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

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

JOSHUA L. KAUL
Attorney General of Wisconsin

KARA L. JANSON
Assistant Attorney General
State Bar #1081358

Attorneys for Plaintiff-Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809
(608) 294-2907 (Fax)
jansonkl@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

Green submits that he's a plain-language constructionist here to safeguard the due process rights of incompetent criminal defendants. But it's a superficial representation. His argument reads phrases out of the relevant statute and endorses a pre-trial commitment up to 12 months long where the defendant may receive none of the treatment he needs to restore trial competency.

This case boils down to who's right about the purpose of Wis. Stat. § 971.14(5)(a)1. Is it to provide the State with a meaningful (though not boundless) opportunity to treat a defendant to trial competency, as the State believes? Or is it to allow for a limited pre-trial commitment of an incompetent defendant regardless of whether he receives treatment likely to restore trial competency, as Green contends?

Fortunately for the State, this Court has already resolved the dispute in its favor: "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). Green acknowledges as much 26 pages into his brief. But not before offering inapposite law to persuade this Court that, despite what it said in *Moore*, the "purpose" of the statute is "actually" something different. (Green's Br. 24.) That's a tough sell in the first place, not to mention that this Court must ignore statutory language to buy it.

Green may no longer wish to acknowledge that the State and crime victims have a significant interest in restoring the trial competency of an individual accused of a serious crime. But ignoring it doesn't make it go away. To serve the State's interest, the Legislature has afforded it a single, 12-month chance to treat a defendant to competency.

Because a *Scott*[1] stay interferes with the State's one opportunity to restore trial competency, a tolling order is necessary to achieve the statutory purpose. And there are several established ways of permitting tolling without rewriting the statute.

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.

A. Tolling is plainly necessary to achieve the statutory purpose of Wis. Stat. § 971.14(5)(a)1.

Green's discussion regarding the history of Wis. Stat. § 971.14 cannot change what's evident from the face of subsection (5)(a)1. and this Court's precedent: the "purpose" of the statute is to treat an incompetent defendant to trial competency. *Moore*, 167 Wis. 2d at 498. Green ultimately recognizes "this purpose." (Green's Br. 26). So, it's unclear why, two pages earlier in his brief, he claims that the statutory "purpose" is "actually" something different. (Green's Br. 24.) But the State will try to unpack it.

Green cites to a variety of cases discussing the importance of limitations on the State's ability to commit an incompetent criminal defendant. (Green's Br. 16–19.) Because the Legislature has, over time, narrowed the commitment-for-competency-restoration window, Green extrapolates that "§ 971.14(5)(a)1.'s provisions are meant to limit the length of an individual's commitment." (Green's Br. 19.) He seems to believe that section 971.14(5)(a)1. exists solely "to protect

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

incompetent defendants," and he scoffs at the idea that the statute affords the State a right "to treat a defendant to competency." (Green's Br. 24, 34.)

That section 971.14(5)(a)1. caps the commitment period to recognize an unconvicted defendant's liberty interest in not being confined indefinitely doesn't change that the purpose of the statute is to treat an incompetent defendant to trial competency. *Moore*, 167 Wis. 2d at 498. Green refuses to acknowledge that there is no commitment to limit without a finding that "appropriate treatment" is "likely" to restore trial competency. Wis. Stat. § 971.14(5)(a)1. Stated otherwise, nothing happens under section 971.14(5)(a)1. unless there is treatment decision, which is why this Court hit the nail on the head when it discerned the statute's purpose in *Moore*. Even the court of appeals' opinion in this case, which Green relies upon, recognizes that "the purpose of Wis. Stat. § 971.14 is to give the State the opportunity to bring a defendant to competency" within a certain time. (A-App. 131.)

Green repeatedly cites to *State ex rel. Matalik v. Schubert*, 57 Wis. 2d 315, 324, 204 N.W.2d 13 (1973), for the proposition that "[t]he purpose of sec. 971.14 is to maximize rather than minimize the rights afforded criminally accused persons." (Green's Br. 25, 32.) Unlike in *Moore*, this Court in *Matalik* wasn't discerning the purpose of section 971.14(5)(a). *See Matalik*, 57 Wis. 2d at 324. And it couldn't have, as section 971.14(5)(a)—along with its requirement that a commitment be for "appropriate treatment"—didn't exist until 1981.[2] *See*

[2] Before that, Wis. Stat. § 971.14 appeared to allow for the commitment of an incompetent criminal defendant *without* treatment. *See* Wis. Stat. § 971.14(5) (1979–80) ("If the court determines that the defendant lacks competency to proceed, the proceeding against the defendant shall be suspended and the court shall commit the defendant to the custody of the department."). The word "treatment" was not used anywhere in Wis. Stat. § 971.14.

1981 Wis. Act 367, § 4. Notably, all the cases that Green relies upon to claim that the "purpose of [section 971.14(5)(a)1.] is actually to protect incompetent defendants," namely *Haskins*,[3] *Deisinger*,[4] and *Matalik*, predate the statute's very existence. (Green's Br. 17–26.)

Regarding the protection of incompetent defendants, it's notable that Green's argument endorses a pre-trial commitment up to 12 months long where the defendant might receive none of the treatment he needs to restore trial competency. To reiterate, where a *Scott* stay exists, the court has determined that involuntary medication is *the* "appropriate treatment" likely to restore trial competency within 12 months—other treatments won't do the trick. (State's Br. 13–14.) For someone who champions the principle that "the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed," it's surprising to hear that Green thinks it's fine to commit an incompetent defendant for "treatment" like "counseling" and "education" that *won't* restore trial competency. (Green's Br. 17, 39.)

Further, the reason why section 971.14(5)(a) was created—including its requirement that a commitment be for "appropriate treatment" "likely" to restore competency—was to comply with *Jackson v. Indiana*, 406 U.S. 715 (1972). The Judicial Committee Note for the 1981 legislation states that "Sub. (5) requires, in accordance with [*Jackson*], that competency commitments be justified by the defendant's *continued progress* toward becoming competent within a reasonable time." 1981 Judicial Committee Note, § 971.14. So, while Green claims to advance an argument consistent with

---

[3] *State ex rel. Haskins v. Cty. Ct. of Dodge Cty.*, 62 Wis. 2d 250, 214 N.W.2d 575 (1974).

[4] *State ex rel. Deisinger v. Treffert*, 85 Wis. 2d 257, 270 N.W.2d 402 (1978).

Jackson and our Legislature's response to it (Green's Br. 12–41), he's doing the opposite: he's advocating for a commitment where there might be zero progress toward becoming competent within a reasonable time. If the Legislature was fine with that result, why did it change the statute?

It's true that a tolling order during a *Scott* stay could "result in a defendant being held for a period longer than twelve months."[5] (A-App. 129.) But is that truly inconsistent with the Legislature's response to *Jackson*, as Green argues? (Green's Br. 12, 34, 41.) *Jackson* indicates that a pre-trial commitment for competency restoration "may only last for a reasonable amount of time." (Green's Br. 41.) As Green notes, "Our legislature has determined that a reasonable amount of time is twelve months." (Green's Br. 41.) But as Green ignores, the Legislature chose that time based on its understanding that the defendant would receive "appropriate treatment" "likely" to restore trial competency. Wis. Stat. § 971.14(5)(a)1. Thus, it's perfectly logical to conclude that where a *Scott* stay prohibits the State from providing the appropriate treatment likely to restore competency, the "reasonable period of time necessary to determine whether there is a substantial probability that [the defendant] will attain [competency] in the foreseeable future" might exceed

---

[5] Green claims that with a tolling order, an incompetent defendant's pre-trial commitment could extend "beyond the maximum sentence the defendant could face if convicted." (Green's Br. 13.) This is somewhat of a red herring because these cases will involve serious crimes, often with lengthy penalties (as in this case). The State cannot obtain an involuntary medication order without an "*important* governmental interest," like the prosecution of "a serious crime." *Sell v. United States*, 539 U.S. 166, 180 (2003). Further, if the defendant has a legitimate claim that a tolling order threatens pre-trial commitment beyond the length of the maximum sentence he faces, the circuit court can factor that into its tolling decision.

12 months. *Jackson*, 406 U.S. at 738. The State's position in this case neither contradicts *Jackson*'s instruction nor our Legislature's response to it.

To summarize, the "purpose" of section 971.14(5)(a)1. is "to provide treatment to an incompetent person so that he or she may regain competency and face the pending criminal charges." *Moore*, 167 Wis. 2d at 498. Despite his best efforts, Green has not established that the "purpose" of the statute is "actually" something different. (Green's Br. 24.) It's Green—not the State—who makes an "erroneous declaration" about the purpose of section 971.14(5)(a)1. (Green's Br. 24.)

Since the purpose of the relevant statute is to treat an incompetent defendant to trial competency, *Moore*, 167 Wis. 2d at 498, and since a *Scott* stay prohibits the State from providing the appropriate treatment likely to restore competency within the time allotted, *State v. Scott*, 2018 WI 74, ¶ 43, 382 Wis. 2d 476, 914 N.W.2d 141, a tolling order is necessary to achieve the statutory purpose. "[T]he legislature did not intend the absurd result that" the defendant may run down (or out) the treatment-to-competency clock by filing an appeal of an involuntary medication order (either meritorious or frivolous). *Moore*, 167 Wis. 2d at 498.

Aside from unpersuasively arguing that a tolling order is unnecessary to achieve the (true) statutory purpose because the defendant can allegedly remain committed to receive treatment that won't restore his competency, Green contends that tolling is not needed because the State can move to lift the *Scott* stay. (Green's Br. 38–40.) In one breath, he argues, "The state is in control here"—it just needs a solid case for the involuntary medication order and "it should have no problem" protecting its significant interest in treating a defendant to trial competency. (Green's Br. 39.) But in another, Green admits that the State is not actually "in control" because the defendant can repeatedly appeal the lifting of the stay and, if successful in obtaining an emergency stay of the involuntary

medication order, chip away at the treatment-to-competency clock. (Green's Br. 39–40.)

To be clear, the State is not solely concerned with "preventing a defendant from using up the entire commitment period on a frivolous appeal." (Green's Br. 39.) The State is afforded a full 12 months to treat a defendant to trial competency. A *Scott* stay—which the State cannot prevent, even with a slam-drunk case for the involuntary medication order—likely deprives the State of its full 12 months. At a minimum, it takes time for the State to file the motion to lift the stay and for the circuit court to decide it, all the while the treatment-to-competency clock is running. And again, if the defendant successfully obtains an emergency stay of the involuntary medication order as he runs his appeal up the ladder (which happened here), more time comes off the clock. The State is entitled to 12 months, not 12 months minus however long it takes to undue an automatic stay that the Legislature never anticipated.

The underlying message of Green's argument here is that unless the State has an open-and-shut case for the involuntary medication order, its interest in treating a defendant to trial competency is unworthy of protection. (Green's Br. 38–40.) He does not explain why the State's interest in prosecuting a murder would be lesser in a case where the circuit court grapples with the highly technical decision of whether the State has satisfied "*Sell*'s high standard." (A-App. 107–09, 117.) Green suggests that the State's burden is an easy one but make no mistake, "the circumstances in which orders for involuntary medication are constitutionally permissible 'may be rare.'" (A-App. 117 (citing *Sell v. United States,* 539 U.S. 166, 180 (2003)).) There

will be close calls in these cases[6] and that doesn't make the State's interest any less deserving of protection when a favorable decision inevitably is appealed.

Finally, Green's position that the treatment-to-competency clock should be allowed to tick away where the State cannot obtain a lifting of the stay discounts the rights of crime victims in these serious cases. They have a constitutional right to "fairness," and it "shall . . . be protected by law in a manner no less vigorous than the protections afforded to the accused." Wis. Const. art. I, § 9m (2)(a). A tolling order during a *Scott* stay protects that right; Green's position undermines it.

For the above reasons, tolling is plainly necessary to achieve the statutory purpose of section 971.14(5)(a)1.

B. There are three well-established methods to approve tolling without rewriting the statute.

Having put most of his eggs in the statutory-purpose basket, Green doesn't mount much of a challenge to the State's proposed methods by which this Court may approve tolling during a *Scott* stay.

Regarding inherent authority, Green knocks the State for "point[ing] to nothing . . . to suggest that without the authority to toll the statutory limits" in section 971.14(5)(a)1., "a court will cease to exist or it will not be able to exercise its jurisdiction in an orderly and efficient manner." (Green's Br. 29.) The State didn't do that because that's not its argument. The State argues that tolling is necessary to fairly administer justice. (State's Br. 17–22.)

---

[6] Unless the decision-maker is like Green, who seemingly does not suffer from a "learning curve" in this complicated area of the law. (Green's Br. 38.)

Recognizing that this Court considers "historical practices when determining whether a certain power is inherent in the judiciary," *State v. Schwind*, 2019 WI 48, ¶ 13, 386 Wis. 2d 526, 926 N.W.2d 742, the State offered numerous cases demonstrating that "courts historically have had the power to toll statutory limits when justice requires it." (State's Br. 17–19.) Green responds that the State's cases "are easily distinguishable" but distinguishes none of them except to say, inaccurately, that they all "involve tolling a statute of limitations." (Green's Br. 30.) Relying on "Am. Jur.," he claims that "equitable tolling applies only to statutes of limitation." (Green's Br. 27, 30.)

For starters, Green's proffered citation does not state that "equitable tolling applies *only* to statutes of limitation." (Green's Br. 30 (emphasis added).) Unlike Green, the State relied on Supreme Court precedent for its argument here. (State's Br. 17.) And that says it's "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).

Consistent with *Young*, this Court has applied equitable tolling to the 30-day statutory deadline for filing a petition for review, and some members of this Court would apply it to the 20-day deadline for seeking judicial substitution. *See State ex rel. Nichols v. Litscher*, 2001 WI 119, ¶¶ 13–24, 247 Wis. 2d 1013, 635 N.W.2d 292; *State v. Zimbal*, 2017 WI 59, ¶¶ 54–55, 73, 375 Wis. 2d 643, 896 N.W.2d 327 (Roggensack, C.J., concurring). Green doesn't explain why he thinks these are statutes of limitation. (Green's Br. 30.) Had he defined the phrase, he would have noted that "[a] statute of limitations usually establishes the time frame within which a claim must be initiated after a cause of action actually accrues." *Aicher ex rel. LaBarge v. Wisconsin Patients Comp. Fund*, 2000 WI 98, ¶ 26, 237 Wis. 2d 99, 613 N.W.2d 849.

Green would have been required to articulate how a petition for review or a judicial-substitution request constitutes a "claim" in this sense. *Id.* The State can't make sense of it—these statutes sound more like the "limitations periods" described in *Young*. *See Young*, 535 U.S. at 47, 49.

And anyway, "equitable powers are broad and flexible." *Prince Corp. v. Vandenberg*, 2016 WI 49, ¶ 80, 369 Wis. 2d 387, 882 N.W.2d 371 (collecting authorities) (Abrahamson, J., concurring in part and dissenting in part). Green's claim that equitable tolling applies only to statutes of limitation (as the State understands the phrase) is narrow, rigid, and unavailing.

The remainder of Green's arguments against the State's proposed avenues for approving tolling are premised on erroneous statements already addressed above. He claims that "the state's proposed tolling rule would not promote the purpose[ ] of the statute" (wrong), that there is "no government created obstacle here" (wrong), that tolling "would be contrary to this court's prior decisions and the legislature's policy choices regarding the length of commitments for competency restoration" (wrong), and that "an adequate remedy to the problem [the State] presents" already exists (wrong). (Green's Br. 32, 35–36.)

In the end, Green wants this Court to believe that this case is about the State "depriv[ing] defendants of their freedom" for an "[un]reasonable" amount of time for no good reason. (Green's Br. 36–37.) It's not. It's about what happens when a defendant accused of committing a serious crime *elects* to appeal an involuntary medication order, thereby preventing the State from providing the *only* treatment likely to restore trial competency within the time allotted. The State gets one chance at competency restoration, and it should be a meaningful one. The Legislature expected nothing less.

CONCLUSION

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

Dated this 28th day of September 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

KARA L. JANSON
Assistant Attorney General
State Bar #1081358

Attorneys for Plaintiff-
Respondent-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809
(608) 294-2907 (Fax)
jansonkl@doj.state.wi.us

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 2,995 words.

Dated this 28th day of September 2021.

KARA L. JANSON
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12) (2019–2020)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12) (2019–20).

I further certify that:

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

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

Dated this 28th day of September 2021.

KARA L. JANSON
Assistant Attorney General