STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2020AP000298-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JOSEPH G. GREEN,

Defendant-Appellant.

Appeal from Final Orders Regarding a
Commitment for Treatment (Incompetency)
Entered in the Dane County Circuit Court,
the Honorable Valerie Bailey-Rihn, Presiding

BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

> Do circuit courts have authority to toll the statutory limits on the length of commitments to restore defendants to competency when an automatic stay of an involuntary medication order is entered?

The circuit court granted the state's motion to toll the length of commitment in this case. The court of appeals reversed, holding that the circuit court lacked authority to toll the statutory period to bring a defendant to competency.

This court should affirm the court of appeals and hold that circuit courts may not toll the statutory time limits imposed on commitments to restore competency.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Given the court's grant of review, both oral argument and publication are warranted.

STATEMENT OF THE CASE AND FACTS

On December 27, 2019, the state filed a criminal complaint charging Joseph G. Green with first-degree intentional homicide, use of a dangerous weapon. (2:1). An initial appearance was held the same day and a preliminary hearing was scheduled. (38).

The case, however, did not proceed to a preliminary hearing. Rather, on the date of the hearing, defense counsel requested that a competency evaluation be ordered. (39:2). An order for competency examination was entered and a competency report, completed by Dr. Craig Schoenecker, was subsequently filed with the court. (9; 12).

A competency hearing was held on February 10, 2020, at which Dr. Schoenecker testified and his report was admitted into evidence. (40:9). Dr. Schoenecker confirmed that, based on his examination of Mr. Green, it was his opinion that Mr. Green was not competent but could be restored to competency within the statutory timeframe if treated at a state mental health institute. (40:5-6). Dr. Schoenecker further explained that, despite not having obtained any information about Mr. Green's prior treatment history or whether he had been previously treated with medications, it was his opinion that the primary treatment for Mr. Green should consist of "[a]nti-psychotic-type medication," which would be substantially likely to render Mr. Green competent to proceed in the criminal case, substantially unlikely to have side effects that undermine the fairness of trial, and would be medically appropriate. (40:7-8, 11-12). Based on the doctor's testimony, the circuit court found Mr. Green incompetent and entered an order of commitment for treatment (incompetency) allowing for the involuntary administration of medication. (13; 40:18-22).

Thereafter, defense counsel filed a notice of appeal and an emergency motion for automatic stay of the involuntary medication order. (15; 16). The circuit court set the matter for a hearing, after which it granted a stay of the involuntary medication order. (41). An amended order of commitment for treatment, which noted, "[t]he administration of involuntary medication is stayed until further order of the Court," was then filed. (18).

The state subsequently filed a motion to lift the automatic stay, as well as a motion to toll statutory time to bring defendant to competence. (19; 26). Defense counsel filed written objections to the motions and a two-day hearing was held on May 6 and 19, 2020. (20; 28; 29; 42; 43).

Prior to the final hearing date, the state filed a notice of treatment plan which contained the specific medication and dosage that it was requesting the court to order. (27). At the hearing, the state again called Dr. Schoenecker to make its case. As relevant, Dr. Schoenecker testified about Haldol, a first-generation antipsychotic medication. Specifically, he testified about its potential side effects, as well as ways to try to mitigate those side effects and that, "on paper Haldol would be an appropriate treatment," for Mr. Green. (43:16-20). The doctor declined to say whether that medication would be substantially likely to render Mr. Green competent to stand trial or whether it would be unlikely to interfere with Mr. Green's ability to assist counsel at trial. (43:21-22). He acknowledged that no medications had been

prescribed for Mr. Green and that his evaluations were not done for the purpose of prescribing Mr. Green medications. (43:38-39, 41).

After arguments, the circuit court granted the state's motion to lift the stay, discussing the factors set forth in *Scott*[1]. (43:61-62). It also granted the state's motion to toll the statutory time limits. (43:62-69). A written order to that effect was filed. (35).

Mr. Green then sought reinstatement of the stay pending appeal in the court of appeals. *State v. Green*, 2021 WI App 18, ¶10, 396 Wis. 2d 658, 957 N.W.2d 583. On May 20, 2020, the court of appeals granted an emergency stay of the involuntary medication order. *Id*. After further briefing, however, on July 10, 2020, the court of appeals issued a decision denying Mr. Green's motion for relief pending appeal and lifted the temporary stay of the medication order. *Id*. Mr. Green then sought relief from this court, which was denied. Consequently, Mr. Green was involuntarily medicated while his appeal of the involuntary medication order moved forward.

On February 25, 2021, seven months after the decision denying Mr. Green's motion for relief pending appeal, the court of appeals issued its decision in this case, reversing the involuntary medication order, as well as the order lifting the automatic stay of that order, due to the state's failure to present sufficient evidence to support that order. *Green*, 2021 WI App 18,

[1] *State v. Scott*, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141.

¶2. The court of appeals also held that "the circuit court lacked the authority to toll the statutory period to commit Green in order to bring him to competency while the stay was in place." *Id*.

Specifically, the court of appeals found that the plain language of Wis. Stat. § 971.14(5)(a)1. does not allow for tolling. *Id*. ¶52. It rejected the state's arguments, finding that by enacting that statute the "legislature intended to limit the period for which a defendant can be committed to bring him to competency to a maximum of twelve months." *Id*. ¶54. The court of appeals also noted that the twelve month limitation of the commitment "reflect[ed] the legislature's policy position in balancing the State's interest in bringing a defendant to trial with a defendant's liberty interest in his or her own freedom." *Id*. ¶57. Tolling the statutory limits on the commitment, the court of appeals found, "is not only unnecessary to achieve the statute's purpose but is counter to the statute's purpose." *Id*. ¶62.

The state petitioned this court for review of the tolling issue. That petition was granted, the state filed its initial brief, and this brief follows.

ARGUMENT

Allowing circuit courts to toll the statutory limits of a commitment to bring a defendant to competency would be contrary to both the plain language and purpose of Wis. Stat. § 971.14(5)(a)1..

Almost 50 years ago the United States Supreme Court found that there are constitutional limits to the amount of time an incompetent defendant, still presumed to be innocent and not determined to be a danger to himself or others, could be committed and subject to treatment in an attempt to bring him to competency. *See Jackson v. Indiana*, 406 U.S. 715, 738 (1972). After a series of revisions to the statute and decisions from this court, our legislature ultimately determined that, in Wisconsin, a reasonable length of commitment for competency restoration is twelve months, or the maximum sentence the defendant faces on his most serious charge, whichever is less. The state is now asking this court to allow the extension of such commitments – for an unknown number of months or years – while a stay of an involuntary medication order pending appeal remains in place.

"Subjecting a person to confinement when there has been no determination of guilt implicates profound due process concerns." *Green*, 2021 WI App 18, ¶57. As this court has recognized, when an incompetent defendant is committed for purposes of competency restoration he is subjected to "custodial warehousing" in a mental facility "without due process guarantees

accorded a civil committee." *State ex rel. Deisinger v. Treffert*, 85 Wis. 2d 257, 264, 270 N.W.2d 402, 406 (1978).

Rather than recognizing the significance of what it is asking this court to do, the state portrays the issue as one related to the length of treatment, referring to it as the "treatment-to-competency clock." In reality, what the state is asking this court to do is extend the length of an incompetent defendant's pre-trial commitment – the deprivation of his liberty – beyond the length the legislature has deemed to be reasonable and even beyond the maximum sentence the defendant could face if convicted, an idea this court has repeatedly rejected. *See Deisinger*, 85 Wis. 2d at 264; *See also State v. Moore*, 167 Wis. 2d 491, 500, 481 N.W.2d 633 (1992).

This court should hold true to its precedent and give deference to the legislature's policy choice by rejecting the tolling rule requested by the state. Such a rule is contrary to the plain language of Wis. Stat. § 971.14(5)(a)1.. It is also contrary to the purpose of the statute. For that reason, the methods by which the state proposes this court adopt the rule are unconvincing. Finally, the rule is unnecessary. This court provided the state with a solution to its perceived problem when it provided an avenue to lift the automatic stay of involuntary medication orders.

A. Wis. Stat. § 971.14 and its history.

The procedures for Wisconsin's criminal competency proceedings are set forth in Wis. Stat.

§ 971.14. That section states that, if there is reason to doubt a defendant's competency, the court shall, if necessary, make a finding of probable cause and "appoint one or more examiners having the specialized knowledge determined by the court to be appropriate to examine and report upon the condition of the defendant." Wis. Stat. § 971.14(1r)-(2)(a). If an inpatient examination is completed, the report must be filed within 15 days, whereas the report after an outpatient examination must be filed within 30 days. Wis. Stats. § 971.14(2)(c).

The statute also lays out what information must be contained in the examiner's competency report, including an "opinion regarding the likelihood that the defendant, if provided treatment, may be restored to competency within the time period permitted under sub. (5)(a)," and "[i]f sufficient information is available to the examiner to reach an opinion, the examiner's opinion on whether the defendant needs medication or treatment." Wis. Stats. § 971.14(3).

Upon receiving the report, the court shall provide copies to the parties and hold a hearing at which it shall "determine the defendant's competency and, if at issue, competency to refuse medication or treatment." Wis. Stats. § 971.14(4)(b). If, after the hearing,

> 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 suspend the proceedings and *commit the*

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

Wis. Stat. § 971.14(5)(a)1.. (emphasis added). A defendant under such a commitment is entitled to sentence credit for the days spent in the commitment. Wis. Stat. § 971.14(5)(a)3. Further, if an involuntary medication order is not entered at the initial competency hearing, § 971.14(5)(am) states that the department may file a motion for an involuntary medication order at any point that it determines such an order is necessary.

While under the commitment, the defendant is to be periodically reexamined and written reports regarding his competency status "shall be furnished to the court 3 months after *commitment*, 6 months after *commitment*, 9 months after *commitment* and within 30 days prior to the *expiration of commitment*." Wis. Stat. § 971.14(5)(b)(emphasis added). If, during a period of commitment, the defendant regains competency, "the defendant shall be discharged from commitment and the criminal proceedings shall be resumed." Wis. Stat. § 971.14(5)(c). If a defendant who has been restored to competency again becomes incompetent, he may be placed under another commitment, however, "the maximum period under par. (a) shall be 18 months minus the days spent in previous commitments under this subsection, or 12 months, whichever is less." Wis. Stat. § 971.14(5)(d).

Finally, the statute states that, "[i]f a court determines that it is unlikely that the defendant will become competent within the remaining commitment period, it shall *discharge the defendant from the commitment* and release him or her." Wis. Stat. § 971.14(6)(a)(emphasis added). The court may then order that the defendant be taken back into custody for the commencement of proceedings under Chapters 51 or 54, or that the defendant "appear in court at specified intervals for redetermination of his or her competency to proceed." Wis. Stat. § 971.14(6)(a)-(b).

Throughout the statute the legislature imposed time limits on the various steps in the procedure. It also repeatedly referenced the period of commitment, not the "period of treatment." This supports the court of appeals' finding that "the purpose of WIS. STAT. § 971.14 is to give the State the opportunity to bring a defendant to competency while limiting to no more than twelve months the period in which a defendant may be held without any chance to prove his or her innocence as to the crimes charged." *Green*, 2021 WI App 18, ¶¶61-62. This purpose is also apparent from the legislative history of § 971.14.

As this court noted in *State v. Moore*, 167 Wis. 2d 491, 500, 481 N.W.2d 633 (1992), "the history of the statute reflects a continuing good faith effort by the legislature to respond to decisions of both this court and the United States Supreme Court regarding the constitutional limitations upon the state's ability to

commit an individual found to be incompetent to stand trial."

First, in *Jackson v. Indiana*, 406 U.S. 715, 738 (1972), the United States Supreme Court held that due process requires that "the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." Specifically, it went on to hold that a criminal defendant,

> committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceedings that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal.

Jackson, 406 U.S. at 738.

This court subsequently interpreted the "reasonable period of time" limitation in *Jackson* to require reexamination after six months of commitment and a maximum commitment of eighteen months. *Moore*, 167 Wis. 2d at 501; *State ex rel. Matalik v. Schubert,* 57 Wis. 2d 315, 328, 204 N.W.2d 13 (1973);[2] *State ex rel. Haskins v. Dodge County*

[2] In *Matalik*, this court held, "We consider that a period of six months after commitment has commenced should be long

Court, 62 Wis. 2d 250, 262, 214 N.W.2d 575 (1974). Specifically, in *Haskins*, this court, on declaratory judgment, heard argument and data from the State Public Defender in support of a maximum commitment of twelve months, and from the Attorney General in support of a maximum commitment of eighteen months. *Haskins,* 62 Wis.2d at 260-61. Giving deference to the legislature's policy choice, and acknowledging the data showing that treatment beyond twelve months "yields [a] drastically reduced percentage of cures," this court held that "the ultimate retention of a defendant under sec. 971.14, Stats., should be limited to eighteen months." *Id.* at 261-62.

In response to *Jackson* and *Haskins*, the legislature amended § 971.14(5) to provide that the maximum period of commitment was twenty-four months. *Moore*, 167 Wis. 2d at 501; *Deisinger*, 85 Wis. 2d at 261-62.

Thereafter, in *State ex rel. Deisinger v. Treffert*, 85 Wis. 2d 257, 270 N.W.2d 402 (1978), this court found that "[t]he most basic notions of due process fairness require that one found incompetent to stand trial is entitled to release when observatory

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enough to determine whether such a person as petitioner will never recover or will not soon recover his competency so as to be able to stand trial, and if the respondent desires that petitioner be permanently committed, he either commence civil commitment proceedings under ch. 51, Stats., within sixty days from the date of this order, or otherwise release petitioner." *Matalik v. Schubert,* 57 Wis. 2d at 328.

confinement reaches the length of the potential maximum sentence for the underlying criminal offense." *Deisinger*, 85 Wis. 2d at 268. Therefore, to avoid finding the statute unconstitutional, the court read in a requirement "the confinement for observation of competency to stand trial shall not exceed the maximum penalty under the charged offense." *Id*. at 271.

In response, the legislature again amended Wis. Stat. § 971.14(5)(a). *Id*. at 502. This time the legislature stated that the defendant may be committed "to the custody of the department for placement in an appropriate institution for a period of time not to exceed 18 months, or the maximum sentence specified for the most serious offense with which the defendant is charged, whichever is less." *Id*. at 496; Wis. Stat. § 971.14(5)(a), 1981-82.

The law was subsequently amended to its current form, reducing the maximum length of commitment from eighteen months to twelve months, or the maximum sentence the defendant faces, whichever is less. Wis. Stat. § 971.14(5)(a).

The legislature's intent, apparent from the plain language of the statute itself, as well as the history laid out above, leads to one conclusion - § 971.14(5)(a)1.'s provisions are meant to limit the length of an individual's commitment.

B. Allowing courts to toll the length of commitment would be contrary to the plain language of § 971.14(5)(a)1..

The language used in § 971.14(5)(a)1. is clear and unambiguous; once a defendant is found incompetent, the circuit court is allowed to commit him for a period not to exceed twelve months, or the maximum sentence for the most serious offense he is charged with, whichever is less. Here, the circuit court erred when, without authority to do so, it granted the state's motion to toll the length of the maximum twelve-month commitment applicable to Mr. Green. As a result, this court should affirm the circuit court's reversal of the order in this case, as well as its holding that circuit courts may not toll the statutory time limits of a commitment for purposes of competency restoration.

Statutory construction is a question of law that this court reviews de novo. *Moore*, 167 Wis. 2d at 495-96. "The primary purpose of statutory interpretation and construction is to ascertain and give effect to the intent of the legislature." *Id*. at 496. Importantly, the court's "role is not to justify the legislative action or to substitute [it's] judgment for that of the legislature. Rather, [it's] role is to examine and interpret the legislative language." *Green*, 2021 WI App 18, ¶58 (quoting *Braverman v. Columbia Hosp., Inc.*, 2001 WI App 106, ¶24, 244 Wis. 2d 98, 629 N.W.2d 66.).

"[S]tatutory interpretation 'begins with the language of the statute.'" *State ex rel Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶¶44-45, 271 Wis. 2d 633, 681 N.W.2d 110. "If the language is plain and unambiguous, [the] analysis stops there." *Wisconsin Dep't of Workforce Dev. v. Wisconsin Lab. & Indus. Rev. Comm'n*, 2015 WI App 56, ¶7, 364 Wis. 2d 514, 869 N.W.2d 163. Further, "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd results." *Kalal*, 2004 WI 58, ¶46.

Again, § 971.14(5)(a)1., states, in relevant part:

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

(emphasis added). This language is clear – no defendant, regardless of the charge or maximum penalty he faces, can be committed, for purposes of competency restoration, for a period longer than twelve months.

The statute contains no provision for extending, or tolling this time. Rather, the legislature provided an answer to what must be done if the defendant cannot be restored to competency within the maximum period of commitment – the circuit court "shall discharge the defendant from the commitment and release him." Wis. Stat. § 971.14(6)(a). The plain language sets forth a straight-forward and simple rule: a defendant must be discharged from the commitment if he is not restored to competency within twelve months, or the maximum sentence he faces on his most serious charge, whichever is less. Wis. Stat. § 971.14(5)-(6).

Thus, the plain language of the statue unambiguously prohibits a circuit court from ordering that a defendant remain in custody – for purposes of competency restoration – for longer than twelve months. *See Green*, 2021 WI App 18, ¶¶61-62. This prohibition applies regardless of whether an involuntary medication order is entered at the time of the commitment, regardless of whether such an order is stayed, and regardless of whether treatment – including medication – is delayed for any other reason.[3] As the court of appeals held, "the legislature intended to limit the period for which a defendant can be committed to bring him or her to competency to a

[3] Mr. Green did not prevent DHS from providing him with treatment during the 98 days that the circuit court stayed the involuntary medication order in this case – rather, he remained in the jail on a waiting list for Mendota. (43:65-67). His treatment was delayed no more than it otherwise would have been.

maximum of twelve months." *Green*, 2021 WI App 18, ¶54. "[I]t is the custody, not the treatment, that may not exceed twelve months." *Id*. ¶61.

Review of this court's prior examination of the statute and its history, as laid out above, confirms this plain meaning interpretation. *See Kalal*, 2004 WI 58, ¶51(extrinsic sources may be consulted to confirm or verify a plain-meaning interpretation). This court repeatedly examined the provisions of § 971.14(5)(a)1. in light of the "constitutional limitations" of the state's ability to commit an incompetent defendant, and the legislature repeatedly responded to this court's decisions by reducing the length of such commitments. *See Moore*, 167 Wis. 2d at 500; *See also Supra* Section I.

Finally, allowing the circuit court to toll the statutory limits on the length of a defendant's commitment while a stay of the involuntary medication order is in place would lead to an absurd and unreasonable result. As the state concedes, an appeal of an involuntary medication order would likely take twelve months or more. Allowing the circuit court to continue to deprive a defendant – "still clothed with a presumption of innocence" – of his liberty during the appeal, and then for twelve months, or the maximum sentence the defendant faced, could result in cases in which the defendant is committed for far longer than the maximum time he could be sentenced if ultimately convicted of the crimes he faces – a result this court has already found would be both unconstitutional and

absurd. *See Deisinger*, 85 Wis. 2d at 268; *See also Moore*, 167 Wis. 2d at 500.

The statute simply provides no means through which the government may commit a defendant for a single period longer than twelve months for purposes of competency restoration. Rather, the legislature specifically stated that the defendant shall be committed for a *period not to exceed* twelve months. Wis. Stat. § 971.14(5)(a)1.. Allowing the circuit court to toll that time limit, for any reason, would be contrary to the plain language of the statute and, therefore, the legislative intent.

C. Allowing courts to toll the length of commitment would be contrary to the purpose of § 971.14(5)(a)1..

Overlooking the plain language of the statute and years of precedent from this court, the state repeatedly asserts that the purpose of § 971.14(5)(a)1. "is to give the State a single 'opportunity' to treat a defendant to trial competency." (State's Br. 16). Based on that erroneous declaration, it goes on to argue that allowing circuit courts to toll the statutory limits on the length of commitment would not be contrary to that purpose and, therefore, this court should find such tolling proper under one of three theories. As the purpose of the statute is actually to protect incompetent defendants and to limit the length of time the state may deprive them of their liberty without the protections granted to other civil committees, the state's arguments fail.

On review of this case below, the court of appeals found that "the purpose of WIS. STAT. § 971.14 is to give the state the opportunity to bring a defendant to competency *while limiting to no more than twelve months the period in which a defendant may be held without any chance to prove his or her innocence as to the crimes charged*." *Green*, 2021 WI App 18, ¶62 (emphasis added). This interpretation, unlike the state's, is consistent with the plain language of the statute and this court's prior decisions.

This court has held that "the basic justification of a statute which prohibits the state from proceeding against an incompetent person is to protect him from a criminal prosecution when he is unable to defend himself and to make sure that he will be afforded a due process trial at a time when he can assist in his own defense." *Haskins*, 62 Wis. 2d at 258*; See also Deisinger*, 85 Wis. 2d at 268 ("The primary right being protected by sec. 971.14(5) is the right of a defendant to a fair trial in which he can aid in the preparation of his defense."). And further that, "it cannot be denied that the procedure spelled out by sec. 971.14, Stats., on the determination of incompetency to proceed, is a critically important failsafe device for the benefit of accused persons who may not be able to fully cooperate and assist in their defense." *Matalik*, 57 Wis. 2d at 322.

"The purpose of sec. 971.14 is to maximize rather than minimize the rights afforded criminally accused persons." *Id*. at 324. Thus, incarceration of an incompetent defendant "cannot be continued unless there is evidence in the record that the criminal

incarceration will not continue indefinitely but will soon be terminated." *Haskins*, 62 Wis. 2d at 260.

This court has held that the legislature did not intend that an incompetent defendant waiting trial could be confined longer than a defendant found guilty of the same offense. *Moore*, 167 Wis. 2d at 498. In so holding, it noted that "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. The commitment is no way punitive, for there has been no determination of guilt." *Id*. With this purpose in mind, this court stated that it would be absurd that a person not competent to stand trial, "who is 'still clothed with a presumption of innocence'" could be confined or committed longer than a person found guilty or not guilty by reason of mental disease or defect of the same offense. *Id*. at 500; *See also Deisinger*, 85 Wis. 2d at 268-69.

Throughout these cases, this court, like the court of appeals, recognized that questions regarding the appropriate length of a commitment for competency restoration were policy questions best left to the legislature. *See Haskins*, 62 Wis. 2d at 256, 261; *See also Green*, 2021 WI App 18, ¶57 ("This choice reflects the legislature's policy position in balancing the State's interest in bringing a defendant to trial with a defendant's liberty interest in his or her own freedom.").

Because tolling the maximum statutory period of commitment would be contrary to the recognized purposes of § 971.14(5)(a)1., as well as the legislature's policy choice, each of the state's three avenues to achieving that goal are dead ends.

1. Inherent authority.

Despite the plain language and purpose of the statute set forth above, the state asks this court to find that the circuit court had inherent authority to toll the statutory limits on the length of Mr. Green's commitment for competency restoration. In support, it relies on cases applying the doctrine of equitable tolling. As equitable tolling applies only to statutes of limitation, and the authority to toll the limits on the maximum term of commitment is not necessary for circuit courts to properly function, the state's argument misses the mark.

A court's inherent authority "consists of only those powers that are necessary for the judiciary to accomplish its constitutionally mandated functions and preserve its role as a coequal branch of government." *State v. Schwind*, 2019 WI 48, ¶2, 386 Wis. 2d 526, 926 N.W.2d 742. Stated another way, "[a] power is inherent when it 'is one without which a court cannot properly function.'" *State v. Henley*, 2010 WI 97, ¶73, 328 Wis. 2d 544, 787 N.W.2d 350. Courts have been recognized to have inherent authority in the following 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." *Id*. ¶73. The question of judicial authority is a question of law this court reviews de novo. *Id*. ¶29.

The state asserts that the ability to toll the statutory limits on the length of commitment under § 971.14(5)(a)1. fits within the third category of inherent authority – it's necessary to ensure the efficient and effective functioning of the court and fairly administer justice. (State's Br. 17). Authority to toll the time limits on the maximum period of commitment, however, would not conform with the powers this court has previously recognized to fall within this area of inherent authority.

Unlike the ability to hold a person in contempt for failing to appear, appoint counsel for indigent parties, assess costs for impaneling a jury, or correct clerical errors, the ability to extend the deprivation of an incompetent defendant's freedom by tolling the statutory limits on the length of commitment is not necessary to "enable the court to effectively and efficiently resolve the disputes before it," nor is it necessary to fairly administer justice. *Schwind*, 2019 WI 48, ¶¶30-31; *See Smith v. Burns*, 65 Wis. 2d 638, 223 N.W.2d 562 (1974); *Joni B. v. State*, 202 Wis. 2d 1, 549 N.W.2d 411 (1996); *Jacobson v. Avestruz*, 81 Wis. 2d 240, 260 N.W.2d 267 (1977); *State v. Prihoda*, 2000 WI 123, 239 Wis. 2d 244, 618 N.W.2d 857. Such a power does not relate "to the existence of the court and the orderly and efficient exercise of its

jurisdiction." *See City of Sun Prairie v. Davis*, 226 Wis. 2d 738, ¶19, 595 N.W.2d 635 (1999).

Commitments for competency restoration are statutory creations and the length thereof a policy decision made by the legislature in light of constitutional limitations recognized by the courts. Moreover, this court provided circuit courts with an avenue to fairly administer justice in the event an involuntary medication order is entered and then stayed pending appeal – if the court believes the order was properly entered and any appeal thereof would not be successful, it can lift the stay upon the state's motion. *See Scott*, 2018 WI 74, ¶¶45-48.

The state points to nothing – no case law, statutory authority, or otherwise – to suggest that without the authority to toll the statutory limits and extend the length of a commitment for competency restoration, "a court will cease to exist or it will not be able to exercise its jurisdiction in an orderly and efficient manner." *See Davis*, 226 Wis. 2d 738, ¶27. Rather, the state asks this court to interpret the inherent authority of courts too broadly in order to allow courts to lengthen the period of commitments and thereby replace the legislature's policy choices with their own. *See Schwind*, 2019 WI 48, ¶14 ("If the inherent authority of courts is defined too broadly, we risk infringing upon the authority of the legislative or executive branches by replacing their policy preferences with our own."); *See also Flynn v. Dept. of Admin.*, 216 Wis. 2d 521, 529, 576 N.W.2d 245 (1998)("It is for the legislature to make policy choices,

ours to judge them based not on our preference but on legal principles and constitutional authority.").

Perhaps recognizing the difficulty it faced in making an argument related to inherent authority under the grounds provided above, the state, rather than expounding on the principles of inherent authority, directs this court to cases involving equitable tolling. Such cases, however, are easily distinguishable.

Equitable tolling "allows a plaintiff to initiate an action beyond the statute of limitations deadline," under certain circumstances "when justice requires it." 51 Am. Jur. 2d, Limitations of Actions § 153 (2021). Further,

> The equitable tolling of a statute is appropriate when consistent with the policies underlying the statute and the purposes underlying the statute of limitations, and equitable tolling is not permissible if it is inconsistent with the text of the relevant statute. Even in the absence of an explicit prohibition on equitable tolling of a statute of limitations, a court may conclude that either the text of a statute or a manifest legislative policy underlying it cannot be reconciled with permitting equitable tolling.

Id. Consistent with these principles, the cases cited by the state involve tolling a statute of limitations – the deadline by which a party must initiate an action – under circumstances where such tolling would

promote the purposes of the statute.[4] Such cases are not relevant to the issue now before the court.

In this case, the state seeks a rule allowing courts to toll the time limits that the legislature has imposed on the state's ability to deprive an individual of his liberty. The maximum length of commitment under § 971.14(5)(a)1. is not a statute of limitations, it is a limit on the length of time the state may deprive an incompetent defendant of his freedom. Contrary to the state's assertion, it is not "common sense that if justice requires tolling a statutory period so that a prisoner may appeal a disciplinary decision…it

[4] *See American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 555-56, 558-59 (1974)(tolling time for parties to file motion to intervene as plaintiffs in civil suit and noting that "the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose."); *Young v. United States*, 535 U.S. 43, 47 (2002)(tolling time in which IRS can file a claim for a tax debt); *State ex rel Nichols v. Litscher*, 2001 WI 119, ¶28, 247 Wis. 2d 1013, 635 N.W.2d 292 (tolling 30-day deadline for filing of a petition for review and holding that the "tolling rule will ensure the proper treatment of pro se prisoners who file petitions for review."); *State ex rel. Walker v. McCaughtry*, 2001 WI App 110, ¶18, 244 Wis. 2d 177, 629 N.W.2d 17 (tolling time for filing a certiorari action and stating that "[b]y requiring prisoners to submit documents under their control within a designated period, the prisoner is treated equitably and the legislative intent is fulfilled."); *State v. Zimbal*, 2017 WI 59, 375 Wis. 2d 643, 896 N.W.2d 327 (tolling time for filing a request for substitution of judge).

mandates tolling" in this situation. (State's Br. 20). The two situations are not comparable. Here, we are talking about the deprivation of an innocent person's liberty, not about the time in which a prisoner can initiate an appeal.

Further, the state's proposed tolling rule would not promote the purposes of the statute. Rather, as the court of appeals found, allowing courts to toll the statutory limits on the length a § 971.14(5)(a)1. commitment would be contrary to the purposes of the statue. *Green*, 2021 WI App 18, ¶62.

The provisions of § 971.14 are intended to protect incompetent defendants. *See Haskins*, 62 Wis. 2d at 258*; See also Deisinger*, 85 Wis. 2d at 268. The statute is meant "to maximize rather than minimize the rights afforded criminally accused persons." *Matalik*, 57 Wis. 2d at 324. Allowing courts to extend the length of a commitment beyond the maximum term set forth by the legislature, and in some circumstances beyond the maximum penalty the defendant faces, would be contrary to such purposes. It would not protect the defendant, nor would it maximize the rights afforded to him. Instead, it would extend the time within which he is deprived of his liberty without being afforded the protections granted to other civil committees.

The state's proposed tolling rule does not fall within the inherent authority of courts. It is also plainly contrary to the purpose of § 971.14(5)(a)1.. Accordingly, this court should hold that circuit courts

may not toll the statutory limits on the length of a commitment for competency restoration due to a stay of an involuntary medication order, or for any other reason.

2. Exception to the rule of strict adherence.

The state next asserts that this court can find that an exception to the rule of strict adherence applies in cases where there is a *Scott* stay. This argument, like that regarding inherent authority, is misguided.

In support of its request that this court find an exception to the rule of strict adherence, the state cites only to cases in which this court has declined to strictly enforce the deadline for a defendant to file a request for substitution of judge. *See Zimbal*, 2017 WI 59; *See also Baldwin v. State*, 62 Wis. 2d 521, 215 N.W.2d 541 (1974); *State ex rel. Tessmer v. Cir. Ct. Branch III, In & For Racine Cty.*, 123 Wis. 2d 439, 367 N.W.2d 235 (Ct. App. 1985); *State ex rel. Tinti v. Cir. Ct. for Waukesha Cty., Branch 2*, 159 Wis. 2d 783, 464 N.W.2d 853 (Ct. App. 1990). Just as the cases the state relied upon for its inherent authority argument, these cases involve extending the time within which a party can assert a right. That is contrary to the situation here – in which the state is requesting an extension of the time in which it can deprive incompetent defendants of their freedom by expanding the maximum length of commitment under § 971.14(5)(a)1..

Similarly, just as the equitable tolling cases did, the cases supporting an exception to the rule of strict adherence do so only when such an exception would promote, rather than interfere with, the purpose of the statute.[5] Such cases also rely on a finding that a "government-created obstacle prevents a defendant from complying with the statutory deadline." *Zimbal*, 2017 WI 59, ¶40. Neither of those conditions is met here.

As set forth above, allowing courts to toll the statutory limits on the length of commitment for competency restoration would be contrary to the purpose of § 971.14. A tolling rule would neither protect an incompetent defendant, nor would it maximize the rights afforded to him. Rather, it would be counter to the express language of the statute, adopted in light of decisions from the U.S. Supreme Court and this court, limiting the length of commitment to twelve months. Surely the state's perceived "statutory right" to treat a defendant to competency (if the statute is interpreted that way) should not trump the defendant's constitutional

[5] *See Zimbal*, 2017 WI 59, ¶48 ("A requirement that a defendant file a request for substitution within a 20 day time limit when the circuit court in essence extends the deadline until counsel is appointed is contrary to the goal of affording a defendant an opportunity to exercise the statutory right to substitution"); *See also Baldwin*, 62 Wis. 2d at 530 ("A strict construction makes it impossible to obtain the objective of this section and would frustrate the objective of this statute."); *Tessmer*, 123 Wis. 2d at 441-43 (same).

liberty right being protected by the statute's unambiguous limitation on the length of commitment.

Moreover, there is no government created obstacle here. A stay of the involuntary medication order does not stay the commitment of the individual, nor does it prevent the state from providing other treatment. Further, such a stay can be lifted if the state is able to show that it met its burden of proof and, therefore, has a strong likelihood of success on appeal. If it is not able to make such a showing, and the stay remains in place, that is an obstacle it brought upon itself.

An exception to the rule of strict adherence is not appropriate under these circumstances – it would allow the state to extend the time in which it can deprive a defendant of his freedom, contrary to the purpose of § 971.14. Consequently, the exception should not be applied and this court should hold that circuit courts cannot toll the statutory limits placed on the length of commitments under § 971.14(5)(a)1..

3. Superintending authority.

Lastly, the state asks that this court use its superintending authority to adopt a tolling rule. For the reasons set forth above, this court should decline to do so. The tolling rule requested by the state would not only be contrary to the purpose of the statute, it would be contrary to this court's prior decisions and the legislature's policy choices regarding the length of commitments for competency restoration. Further, such a tolling rule is not necessary, as this court has

provided the state with an adequate remedy to the problem it presents.

"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*, 2018 WI 74, ¶43, (quoting *Arneson v. Jezwinski*, 206 Wis. 2d 217, 225, 556 N.W.2d 721 (1996)). The authority is "as broad and as flexible as necessary to insure the due administration of justice in the courts of this state." *In re Kading*, 70 Wis. 2d 508, 520, 235 N.W.2d 409 (1975). However, this court does not exercise its superintending authority lightly and such authority will not be exercised "where there is another adequate remedy, by appeal or otherwise, for the conduct of the trial court, or where the conduct of the trial court does not threaten seriously to impose a significant hardship upon a citizen." *Jezwinski*, 206 Wis. 2d at 226 (quoting *McEwen v. Pierce County*, 90 Wis. 2d 256, 269-70, 279 N.W.2d 469 (1979)).

The necessities of justice do not require this court to adopt the tolling rule proposed by the state. Unlike the situation presented in *Scott*, the state does not face deprivation of a constitutionally protected liberty interest, or any other significant hardship if the rule is not adopted. *Scott*, 2018 WI 74, ¶44. The opposite is true. If this court adopts the state's position, the state will be allowed to deprive defendants of their freedom, without the protections afforded by the civil commitment procedures, for

longer than this court and the legislature has deemed reasonable and, in some situations, for longer than the maximum sentence they would face if convicted. *See Haskins,* 62 Wis.2d at 262; *See also Deisinger*, 85 Wis. 2d at 268. Justice does not demand such a rule. It demands the opposite.

Further, while imposing the automatic stay of involuntary medication orders, this court provided the state with an adequate remedy. It provided the state with an opportunity to lift the automatic stay. *Scott*, 2018 WI 74, ¶¶45-48. As will be developed more thoroughly below, this opportunity adequately protects the state's interest in restoring a defendant to competency so that he can be brought to trial.

For these reasons, this court should decline to exercise its superintending authority.

D. Tolling of the length of commitment is not necessary to avoid the state's perceived problem with the statute.

The state argues that this court's adoption of an automatic stay of an involuntary medication order pending appeal caused a serious problem that must now be addressed. Specifically, it asserts that such a stay pending appeal will allow defendants to use up all of the maximum commitment period with a frivolous appeal, thus depriving the state of it's "*one* chance to bring an incompetent criminal defendant to competency." (State's Br. 6). For that reason, the state declares, this court must allow circuit courts to toll the statutory limits of the commitment – in effect, allow

them to extend the commitment, and deprive the defendant of his freedom, for longer than the maximum period allowed by statute.

First, this court's decision creating an automatic stay of involuntary medication orders did not create a problem for the state. The state does not ask this court to overrule its decision in *Scott*. Instead, what the state appears to be grappling with is the recognition that the minimal evidence it used to present to obtain involuntary medication orders has now been recognized as insufficient under *Sell*.[6] It is thus concerned that while adjusting to this new standard, it may not be able to meet its burden and, therefore, improperly entered involuntary medication orders may be stayed pending appeal. Defendants, however, should not pay the price for this learning curve by being deprived of their freedom for longer than the maximum commitment period.

Second, while the automatic stay of the involuntary medication order may prevent the state from involuntarily medicating a defendant, it does not prevent the state from providing other treatment during the commitment period. A commitment for competency restoration under § 971.14(5)(a)1. and an order for involuntary medication are not the same thing. The commitment may, and given the court of appeals' decision in this case likely will, begin before any involuntary medication order is sought or granted. *See* Wis. Stat. § 971.14(5)(am). Moreover, many

[6] *Sell v. United States*, 539 U.S. 166 (2003).

defendants may be brought to competency without being involuntarily medicated – other forms of treatment, including counseling, education, and voluntary medication, exist. Importantly, the commitment itself is not stayed. The defendant remains in the custody of the department and will continue to receive treatment while an automatic stay of the order is in place. Thus, if the defendant obtains a stay of an involuntary medication order, and it is ultimately decided that the involuntary medication order was invalid, the state will have lost no time and no opportunity to provide the defendant with treatment.

Third, and more importantly, the state's ability to lift the automatic stay pending appeal provides a means of preventing a defendant from using up the entire commitment period on a frivolous appeal. The state is in control here. It is the one with the burden to present the necessary evidence sufficient to obtain the involuntary medication order. *Green*, 2021 WI App 18, ¶16. If it does, it should have no problem meeting its burden to have the automatic stay lifted. The state must simply prove to the circuit court – the same court which just granted the involuntary medication order – that it has a strong likelihood of success on the merits of the appeal. *See State v. Gudenshwager*, 191 Wis. 2d 431, 440-41, 529 N.W.2d 225 (1995)(explaining that, while there are other factors, the factors are not prerequisites, but interrelated considerations that must be balanced together. A stronger showing on one makes up for a lesser shower on another.). As the circuit court granted the requested medication order,

it necessarily found that the state met its burden and would likely find that the state will succeed on appeal, thereby lifting the stay. If the circuit court denies the state's request to lift the stay pending appeal, however, the state may appeal that decision. Wis. Stat. § 809.12. And again, if it has met its burden of presenting the evidence required under *Sell*, it should have a strong argument in support of lifting the automatic stay.

While it is true, as the state argues, that the defendant may appeal the circuit court's decision to lift the automatic stay pending appeal, if anything, this case points out exactly how difficult obtaining such relief pending appeal is for defendants. Mr. Green obtained an automatic stay pending appeal, but on the state's motion, the circuit court then lifted that stay. Mr. Green next sought relief in the court of appeals, and although granted temporary emergency relief, his request for relief pending appeal was denied, as was Mr. Green's petition to this court. As a result, Mr. Green was involuntarily medicated, under an order that was ultimately determined to be unconstitutional, for seven months while his appeal of that medication order moved forward.

Finally, the state's implication that if the length of the commitment is not tolled, it will lose the ability to bring defendants like Mr. Green to trial, ignores the balancing approach that the legislature and this court have determined to be necessary and appropriate in

these circumstances.[7] Both this court and the United States Supreme Court have recognized that detention of an individual for purposes of competency restoration cannot be indefinite, it may only last for a reasonable amount of time. *Jackson*, 406 U.S. 715, 738 (1972); *Matalik,* 57 Wis. 2d at 328; *Haskins,* 62 Wis.2d at 262. Our legislature has determined that a reasonable amount of time is twelve months. Wis. Stat. § 971.14(5)(a)1.. It further explained that, if competency restoration cannot be accomplished in twelve months, the competency commitment, not the criminal proceeding, must end. The defendant is not simply free to go wander the streets – the state may obtain a longer commitment if it is able to meet the more demanding requirements of Chapters 51 or 55, Wis. Stats. Moreover, the criminal case is not

[7] *See In re Mental Condition of Billy Jo W.*, 182 Wis. 2d 616, 645, 514 N.W.2d 707 (1994)("the legislature has interwoven the provisions of chapters 51 and 971 to accommodate the constitutional protections against perpetual, unjustified confinement on the one hand and the interests of the public in prosecuting criminal defendants on the other. Consequently, an individual who has been charged with a criminal offense is not removed from the purview of the criminal court simply because he fails to regain competency within 18 months and is subject to civil commitment."); *See also Deisinger*, 85 Wis. 2d at 270 ("While the conclusion reached calls for the defendant's release or civil commitment at the end of the maximum penalty period, this does not preclude the state from bringing the party to trial at some future date if he regains competency. The ability of the state to allow the indictment to pend while the accused is released but still awaiting competency is only limited by the defendant's right to a speedy trial.")

dismissed. It remains open and the defendant may be ordered to appear before the court at regular intervals and thereafter brought to trial at any time if he becomes competent. Wis. Stat. § 971.14(6).

Tolling of the maximum period of commitment under § 971.14(5)(a)1. during the time an involuntary medication order is stayed, is not only unnecessary, it is contrary to the plain language and purpose of the statute, as well as this court's prior decisions interpreting the constitutional limitations on the state's ability to commit incompetent defendants. This court must hold that circuit courts lack authority to toll the statutory limits and affirm the court of appeals' decision reversing the tolling order granted in this case.

CONCLUSION

For the reasons stated above, Mr. Green respectfully requests that this court affirm the court of appeals' decision reversing the tolling order in this case and hold that circuit courts do not have the authority to toll the statutory limits on the length of a commitment to return a defendant to competency.

Dated and filed this 7th day of September, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 8,585 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

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

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

Dated and filed this 7th day of September, 2021.

Signed:

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