the court of appeals instituted a tolling rule to ensure that prisoners are "treated equitably and the legislative intent is fulfilled." That tolling rule also pertained to the statutory deadline for filing a petition for a writ of certiorari. *Walker*, 244 Wis. 2d 177, ¶ 10. The court of appeals held that the statutory deadline was tolled while Walker waited for documents to support his fee-waiver request. *Id.* ¶¶ 12–18. And because "two courts [erroneously] required the payment of the same balance in Walker's trust account," the court of appeals reasoned that "the forty-five-day limit was tolled while Walker attempted to resolve that problem," too. *Id.* ¶ 22.

In *Nichols*, this Court declined to adopt a "strain[ed]" interpretation of Wis. Stat. §§ 808.10 and (Rule) 809.62(1) to protect pro se prisoners filing petitions for review, opting instead for an equitable tolling rule. *Nichols*, 247 Wis. 2d 1013, ¶¶ 11–24. Nichols asked this Court to read a "prison mailbox rule" into the statute and rule to safeguard his right to file a petition. *Id.* ¶ 8. He was subject to a 30-day deadline and placed his petition in the mailbox "with time to spare." *Id.* ¶¶ 5–8. However, due to prison rules and procedures, Nichols's petition was untimely. *Id.* ¶¶ 4–6. Relying on cases like *Steldt* and *Walker*, this Court concluded that "[a] tolling rule [would] ensure the proper treatment of pro se prisoners who file petitions for review." *Id.* ¶¶ 22–23, 28. It "discern[ed] no convincing reason why pro se prisoners . . . should be placed at a disadvantage" in exercising their right. *Id.* ¶ 28.

The takeaway is that sometimes justice requires a court to exercise its inherent authority to toll a statutory time limit,

assuming tolling is not inconsistent with the statute's purpose. While most of the above cases involve a pro se defendant obtaining relief through tolling, *Young* makes clear that the government may be entitled to tolling, too. It's also common sense that if justice requires tolling a statutory period so that a prisoner may appeal a disciplinary decision, *see Walker*, 244 Wis. 2d 177, ¶ 2, it mandates tolling so that the State may have a meaningful opportunity to restore the competency of an individual accused of murder.

Here, without a tolling order during a *Scott* stay, the State may "be effectively denied [its one] opportunity" to bring an incompetent defendant to trial competency for a serious crime. *Steldt*, 238 Wis. 3d 393, ¶ 16; *compare Young*, 535 U.S. at 46, 50. That would be for reasons beyond the State's control—again, a *Scott* stay prohibits DHS from providing the "appropriate treatment" likely to restore trial competency. Wis. Stat. § 971.14(5)(a)1.; *compare Young*, 535 U.S. at 46, 50 (automatic stay prevented IRS from protecting its rights under Bankruptcy Code); *Steldt*, 238 Wis. 2d 393, ¶ 17 (involving a government-created obstacle beyond the defendant's control); *Walker*, 244 Wis. 2d 177, ¶ 16 (same); *Nichols*, 247 Wis. 2d 1013, ¶ 28 (same).

Not only is the above result unfair, but it's also contrary to section 971.14(5)(a)1.'s purpose.[9] *See Moore*, 167 Wis. 2d at

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[9] As noted, the court of appeals here recognized that the purpose of Wis. Stat. § 971.14(5)(a)1. is to "give the State the opportunity to bring a defendant to competency" within a certain time. (A-App. 131.) Under the plain language of the statute, that opportunity must involve "appropriate treatment" likely to restore trial competency. Wis. Stat. § 971.14(5)(a)1. The court of appeals did not disagree that a *Scott* stay could effectively run out the clock on the State's chance to appropriately treat the defendant to competency. (A-App. 126–32.) Yet, it concluded that a tolling order is not necessary to achieve the statute's purpose. (A-App. 131.) The State simply cannot follow this logic.

498; *compare Steldt*, 238 Wis. 2d 393, ¶¶ 16–17; *Walker*, 244 Wis. 2d 177, ¶ 18. There is "no convincing reason" why the State "should be placed at a disadvantage" in trying to restore the trial competency of an individual accused of a serious crime. *Nichols*, 247 Wis. 2d 1013, ¶ 28. Nor is there a convincing reason why a victim's "rights to justice and due process" should be compromised. Wis. Const. art. I, § 9m (2).

The court of appeals implied that tolling was inappropriate because, once committed, a defendant's treatment may be delayed for reasons other than a *Scott* stay. (A-App. 131 n.16.) Irrelevant. If the government is unable to timely provide treatment for reasons arguably within its control, justice would not require tolling of the order to allow DHS 12 full months to provide appropriate treatment. *See Walker*, 244 Wis. 2d 177, ¶¶ 17–18. But where, as here, DHS is prevented from administering "appropriate treatment" for reasons beyond its control, tolling is appropriate. *See Young*, 535 U.S. at 47–51.

For the above reasons, this Court should hold that the circuit court had the inherent authority to toll the treatment-to-competency clock in section 971.14(5)(a)1. That "the statute contains an unambiguous time limit" did not prevent the court from exercising its inherent authority to toll the clock. (A-App. 130.) If that were the case, courts would never be able to toll a statutory time limit unless the statute expressly authorized it. That's not what the law shows. *See, e.g.*, *Young*, 535 U.S. at 47–51; *Steldt*, 238 Wis. 2d 393, ¶¶ 2, 16–17; *Walker*, 244 Wis. 2d 177, ¶¶ 10, 12–22; *Nichols*, 247 Wis. 2d 1013, ¶¶ 8, 28. The court of appeals here was wrong to suggest that tolling would only be permissible if the "statute . . . create[d] an exception allowing the court to commit the defendant to custody for longer than twelve months because, during some portion of that time, the defendant is not receiving 'appropriate treatment.'" (A-App.

131.) What matters is that the statute *doesn't* prohibit tolling. *See Young*, 535 U.S. at 47.

2. An exception to the rule of strict adherence.

Behind door number two is an exception to the rule of strict adherence to a statute.

In *Zimbal*, this Court applied the exception to deem timely Zimbal's judicial substitution request. *Zimbal*, 375 Wis. 2d 643, ¶ 3. After successfully appealing the denial of his plea-withdrawal motion, Zimbal had 20 days upon remittitur to file his substitution request. *Id.* ¶¶ 7–8. The circuit court told Zimbal that he could not file his request until counsel was appointed, which happened outside the 20-day statutory deadline for seeking substitution. *Id.* ¶¶ 10–14. The court ultimately denied Zimbal's substitution request as untimely under the statute. *Id.* ¶ 14.

Three members of this Court would have applied equitable tolling to consider Zimbal's substitution request timely. *Zimbal*, 375 Wis. 2d 643, ¶¶ 54–55, 73. But a majority of this Court applied an exception to the rule of strict adherence to reach the same result. *Id.* ¶ 3.

The *Zimbal* Court began its analysis as follows: "[i]n determining whether Zimbal's request for substitution of judge was timely, we must consider both the plain meaning of the substitution statute and whether, under the circumstances, Zimbal was provided with an opportunity to exercise the statutory right to substitution." *Zimbal*, 375 Wis. 2d 643, ¶ 21. The plain language of the statute did not provide for any exception to its 20-day deadline for requesting substitution. *Id.* ¶ 22. Relying on the statutory language and case law, the State argued that "the substitution statute demand[ed] strict adherence to its terms." *Id.* ¶ 39. But "because the circuit court directed that the substitution issue would . . . be addressed after trial counsel was appointed and

Zimbal followed that directive," this Court made "an exception to the rule of strict adherence." *Id.* ¶ 40.

The *Zimbal* Court explained, "This limited exception comports with our prior case law allowing for an exception when a government-created obstacle prevents a defendant from complying with the statutory deadline." *Zimbal*, 375 Wis. 2d 643, ¶ 40. This Court noted that "[i]n order to comply with the statutory deadline, Zimbal would have had to disregard the instructions of the circuit court." *Id.* ¶ 46. Holding Zimbal to a hard-and-fast 20-day deadline, this Court continued, would be "contrary to the goal of affording a defendant an opportunity to exercise the statutory right to substitution." *Id.* ¶ 48.

Zimbal provides another example of why the court of appeals here erred in concluding "that the circuit court [was] not free to disregard" section 971.14(5)(a)1.'s "unambiguous time limit." (A-App. 130.) On the contrary, strict adherence to a statutory time limit is not warranted where a government-created obstacle deprives a party of the opportunity to exercise a statutory right. *See Zimbal*, 375 Wis. 2d 643, ¶ 3; *accord Baldwin v. State*, 62 Wis. 2d 521, 529–30, 215 N.W.2d 541 (1974); *State ex rel. Tessmer v. Cir. Ct. Branch III, In & For Racine Cty.*, 123 Wis. 2d 439, 443, 367 N.W.2d 235 (Ct. App. 1985); *State ex rel. Tinti v. Cir. Ct. for Waukesha Cty., Branch 2*, 159 Wis. 2d 783, 790, 464 N.W.2d 853 (Ct. App. 1990).

Here, where a *Scott* stay prevents DHS from providing the "appropriate treatment" likely to restore trial competency, strict adherence to section 971.14(5)(a)1.'s 12-month clock is not warranted. In this situation, a government-created obstacle deprives the State of a meaningful "opportunity to bring a defendant to competency," as is its right under the statute. (A-App. 131); *compare Zimbal*, 375 Wis. 2d 643, ¶ 48. If the statute's time limit is strictly enforced, DHS would have to ignore the *Scott* decision to receive a full 12 months to bring

the defendant to competency. *Compare id.* ¶ 46. DHS can't do that, which is why the State is before this Court seeking relief. *Compare id.* ¶¶ 32–40.

The State recognizes that *Zimbal*, like some of the cases discussed in Argument Section B.1., above, involves a criminal defendant seeking relief. Again, though, it should not matter that the State is the party seeking a relaxation of section 971.14(5)(a)1.'s time limit. If an exception to the rule of strict adherence applies so that a defendant may file a judicial substitution request, *see Zimbal*, 375 Wis. 2d 643, ¶ 3, surely an exception applies to protect the State's one chance to render competent an individual accused of a serious crime.

This Court should approve and permit the tolling procedure in this case because strict adherence to section 971.14(5)(a)1.'s time limit during a *Scott* stay deprives the State of a meaningful opportunity to treat a defendant to competency for reasons beyond its control. The State acknowledges that the *Zimbal* Court did not frame its decision in terms of tolling. *See Zimbal*, 375 Wis. 2d 643, ¶ 3 n.2. But practically speaking, this Court gave Zimbal more time than was statutorily authorized to complete an act, which is what tolling does. *Compare id.* ¶¶ 40–48, *with Nichols*, 247 Wis. 2d 1013, ¶ 32. Thus, *Zimbal* provides this Court with another avenue to affirm the circuit court's relaxation of section 971.14(5)(a)1.'s time limit without rewriting the statute.

3. Superintending authority.

If this Court disagrees that the circuit court was authorized to toll section 971.14(5)(a)1.'s 12-month clock under one of the above theories, it should exercise its superintending authority to create a tolling rule.

"Pursuant to Article VII, Section 3 of the Wisconsin Constitution, this court has superintending authority 'that is

indefinite in character, unsupplied with means and instrumentalities, and limited only by the necessities of justice.'" *Scott*, 382 Wis. 2d 476, ¶ 43 (citation omitted). In other words, whether this Court chooses to exercise its supervisory authority is a matter of judicial policy rather than one relating to the power of the Court. *See Koschkee v. Evers*, 2018 WI 82, ¶ 8, 382 Wis. 2d 666, 913 N.W.2d 878.

This Court does not lightly invoke its superintending authority. *Koschkee*, 382 Wis. 2d 666, ¶ 12. But as *Scott* shows, where the issue involves forced medication to restore the competency of a criminal defendant, this Court's intervention may be necessary to protect a party's significant interest. *See Scott*, 382 Wis. 2d 476, ¶¶ 43–44.

In *Scott*, the question of whether this Court should exercise its superintending authority to "order that involuntary medication orders are subject to an automatic stay pending appeal" appeared to be a no-brainer. *Scott*, 382 Wis. 2d 476, ¶ 43. As noted, this Court reduced its analysis to a single sentence: "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." *Id.* ¶ 44 (citation omitted).

Fair enough. But the defendant is not the only party with a significant interest in this context. *See Sell*, 539 U.S. at 180. Indeed, Green fairly concedes that the State has an important interest in prosecuting him for murder. (A-App. 110.) And the rights of crime victims in Wisconsin—"a very important public policy consideration . . . of constitutional dimension"—should not be overlooked. *Democratic Party of Wisconsin v. Wisconsin Dep't of Just.*, 2016 WI 100, ¶ 14, 372 Wis. 2d 460, 888 N.W.2d 584. "This court recognizes 'that justice requires that all who are engaged in the prosecution of crimes make every effort to minimize further suffering by crime victims.'" *Id.* (citation omitted).

To serve the State's significant interest in this area, the Legislature has given it a single, 12-month chance to treat a defendant to competency. Wis. Stat. § 971.14(5)(a)1. During those 12 months, the Legislature intended that the defendant would receive "appropriate treatment" likely to restore competency as "determine[d]" by the court.[10] *Id.* It simply did not intend to set up the State for failure by prohibiting DHS from providing the "appropriate treatment" likely to retore trial competency while the defendant's appeal runs out the treatment-to-competency clock.

Unfortunately, without a tolling order, the *Scott* stay leads to that result. Because the purpose of section 971.14(5)(a)1. is to provide the State with a meaningful—not a meaningless—opportunity to treat a defendant to competency, (A-App. 131); *Moore*, 167 Wis. 2d at 498, this Court should exercise its superintending authority to approve and permit the tolling procedure at issue in this case. This Court would hardly be substituting its judgment for that of the Legislature's when the Legislature could not have foreseen the automatic stay procedure enunciated in *Scott*. Before *Scott*, circuit courts had *discretion* to stay involuntary medication orders pending appeal—nothing in the plain language of Wis. Stat. § 808.07, governing relief pending appeal, authorized an automatic stay in this situation. But the absence of language mandating a stay in section 808.07 (and, of course, in section 971.14) did not stop this Court from using its superintending authority to create such a rule in *Scott*. A similar result should follow here, where a tolling rule

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[10] This legislative intent is manifest in subsection (5)(b), which requires that the defendant be reexamined and a report from that reexamination be furnished to the court every three months. If the defendant is not receiving "appropriate treatment" during his commitment, the periodic examinations are pointless and the progress towards competency unlikely.

is plainly necessary to achieve section 971.14(5)(a)1.'s purpose.

Finally, it's worth noting that the State is *not* asking this Court to overturn *Scott*—either with respect to its holding that involuntary medication orders are appealable as of right, or regarding its automatic-stay-pending-appeal rule. The State just wants to protect its significant interest in this sensitive area of the law, just like the defendant in *Scott*. For this reason, the State does not find itself making a controversial ask here.

Green sees things differently.

C. Green's solutions are inadequate to protect the State's significant interest in bringing an incompetent defendant to trial competency.

As noted, the court of appeals adopted Green's position that the Legislature "intended to limit the period for which a defendant can be committed to bring him or her to competency to a maximum of twelve months," regardless of whether the defendant receives "appropriate treatment" during that time. (A-App. 127–32.)

Throughout this litigation, Green has suggested that it's no big deal that a *Scott* stay could effectively run out the clock on the State's single chance to restore trial competency for two reasons. First, under *Scott*, the State may move to lift the automatic stay of the involuntary medication order. Second, upon the defendant's discharge from the competency commitment, the State has alternative avenues of relief under Wis. Stat. chapter 51 or chapter 55. These are not equitable solutions to the *Scott*-stay problem.

To convince a court to lift the *Scott* stay, the State must make "a *strong* showing that it is likely to succeed on the merits of the appeal." *Scott*, 382 Wis. 2d 476, ¶ 47 (emphasis added). Demonstrating a strong likelihood of success on

appeal is no small task to safeguard the State's significant interest in this context. By contrast, the defendant does not need to show any likelihood of success on appeal to obtain the *Scott* stay, which protects his competing interest in this area. Requiring the State to prove a slam-dunk case to protect its interest, when the defendant simply needs to file an appeal to safeguard his, is not equitable. And what about cases that present a closer call? Is it equitable to let the treatment-to-competency clock tick away pending appeal simply because the State doesn't have an open-and-shut case defending the involuntary medication order? The answer is no, particularly when considering that the State has one chance to treat a defendant to trial competency.

Further, as this case makes abundantly clear, the circuit court's lifting of the *Scott* stay is not the final word on the matter. The defendant may file a motion for emergency temporary relief and a motion for temporary stay pending appeal in the court of appeals, which is what happened here. (A-App. 106.) And if that doesn't work, the defendant may seek relief in this Court, either through a petition for a supervisory writ or a petition for review, like Green did in this case. The point is that these things take time to decide, and if the defendant succeeds in re-instating the stay of the involuntary medication order along the way (which happened here, (A-App. 106)), DHS does not receive the full 12 months it is afforded to treat the defendant to trial competency. This is not to mention the time it takes for the State to file the motion to lift the stay in the first place, as well as the time it takes for the circuit court to hear and decide the motion, all the while the treatment-to-competency clock is running.

In short, a motion to lift the stay is not an equitable solution to the *Scott*-stay problem.

Nor is it equitable to pass on a tolling rule simply because the State has alternative avenues of relief under Chapter 51 and Chapter 55 once the defendant is discharged

from the competency commitment. For starters, the State's purpose in medicating Green to competency to stand trial under section 971.14 is to achieve justice for his victim and the community—not to commit him for mental health treatment or provide him with protective services. This proposed solution thus ignores and trivializes the importance of the prosecution in this case. The Supreme Court has been careful not to "suggest that civil commitment is a substitute for a criminal trial." *Sell*, 539 U.S. at 180.

Moreover, to be committed or to receive services under these chapters, a person must meet certain standards.

Under Chapter 51, the mental health chapter, a person must satisfy one of several standards of dangerousness for commitment. Wis. Stat. § 51.20(1)(a)2. But a homicide defendant, who has, allegedly, been violent and dangerous in the past, may not be *presently* dangerous for purposes of Chapter 51. Thus, counterintuitively, a homicide defendant may not be eligible for involuntary commitment or medication because he's not dangerous enough. Further, not every case in this context will involve a defendant who appears dangerous based on the allegations in the complaint. The Supreme Court has made clear that involuntary medication for trial competency purposes may be warranted for "serious crime[s] against property." *Sell*, 539 U.S. at 180. Simply stated, Chapter 51 is not a one-size-fits-all solution to the *Scott*-stay problem.

Under Chapter 55, a person is eligible for protective services only if he is an "[a]dult at risk," i.e., one whose physical or mental condition "substantially impairs his or her ability to care for his or her needs and who has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation." Wis. Stat. § 55.01(1e). There is no reason to think the average criminal defendant would meet that standard, so this isn't an equitable solution to the *Scott*-stay problem, either.

A final point to consider here is that "it may be difficult or impossible to try a defendant who regains competence after years of commitment during which memories may fade and evidence may be lost." *Sell*, 539 U.S. at 180. This is just one more reason why Green's proposed solution here is no solution at all.

For the above reasons, this Court should approve and permit the tolling procedure at issue in this case.

CONCLUSION

This Court should reverse the court of appeals' decision on the tolling issue.

Dated this 16th day of August 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (c) (2019-20) for a brief produced with a proportional serif font. The length of this brief is 7,337 words.

Dated this 16th day of August 2021.

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Assistant Attorney General

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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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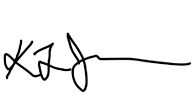

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Index to Appendix
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APPENDIX CERTIFICATION

I hereby certify that filed with this brief is an appendix that complies with Wis. Stat. § 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 Wis. Stat. § 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.

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