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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2024AP2177-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

DESMOND J. WILHITE,

Defendant-Appellant-Respondent.

RESPONSE TO PETITION FOR REVIEW

DAVID J. SUSENS
Assistant State Public Defender
State Bar No. 1099463

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2124
susensd@opd.wi.gov

Attorney for Desmond J. Wilhite

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SUMMARY OF THE ARGUMENT OPPOSING REVIEW

Desmond J. Wilhite opposes the state's petition for review of the decision of the court of appeals in *State v. Wilhite*, 2025 WI App 64, 2025 WL 2731556 (Ct. App. September 25, 2025) (ordered published). Because neither the procedural nor substantive issues raised by the state demonstrate “special and important reasons” for this Court’s discretionary review under the criteria described in Wis. Stat. § 809.62(1r), this Court should deny the state’s petition.

In finding portions of Wis. Stat. § 971.17(3)(e) facially unconstitutional, the decision of the court of appeals addressed an important question of constitutional law. But contrary to the state’s claim in the petition for review, the decision of the court of appeals did not conflict with *State v. Randall*, 192 Wis. 2d 800, 532 N.W.2d 94 (1995). (Pet. 9). Instead, the decision of the court of appeals harmonized § 971.17(3)(e) with controlling decisions by this Court in *Randall*, and the United States Supreme Court in *Jones v. United States*, 463 U.S. 354 (1983), and *Foucha v. Louisiana*, 504 U.S. 71 (1992).

Nothing in the state’s petition demonstrated conflict between the well-settled constitutional principles in those and the thorough, well-reasoned decision of the court of appeals on the merits here. Likewise, nothing in the state’s petition established a need for this Court to reexamine *Randall*. Thus, on the

substantive issues presented, the state's petition seeks this Court's guidance where no guidance is needed and seeks to correct an error that does not exist. Accordingly, this court should deny review on the substantive issues.

To prevent a decision by the court of appeals on the merits of his substantive constitutional claim, the state argued that Wilhite forfeited review of his facial constitutional challenge. (State's. Br. 26) (Pet. 9). The state's petition also argues procedural bars to judicial review based on the competency of the court of appeals and purported non-compliance with the Uniform Declaratory Judgments Act (UDJA), Wis. Stat. § 806.04(11). Because the court of appeals correctly rejected those arguments as unsupported and undeveloped in a well-reasoned decision that applied the procedural facts of the case to well-established legal principles, this Court should also deny review on the procedural issues.

In total, the state's petition for review identified no errors that need correcting, no conflicts in the law that require this Court's guidance, and no other "special and important reasons" that warrant this Court's review. Wis. Stat. § 809.62(1r). Review would require nothing more than this Court's "application of well-settled principles to the factual situation." Wis. Stat. § 809.62(1r)(c)1. The state's petition demonstrated that the state simply disagrees with a correct and comprehensive decision of the court of appeals because it is adverse. Accordingly, this Court should deny review.

ARGUMENT

I. The state’s substantive arguments do not merit review because the court of appeals correctly followed controlling opinions of this Court and the United States Supreme Court to harmonize Wis. Stat. § 971.17(3)(e) with well-settled constitutional principles.

The basic premise of Wilhite’s facial challenge is simple. Confinement under an NGI commitment is “a significant deprivation of liberty that requires due process protection.” *Jones*, 463 U.S. at 361. Due process “permits the government, on the basis of the [NGI] judgment, to confine [a person to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society.” *Id.* at 368. The plain language of Wis. Stat. § 971.17(3)(e) allows the government to confine an NGI acquittee in a mental institution based solely on a rule violation without proof of current dangerousness.

An NGI acquittee who has already been conditionally released has necessarily already been found not dangerous by the circuit court under Wis. Stat. §§ 971.17(3)(a) and (4)(d). Because Wis. Stat. § 971.17(3)(e) allows revocation of that conditional release and confinement based on a rule violation alone, “absent a determination in civil commitment proceedings of current mental illness and dangerousness,” it is facially unconstitutional. *Foucha*, 504 U.S. at 78-79.

This Court has already interpreted *Jones* and *Foucha* in a manner that demands the outcome reached by the court of appeals in this case. In *Randall*, this Court held that “it is not a denial of due process for an [NGI] acquittee who has committed a criminal act to be confined in a state mental health facility for so long as [the acquittee] *is considered dangerous*, provided that the commitment does not exceed the maximum term of imprisonment which could have been imposed for the offense charged. 192 Wis. 2d at 806-07 (emphasis added). In other words, an NGI acquittee can be confined “*based on dangerousness alone*” under certain circumstances. *Id.* at 841 (emphasis added).

The state’s substantive arguments attempted to ignore the dangerousness requirement repeatedly invoked in *Randall*, *Foucha*, and *Jones*. Those cases all demand that confinement of an NGI acquittee requires proof of current dangerousness. Nothing in the state’s petition shows that the court of appeals erred in following that binding precedent when declaring portions of Wis. Stat. § 971.17(3)(e) facially unconstitutional. To the contrary, the decision of the court of appeals took the necessary step to harmonize Wis. Stat. § 971.17(3)(e) with that well-established due process demand.

Acknowledging that “the statute enjoys a presumption of constitutionality,” the court of appeals concluded that “Wilhite carried the heavy burden of showing that Wis. Stat. § 971.17(3)(e) contains a flaw on the dangerousness issue that prevents

constitutional enforcement under any circumstances.” *Wilhite*, 2025 WI App 64, ¶42. In reaching that determination, the court of appeals rejected each of the state’s substantive arguments to the contrary based on the plain language of § 971.17(3)(e) and the controlling opinions of this Court in *Randall*, and the United States Supreme Court in *Jones* and *Foucha*. *Id.* ¶¶43-58.

In its petition for review, the state did not dispute that § 971.17(3)(e) allows the government to confine an NGI acquittee in a mental institution based solely on a rule violation without proof of current dangerousness. Nor did the state argue that *Randall* was wrongly decided and should be revisited or that this Court’s interpretation of *Jones* and *Foucha* in *Randall* was flawed. Instead, the state petitioned for review based on the flawed argument that “[r]evocation of an NGI acquittee’s conditional release without a showing of dangerousness does not violate due process.” (Pet. 26).

In support, the state rehashed the unpersuasive arguments from its response brief that the court of appeals rejected, claimed that “the court of appeals misplaced its reliance on *Foucha*,” and implied that the court of appeals misinterpreted *Randall*. (Pet. 26-31). Those arguments are both conclusory and wrong. As the court of appeals correctly explained, the state’s arguments are either “directly refuted by the holdings in *Jones* and *Foucha*” or fail because they “take[] language in *Randall* completely out of context” by ignoring the plain requirement that confinement be

based on dangerousness. *Wilhite*, 2025 WI App 64, ¶¶ 45-49, 55-57. The court of appeals' rejection of those arguments was comprehensive, correct, and consistent with controlling opinions of this Court and the United States Supreme Court. No further guidance from this Court is needed.

The state also claimed that this Court should grant review because “institutional care was necessary to stabilize Wilhite’s condition due to escalating behavior.” (Pet. 30-32). Accordingly, the state asked this Court to grant review to correct prevent the “impact” on “how DHS and circuit courts manage other NGI acquittees placed on conditional release.” (Pet. 30-32). Given the fact that this is a facial constitutional challenge, this argument entirely misses the point because § 971.17(3)(d) is either facially constitutional, or it is not.

While the facts would be relevant to an as-applied challenge, a facial challenge must focus on the constitutionality of the text of the statute. *State v. Wood*, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63; *See also See State v. Olson*, 127 Wis. 2d 412, 420-21, 380 N.W.2d 412 (Ct. App. 1985) (“a statute is said to be facially invalid if its unconstitutionality can be determined without proof of extrinsic circumstances”). Because there is no dispute that this was a facial challenge, neither the underlying facts of Wilhite’s case nor the impact of the decision of the court of appeals on how DHS manages NGI acquittees on conditional release impact that determination.

Accordingly, this Court should deny review because the court of appeals relied on controlling opinions of this Court and the United States Supreme Court and reached a conclusion that correctly harmonized Wis. Stat. § 971.17(3)(e) with the well-settled constitutional principles in those cases. In other words, there are no errors to correct and no legal conflicts to resolve. This Court should not grant review to merely re-apply the facts of the case to preexisting case law. Wis. Stat. § 809.62(1r)(c)1.

II. The state’s procedural arguments do not merit review because they point to no genuine conflicts in the law and seek error correction where there is no error.

Given the weakness of the state’s position on the constitutionality of § 971.17(3)(e), much of the petition for review was devoted to lamenting the fact that the court of appeals even reached the merits of Wilhite’s substantive claim. (Pet. 15-25). None of the state’s procedural objections called into question the basic principle that, when a statute violates constitutional rights, “a court has not only the power but also the duty to strike down the act.” *Ferdon ex rel. Petrucelli v. Wis. Patients Compensation Fund*, 2005 WI 125, ¶69, 284 Wis. 2d 573, 701 N.W.2d 440 (*overruled on other grounds*). By failing to identify any basis for the court of appeals to duck the substantive constitutional question, the state’s petition failed to establish any procedural questions worthy of review.

A. Wilhite's facial challenge cannot be forfeited.

The state did not dispute that Wilhite's challenge to Wis. Stat § 971.17(3)(e) is a facial challenge. Wilhite did not dispute that he did not raise his facial challenge in the circuit court. *Wilhite*, 2025 WI App 64, ¶12. In its petition, the state claimed this Court's review is needed to "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." (Pet. 19). This Court should deny review because it has already decided—on many occasions—that facial challenges like Wilhite's cannot be forfeited.

This Court has repeatedly held that "a facial challenge to the constitutionality of a statute is a matter of subject matter jurisdiction and cannot be waived." *State v. Trochinski*, 2002 WI 56, ¶34, n.15, 353 Wis. 2d 38, 644 N.W.2d 891; *State v. Cole*, 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328; *State v. Bush*, 2005 WI 103, ¶19, 283 Wis. 2d 90, 699 N.W.2d 80; *Winnebago Cty. v. Christopher S.*, 2016 WI 1, ¶4, n.6, 366 Wis. 2d 1, 878 N.W.2d 109. This is so because, if a facial challenge succeeds, the unconstitutional provisions of the statute are null and void and courts have no power to act under those provisions. *State ex rel. Skinkis v. Treffert*, 90 Wis. 2d 528, 538, 280 N.W.2d 316 (Ct. App. 1979); *State v. Wood*, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63.

Plucking cherry-picked language from *State v. Weso*, 60 Wis. 2d 404, 210 N.W.2d 442 (1973), the state's petition sought to manufacture a conflict in the procedural law on facial constitutional challenges where there is none. (Pet. 19). True, *Weso* briefly collects cases that stand for the general proposition that the "constitutionality of a statute normally cannot be raised for the first time on appeal as a matter of right." 60 Wis. 2d at 413. But *Weso* immediately acknowledges that "there are exceptions involving the *jurisdiction of the subject matter* or public policy" and then clarifies that the Court did "not consider *the facts* of this case come within either one of the exceptions." *Id.* (emphasis added). Because this facial constitutional challenge is substantive, it fits the exception to that general rule and cannot be forfeited.

As the state pointed out, concurring opinions penned by members of this Court in *Milwaukee Cty. v. Mary F.-R.*, 2013 WI 92, 351 Wis.2d 273, 839 N.W.2d 581, question whether a constitutional challenge to the size and unanimity of a jury was a procedural or substantive challenge that could never be forfeited. But those concurring opinions are neither binding or relevant here because Wilhite's facial challenge unquestionably attacked the substance of § 971.17(3)(e) and "argued that the State lacked the authority" to confine anyone under that statute based on a rule violation alone, without requiring a finding of current dangerousness. *Id.*, ¶76 (Ziegler, J. concurring).

It is well-settled that “[a]n unconstitutional act of the Legislature is not a law” and “in legal contemplation has no existence.” *Skinkis*, 90 Wis. 2d at 532 (citing *John F. Jelke Co. v. Beck*, 208 Wis. 650, 242 N.W. 576 (1932)). Thus, the “common ground” in long-standing jurisprudence on waiver and forfeiture of constitutional challenges “is the unassailable proposition that an issue of subject matter jurisdiction cannot be waived by inadvertence or by deliberate failure to raise it at the trial court level, and that such an issue can *always* be raised as a matter of right for the first time on appeal or review by a higher court.” *Id.* at 534-37 (collecting decisions of this Court and the United States Supreme Court) (emphasis added).¹ Nothing in the state’s petition for review undermined that “unassailable proposition.” *Id.*

Accordingly, this Court should deny review because there is no conflict in the law and no clarification is required. The court of appeals correctly concluded that Wilhite did not forfeit his facial constitutional challenge to Wis. Stat. § 971.17(3)(e) based on this Court’s unequivocal holdings explaining that such challenges cannot be waived or forfeited. *Wilhite*, 2025 WI App. 64, ¶15.

¹ The court of appeals correctly found that the state’s reliance on *State v. Klapps*, 2021 WI App 5, 395 Wis. 2d 743, 954 N.W.2d 38, was meritless because *Klapps* involved forfeiture of a claim of judicial bias rather than a facial challenge that cannot be forfeited for all the reasons described above. *Wilhite*, 2025 WI App 64, ¶14.

B. The court of appeals had competency to decide Wilhite's substantive claim.

Under Article VII, § 5 of the Wisconsin Constitution, the court of appeals has "broad jurisdiction over all orders and judgments of the circuit court." *Leavitt v. Beverly Enterprises, Inc.*, 2010 WI 71, ¶39, 326 Wis. 2d 421, 784 N.W.2d 683. Accordingly, this Court "no longer look[s] to statutory language listing or describing the kinds of orders which are or are not appealable" to decide if appellate courts have jurisdiction over a circuit court order. *Id.* Nonetheless, the state claimed that review is warranted to decide whether Wis. Stat. § 971.17(7m) deprived the court of appeals of competency to hear Wilhite's facial constitutional challenge because it was not raised in a postdisposition motion. (Pet. 19-22). The state was wrong.

As the court of appeals correctly found, the state cited no relevant legal authority to develop its argument on competency. *Wilhite*, 2025 WI App 64, ¶17. Despite its effort to further develop that argument for the first time in the petition for review, the state did not point to any authority that supports its position that the competency of the court of appeals is limited by § 971.17(7m) or any other statute. The court of appeals explained that each case cited by the state addressed either a circuit or municipal court's competency to hear a case. *Id.* The state identified no basis that would extend those limitations on trial court competency to the court of appeals.

True, “a *circuit court’s* ability to exercise the subject matter jurisdiction vested in it by the constitution may be affected by noncompliance with statutory requirements pertaining to the invocation of [subject matter] jurisdiction in individual cases.” *City of Eau Claire v. Booth*, 2016 WI 65, ¶7, 370 Wis. 2d 595, 882 N.W.2d 738 (emphasis added and citation omitted). But there is no case law or statute that similarly limits the competency of the court of appeals to exercise its “broad jurisdiction over all orders and judgments of the circuit court.” *Leavitt*, 326 Wis. 2d 421, ¶39.

Contrary to the state’s claim, “[a]ppellate courts have the power to consider issues raised for the first time on appeal” even when those issues are unreserved. *State v. Huebner*, 2000 WI 486, ¶28, 235 Wis. 2d 486, 611 N.W.2d 727. Given the broad authority over circuit courts, the court of appeals “can and should reach an issue of subject matter jurisdiction even where neither party raises it.” *Skinkis*, 90 Wis. 2d at 535. The state never contended with the fact that—as discussed above—Wilhite’s constitutional claim plainly raises an issue of subject matter jurisdiction that cannot be forfeited.

But even if Wilhite could forfeit his facial constitutional challenge, the court of appeals may “nevertheless decide a constitutional question not raised below if it appears in the interest of justice to do so and where there are no factual issues that need resolution.” *State v. Benzel*, 220 Wis. 2d 588, 591, 538 N.W.2d 434 (Ct. App. 1998). Moreover, in a case

repeatedly cited by the state, the court of appeals affirmatively acknowledged that it has discretionary reversal authority under § 752.35 even when an NGI acquittee forfeited a judicial bias claim on appeal by failing to raise it in a postdisposition motion. *Klapps*, 395 Wis. 2d 743, ¶31. Thus, this Court should deny review of the state's unsupported and undeveloped argument that the court of appeals had no competency to decide Wilhite's substantive facial constitutional challenge.

- C. Wilhite complied with the requirements of Wis. Stat. § 806.04(11) by serving the attorney general and legislature with his appellant's brief.

The state's final procedural claim also does not warrant this Court's review. In the court of appeals, the state claimed that the court "should decline to consider Wilhite's facial challenge based on his failure to prove compliance with section 806.04(11)'s service requirements." (Resp. Br. 30). In the petition for review, the state did not dispute the conclusion of the court of appeals that "Wilhite complied with the requirements of the statute" by serving the legislature after the state filed its response brief but before he filed his reply brief. *Wilhite*, 2025 WI App 64, ¶22.

Accordingly, the state abandoned any claim that the timing of Wilhite's service of the legislature foreclosed review by the court of appeals.² The state

² The state was correct to abandon this claim because there is no legal authority supporting an argument that Wilhite

was correct to abandon this claim. The state was correct to abandon this claim because there is no authority supporting its argument that Wilhite did not serve the legislature or that the timing of Wilhite's service of the legislature violated Wis. Stat § 806.04(11). "The plain language of the statute requires service" and does not prescribe the method or timing for providing notice to the legislature. *See Wren v. Columbia St. Mary's Hosp. Milwaukee, Inc.*, 2025 WI App 22, ¶40, 415 Wis. 2d 758, 19 N.W.3d 614, review granted, 2025 WI 38. Wilhite served the legislature.

In its petition, the state limited its argument to a new claim that Wilhite's purported failure to serve the attorney general prejudiced the state. (Pet. 22-25). The state's argument fails from the start because the court of appeals correctly concluded that Wilhite complied with the requirement to serve the attorney general, who "represents the state in this action" and signed the state's response brief, when "Wilhite electronically filed his appellant's brief." *Id.*, ¶20.

The purpose of the service requirement is "to give the attorney general the opportunity to defend the statute . . . against a claim of unconstitutionality."

did not serve the legislature or that the timing of Wilhite's service of the legislature violated Wis. Stat § 806.04(11). "The plain language of the statute requires service" and does not prescribe the method or timing for providing notice to the legislature. *See Wren v. Columbia St. Mary's Hosp. Milwaukee, Inc.*, 2025 WI App 22, ¶40, 415 Wis. 2d 758, 19 N.W.3d 614, review granted, 2025 WI 38.

Town of Walworth v. Village of Fontana-on-Geneva Lake, 85 Wis. 2d 432, 436, 270 N.W.2d 442 (Ct. App. 1978). Because the state is a party in this case, the attorney general was served with a copy of Wilhite's brief, and the attorney general appeared on behalf of the state in the court of appeals to defend the constitutionality of Wis. Stat. § 971.17(3)(e), that purpose was met. Accordingly, the state's reliance on *Kurtz v. City of Waukesha*, 91 Wis. 2d 103, 280 N.W.2d 757 (1979), holds no water. *Wilhite*, 2025 WI App 64, ¶21. Here, Wilhite satisfied the requirements of Wis. Stat. § 806.04(11) "simply by serving the attorney general with a copy of the proceedings." *Wren*, 415 Wis. 2d 758, ¶17.

On top of the failed claim that Wilhite never served the attorney general, the state never developed an argument in the court of appeals that the interests of the state were prejudiced by the attorney general's lack of participation in the circuit court. *Wilhite*, 2025 WI App 64, ¶¶20-21. In the petition for review, the state claimed that Wilhite's "decision to wait until after he appealed to serve notice of his constitutional challenge under the UDJA prejudiced the state" by denying "the State the opportunity to present evidence to the circuit court that Wilhite should be revoked because he was also dangerous." (Pet. 23-24). The state's argument lacks any legal support and makes no sense in the context of a facial constitutional challenge that cannot be waived.

Unlike an as-applied challenge, where the reviewing court considers “the facts of the particular case in front of us,” the substance of the statute and Willhite’s due process rights are what matter here. *Wood*, 323 Wis. 2d 321, ¶13. The state’s claim that the timing of Wilhite’s service prevented the state from hypothetically presenting hypothetical evidence in the circuit court is inapposite because Wilhite did not raise an as-applied challenge, his facial challenge could not be forfeited, and he served the attorney general upon making his claim.

At any rate, the state had its opportunity to present evidence of Wilhite’s dangerousness in the circuit court. Like in its arguments in the court of appeals, the state’s argument in the petition for review “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.” *Id.*, ¶63. After failing to present evidence or argue dangerousness in the circuit court, the attorney general defended Wis. Stat. § 971.17(3)(e) in the court of appeals and in this petition. Accordingly, Wilhite complied with Wis. Stat. § 806.04(11), the state was in no way prejudiced, and the state’s petition identified no procedural issues that merit this Court’s review.

* * * * *

Section 971.17(3)(e) is either constitutional, or it is not. The court of appeals correctly held that it is not. Nothing in the state’s petition showed that the court of appeals erred in reaching the merits of that

substantive claim or established any conflict in the law about the state's erroneous procedural claims. Likewise, nothing in the state's petition showed that the court of appeals erred by finding portions of Wis. Stat. § 971.17(3)(e) unconstitutional or established any conflict in the well-established precedent of this Court and the United States Supreme Court that demanded the outcome. Accordingly, none of the issues presented by the state warrant review.

CONCLUSION

For the reasons stated above, this Court should deny the state's petition for review.

Dated this 13th day of November, 2025.

Respectfully submitted,

Electronically signed by

David J. Susens

DAVID J. SUSENS

Assistant State Public Defender

State Bar No. 1099463

Office of the State Public Defender

Post Office Box 7862

Madison, WI 53707-7862

(608) 267-2124

susensd@opd.wi.gov

Attorney for Desmond J. Wilhite

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief and S. 809.62(3) and (4) for a response to a petition for review. The length of this brief is 3,949 words.

Dated this 13th day of November, 2025.

Signed:

Electronically signed by

David J. Susens

DAVID J. SUSENS

Assistant State Public Defender