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STATE OF WISCONSIN
IN SUPREME COURT

No. 2024AP2177-CR

STATE OF WISCONSIN,
Plaintiff-Respondent-Petitioner,
v.
DESMOND J. WILHITE,
Defendant-Appellant.

PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-Respondent-
Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 294-2907 (Fax)
donald.latorraca@wisdoj.gov

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The State of Wisconsin petitions this Court to review the court of appeals' decision in *State v. Desmond J. Wilhite*, No. 2024AP2177-CR, 2025 WL 2731556 (Wis. Ct. App. Sept. 25, 2025) (recommended publication); (Pet-App. 3–16). The court of appeals reversed and vacated the circuit court's order revoking Wilhite's conditional release from his NGI commitment based on his violation of the rules of release. The court of appeals declared that Wis. Stat. § 971.17(3)(e), which authorizes revocation of an insanity committee's conditional release based *either* on a rule violation *or* dangerousness, was facially unconstitutional as it allowed for the revocation of conditional release without proof of dangerousness. The court of appeals decided this issue even though Wilhite never preserved it for appellate review—either through an objection at the revocation hearing or through a postdisposition motion under Wis. Stat. § 971.17(7m).

ISSUES PRESENTED FOR REVIEW

1. Does every facial constitutional challenge to a statute always implicate a court's subject matter jurisdiction such that an appellant can never forfeit a facial constitutional challenge by failing to preserve it in the circuit court?

The court of appeals answered: Yes.

2. Did Wilhite's noncompliance with section 971.17(7m)(a)'s requirements for preserving issues for appellate review deprive the court of appeals of competency to decide his facial constitutional challenge?

The court of appeals answered: No.

3. Did Wilhite comply with requirements under the Uniform Declaratory Judgments Act (UDJA), Wis. Stat. § 806.04(11), that he serve notice of his facial challenge to a section 971.17(3)(e)'s constitutionality on the Attorney General and Legislature?

The court of appeals answered: Yes.

4. Did Wilhite prove beyond a reasonable doubt that section 971.17(3)(e) was facially unconstitutional because it authorized the circuit court to revoke his conditional release based on his violation of the conditions and rules of release without finding dangerousness?

The court of appeals answered: Yes, and severed language from section 971.17(3)(e) that allows for revocation based on a violation of the rules or conditions of release.

STATEMENT OF CRITERIA SUPPORTING REVIEW

Wilhite's case presents equally important issues of constitutional law and appellate procedure that merit this Court's review. Wis. Stat. § (Rule) 809.62(1r).

Whether the court of appeals always has subject matter jurisdiction to consider unpreserved issues for the first time on appeal merits this Court's review because: (1) it presents a real and significant question under Wis. Const. art. VII, § 5(3); (2) a decision will help clarify the law on an issue that is legal rather than factual in nature; and (3) the court of appeals' decision conflicts with this Court's prior decisions, like *State v. Weso*, 60 Wis. 2d 404, 413, 210 N.W.2d 442 (1973) ("constitutionality of a statute normally cannot be raised for the first time on appeal as a matter of right"). Wis. Stat. § (Rule) 809.62(1r)(a), (c)3., and (d).

The issue of the court of appeals' competency presents "[a] real and significant question of . . . state constitutional law," i.e., whether the phrase "as the legislature may provide by law" in Wis. Const. art. VII, § 5(3), allows the court of appeals to decide an appellant's unpreserved claims absent statutory authority. Wis. Stat. § (Rule) 809.62(1r)(a). This Court's decision will also have a statewide impact, ensuring that litigants initiate facial constitutional challenges in the proper forum. Wis. Stat. § (Rule) 809.62(1r)(c)2. Review will

also clarify whether this Court's competency jurisprudence applies to the court of appeals.

Whether Wilhite complied with the UDJA's service requirements and whether the court of appeals may excuse delayed service unless the Attorney General shows prejudice merits review. This issue presents a legal question, i.e., the interpretation and application of the UDJA, and is one that is likely to recur unless this Court resolves it. Wis. Stat. § (Rule) 809.62(1r)(c)3.

Finally, this Court should review the court of appeals' declaration that section 971.17(3)(e) is facially unconstitutional because it allows for revocation of conditional release absent a showing of dangerousness. The court of appeals' decision presents "[a] real and significant question of federal or state constitutional law." Wis. Stat. § (Rule) 809.62(1r)(a). Its decision that section 971.17(3) allows for the institutional placement of dangerous NGI acquittees conflicts with *State v. Randall*, 192 Wis. 2d 800, 532 N.W.2d 94 (1995), which recognized that treatment geared toward reducing an NGI acquittee's symptoms of mental illness is a constitutionally permissible purpose for an NGI acquittee's confinement. Wis. Stat. § (Rule) 809.62(1r)(d). Finally, its decision, by foreclosing revocation of conditional release based on rule and condition violations without a showing of dangerousness will have a statewide impact on how the Department of Health Service (DHS) and circuit courts manage conditionally released NGI acquittees by preventing their revocation to facilitate institutional treatment before they become dangerous to themselves or others. Wis. Stat. § (Rule) 809.62(1r)(c)2.

CONSTITUTIONAL PROVISIONS AND STATUTES INTERPRETED

Should this Court grant review, it will interpret Wis. Const. art. VII, § 5(3), which provides in part, "The appeals

court shall have such appellate jurisdiction in the district, including jurisdiction to review administrative proceedings, as the legislature may provide by law, but shall have no original jurisdiction other than by prerogative writ.”

This Court will also interpret several other statutes, including Wis. Stat. § 971.17(3)(e), which guides a circuit court’s decision to revoke an NGI acquittee’s conditional release (State’s Br. 19–21); Wis. Stat. § 971.17(7m), which identifies the procedures for preserving issues for appellate review of a circuit court’s conditional release determinations (State’s Br. 26–27); and the UDJA, Wis. Stat. § 806.04(11), which requires parties challenging a statute’s constitutionality to serve notice on both the Attorney General and Legislature. (State’s Br. 28–30).

Briefly, section 971.17(3)(e) authorizes the DHS to petition the circuit court for revocation of an NGI acquittee’s conditional release based on an allegation “that a released person has violated any condition or rule, or that the safety of the person or others requires that conditional release be revoked.” At a hearing on the petition, the State must prove either dangerousness or a violation of a rule or condition:

[t]he state has the burden of proving by clear and convincing evidence that any rule or condition of release has been violated, *or* that the safety of the person or others requires that conditional release be revoked. If the court determines after hearing that any rule or condition of release has been violated, *or* that the safety of the person or others requires that conditional release be revoked, it may revoke the order for conditional release and order that the released person be placed in an appropriate institution.

Wis. Stat. § 971.17(3)(e).

STATEMENT OF THE CASE

A. The circuit court accepted Wilhite's NGI plea and placed him on conditional release.

The State charged Wilhite with threats to a law enforcement officer, resisting an officer, criminal damage to property, and disorderly conduct. (R. 2:1–2.) According to the complaint, MYA reported that he and Wilhite were together in a living room when Wilhite challenged him to a fight and later threatened to “kick [his] ass” and kill him. (R. 2:2.) After MYA locked Wilhite out of the house, Wilhite broke down a door to the garage. (R. 2:2.) MYA believed that Wilhite was going to assault him with a dolly that Wilhite had picked up. (R. 2:3.) Although Wilhite initially complied with an officer's request to place his hands behind his back, Wilhite spun around and pushed away from the officer. (R. 2:3.) Even after the officer took Wilhite to the ground, Wilhite refused commands to lie on his stomach, and he continued to thrash after being handcuffed. (R. 2:3.) When officers walked Wilhite to the car, Wilhite threatened to get a gun after he got out of jail and shoot the officer in the face. (R. 2:3.)

The State later charged Wilhite in a second case, with fourth-degree sexual assault, disorderly conduct, and two counts of misdemeanor bail jumping. (R. 63:15.) Wilhite's second case concerned allegations that officers responded to a group home after Wilhite called police and “reported that he had just raped a woman.” (R. 63:16.) The woman reported that Wilhite “had reached around her waist, grabbed her breasts” and her pants near her vagina, and that Wilhite pulled his pants down, exposing his penis. (R. 63:16.)

Based on a plea agreement, Wilhite pled “guilty but not guilty by reason of mental disease or defect” to felony battery or threat to a law enforcement officer in the first case and disorderly conduct and two counts of misdemeanor bail jumping in his second case. (R. 64; 173:3–4.) The circuit court

accepted Wilhite's pleas and found him not guilty by reason of mental disease or defect. (R. 173:12–13.)

DHS recommended against conditional release based on its assessment that Wilhite was dangerous. (R. 71:8.) But based on the parties' stipulation, the circuit court placed Wilhite on conditional release. (R. 182:3–5, 9.)

B. DHS petitioned for revocation of Wilhite's conditional release three times, and the circuit court granted the third petition.

In January 2024, DHS petitioned for revocation of Wilhite's conditional release based on a violation of the rules of release stemming from another outburst in his group home. (R. 117; 118.) At a hearing, the circuit court determined, without objection from Wilhite, that section 971.17(3) required the State to show a violation of a rule or condition of release or to show dangerousness, and that a showing of dangerousness was not required. (R. 178:25–26, 35.) The circuit court heard evidence about Wilhite's conduct that demonstrated increased anger and outbursts and considered a proposed plan for institutional treatment. (State's Br. 13–17.)

The circuit court determined that the State "met its burden by clear and convincing evidence that [Wilhite] violated his rules." (R. 179:46); (Pet-App. 23). In its decision, it noted Wilhite's "history of aggression and explosiveness," including in his two cases. (R. 179:46.) While acknowledging that his recent behavior is "not the most serious," the circuit court observed that DHS had filed three revocation petitions against Wilhite in the past 12 months and that two were withdrawn to give Wilhite second and third chances. (R. 179:47–48.) It relied partly on an agent's testimony that Wilhite's "temper tantrums are increasing" and that his needs "cannot be met in the group home." (R. 179:46–47.) The circuit court expressed concern that Wilhite's behavior was

“escalating” and revoked his conditional release. (R. 179:47–48.) The circuit court issued a revocation order and an order for institutional placement. (R. 136; 137); (Pet-App. 17–20).

C. The court of appeals reversed.

Wilhite raised two claims on appeal: (1) the sufficiency of the evidence for the revocation decision; and (2) his facial constitutional challenge to section 971.13(3)(e). (Wilhite’s Br. 6.) Inconsistent with the principles of constitutional avoidance (State’s Br. 9 n.1 (citing *State v. Scott*, 2018 WI 74, ¶ 12, 382 Wis. 2d 476, 914 N.W.2d 141)), the court of appeals proceeded directly to Wilhite’s facial constitutional claim without ever deciding the sufficiency issue. And it reached Wilhite’s constitutional claim despite determining that he “did not raise his facial constitutional challenge to [section] 971.17(3)(e) in the circuit court and also that he did not file a motion for postdisposition relief under [section] 971.17(7m).” *Wilhite*, 2025 WL 2731556, ¶ 13.

The State asserted three procedural objections to the court of appeals’ consideration of Wilhite’s unpreserved constitutional claim, including forfeiture, the court of appeals’ competency to decide his facial constitutional claim by failing to preserve it through a postdisposition motion under section 971.17(7m), and his noncompliance with UDJA’s requirements for service of constitutional challenges on the Attorney General and Legislature. (State’s Br. 26–32.) As to whether an unpreserved facial constitutional challenge to a statute can be forfeited, the State noted a conflict in this Court’s decisions and preserved it for this Court’s review. (State’s Br. 32 n.8 (citing *State v. Cole*, 2003 WI 112, ¶ 46, 264 Wis. 2d 520, 665 N.W.2d 328 (matters of subject matter jurisdiction that cannot be waived), and *Weso*, 60 Wis. 2d at 413 (“constitutionality of a statute normally cannot be raised for the first time on appeal”))).)

The court of appeals rejected the State’s procedural objections to reach Wilhite’s unpreserved constitutional challenge. Interpreting *State v. Bush*, 2005 WI 103, 283 Wis. 2d 90, 699 N.W.2d 80, the court of appeals determined that it had subject matter jurisdiction to consider facial constitutional challenges to statutes raised for the first time on appeal, and that Wilhite could not forfeit such a challenge. *Wilhite*, 2025 WL 2731556, ¶¶ 14–15. It rejected the State’s argument that section 971.17(7m)(a), which limits the claims that an NGI acquittee can raise on appeal, deprived it of competency to decide Wilhite’s facial challenge. *Id.* ¶¶ 16–17. The court of appeals determined that Wilhite’s service of his brief on the State constituted sufficient service on the Attorney General under section 806.04(11) and asserted that Wilhite’s service here did not prejudice the State. *Id.* ¶¶ 18–21. It also decided that Wilhite’s service of the notice of his challenge on the Legislature *after* the State filed its response brief constituted timely notice because section 806.04(11) “does not set a deadline for service.” *Id.* ¶ 22.

The court of appeals determined that section 971.17(3)(e) was “facially unconstitutional to the extent that it allows for the commitment of a conditionally released NGI acquittee without a finding of dangerousness.” *Wilhite*, 2025 WL 2731556, ¶¶ 40–42, 64. Applying the severability doctrine, the court of appeals struck section 971.17(3)(e)’s language that allowed for revocation of an NGI acquittee’s conditional release based on a rule violation. *Id.* ¶ 61. It construed the severed statute to allow for DHS to initiate revocation of an NGI acquittee’s conditional release based only on a showing of dangerousness. *Id.*

ARGUMENT

I. The significant procedural issues, including the court of appeals' jurisdiction and competency to decide Wilhite's unreserved claim and Wilhite's compliance with the UDJA, merit review.

Wilhite did not preserve his challenge to section 971.17(3)(e)'s constitutionality through a timely objection at his revocation hearing or through a postdisposition motion in circuit court. Wis. Stat. § 971.17(7m); *Wilhite*, 2025 WL 2731556, ¶ 13. The court of appeals rejected the State's procedural objections to his facial constitutional challenge, determining that it always has subject matter jurisdiction to decide a facial constitutional challenge, that it was competent to decide such a challenge, and that Wilhite had complied with his obligations under the UDJA to serve the Attorney General and Legislature with his facial constitutional challenge by raising it for the first time in his appellate brief. (State's Br. 26–32.) Each procedural issue implicates this Court's criteria for granting review and merits review. Wis. Stat. § (Rule) 809.62(1r).

A. The court of appeals' decision that Wilhite's unreserved facial challenge went to its subject matter jurisdiction and was not forfeitable conflicts this Court's other decisions and the Wisconsin Constitution.

Relying primarily on *Bush*, the court of appeals treated the law as settled: It always has subject matter jurisdiction to decide a facial constitutional challenge to a statute and that a litigant can never forfeit such a challenge by failing to preserve it in the circuit court. *Wilhite*, 2025 WL 2731556, ¶¶ 14–15 (citing *Bush*, 283 Wis. 2d 90, ¶ 17). The court of appeals noted that it previously concluded, based on *Bush*, that a litigant does not forfeit a facial constitutional challenge

by failing to raise it in the circuit court. *Id.* (citing *State v. Talley*, 2015 WI App 4, ¶¶ 16–17, 359 Wis. 2d 522, 859 N.W.2d 155). But the court of appeals misplaced its reliance on *Bush*, and its decision in *Talley* rests on a misunderstanding of the foundation for this Court’s decision in *Bush*.

As the State noted, *Bush*, unlike *Wilhite*, raised his facial challenge to Wis. Stat. ch. 980’s constitutionality *in the circuit court before* raising the claim in the court of appeals and this Court. (State’s Br. 32 n.9 (citing *Bush*, 283 Wis. 2d 90, ¶ 1).) In *Bush*, the State asserted that *Bush* forfeited his right to raise a facial constitutional challenge to chapter 980 *in the circuit court* because he did not raise his claim in two prior appeals challenging his commitment. *Bush*, 283 Wis. 2d 90, ¶ 11. In rejecting the State’s forfeiture argument, this Court relied on *the circuit court’s* jurisdiction as proscribed under the Wisconsin Constitution, which partly provides “circuit courts have *original* jurisdiction ‘in all matters civil and criminal.’” *Id.* ¶ 17 (quoting Wis. Const. art. VII, § 8) (emphasis added). In deciding *Wilhite’s* case, the court of appeals overlooked this Court’s critical reference in *Bush* to the circuit court’s original jurisdiction under the Wisconsin Constitution, which prompted this Court to decide that *Bush* did not forfeit his facial constitutional challenge in circuit court. In contrast to the circuit court and supreme court, which both have broad original jurisdiction under Wis. Const. art. VII, §§ 3 and 8, the court of appeals has “no original jurisdiction other than by prerogative writ.” Wis. Const. art. VII, § 5(3).

Moreover, the Wisconsin Constitution limits the scope of the court of appeals' appellate jurisdiction "as the legislature may provide by law." Wis. Const. art. VII, § 5(3). And here, through section 971.17(7m)(a),¹ the Legislature limited the issues that an NGI acquittee can raise on appeal to: (1) a challenge to the "sufficiency of the evidence"; (2) "issues previously raised"; and (3) issues presented in a motion for postdispositional relief. As the State argued, section 971.17(7m)(a)'s plain meaning is mandatory and "requires a postdisposition motion when an issue has not been previously raised." (State's Br. 26 (quoting *State v. Klapps*, 2021 WI App 5, ¶ 20, 395 Wis. 2d 743, 954 N.W.2d 38).) Despite its unequivocal holding in *Klapps* that section 971.17(7m)(a) requires litigants to raise otherwise unpreserved challenges to the revocation of conditional release through a postdisposition motion before an appeal, *Klapps*, 395 Wis. 2d 743, ¶¶ 24–25, the *Wilhite* court distinguished *Klapps*, limiting its holding to as-applied, not facial challenges. *Wilhite*, 2025 WL 2731556, ¶ 14 (concluding, based on *Bush*, that a facial challenge cannot be forfeited).

In declining to apply forfeiture to *Wilhite*'s unpreserved facial constitutional challenge, the court of appeals asserted that this Court had already declined to revisit and overrule *Bush*. *Wilhite*, 2025 WL 2731556, ¶ 15 (citing *Milwaukee County v. Mary F.-R.*, 2013 WI 92, 351 Wis. 2d 273, 839 N.W.2d 581). The court of appeals misread *Mary F.-R.* In *Mary F.-R.*, this Court avoided deciding whether a litigant could forfeit a facial constitutional challenge to a statute by failing to raise it in the circuit court. Instead, this Court

¹ Wisconsin Stat. § 971.17(7m)(a) provides in relevant part: "The person shall file a motion for postdispositional relief in the circuit court before a notice of appeal is file unless the grounds for seeking relief are sufficiency of the evidence or issues previously raised."

unequivocally “*assume[d], without deciding*, that she did not forfeit her challenge when she failed to make a contemporaneous objection at the time the circuit court empaneled the six-person jury.” *Mary F.-R.*, 351 Wis. 2d 273, ¶ 34 (emphasis added). And four justices, in two concurrences, recognized the unresolved nature of whether a facial constitutional challenge goes to a court’s subject matter jurisdiction and cannot be forfeited.

In her concurrence in *Mary F.-R.*, then Chief Justice Abrahamson noted that *Bush* predated *State v. Ndina*, 2009 WI 21, 315 Wis.2d 653, 761 N.W.2d 612, which “clarified the difference between the concepts of ‘forfeiture’ and ‘waiver.’” *Mary F.-R.*, 351 Wis. 2d 273, ¶ 64 (Abrahamson, C.J., concurring). Chief Justice Abrahamson observed that the majority opinion left two questions unanswered: “(1) whether *Bush* referred to a facial challenge to the constitutionality of a statute as a right subject to a waiver standard or a forfeiture standard; and (2) whether *Mary F.-R.*’s facial [constitutional challenge to a statute] is subject to a waiver standard or a forfeiture standard.” *Id.* ¶ 65. Noting this Court’s observation in *Bush* that jurisprudence concerning subject matter jurisdiction and competence “is murky at best,” Chief Justice Abrahamson concluded that the “question about facial challenges, subject matter jurisdiction, and competence is also left for another day.” *Id.* ¶ 66 (quoting *Bush*, 283 Wis. 2d 90, ¶ 16).

Writing for three justices, Justice Ziegler criticized the majority for “assuming, without deciding” that *Mary* did not forfeit her challenge by failing to preserve it through a timely objection in the circuit court and proceeding to the merits. *Mary F.-R.*, 351 Wis. 2d 273, ¶¶ 69–70 (Ziegler, J., concurring). Based on the legal principles guiding forfeiture and *Bush*, Justice Ziegler rejected the proposition that every facial challenge to a statute implicates a court’s subject matter jurisdiction. *Id.* ¶¶ 74–76. Justice Ziegler would have

concluded that Mary forfeited her facial challenge to a statute by failing to raise her challenge in the circuit court. *Id.* ¶ 77.

Finally, even if *Bush* held that a party can never forfeit an unpreserved facial constitutional challenge in the court of appeals because it implicates subject matter jurisdiction, such a holding would conflict with this Court's prior decisions that were neither overruled nor modified by subsequent decisions like *Bush*. In *Weso*, 60 Wis. 2d 404, this Court declined to reach *Weso*'s facial, due process challenge to a statute defining the crime of endangering safety by conduct regardless of life. *Id.* at 412–13. Noting that *Weso* did not raise this issue in circuit court, this Court reiterated “it has long been the rule that the constitutionality of a statute normally cannot be raised for the first time on appeal as a matter of right,” subject to limited exceptions like challenges that implicate subject matter jurisdiction. *Id.* at 413 (cases cited therein). Unlike the court of appeals here, this Court in *Weso* did not assume that *any* facial challenge to a statute implicated its subject matter jurisdiction. Although the State quoted this passage from *Weso* (State's Br. 32 n.8.), the court of appeals made no effort to reconcile *Bush* with *Weso*, which this Court has neither overruled nor modified.

By granting review, this Court would clarify when, if ever, the court of appeals may, in the exercise of its appellate jurisdiction, decide an unpreserved facial constitutional challenge to a statute.

B. The court of appeals lacked statutory competency to decide Wilhite's unpreserved facial challenge merits review.

Jurisdiction aside, the State argued that the court of appeals lacked competency to decide Wilhite's facial challenge because he failed to preserve the issue for appellate review by first raising it in the circuit court as section 971.17(7m)'s plain language required. (State's Br. 30–32.) The court of appeals

dismissed the State's competency argument as undeveloped, asserting that it failed to "explain how the cited case law applies to [the court of appeals'] competency in this NGI commitment case." *Wilhite*, 2025 WL 2731556, ¶¶ 16–17.

Not so. The State developed an argument that explained to the court of appeals why it lacked competency to decide an unpreserved facial constitutional challenge. The State discussed controlling precedent that distinguishes between a court's jurisdiction and its competency to act. As the State explained, (State's Br. 31), "[s]tatutory competency . . . defines a circuit court's 'ability to undertake a consideration of the specific case or issue before it.'" *State v. Sanders*, 2018 WI 51, ¶ 20, 381 Wis. 2d 522, 912 N.W.2d 16 (citation omitted). And "noncompliance with statutory requirements pertaining to the invocation of [a court's] jurisdiction" may affect a court's "ability to exercise its subject matter jurisdiction." *City of Cedarburg v. Hansen*, 2020 WI 11, ¶ 49, 390 Wis. 2d 109, 938 N.W.2d 463, (citation omitted), *opinion modified*, 2020 WI 45, 391 Wis. 2d 671, 943 N.W.2d 544.

After discussing the legal standards concerning a court's competency, the State argued that section 971.17(7m) deprived the court of appeals of competency to decide *Wilhite's* unpreserved facial challenge. "Through section 971.17(7m), the Legislature established a procedure that specifies what claims a litigant can raise on appeal: a challenge to the sufficiency of the evidence, an issue previously raised, and a claim raised through a motion for postdisposition relief." (State's Br. 31.) The State characterized section 971.17(7m) as "a rule of statutory competency because it limits what issues this Court can consider on appeal." (State's Br. 31 (citing *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶¶ 12–13, 273 Wis. 2d 76, 681 N.W.2d 190).) The State concluded, "Section 971.17(7m) does not confer competency on this Court to reach

Wilhite's unpreserved claims as a matter of right." (State's Br. 31–32.)

The court of appeals dismissed the State's reliance on *Mikrut*, *Sanders*, and *Hansen* to question its competency to decide Wilhite's case because those cases concerned the circuit court's competency and not the court of appeals' competency. *Wilhite*, 2025 WL 2731556, ¶ 17. To be sure, those cases presented questions of a circuit court's competency, but the court of appeals should not have read this Court's opinions so narrowly. Indeed, this Court has discussed these principles more generally, without reference to a particular court. "Noncompliance with statutory mandates affects a *court's* competency and 'a *court's* "competency," as the term is understood in Wisconsin, is not jurisdictional at all, but instead, is defined as "the power of a *court* to exercise its subject matter jurisdiction" in a particular case." *City of Eau Claire v. Booth*, 2016 WI 65, ¶ 7, 370 Wis. 2d 595, 882 N.W.2d 738 (emphasis added) (citation omitted).

The court of appeals never affirmatively demonstrated, by reference to any law, why statutes like section 971.17(7m) that circumscribe what issues a litigant can raise on appeal do not constrain its authority to address unpreserved issues other than the sufficiency of the evidence. The court of appeals assumed that it was competent to decide Wilhite's claim because it always has subject matter jurisdiction to decide unpreserved facial challenges to a statute. *Wilhite*, 2025 WL 2731556, ¶ 17 n.5. This is a flawed assumption because subject matter jurisdiction and competency, though related, are "distinct concepts." *Hansen*, 390 Wis. 2d 109, ¶ 49. The court of appeals' limited appellate jurisdiction under Art. VII, § 5(3), i.e., "as the legislature may provide by law," had the effect of limiting its competency to decide only those matters that the Legislature affirmatively empowered it to decide. Considering section 971.17(7m)'s express limits on what issues Wilhite could raise on appeal, the court of appeals

should have identified what statute conferred competency on it to decide Wilhite's unpreserved facial challenge.

This Court should grant review to clarify the law on when the court of appeals is statutorily competent to decide otherwise unpreserved claims, including facial constitutional challenges to a statute.

C. Whether Wilhite complied with his obligation under UDJA to serve the statutorily designated constitutional officers.

The UDJA requires a party challenging a statute's constitutionality to serve the Attorney General with a copy of the proceeding. Wis. Stat. § 806.04(11). And when a challenge relates to a statute's construction or validity, this section, as amended by 2017 Wis. Act 369, § 98, also requires service of a copy of the proceedings on certain legislative officials, including "the speaker of the assembly, the president of the senate, and the senate majority leader," (hereinafter, "the Legislature"). Wis. Stat. § 806.04(11).

As this Court has recognized, even when an "appeal does not involve an action for declaratory judgment, a pronouncement by this court on the constitutionality of an act is precedent no matter how the issue is presented." *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 116, 280 N.W.2d 757 (1979). Therefore, it "conclude[d] that cogent reasons exist for the application of the service requirement in all cases involving constitutional challenges." *Id.* at 117. This Court later clarified the *Kurtz* rule, holding that noncompliance with section 806.04(11) was not jurisdictional and was curable when the underlying action did not seek a declaratory judgment. *See Brown Cnty. Hum. Servs. v. B.P.*, 2019 WI App 18, ¶¶ 27–28, 386 Wis. 2d 557, 927 N.W.2d 560 (citation omitted) (declining to reach as-applied challenge raised for first time on appeal based on noncompliance with the UDJA).

Here, the court of appeals determined that Wilhite's service of his brief-in-chief on the State satisfied section 806.04(11)'s service requirement for service on the Attorney General and that there was no showing that the delayed service prejudiced the State. *Wilhite*, 2025 WL 2731556, ¶¶ 19–21.² Nothing in section 806.04(11) authorizes a court to excuse service absent a showing of prejudice. Regardless, the State explained how Wilhite's decision to raise his facial constitutional challenge for the first time on appeal prejudiced the State. (State's Br. 27, 29.) Had Wilhite served the Attorney General with his facial challenge to 971.17(3)(e)'s constitutionality while the matter was pending in the circuit court, the State could have litigated the revocation hearing differently. For example, it could have presented evidence at the revocation hearing "to show Wilhite's dangerousness" which would have avoided the constitutional challenge altogether. (State's Br. 27, 29.)

But the court of appeals never addressed the State's argument that Wilhite's failure to serve notice of his facial constitutional challenge on the Attorney General while the matter was pending in the circuit court prejudiced the State. Rejecting the State's request to remand the matter to allow it to prove dangerousness if that's what the statute required (State's Br. 44–45), the court of appeals asserted: "The State fails to come to grips with the fact that the State never alleged dangerousness in the circuit court, neither in its petition nor in argument to the court." *Wilhite*, 2025 WL 2731556, ¶ 63. *But this was exactly the State's point*: Wilhite's decision to wait until after he appealed to serve notice of his constitutional challenge under the UDJA prejudiced the

² It also determined that Wilhite's service on the Legislature after the State filed its response brief complied with section 806.04(11)'s service requirement because "the statute does not set a deadline for service." *Wilhite*, 2025 WL 2731556, ¶ 22.

State. He denied the State the opportunity to present evidence to the circuit court that Wilhite should be revoked because he was also dangerous. (State’s Br. 27, 29, 44–45.) Wilhite’s delay in serving notice of his challenge until after his appeal also deprived the circuit court of an opportunity to decide the revocation petition guided by principles of constitutional avoidance. *Scott*, 382 Wis. 2d 476, ¶ 12; *State v. Hamilton*, 120 Wis. 2d 532, 540, 356 N.W.2d 169 (1984) (This Court does not ordinarily “consider the constitutionality of a statute unless such a decision is essential to the determination of the question before the court.”). Wilhite’s delayed service until after he appealed precluded the State from arguing and the circuit court from deciding whether Wilhite was dangerous, which would have rendered the facial challenge unessential to the resolution of his case. Wilhite’s delayed service prejudiced the State.

The court of appeals’ interpretation of the UDJA effectively creates a presumption that untimely compliance with service requirements can be excused unless a designated constitutional officer affirmatively shows prejudice. Section 806.04(11)’s plain language does not excuse noncompliance with its requirements simply because the Attorney General failed to offer proof that delayed service prejudiced the State. Moreover, rather than ignoring the State’s argument that Wilhite’s failure to serve notice while the case was pending in the circuit court prejudiced the State, the court of appeals should have explained why the State’s prejudice argument fell short.

* * * * *

The court of appeals reached Wilhite’s facial constitutional challenge to section 971.17(3)(e) even though he did not preserve the issue for appellate review as required under section 971.17(7m) and did not serve the designated officials with his challenge as required under the UDJA until filing his brief in the court of appeals. The court of appeals’

rejection of the State's procedural objections to deciding Wilhite's unpreserved claim encourages appeal by ambush. It allows appellants to sandbag the State and the circuit court, by depriving the State the opportunity to litigate the case and the circuit court from deciding it guided by principles of constitutional avoidance. This Court should grant review to decide what parameters, if any, limit the court of appeals' power to decide an unpreserved, facial challenge to a statute.

II. The circuit court's revocation of Wilhite's conditional release, based on his violations of the conditions of release without a finding of dangerousness, did not violate due process.

In reviewing a challenge to a statute's constitutionality, "[a] court indulges every presumption to sustain the law if at all possible, and if any doubt exists about a statute's constitutionality, [the court] must resolve that doubt in favor of constitutionality." *Porter v. State*, 2018 WI 79, ¶ 29, 382 Wis.2d 697, 913 N.W.2d 842 (citation omitted). This presumption stems from the judiciary's respect for the Legislature, "a co-equal branch of government and is meant to promote due deference to legislative acts." *Tammy W.G. v. Jacob T.*, 2011 WI 30, ¶ 46, 333 Wis. 2d 273, 797 N.W.2d 854 (citation omitted). Accordingly, Wilhite carried a "heavy burden" of overcoming "the presumption of constitutionality . . . [by] proof beyond a reasonable doubt." *Id.* (citation omitted)

Despite these strong presumptions and Wilhite's heavy burden, the court of appeals held that section 971.17(3)(e) was facially unconstitutional because it allowed a circuit court to revoke an NGI acquittee's conditional release based on a rule violation without a finding of dangerousness. *Wilhite*, 2025 WL 2731556, ¶¶ 3, 42. Its declaration that section 971.17(3)(e) was facially unconstitutional is reason enough to grant review because it presents "[a] real and significant question of . . . constitutional law." Wis. Stat. § (Rule) 809.62(1r)(a).

Moreover, there are compelling legal and practical reasons for this Court to grant review.

A. Revocation of an NGI acquittee's conditional release without a showing of dangerousness does not violate due process.

The court of appeals erred when it declared section 971.17(3)(e) unconstitutional because it allowed for the revocation of an NGI's acquittee's conditional release without a showing of dangerousness. It noted that, following an NGI verdict, section 971.17(3)(a) requires a circuit court to place an NGI acquittee on conditional release rather than institutional care unless the person is dangerous. *Wilhite*, 2025 WL 2731556, ¶ 26. It reasoned that when the circuit court places an NGI acquittee on conditional release rather than in an institution following the NGI verdict, then the person is no longer dangerous. *Id.* ¶ 30. Therefore, it concluded that the presumption that an NGI acquittee is dangerous no longer applies and that the circuit court cannot revoke an NGI acquittee's conditional release unless it finds that the person is again dangerous. *Id.* ¶ 41.

The court of appeals' reasoning is flawed. As currently drafted, section 971.17 reflects a legislative preference that the circuit court should commit NGI acquittees to conditional release rather institutional care unless they are dangerous. This standard applies to the circuit court's initial placement decision under section 971.17(3)(a) and its decision to grant or deny an institutionalized NGI acquittee's petition for conditional release under section 971.17(4)(d). While the Legislature can certainly promulgate an NGI scheme that prefers a commitment to conditional release rather than institutional care, due process does not require it. This is because NGI commitments are constitutionally different from other civil commitments.

The insanity defense is a statutory right of a criminal defendant and “is not guaranteed [under] either the United States or Wisconsin Constitutions.” *State v. Lagrone*, 2016 WI 26, ¶ 32, 368 Wis. 2d 1, 878 N.W.2d 636 (citation omitted). The insanity defense is an affirmative defense to criminal liability and punishment. Wis. Stat. § 971.15(3). After the State proves a defendant’s guilt beyond a reasonable doubt, the burden shifts to the defendant to show he is not responsible for his crime due to his mental defect. Wis. Stat. §§ 971.15(3), 971.165; *State v. Magett*, 2014 WI 67, ¶¶ 33, 39, 355 Wis. 2d 617, 850 N.W.2d 42. Thus, the insanity phase is not a “purely civil” proceeding but “a special proceeding in the dispositional phase of a criminal proceeding.” *Lagrone*, 368 Wis. 2d 1, ¶ 34 (citation omitted). Importantly, “[a] successful acquittee . . . is nonetheless guilty.” *Randall*, 192 Wis. 2d at 833.

The U.S. Supreme Court and this Court have recognized that these significant differences between insanity acquittees and “civil-commitment candidates” justify different treatment. *State v. Field*, 118 Wis. 2d 269, 278–79, 347 N.W.2d 365 (1984). Interpreting *Jones v. United States*, 463 U.S. 354 (1983), this Court identified “two facts” that an NGI verdict establishes: “first, that the defendant committed an act constituting a criminal offense; second, the defendant committed the act because of mental illness.” *Field*, 118 Wis. 2d at 277 (citation omitted). “[T]he fact that a person who has been found [NGI] has committed a criminal act demonstrates a degree of dangerousness to society that may be lacking in the actions of one who is civilly committed.” *Id.* And because an NGI acquittee was found to have committed the crime beyond a reasonable doubt, “[NGI] acquittees constitute a special class that should be treated differently from other candidates for commitment.” *Id.* at 282 (quoting *Jones*, 463 U.S. at 370).

Because a commitment implicates a liberty interest, the “State must have ‘a constitutionally adequate purpose for the confinement.’” *Jones*, 463 U.S. at 361 (citation omitted). Based on *Jones*, this Court concluded that a commitment following an NGI acquittal serves a two-fold purpose: “to treat the individual’s mental illness and to protect the individual and society from his or her potential dangerousness.” *Randall*, 192 Wis. 2d at 820. Because an NGI committee may not be confined longer than the maximum term of confinement for the underlying crime, Wis. Stat. § 971.17(1)(b), “[i]ncapacitation for the purposes of treatment and rehabilitation . . . does not turn commitment into an impermissible form of incarceration so long as the state houses the acquittee in a facility appropriate to his or her condition and provides the acquittee with [appropriate] care and treatment.” *Id.* at 833–34. This Court concluded that confinement for treatment during a commitment does not violate due process “whether that treatment is geared to reducing clinical symptoms of mental illness *or* behavioral disabilities which render the acquittee dangerous.” *Id.* at 837 (emphasis added). In sum, because one constitutionally recognized purpose of an NGI commitment is treatment of the mental illness, institutional placement of an NGI acquittee during the period of his commitment for treatment does not violate due process.

Nonetheless, in deciding that revocation of conditional release based on a rules or condition violation violated due process, the court of appeals declared that “the Supreme Court made clear in *Foucha* and *Jones* that due process requires a showing of dangerousness before a court can commit a conditionally released NGI acquittee.” *Wilhite*, 2025 WL 2731556, ¶ 58. The court of appeals’ statement demonstrates a flawed misunderstanding of those cases, neither of which have anything to do with revocation of conditional release of an NGI acquittee.

In *Jones*, the Supreme Court held that an NGI statute that requires an automatic commitment to an institution following an NGI finding does not violate due process. *Jones*, 463 U.S. at 363–66. And, relying on *Jones*, this Court determined that Wisconsin’s prior scheme under section 971.17 that allowed for the automatic, institutional placement following an NGI verdict without a finding of a present mental illness and dangerousness did not violate due process or equal protection. *Field*, 118 Wis. 2d at 282–84; *Randall*, 192 Wis. 2d at 821. If anything, *Jones* and *Field* demonstrate that the automatic institutional placement of an NGI committee for purposes of treatment of a mental condition after an NGI verdict, regardless of present dangerousness, does not violate due process.³

The court of appeals misplaced its reliance on *Foucha*. There, the U.S. Supreme Court interpreted a Louisiana statute that permitted “the indefinite detention of insanity acquittees who are not mentally ill but who do not prove they would not be dangerous to others.” *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992). As the State argued, this Court long ago recognized that Wisconsin’s NGI scheme does not suffer from the constitutional flaws that Louisiana’s scheme did and that, therefore, it did not violate due process to continue to confine a person who was dangerous but no longer mentally ill. (State’s Br. 35–38 (discussing *Foucha* and *Randall*)).

After summarizing why the U.S. Supreme Court concluded that it is constitutionally permissible to treat NGI acquittees differently from other civil committees, *Randall*, 192 Wis. 2d at 821, this Court identified several critical

³ Moreover, as argued (State’s Br. 40), the Legislature limited how long an NGI acquittee who is not dangerous could be placed in an institution for treatment. Under section 971.17(4), an NGI acquittee may petition for conditional release six months after revocation and the circuit court must grant the petition unless the State proves that the acquittee is still dangerous.

differences between Louisiana's NGI scheme and section 971.17. First, unlike Louisiana's scheme, section 971.17 requires the State to prove that an NGI acquittee committed the underlying crime by proof beyond a reasonable doubt. *Randall*, 192 Wis. 2d at 833. Second, unlike Louisiana's scheme that allowed commitments of unlimited duration, a commitment under section 971.17 is limited to the maximum term of imprisonment. *Id.* at 808–09, 833. Third, unlike Louisiana's scheme that required an insanity acquittee to prove that they are not dangerous, section 971.17 placed the burden on the State to justify continued detention. *Id.*

Despite these constitutionally significant differences between the Louisiana scheme, which the U.S. Supreme Court declared unconstitutional in *Foucha*, and section 971.17, which this Court upheld in *Randall*, the court of appeals relied heavily on *Foucha* to decide Wilhite's claim. *Wilhite*, 2025 WL 2731556, ¶¶ 34–42. It concluded that *Foucha* only allowed for the institutional placement of NGI acquittees, either at a hearing on the initial commitment placement or at a revocation hearing, upon a showing of dangerousness. *Id.* ¶ 42. By holding that institutional placement is only allowed for dangerous NGI acquittees, the court of appeals ignored the other constitutionally justifiable reason to order institutional care for an NGI acquittee: treatment of the NGI acquittee's mental illness at an appropriate DHS institution. *Randall*, 192 Wis. 2d at 834

When the circuit court decided DHS's petition to revoke conditional release, Wilhite concededly remained mentally ill. (Wilhite's Br. 13 n.1.) Based on the hearing record, the circuit court determined that institutional care was necessary to stabilize Wilhite's condition due to escalating behavior. (R. 179:47–48.) Revocation of Wilhite's conditional release served a constitutionally permissible purpose of an NGI commitment, i.e., "treatment . . . geared to reducing clinical symptoms of mental illness." *Randall*, 192 Wis. 2d at 837.

Therefore, the court of appeals erred in declaring section 971.17(3)(e) facially unconstitutional because institutional placement of an NGI acquittee for treatment of his underlying mental illness does not violate due process.

B. The court of appeals' decision impacts how DHS and circuit courts will manage NGI acquittees on conditional release.

While court of appeals' decision will not affect Wilhite,⁴ it impacts how DHS and circuit courts manage other NGI acquittees placed on conditional release.

As this Court recognized in a case interpreting Wis. Stat. § 980.08(8), which authorizes the revocation of a sexually violent person's supervised release based on a rule violation or dangerousness, a court should not be forced to wait for "overtly dangerous acts" before revoking release. *State v. Burris*, 2004 WI 91, ¶ 72, 273 Wis. 2d 294, 682 N.W.2d 812. This Court observed that the circuit court was "not required to ignore indications that a [committed] person has disregarded the rules repeatedly in the past and will do so in the future." *Id.* As the State argued here, preventing DHS from initiating a revocation of conditional release based on a rule violation "would make courts powerless to enforce their rules and conditions of release absent a showing of overt dangerousness." (State's Br. 42.)

The circumstances that triggered the circuit court's revocation of Wilhite's conditional release illustrate the adverse impact that the court of appeals' decision will have on managing NGI acquittees. Here, it revoked Wilhite's

⁴ "Wilhite was discharged from his commitment in June 2025." *Wilhite*, 2025 WL 2731556, ¶ 63. But the State was unable to assert mootness due to potential collateral consequences. *Id.* ¶ 1 n.1; see *Sauk County v. S.A.M.*, 2022 WI 46, ¶ 27, 402 Wis. 2d 379, 975 N.W.2d 162 (liability based on cost of care).

conditional release out of concern that his behavior was “escalating”⁵ and its determination that inpatient treatment was necessary to stabilize him and allow him to return to the community with the necessary tools to function in a group home. (R. 179:47–48.) The circuit court’s reasons for revoking Wilhite squared with a constitutionally legitimate purpose of an NGI acquittee’s institutional placement: treatment of a mental illness—a condition that he concedes was present when he was revoked. (R. 179:47–48); *Randall*, 192 Wis. 2d at 833–34); (Wilhite’s Br. 13 n.1). Applied here, the court of appeals’ decision would have prohibited the circuit court from acting proactively to treat Wilhite’s mental illness through an institutional placement *before* his condition escalated to endangering him or the public.

* * * * *

By itself, the court of appeals’ declaration that section 971.17(3)(e) is facial unconstitutional warrants this Court’s review.

⁵ Wilhite’s violations of the rules were not benign. The State presented testimony at the revocation hearing from several witnesses responsible for managing Wilhite in the community and which supported the circuit court’s determination that his conduct was escalating. (State’s Br. 13–17.)

CONCLUSION

This Court should grant the State's Petition for Review.

Dated this 23rd day of October 2025.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Donald V. Latorraca
DONALD V. LATORRACA
Assistant Attorney General
State Bar #1011251

Attorneys for Plaintiff-Respondent-
Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2797
(608) 294-2907 (Fax)
donald.latorraca@wisdoj.gov

FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 7615 words.

Dated this 23rd day of October 2025.

Electronically signed by:

Donald V. Latorraca
DONALD V. LATORRACA
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 23rd day of October 2025.

Electronically signed by:

Donald V. Latorraca
DONALD V. LATORRACA
Assistant Attorney General