STATE OF WISCONSIN

IN SUPREME COURT

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

SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT

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CASES CITED

ISSUE PRESENTED

Whether the holdings and reasoning of *State v. Scott*, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141, are limited to postconviction competency proceedings?

INTRODUCTION

Prior to trial Mr. Green was found incompetent and an order of commitment for competency was entered. The portion of that order allowing for the involuntary administration of medication was subsequently stayed pending appeal pursuant to *State v. Scott*, 2018 WI 74, 382 Wis. 2d 476, 914 N.W.2d 141. After additional hearings and briefing however, the circuit court granted the state's motions to lift the automatic stay of the involuntary medication order and to toll the statutory limits on the length of Mr. Green's commitment.

Mr. Green appealed. The court of appeals found that the involuntary medication order was improper and that the circuit court lacked authority to toll the length of Mr. Green's commitment.

The state petitioned for review on the issue of the circuit court's ability to toll the limits on the maximum length of commitment for competency restoration. This Court granted review, the parties submitted briefs, and oral argument was heard on December 13, 2021. Thereafter, additional briefing was ordered. This brief follows.

ARGUMENT

The holdings and reasoning of *State v. Scott* apply to all competency proceedings.

This Court's decision in *Scott*, creating an automatic stay of involuntary medication orders pending appeal, was not limited to orders entered during postconviction criminal proceedings. The language used throughout the decision, as well as this Court's decision in *State v. Fitzgerald*, 2019 WI 69, 387 Wis. 2d 384, 929 N.W.2d 165, demonstrate the Court's intention that the automatic stay apply to all competency proceedings.

Should this Court decide otherwise, however, the reasoning employed by the Court in *Scott* applies equally to pre-trial proceedings and should be used to apply *Scott's* holding to impose an automatic stay pending appeal of all involuntary medication orders entered in competency proceedings. The harm caused by the involuntary administration of antipsychotic medication, at any stage of the criminal proceedings, cannot be undone, rendering appeals of such orders inadequate to protect the defendant's significant liberty interest.

A. The relevant holdings in *Scott* were not limited to postconviction proceedings.

In *Scott*, this Court was presented with four separate questions and, in a unanimous decision, answered each of them as follows:

> 1. Before a circuit court can require a non-dangerous but incompetent defendant to be involuntarily treated to competency *in the context of postconviction proceedings*, the

> circuit court must follow the procedure this court established in State v. Debra A.E., 188 Wis. 2d 111, 523 N.W.2d 727 (1994). If Debra A.E. is applied properly, an order finding the defendant incompetent to seek postconviction relief ordinarily will not need to include an order for involuntary medication or treatment to restore competency. The circuit court erred in the instant case by failing to comply with the procedures established in Debra A.E.
>
> 2. The proceeding to determine whether a defendant is competent is separate and distinct from the defendant's underlying criminal proceeding. Thus, 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.
>
> 3. The court of appeals erroneously exercised its discretion when it denied the defendant's motion for relief pending appeal without explaining its reasoning for its discretionary denial decision.
>
> 4. Involuntary medication orders are subject to an automatic stay pending appeal, which can be lifted upon a successful motion by the State.

State v. Scott, 2018 WI 74, ¶¶10-11 (*emphasis* added).

The language used in each holding demonstrates that only the first was limited to postconviction proceedings. This Court specified that its holding with respect to that question applied "in the context of postconviction proceedings." *Id.*, ¶11. That limiting language is noticeably absent from the remaining holdings, including this Court's holding that involuntary medication orders are subject to an automatic stay pending appeal. *See Id.*, ¶11.

The same can be said of the language used throughout the Court's decision. In Section II, the Court repeatedly notes that it is discussing the mandatory procedure for treating a defendant to competency in the context of postconviction proceedings or for purposes of appeal. *Id.*, ¶¶21-24, 26. No such language was used in the remaining sections, making it clear that the Court's other holdings were not intended to be limited to postconviction proceedings.

Specifically, in holding that circuit court orders regarding competency and involuntary treatment are final orders issued in a special proceeding and appealable as of right, this Court noted that "[t]he competency proceeding is not part of the defendant's underlying criminal proceeding; it is 'merely connected' to it." *Id.*, ¶¶33-34. "The competency proceeding resolves an issue separate and distinct from the issues presented in the defendant's underlying criminal proceeding;" it is commenced independently of the criminal proceeding. *Id.*

The Court here did not distinguish between pre-trial and postconviction proceedings. Nor could it, as the logic employed applies equally to both. A competency determination made pre-trial does not resolve any issue related to the underlying criminal proceeding; it does not determine guilt or innocence, but rather, resolves a separate and distinct issue – the defendant's competency to proceed to trial. Moreover, if the competency proceeding is not part of the criminal proceeding, it should make no difference whether that independent proceeding occurs pre or postconviction.

Similarly, the Court did not use any language limiting its holdings in Section V to postconviction proceedings. *See Id.*, ¶¶42-48. This Court stated that it was addressing "the fourth and final issue: whether involuntary medication orders should be stayed automatically pending appeal as suggested by Scott." *Id.*, ¶42. It then noted that it was using its superintending authority to "order that involuntary medication orders are subject to an automatic stay pending appeal," explaining that its reason for doing so was "simple – if involuntary medication orders are not automatically stayed pending appeal, the defendant's 'significant' constitutionally protected 'liberty interest' in 'avoiding the unwanted administration of antipsychotic drugs' is rendered a nullity." *Id.*, ¶¶43-44.

Again, the Court did not mention postconviction proceedings – it did not state "involuntary medication orders *in postconviction proceedings* are subject to an automatic stay pending appeal." And, as discussed in more detail below, the Court's explanation of its decision makes it apparent that the holding was not limited to postconviction proceedings. The defendant's liberty interest in avoiding involuntary medication is the same both pre-trial and postconviction, and that interest would be rendered a nullity without an automatic stay at either point in the criminal proceedings.

Further, this Court indicated that it was adopting the automatic stay "as suggested by Scott." *See Id.* ¶42. Scott did not limit his argument for adoption of an automatic stay to postconviction proceedings. *See* Defendant-Appellant-Petitioner's Br., 2017 WL 4820497, at 25-27. Rather, Scott

requested that this Court use its superintending authority "to control the course of litigation involving orders to treat a defendant against his will until he is competent to proceed in a case." *See Id.*, at 27. In support, he noted that "[a]n erroneous involuntary medication order violates the defendant's significant, constitutionally protected liberty interest in avoiding the unwanted administration of antipsychotic drugs. The issue is effectively unreviewable on appeal." *Id.* For that reason, he asked the Court to "hold that when a defendant appeals such an order, the circuit court or court of appeals should automatically stay the administration of involuntary treatment or medication." *Id.* Neither Scott's argument nor his suggested rule were restricted to involuntary medication orders entered after conviction.

In it's response brief, the state agreed with Scott's argument, noting that "involuntary medication orders must be immediately appealable for the reasons the Supreme Court identified in *Sell*: once a defendant 'ha[s] undergone forced medication – the very harm he seeks to avoid' – that harm [cannot [be] undo[ne].'" *See* Plaintiff-Respondent's Br., 2017 WL 6622203, at 31; *See also Scott*, 2018 WI 74, fn. 17. While the state did not agree with Scott's proposed automatic stay, it acknowledged that a stay "should be granted in most appeals of involuntary medication orders" because "[i]ncompetent defendants have 'a constitutionally protected liberty interest in avoiding the unwanted administration of antipsychotic drugs,' and the 'harm' of 'hav[ing] undergone forced medication' (assuming it was done erroneously) 'cannot [be] undo[ne].'" Plaintiff-Respondent's Br., 2017 WL 6622203, at 34-

35. These concessions by the state were based on the reasoning in *Sell*[1] – a pre-trial competency case.

Aside from the specific language this Court used in *Scott*, and the arguments made by the parties, the Court's intent that the automatic stay of involuntary medication orders apply to all competency proceedings is also evident when the first and last holdings are considered together. With respect to the first issue, this Court found that circuit courts must follow the procedure set forth in *Debra A.E.*[2] before requiring a defendant to be involuntarily treated to competency during postconviction proceedings. *Scott*, 2018 WI 74, ¶11. It then explicitly stated that when *Debra A.E.* is applied correctly, "an order finding the defendant incompetent to seek postconviction relief ordinarily will not need to include an order for involuntary medication or treatment to restore competency." *Id.*, ¶11. This is because *Debra A.E.*'s procedure allows for the pursuit of many postconviction matters while the defendant is incompetent and preserves any remaining matters until competency is regained. *Id.*, ¶¶24-26. Because involuntary medication orders in postconviction proceedings are unnecessary and should be so rarely used, there was no need for this Court to go to the extreme length of using its superintending authority to create a rule – the automatic stay pending appeal – that applied solely to those proceedings. Limiting the automatic stay in such a way would, in effect, render it meaningless.

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[1] *Sell v. U.S.*, 539 U.S. 166, 179-180, 123 S.Ct. 2174 (2003).

[2] *State v. Debra A.E.*, 188 Wis. 2d 111, 523 N.W.2d 727 (1994).

Finally, in *State v. Fitzgerald*, 2019 WI 69, decided only one year after *Scott*, this Court, while declining to decide when *Scott's* automatic stay of an involuntary medication order begins, implicitly acknowledged that the automatic stay applies to all competency proceedings. In that case, the circuit court found Fitzgerald incompetent and entered an involuntary medication order in order to restore him to competency so that he could stand trial. *Fitzgerald*, 2019 WI 69, ¶¶1, 7. Fitzgerald appealed and, pursuant to *Scott*, the circuit court stayed the involuntary medication order but indicated an intention to lift the stay. *Id.*, ¶9. Fitzgerald then petitioned the court of appeals, and later this Court, arguing that the automatic stay should begin upon entry of the involuntary medication order instead of upon filing of a notice of appeal. *Id.*, ¶¶10, 34. This Court, however, did not decide the issue, noting that it was equally divided "on the issue of when the automatic stay established in *Scott* begins." *Id.*, ¶34. Importantly, neither the majority nor concurring opinion gave any indication that the *Scott* stay did not apply to the case at all because it involved pre-trial, not postconviction, proceedings.

In sum, the language used in the opinion, as well as the implications from the later opinion in *Fitzgerald*, demonstrate that the Court's holdings in *Scott* were not limited to postconviction proceedings. The automatic stay established in *Scott* was intended to apply to all competency proceedings regardless of the stage at which they occur within the criminal case.

B. The reasoning behind *Scott's* automatic stay applies to involuntary medication orders entered in all competency proceedings.

Should this Court find that its holdings in *Scott* were limited to postconviction proceedings, using the reasoning employed in that case, it should now hold that all involuntary medication orders entered for purposes of competency restoration are subject to an automatic stay pending appeal.

As set forth above, this Court stated that the reasoning for its decision to adopt an automatic stay was "simple – 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*, 2018 WI 74, ¶44. This Court was concerned about the harm that would occur without an automatic stay. This reasoning applies to all competency proceedings, not just those at the postconviction stage of a criminal case. *See Riggins v. Nevada*, 504 U.S. 127, 135, 112 S.Ct 1810 (1992)(holding that "forcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriateness. The Fourteenth Amendment affords at least as much protection to persons the State detains for trial.").

In adopting the automatic stay, this Court quoted the United States Supreme Court's decision in *Sell* – a case involving pre-trial competency proceedings – which declared the instances in which the Constitution will permit the government to

involuntarily administer drugs solely for competency purposes "may be rare." *Sell*, 539 U.S. at 179-180. As the *Sell* Court recognized, the significant liberty interest in avoiding the unwanted administration of antipsychotic drugs is the same for every individual, criminal defendant or not; it is only the competing governmental interests that vary and, in some situations, warrant intrusion upon the defendant's constitutionally protected interest. *See Id.* at 178-180.

While the state's interest in restoring a defendant to competency may vary prior to trial and after conviction, the criminal defendant's interest in avoiding the unwanted administration of antipsychotic drugs would be rendered just as much a nullity without an automatic stay pre-trial as it would postconviction. At either stage, appeal of the involuntary medication order would be meaningless if that order was not stayed – if erroneously medicated while an appeal of the medication order proceeds, the defendant is subject to the wrongful deprivation of his constitutional rights. *See Washington v. Harper*, 494 U.S. 210, 229, 110 S. Ct. 1028 (1990)("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty."). *See also Riggins*, 504 U.S. at 137, 142 (1992)(involuntary medication may interfere with the defendant's right to a fair trial). Further, the harm caused by erroneously medicating the defendant against his will cannot be undone.

The use of antipsychotics "threatens an individual's 'mental, as well as physical, integrity.'" *U.S. v. Watson*, 793 F.3d 416, 419 (4th Cir. 2015).

> On the physical side, there is the "violence inherent in forcible medication," compounded

> when it comes to antipsychotics by the possibility of "serious, even fatal, side effects,"... But it is the invasion into a person's mental state that truly distinguishes antipsychotics, a class of medications expressly intended "to alter the will and the mind of the subject."

Id. (internal citations omitted). "The purpose of the drugs is to alter the chemical balance in the patient's brain, leading to changes, intended to be beneficial, in his or her cognitive processes." *Harper*, 494 U.S. at 229.

It is also well recognized that, while they may have therapeutic benefits, antipsychotics can have serious, even fatal side effects, including: acute dystonia ("a severe involuntary spasm of the upper body, tongue, throat, or eyes"); "akathesia (motor restlessness, often characterized by an inability to sit still); neuroleptic malignant syndrome (a relatively rare condition which can lead to death from cardiac dysfunction); and tardive dyskinesia,...a neurological disorder, irreversible in some cases, that is characterized by involuntary, uncontrollable movements of various muscles, especially around the face." *See Id.* at 229-230; *See also State ex rel. Jones v. Gerhardstein*, 141 Wis. 2d 710, 727, 416 N.W.2d 883 (1987)(in which this court recognized some of the serious potential side effects of antipsychotics)[3]; *Kulas*

[3] "These side effects include, but are not limited to the following: dry mouth; dizziness; lowered blood pressure; skin itching; urinary retention; constipation; agranulocytosis (condition which damages blood producing system and can result in death); acute dyskinesia (involuntary movements of muscle system, *e.g.*, inability to keep legs still or paralysis causing eyeballs to roll up into the head); tardive dyskinesia (involuntary movements of fingers and mouth, e.g., sucking

v. Valdez, 159 F.3d 453, 455–56 (9th Cir. 1998)(noting "the serious side effects that such medication can have on mind and personality, physical condition and life itself").

It is because of these effects, both mental and physical, that "order[s] compelling a person to take antipsychotic medication" have been recognized to be "an especially grave infringement of liberty." *U.S. v. Williams*, 356 F.3d 1045, 1055 (9th Cir. 2004).

Consequently, appeals from such orders, without automatic stays pending appeal, are inadequate to protect defendants – whether pre-trial or postconviction – from the harm faced. A favorable decision on appeal, no matter how quickly it is issued, cannot reverse the physical, mental, and constitutional harm inflicted by medicating the defendant with antipsychotics against his will. Moreover, requiring defendants to move the circuit court for a stay pending appeal and then seek review from the court of appeals if denied, would be insufficient. If a motion for stay is not made and granted the same day the involuntary medication

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movements and inability to keep tongue in or out of mouth);10 dystonic reaction (involving muscle spasms of neck, back or eyes); parkinsonism (causing mask-like facial expression and difficulty walking upright); akathisia (inability to sit still); lethargy; sudden unexplained death (probably caused by irregular heart beat).

The experts also agreed that some of these side effects can be reversed if detected early enough and if the psychotropic drugs are discontinued. Others can be treated or controlled with medication. However, it is undisputed that conditions caused by some of the side effects are oftentimes irreversible and can even be fatal."

order is entered, the department can begin medicating the defendant against his will. At that point a subsequent stay granted by the court of appeals would not only fail to prevent the harm the defendant was seeking to avoid (and as conceded by the state in *Scott*, cannot be undone), it could be medically inappropriate and harmful to the defendant.

As this Court recognized in *Scott*, the most effective way to prevent irreparable harm from an improperly entered involuntary medication order is to impose an automatic stay of such orders pending appeal, subject to the state's ability to move the court to lift that stay.[4] Using the reasoning of *Scott*, the automatic stay/lift procedure, if it doesn't already, should apply to involuntary medication orders entered in all competency proceedings.

[4] Mr. Green notes, however, that even *Scott's* automatic stay/lift procedure is not a guarantee, as he was involuntarily medicated under an invalid order for several months while his appeal of that order was pending. *State v. Green*, 2021 WI App 18, ¶¶2, 10, 396 Wis. 2d 658, 95 N.W.2d 583.

CONCLUSION

For the reasons stated above, Mr. Green respectfully requests that this court find that the holdings and reasoning in *Scott* apply to all competency proceedings, both pre and postconviction, 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 while such a stay is in place, reversing the tolling order in this case.

Dated and filed this 7th day of January, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form requirements of Rule 809.19(8)(b) and the word limit established by this Court's December 17, 2021 order, 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 3,134 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 January, 2022.

Signed:

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