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

SUPPLEMENTAL BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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ISSUE PRESENTED

In *State v. Scott*, 2018 WI 74, ¶¶ 34, 43, 382 Wis. 2d 476, 914 N.W.2d 141, this Court held that (1) "[an] order determining incompetency and . . . mandating involuntary medication or treatment to restore competency is . . . appealable as of right," and (2) "involuntary medication orders are subject to an automatic stay pending appeal." Although *Scott* arose in the context of *postconviction* competency proceedings, the bench and bar have assumed that those holdings apply to *pretrial* competency proceedings.

This assumption has caused a problem for the State, as articulated in briefing and at oral argument. A 12-month treatment-to-competency clock applies *pretrial*, and that clock runs even where a *Scott* stay prohibits the State from providing treatment likely to restore competency. The effect of applying *Scott*'s holdings pretrial is that in many cases involving serious crimes, the State no longer receives a full 12 months to treat a defendant to trial competency (as the Legislature intended). This is either because the State loses time undoing the automatic stay, or because the State cannot undo the stay and the defendant's appeal chews up the 12-month clock. The State has proposed tolling as a solution to this dilemma.

But following oral argument, this Court asked, "Whether the holdings and reasoning of *State v. Scott*, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141, are limited to post-conviction competency proceedings."

Admittedly, despite the context in which *Scott* was decided—and notwithstanding significant differences between pretrial and postconviction competency proceedings—this Court used broad language in framing and deciding the issues presented. There's no text expressly limiting the Court's holdings to postconviction competency proceedings.

But that shouldn't be dispositive. *Scott*'s reasoning supports holding that a *pretrial* order finding the defendant incompetent and requiring involuntary medication or treatment to competency is appealable as of right. There are good reasons, though, to limit *Scott*'s automatic-stay procedure to *postconviction* competency proceedings. Chief among them: unlike in postconviction competency proceedings, the State has a significant, immediate need for treatment in the pretrial setting. It has yet to achieve justice for the victims and the community, it *must* treat the defendant to competency to go to trial, and it has a single, 12-month chance to do so. None of these factors are present in the postconviction context, making the potential harm to the State and crime victims greater if the *Scott* stay applies pretrial.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests publication and welcomes oral argument.

ARGUMENT

This Court should hold that *Scott*'s right-to-appeal reasoning soundly applies to pretrial competency proceedings, but it should limit the automatic-stay procedure to the postconviction setting.

The short answer to this Court's question is that *Scott* doesn't expressly limit its holdings to postconviction competency proceedings. Despite the context in which *Scott* was decided, the defendant there sought sweeping relief. The broad language of this Court's holdings seemingly grants that relief. While *Scott*'s right-to-appeal reasoning soundly applies to pretrial competency proceedings, there are good reasons to

limit the automatic-stay procedure to the postconviction setting—reasons this Court likely didn't consider in *Scott*.

The State begins by addressing the holdings and reasoning of *Scott*. Next, it discusses *State v. Fitzgerald*, 2019 WI 69, 387 Wis. 2d 384, 929 N.W.2d 165, an involuntary medication case decided one year later. The State then explains why *Scott*'s right-to-appeal reasoning soundly applies to pretrial competency proceedings. Finally, it discusses why *Scott*'s automatic-stay procedure should be limited to postconviction competency proceedings.

A. *Scott* involves postconviction competency proceedings, but its holdings are broadly worded.

Scott was convicted of several offenses and pursued postconviction relief. *Scott*, 382 Wis. 2d 476, ¶¶ 13–14. Defense counsel later questioned Scott's competency to proceed. *Id.* ¶ 14. The circuit court ultimately found Scott incompetent and ordered involuntary medication. *Id.* ¶ 17. In doing so, it "failed to follow the procedure this [C]ourt set forth in *State v. Debra A.E*, 188 Wis. 2d 111, 523 N.W.2d 727 (1994), for how to resolve competency issues at the postconviction stage of criminal proceedings."[1] *Id.* ¶ 7.

Scott sought a permissive appeal. *Scott*, 382 Wis. 2d 476, ¶ 18. The court of appeals denied Scott's petition and lifted the stay of the involuntary medication order. *Id.* Scott "then appealed the involuntary medication order as an appeal as a matter of right" and filed an emergency motion to stay the order pending appeal. *Id.* ¶ 19. The court of appeals denied

[1] As emphasized in Section D., below, there's no statute governing *postconviction* competency proceedings. Wisconsin Stat. § 971.14—including its 12-month treatment clock—"applies only to defendants who have not yet been sentenced." *State v. Debra A.E.*, 188 Wis. 2d 111, 128 n.14, 523 N.W.2d 727 (1994).

the stay request but allowed Scott's appeal to proceed. *Id.* "As a result, the Department of Health Services began medicating" Scott. *Id.* Thereafter, this Court granted Scott's petition to bypass. *Id.* ¶ 2.

Although the issues presented in *Scott* arose in the postconviction context, Scott sought sweeping relief regarding orders for involuntary medication or treatment to restore competency. First, he requested that this Court "hold that an order for involuntary medication or treatment to restore competency is a final order in a special proceeding that is appealable as a matter of right under Wis. Stat. § 808.03(1)."[2] (Scott's Br. 20.) Second, Scott asked this Court to automatically stay orders for involuntary medication or treatment to restore competency pending appeal. (Scott's Br. 22–27.)

For its part, the State in *Scott* apparently tried to rein in the requested relief. It agreed that "*postconviction medication orders* should be immediately appealable and generally should be stayed pending appeal."[3] (Solicitor General's Br. 3 (emphasis added).) The State didn't join Scott's request for an automatic stay pending appeal, contending that there might be cases where there's a need "to begin medication immediately . . . or where the issue raised on appeal is clearly meritless." (Solicitor General's Br. 36.)

The *Scott* Court didn't use limiting language in framing the issues presented. Relevant here, it queried, "Is a circuit

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[2] Throughout this supplemental brief, the State refers to the defendant's brief-in-chief in *Scott* as "Scott's Br." This brief is publicly available at https://acefiling.wicourts.gov/document/eFiled/2016AP002017/198456.

[3] Throughout this supplemental brief, the State refers to its response brief in *Scott* as "Solicitor General's Br." This brief is publicly available at https://acefiling.wicourts.gov/document/eFiled/2016AP002017/206058.

court order finding the defendant incompetent to proceed and requiring the defendant to be involuntarily treated to competency a final order for purposes of appellate review?" *Scott*, 382 Wis. 2d 476, ¶ 10. And it asked, "Should involuntary medication or treatment orders be automatically stayed pending appeal?" *Id.*

The language of this Court's holdings is similarly broad. *Scott* holds that (1) "an order that the defendant is not competent to proceed (and in the instant case, that the defendant should be medicated and treated to competency) is a final order issued in a special proceeding for purposes of appeal," and (2) "[i]nvoluntary medication orders are subject to an automatic stay pending appeal, which can be lifted upon a successful motion by the State." *Scott*, 382 Wis. 2d 476, ¶ 11.

A single sentence provides the reasoning for the automatic stay: "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." *Scott*, 382 Wis. 2d 476, ¶ 44 (citation omitted). The opinion doesn't acknowledge the State's opposition to the automatic stay based on its concern that cases may call for an immediate need for treatment. *See id.* Perhaps the lifting-of-the-stay mechanism was meant to alleviate the State's worry. But that's unlikely (and insufficient, for reasons explained in briefing and at oral argument in this matter) because none of the factors the State must meet to lift the stay address whether it has an immediate need for treatment.[4] *See id.* ¶ 47. Rather, the

[4] *State v. Gudenschwager*, 191 Wis. 2d 431, 529 N.W.2d 225 (1995), details the factors a party must satisfy for a stay pending appeal. In *Scott*, this Court modified those factors to show how the State can lift the automatic stay. The modified factors primarily

lifting-of-the-stay mechanism appears to respond to the State's concern about frivolous appeals of involuntary medication orders, as it requires the State to show a strong likelihood of success on appeal to lift the stay. *See id.*

Comparatively, the *Scott* Court's right-to-appeal analysis isn't a single sentence. A right to appeal exists only for final judgments or orders, so the question was whether an order of incompetency (and requiring involuntary medication or treatment to restore competency) is "final" for purposes of Wis. Stat. § 808.03(1). *See Scott*, 382 Wis. 2d 476, ¶¶ 27–34. This required a determination that the incompetency order "dispose[d] of the entire matter in litigation as to one or more of the parties, whether rendered in an action or special proceeding." Wis. Stat. § 808.03(1).

This Court reasoned that the incompetency order "disposed of the entire matter in litigation between the parties, namely the question of the defendant's competency to assist with postconviction proceedings and the defendant's competency to refuse medication or treatment." *Scott*, 382 Wis. 2d 476, ¶ 31.

The closer question was whether the competency proceeding was a special proceeding. Applying the test articulated in *Voss v. Stroll*, 141 Wis. 267, 124 N.W. 89 (1910), this Court answered yes, *Scott*, 382 Wis. 2d 476, ¶ 33. Under the *Voss* test, if the "competency proceeding is not part of the defendant's underlying criminal proceeding," but "'merely connected' to it," it's a special proceeding. *Scott*, 382 Wis. 2d 476, ¶¶ 32–33. Because "[t]he competency proceeding resolves an issue separate and distinct from the issues presented in

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are defense centric: they ask whether the defendant, interested parties, and the public will be harmed if the stay is lifted, and involuntary medication proceeds. *See State v. Scott*, 2018 WI 74, ¶ 47, 382 Wis. 2d 476, 914 N.W.2d 141. They don't ask whether the State will be harmed if the stay remains in place.

the defendant's underlying criminal proceeding," this Court reasoned that the competency proceeding was merely connected to—not a part of—the criminal proceeding. *Id.* ¶ 33. It noted that "the defendant's postconviction proceedings were suspended during the pendency of the competency proceeding." *Id.* ¶ 34 n.21. So, the competency proceeding constituted a special proceeding, such that the incompetency order was appealable as of right. *Id.* ¶ 34.

B. In *Fitzgerald*, involving *pretrial* competency proceedings, the State questioned whether *Scott* applied, but this Court didn't address the issue.

Fitzgerald was found incompetent to stand trial for illegally possessing a firearm. *Fitzgerald*, 387 Wis. 2d 384, ¶ 3. The circuit court ordered involuntary medication under Wis. Stat. § 971.14, governing competency proceedings before and at trial. *Id.* ¶¶ 5–7.

Two days later, this Court issued its decision in *Scott*. *Fitzgerald*, 387 Wis. 2d 384, ¶¶ 5, 8. Counsel for Fitzgerald then filed a notice of intent to pursue postdisposition relief and "a letter informing the circuit court that his medication order was automatically stayed under Scott." *Id.* ¶ 8. The court ultimately granted the stay but questioned what event triggered it. *Id.* ¶ 9. The court also indicated that it would lift the stay on the State's motion. *Id.*

Fitzgerald filed a petition for a supervisory writ, which was denied. *Fitzgerald*, 387 Wis. 2d 384, ¶ 10. This Court then granted Fitzgerald's petition for review. *Id.* Fitzgerald asked this Court to "hold that the stay established in Scott begins automatically upon entry of the order for involuntary medication." *Id.* ¶ 34. In arguing that Fitzgerald wasn't entitled to a supervisory writ, the State questioned whether

Scott applied to pretrial competency proceedings.[5] (Circuit Court's Br. 11.)

This Court didn't weigh in because it was equally divided on the writ matter. *Fitzgerald*, 387 Wis. 2d 384, ¶ 34. However, it resolved Fitzgerald's consolidated case, which challenged the constitutionality of section 971.14 considering *Sell v. United States*, 539 U.S. 166 (2003). *Id.* ¶ 2. In discussing the background of these consolidated cases, this Court made several statements suggesting that *Scott* applies pretrial. Most notably, this Court characterized *Scott*'s automatic stay holding as follows: "In Scott, we exercised our superintending authority to 'order that involuntary medication orders [*under Wis. Stat. § 971.14*] are subject to an automatic stay pending appeal.'" *Id.* ¶ 8 (emphasis added) (citation omitted).

The *Fitzgerald* Court's reference to section 971.14 is noteworthy because, as flagged above and discussed in Section D., below, that statute applies only to competency proceedings before and at trial. *See Debra A.E.*, 188 Wis. 2d at 128 n.14. There's no statute governing postconviction competency proceedings. *State v. Daniel*, 2015 WI 44, ¶ 33 & n.9, 362 Wis. 2d 74, 862 N.W.2d 867. At most, section 971.14 serves as guidance postconviction. *Id.* ¶ 33. So, it's not entirely clear what the *Fitzgerald* Court's insertion of section 971.14 into the holding of *Scott* means. It could mean that *Scott*'s automatic-stay procedure applies to appeals of pretrial orders for involuntary medication to restore competency. But maybe not, as section 971.14 serves as guidance for postconviction competency proceedings.

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[5] In this supplemental brief, the State refers to its response brief in *Fitzgerald* as "Circuit Court's Br." This brief is publicly available at https://acefiling.wicourts.gov/document/eFiled/2018AP001214/231796.

The point for now: in *Fitzgerald*, the State questioned whether *Scott* applies pretrial, but this Court didn't squarely tackle the issue.

C. *Scott*'s right-to-appeal reasoning soundly applies to pretrial competency proceedings.

This Court should hold that *Scott*'s right-to-appeal reasoning applies to pretrial competency proceedings. Stated otherwise, a defendant should have a right to appeal a pretrial order finding him incompetent and requiring involuntary medication or treatment to competency.

The analysis is straightforward. First, a pretrial competency proceeding is a special proceeding within the meaning of section 808.03(1). Like a postconviction competency proceeding, a pretrial competency proceeding "resolves an issue separate and distinct from the issues presented in the defendant's underlying criminal proceeding," namely the defendant's competence to proceed (and the necessity of treatment to competency). *Scott*, 382 Wis. 2d 476, ¶ 33; *see also Sell*, 539 U.S. at 176 (stating that the issue of involuntary medication is "completely separate" from the merits of the criminal action). So, a pretrial competency proceeding is connected to—not a part of—the criminal proceeding, which means it's a special proceeding. *Scott*, 382 Wis. 2d 476, ¶¶ 33–34; *see also L.G. by Chippewa Fam. Servs., Inc. v. Aurora Residential Alternatives, Inc.*, 2019 WI 79, ¶¶ 19–22, 387 Wis. 2d 724, 929 N.W.2d 590 (reaffirming this test for special proceeding).

Further bolstering this conclusion is that the criminal proceeding effectively is suspended during the pendency of the pretrial competency proceeding. *Compare Scott*, 382 Wis. 2d 476, ¶ 34 n.21. Section 971.14 requires the court to initiate a competency proceeding whenever there's reason to doubt the defendant's competency pretrial. Practically speaking, once the court orders a competency examination,

nothing happens in the underlying criminal proceeding until competency is resolved.[6] *See generally* Wis. Stat. § 971.14.

A pretrial competency proceeding being a special proceeding, the remaining question is whether a pretrial order of incompetence (and requiring involuntary medication or treatment to competency) "disposes of the entire matter in litigation" between the parties. Wis. Stat. § 808.03(1). It does. The competency proceeding asks whether the defendant is competent and, if not, whether he's likely to restore competency with treatment. The pretrial order of incompetence disposes of that entire matter. *Compare Scott*, 382 Wis. 2d 476, ¶ 31.

Because a pretrial order of incompetence (and requiring involuntary medication or treatment to competency) constitutes an order that "disposes of the entire matter in litigation" between the parties in a "special proceeding," it's a final order appealable as of right under section 808.03(1). Supreme Court precedent favors this result. *See Sell*, 539 U.S. at 176–77 (holding that a pretrial order for involuntary medication to restore competency is a collateral order appealable as of right).

D. Good reasons exist to limit *Scott*'s automatic-stay procedure to postconviction competency proceedings.

This Court should limit *Scott*'s automatic-stay procedure to the postconviction setting because the potential harm to the State and crime victims is greater where the stay applies pretrial, and the defendant still has recourse to protect his interests.

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[6] The State speaks in terms of practice because Wis. Stat. § 971.14(5)(a) directs the circuit court to "suspend the proceedings" *after* ruling on competency.

In most cases, the State doesn't have a significant need to involuntarily medicate a defendant to competency for *postconviction* proceedings. It has already achieved justice for the victims and the community. While the State has dual interests in protecting the defendant's right to appeal and promoting the finality of the conviction, most postconviction claims can proceed despite the defendant's incompetency. *Debra A.E.*, 188 Wis. 2d at 130. Because no statute governs postconviction competency proceedings, *Debra A.E.* "fashion[ed] a process" for "manag[ing] the postconviction relief of alleged incompetent defendants." *Id.* at 129. "[O]rdinarily [that] process need not include a court order for treatment to restore competency." *Id.* at 130.

Even in the rare case where the State would have a significant need to involuntarily medicate a defendant for postconviction proceedings, nothing binds the State to the 12-month treatment-to-competency clock that applies pretrial. Section 971.14 doesn't apply postconviction. *Debra A.E.*, 188 Wis. 2d at 128 n.14. And the foundation of the 12-month pretrial clock—that the State cannot indefinitely confine a defendant who's *still presumed to be innocent* for purposes of competency restoration, *see Jackson v. Indiana*, 406 U.S. 715, 738 (1972); (Green's Br. 12, 41)—does not apply in the postconviction setting. Even if a 12-month treatment clock did apply postconviction, and assuming a *Scott* stay chewed up most of the State's clock while the defendant appeals the involuntary medication order, the worst-case scenario (for the State) would be that the finality of the conviction is compromised.

Pretrial presents a very different scenario. Unlike in the postconviction setting, the State has yet to achieve justice for the victims and the community. And while treatment to competency ordinarily is unnecessary postconviction, treatment to competency is *required* to bring an incompetent defendant to trial, *see* Wis. Stat. §§ 971.13(1) and

971.14(5)(a)1. Also, a 12-month treatment-to-competency clock indisputably applies pretrial, unlike in the postconviction context. That clock runs even where a *Scott* stay prohibits the State from providing treatment likely to restore competency, and the State doesn't get a do-over once its time expires. If the State is unsuccessful at restoring trial competency, the defendant must be discharged from the commitment and released (unless civil commitment proceedings are contemplated). *See* Wis. Stat. § 971.14(6)(a)–(b). Then, the best the State can hope for is that one day, the defendant will regain competency. *See* Wis. Stat. § 971.14(6)(a), (d). In the meantime, the State cannot prosecute him for a serious crime. Certainly, that would interfere with the victim's constitutional rights to "justice and due process," including the right to a "timely disposition of the case, free from unreasonable delay." Wis. Const. art. I, § 9m (2)(d).

The State has a significant, immediate need to treat a defendant to competency pretrial.[7] Its treatment ability is limited to a single, 12-month chance, and the consequences of a meaningless opportunity are dire. This justifies limiting *Scott*'s automatic-stay procedure to postconviction competency proceedings. The standard for a stay pending appeal balances the potential harms to either party, along with the merits of the appeal. *See State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995). As demonstrated, the potential harm to the State (and to crime victims) is greater where a *Scott* stay applies pretrial. Given the context in which *Scott* was decided, this Court likely didn't consider as much in issuing its apparently sweeping holding.

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[7] The lack of a significant, immediate need for treatment drove the State's concession in *Scott* that postconviction medication orders generally should be stayed pending appeal. (Solicitor General's Br. 3, 34–35.)

The State agrees that the defendant has a significant liberty interest in avoiding unwanted medication pretrial. And it recognizes that the harm of undergoing erroneously forced medication "cannot [be] undo[ne]." *Sell*, 539 U.S. at 177. But the defendant isn't without recourse if the automatic stay doesn't apply pretrial. He can still seek a discretionary stay of the involuntary medication order pending appeal—it's just that *he* must meet the standard for a stay. And in a case where the defendant can show a strong likelihood of success challenging the involuntary medication order (making it likely he'll suffer irreparable harm if the stay isn't granted), the balancing test will weigh in his favor and the stay should be ordered. Surely, this recourse was known to the Legislature when it built the structure for restoring trial competency and neglected to subject involuntary medication orders to an automatic stay pending appeal. *See State v. Rosenburg*, 208 Wis. 2d 191, 194–95, 560 N.W.2d 266 (1997) (courts "assume that the lawmakers knew the law in effect at the time they acted").

There's one more reason why this Court should consider limiting *Scott*'s automatic-stay procedure to the postconviction context. Because *Scott* stays the involuntary medication order (not the commitment order) pending appeal, a pretrial commitment for competency restoration routinely proceeds even though the defendant doesn't receive treatment likely to restore trial competency.[8] This raises constitutional concerns because a pretrial commitment for competency restoration is supposed to be "justified by the defendant's continued progress toward becoming competent within a reasonable time." 1981 Judicial Committee Note, § 971.14. Indeed, section 971.14 requires the court to "discharge the

[8] As previously explained, when involuntary medication is ordered, that's the only treatment likely to restore competency within the time allotted.

defendant from the commitment and release him" where it's "unlikely that the defendant will become competent within the remaining commitment period." Wis. Stat. § 971.14(6)(a). An automatic stay creates the frequent, untenable situation of continuing a pretrial commitment where the defendant doesn't receive the treatment needed to progress toward competency.

For this additional reason, this Court should limit *Scott*'s automatic-stay procedure to the postconviction setting.

CONCLUSION

This Court should hold that *Scott*'s right-to-appeal reasoning soundly applies to pretrial competency proceedings. But it should limit the automatic-stay procedure to the postconviction setting. If this Court doesn't, then it should permit tolling of the treatment-to-competency clock during a *Scott* stay.

Dated this 7th day of January 2022.

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 3,300 words.

Dated this 7th day of January 2022.

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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 7th day of January 2022.

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