STATE OF WISCONSIN

IN SUPREME COURT

No. 2020AP298-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JOSEPH G. GREEN,

Defendant-Appellant.

PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

MAURA WHELAN
Assistant Attorney General
State Bar #1027974

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3859
(608) 294-2907 (Fax)
whelanmf@doj.state.wi.us

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ISSUE PRESENTED

Did the circuit court have authority to order tolling of the 12-month statutory time limit for bringing an incompetent criminal defendant to trial competency?

The court of appeals concluded that the circuit court lacked the authority to toll the statutory time limit and vacated the order.

This Court should grant review and reverse the decision of the court of appeals on this issue.

INTRODUCTION

The State of Wisconsin petitions for review of *State v. Joseph G. Green*, Case No. 2020AP298-CR (Wis. Ct. App. Dist. IV Feb. 25, 2021), which reversed an order of the Dane County Circuit Court and remanded for further proceedings. The court's opinion is recommended for publication. There were three issues on appeal. The State seeks this Court's review of the court of appeals' decision on one of those issues: whether a court has the authority to toll the statutory time limits for bringing an incompetent defendant to competency.

Wisconsin Stat. § 971.14(5)(a)1. provides that, following an involuntary medication order, the Department of Health Services has a maximum period of 12 months to provide "appropriate treatment" to the defendant in order to bring him to competency. Meanwhile, the defendant is entitled to a direct appeal of an involuntary medication order, as well as a stay of the order pending appeal. Where, as here, the defendant appeals and the circuit court stays the involuntary medication order, the defendant cannot be provided "appropriate treatment" until the stay is lifted.

This case involves an order for involuntary medication to bring an incompetent homicide defendant, Joseph G.

Green, to trial competency. The State requested, and the circuit court granted, an order tolling the statutory treatment period pending appeal. Green appealed the tolling order, arguing that it was not legally authorized. The court of appeals agreed. (Pet-App. 126–32.)

The State asks this Court to grant review to reverse the court of appeals and rule that the circuit court had the authority to toll the statutory time limit. Although not expressly authorized by the statute, a tolling order is necessary to achieve the statutory purpose. The statute provides a period for "appropriate treatment" not to exceed 12 months; appeals often take 12 months to reach decision. Therefore, if the statutory time limit is not tolled, an appeal will eat up all or most of the time allotted for the "appropriate treatment" the circuit court found necessary to bring the defendant to trial competency. If a defendant is deprived of this "appropriate treatment" to bring him to competency while his case is on appeal, he is involuntarily committed without benefit of treatment. He is effectively warehoused during the pendency of the appeal, and his mental condition is left untreated while the 12-month clock ticks away.

This Court should grant review in this case to determine whether a court may toll time statutory limits during appeal where tolling is necessary to preserve the substantive intent of the statute.

STATEMENT OF THE CASE

Joseph Green was charged with one count of first-degree intentional homicide with the use of a dangerous weapon for killing his sister on Christmas Eve 2019. (R. 2.)

At an adjourned preliminary hearing, Green's defense counsel asked for a competency evaluation. (R. 39:2.) The court appointed Craig Schoenecker, M.D., to conduct Green's competency examination pursuant to Wis. Stat.

§ 971.14(2)(a). (R. 40:3.) Dr. Schoenecker examined Green, prepared a competency report, and testified at a competency hearing held on February 10, 2020. (R. 40:3–15.) At the end of that hearing, the court found that Green was incompetent to stand trial but likely to become competent with treatment. (R. 40:21.)

The court also concluded that the State had satisfied the *Sell* factors for involuntary medication.[1] (R. 40:21–22.) The court entered an order committing Green for treatment, including involuntary administration of medication, that same day. (R. 13.)

A series of motions and counter-motions and a second evidentiary hearing followed. (R. 15, 19–21, 26–34.) The court again concluded that the State had satisfied the *Sell* factors, and on May 20, 2020, reissued the involuntary medication order with modifications. (R. 35:1.)

Pursuant to this Court's ruling in *State v. Scott*, 2018 WI 74, ¶¶ 43–44, 382 Wis. 2d 476, 914 N.W.2d 141, Green was entitled to and was accordingly granted an automatic stay of the medication order pending appeal. (R. 41:2, 6; *see also* R. 18.) Under *Scott*, the State is entitled to a corresponding right to move to lift the stay if certain criteria are met. *Scott*, 382 Wis. 2d 476, ¶¶ 45. The State accordingly moved for and the court granted the State's motion to lift the automatic stay. (R. 19; 35:1.) As part of the order lifting the automatic stay, the court tolled the statutory time limits under Wis. Stat.

[1] Under *Sell v. United States*, 539 U.S. 166, 180–81 (2003), before an involuntary medication order may be entered, the State must prove and the court must find: (1) an important governmental interest; (2) involuntary medication furthering the interest; (3) the necessity of the involuntary medication; and (4) the medical appropriateness of the medication. *See also State v. Fitzgerald*, 2019 WI 69, 387 Wis. 2d 384, ¶¶ 14–18, 929 N.W.2d 165.

§ 971.14(5)(a)1.[2] for bringing Green to competency. (R. 35:2.) Specifically, "the Statutory time limits to bring the Defendant to competency was tolled from the date of the Defendant's appeal, February 12, 2020, until the signing of this order." (R. 35:2.) Because the order was signed on May 20, the time added to the statutory treatment period was 98 days.

Green filed an amended[3] notice of appeal on May 21, 2020. (R. 37.) Green moved for emergency temporary relief and a stay pending appeal in the court of appeals. (Pet-App. 142–43.) The court granted the temporary stay, and ordered the parties to file briefs. (Pet-App. 143.) On July 10, the court denied Green relief pending appeal and lifted the temporary stay of the involuntary medication order. (Pet-App. 139–41.) Green filed a Petition for Supervisory Writ and/or Petition for Review in the supreme court asking for a reinstatement of the stay. (Pet-App. 138.) This Court denied relief. (Pet-App. 138.)

The appeal was briefed, and the court of appeals released its decision on February 25. (Pet-App. 101.) Pertinent to this petition for review,[4] Green argued that the tolling order was not legally authorized because it was not specifically provided for in the statute. The court agreed. (Pet-App. 126–32.) The court concluded that the Legislature

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[2] Under this provision, the Department of Health Services has the lesser of either 12 months or the maximum sentence the defendant faces to bring him to competency.

[3] Green had filed an earlier notice of appeal on February 11, 2020. (R. 16.)

[4] Green also argued that the State failed to satisfy the second, third, and fourth *Sell* standards for involuntary medication. The court held that the State satisfied the third *Sell* standard, but had not met the other two. (Pet-App. 106–26.) Green argued in addition that, under *Scott*, the State was required to file its motion to lift the automatic stay of the order in the court of appeals, because the circuit court lacked competency to hear it. The court held that the circuit court had competency to hear the State's motion to lift the stay. (Pet-App. 132–36.)

"intended to limit the period for which a defendant can be committed to bring him or her to competency to a maximum of twelve months." (Pet-App. 127.) The State interpreted the statutory language allowing the court to "commit the defendant to custody of the department for [appropriate] treatment for a period not to exceed 12 months" as intending to provide the Department of Health Services (DHS) with 12 months to provide "*appropriate treatment*" to the defendant. Wis. Stat. § 971.14(5)(a)1. The court rejected that interpretation, and held that "it is the custody, not the treatment, that may not exceed twelve months." (Pet-App. 131.) The court also rejected the State's arguments that the tolling order was not prohibited by the statute, and that tolling was necessary to achieve the purpose of the statute. (Pet-App. 130–31.)

The State seeks review of the court of appeals' decision regarding the tolling order.

STATEMENT OF § (RULE) 809.62(1r) CRITERIA

This case warrants review by this Court because it a novel question of statewide impact, satisfying the second exemplary criterion set forth in Wis. Stat. § (Rule) 809.62(1r):

> A decision by the supreme court will help develop, clarify or harmonize the law, and
>
> 1. The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or
>
> 2. The question presented is a novel one, the resolution of which will have statewide impact; or
>
> 3. The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.

Wis. Stat. § (Rule) 809.62(1r)(c).

The tolling order in this case presents a novel issue and calls for the application of a new doctrine. The court of appeals' decision in this case is the first published appellate decision on the issue. Indeed, circuit courts had not entered such orders before 2020. But the State is confident that the order is not prohibited by section 971.14 or Wisconsin case law. As will be discussed in the Argument, these tolling orders are necessitated by this Court's 2018 *Scott* decision, which provided for the first time that a person subject to an involuntary medication order is entitled to an automatic stay of that order pending appeal. Because the statute provides only 12 months to bring an incompetent defendant to competency with appropriate treatment, a *Scott* stay effectively extinguishes most or all of the time allotted for treatment. To preserve the statutory intent of allowing 12 months of appropriate treatment, the State asked the circuit court to toll the time limits pending appeal, and the court granted that request. That decision should be affirmed by this Court.

For all these reasons, the State requests this Court to grant this Petition for Review.

ARGUMENT

The circuit court had the legal authority to toll the statutory time limit, which was necessary to achieve the purpose of the statute.

A. The tolling order is both legally permissible and necessary to achieve the legislative purpose of the statutory time limit.

Section 971.14(5)(a)1. limits to 12 months[5] the time available for the State to bring a defendant to trial

[5] In full, the statute provides for a maximum "period not to exceed 12 months, or the maximum sentence specified for the most

competency through "appropriate treatment" authorized by the court:

> If the court determines that the defendant is not competent but is likely to become competent within the period specified in this paragraph *if provided with appropriate treatment,* the court shall . . . commit the defendant to the custody of the department[6] *for treatment* for a period not to exceed 12 months, or the maximum sentence specified . . . whichever is less.

Wis. Stat. § 971.14(5)(a)1.

A circuit court's entry of an involuntary medication order that comports with *Sell* means the court has determined that the medication ordered is "medically appropriate" because only "medically appropriate" treatment satisfies *Sell*. *Sell v. United States*, 539 U.S. 166, 179, 181 (2003). Meanwhile, the statute allows involuntary medication only upon a showing that the court has "determine[d]" that the defendant will regain competency if "provided with appropriate treatment," i.e., the treatment ordered by the court. Wis. Stat. § 971.14(5)(a)1. Thus, *Sell*'s "medically appropriate" treatment and the statute's "appropriate treatment" are the same thing. A *Sell*-compliant involuntary medication order further indicates that involuntary medication is the *only* way to bring the defendant to competency. That is because *Sell* requires the court to "conclude that involuntary medication is *necessary*" to bring a defendant to competency when there are no "alternative, less

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serious offense with which the defendant is charged, whichever is less." Wis. Stat. § 971.14(5)(a)1. In this petition, the State refers to the treatment period as "12 months" generally, because that was the period Green faced.

[6] The "department" is the Department of Health Services (DHS). Wis. Stat. § 971.14(1g).

intrusive treatments" and no "less intrusive means for administering the drugs." 539 U.S. at 181.

This Court in *Scott* held that an involuntary medication order is a final order appealable as of right under Wis. Stat. § 808.03(1). *Scott*, 382 Wis. 2d 476, ¶ 34. In addition, the Court held that, if a defendant chooses to file an appeal, the order is "subject to an automatic stay pending appeal." *Id.* ¶ 43. The Court reasoned that "the defendant's 'significant' constitutionally protected 'liberty interest' in 'avoiding the unwanted administration of antipsychotic drugs' is rendered a nullity" if "involuntary medication orders are not automatically stayed pending appeal." *Id.* ¶ 44.

The State does not question the wisdom of the *Scott* ruling. But *Scott* created a procedural problem for parties litigating involuntary medication orders under section 971.14. The commitment to "the custody of the department [is] for treatment," i.e., the "appropriate treatment" ordered by the court. *See* Wis. Stat. § 971.14(5)(a)1. The statute gives DHS 12 months to provide that treatment. *Id.* However, once a defendant exercises his right to appeal—and obtains an automatic stay—any program DHS might initiate to provide the "appropriate treatment" ordered by the court must be suspended immediately. And (unless this Court reverses the court of appeals in this case) the 12-month treatment period will be ticking away while the defendant receives no "appropriate treatment." In most cases, the defendant's appeal will not be resolved until much—or all—of the 12-month period has expired. Then, contrary to the legislative plan, the defendant will be released from the commitment without receiving sufficient treatment or any treatment at all.

The purpose of the statutory time limit is to balance an unconvicted defendant's liberty interest in not being confined indefinitely with the interests of the State, the victim, the public—and even the defendant himself—in the fair and

effective prosecution of a mentally competent defendant. *See Pate v. Robinson*, 383 U.S. 375, 378 (1966) (as matter of substantive due process, only mentally competent defendants may be criminally tried). The Legislature designed the treatment regime with these competing interests in mind. To balance and serve these interests, the Legislature allowed DHS 12 months—no more, no less—to treat a felony[7] defendant to competency. Wis. Stat. § 971.14(5)(a)1. During those 12 months, the Legislature intended that the defendant would receive "appropriate treatment" as "determine[d]" by the court. *Id.* This legislative intent is manifest in subsection (5)(b), which requires that the defendant be reexamined and a report from that reexamination be furnished to the court every three months. If the defendant is not receiving "appropriate treatment" during his commitment, the periodic examinations are pointless and the progress towards competency unlikely.[8]

As noted, "the object to be accomplished by sec. 971.14(5)(a), Stats., is to *provide treatment* to an incompetent person so that he or she may regain competency and face the pending criminal charges." *State v. Moore*, 167 Wis. 2d 491, 498, 481 N.W.2d 633 (1992) (emphasis added).[9] The

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[7] If the defendant is charged with misdemeanors only, the period is the equivalent of "the maximum sentence specified for the most serious offense with which the defendant is charged." Wis. Stat. § 971.14(5)(a)1.

[8] The court of appeals reaches the opposite conclusion, stating that "[t]hese provisions confirm that an incompetent defendant may be committed for no more than twelve months." (Pet-App. 128.)

[9] The court of appeals cites *Moore* for the proposition that the Legislature intended to limit a defendant's commitment—regardless of whether he receives treatment during the commitment—to 12 months. (Pet-App. 128.) The language emphasized in the text above demonstrates that the court of appeals is in error: *Moore* taught that "the object" of the

Legislature did not envision that the defendant would be *committed with no treatment* for any amount of time—even one day. It did not contemplate that he would be warehoused in a DHS facility without "appropriate treatment" while the appellate courts determined the order's legality. But, without a tolling order, a defendant will be *committed but not treated* during the pendency of his appeal. He will not only languish untreated, but will take up precious treatment space that could be effectively used by another patient.

Neither section 971.14 nor any other statute or case law bars the tolling order entered in this case. The State concedes that the Legislature did not contemplate the use of tolling orders in section 971.14—but neither did it foresee the automatic stay procedure enunciated by this Court in *Scott*. Unquestionably, *Scott* disrupted the structure the Legislature built to bring defendants to competency by breaking down the time limits. In conjunction with *Scott*, this Court should approve and permit the tolling procedure to restore the treatment procedures crafted by the Legislature. If tolling is not allowed, a defendant can effectively nullify the legislatively designed process for competency restoration by filing an appeal (either meritorious or frivolous). That would be an absurd result, which is, of course, disfavored. *See State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110.

The tolling order should be affirmed. Under the plain language of the statute, if a defendant is in custody but not receiving "appropriate treatment," the statutory time limits do not begin to run. The tolling order makes that clear.

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commitment is "to provide treatment." *State v. Moore*, 167 Wis. 2d 491, 498, 481 N.W.2d 633 (1992).

B. The court of appeals' interpretation of the statutory language is unreasonable.

The court of appeals rejected the State's arguments. The principal source of disagreement between the State and the court is their interpretations of the statute's plain language. As explained above, the State interprets subsection (5)(a)1. as limiting the period during which a defendant may be committed for "appropriate treatment" to 12 months. The court, in contrast, concludes that the statutory text "*unambiguously* states that *commitment*[10] to bring a defendant to competency is not to exceed twelve months." (Pet-App. 127 (emphasis added); *accord* Pet-App. 130–31.)

The problem with the court's interpretation is that it reads the phrases "with appropriate treatment" and "for treatment" out of the statute. The court's interpretation would be plausible if the statute allowed for a defendant's commitment *without* treatment. But it does not. A section 971.14 commitment is allowed *only* to provide the defendant with "appropriate treatment." Thus, the court not only reads the "treatment" language out of the statute, it reads something new into the statute—a 12-month commitment of an incompetent defendant without access to the only "appropriate treatment" that can bring him to competency.[11] The court is understandably concerned that a tolling order

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[10] The court emphasizes that the commitment is "*non-punitive.*" (Pet-App. 128.) The State agrees and has never suggested that section 971.14 is punitive in purpose or effect.

[11] In a footnote, the court observed that, once committed, a defendant's treatment may be delayed for reasons beyond the control of the defendant or the court ordering the commitment. (Pet-App. 131 n.16.) True, but irrelevant. If the government is unable to timely provide treatment for reasons arguably within its control, tolling of the order to allow DHS 12 full months to provide appropriate treatment would not be appropriate. But where, as here, DHS is prevented from administering "appropriate treatment" for reasons beyond its control, tolling is appropriate.

will lengthen the period of time an unconvicted defendant will remain in custody before trial. (Pet-App. 128–29.) But the court's approach threatens a far more severe infringement of the defendant's liberty interest—a pointless commitment up to 12 months long in which the defendant simply languishes while receiving none of the treatment he needs to reach trial competency.

The court supports its statutory interpretation by citing other provisions of section 971.14 that contain time limits (e.g., the time for a probable case determination) and concluding that "[j]ust as the circuit court would not be free to ignore the statute's requirement of a probable cause determination, it is not free to ignore the statute's time limit requirements." (Pet-App. 130.) The State agrees that the court cannot ignore time limits. The State's point is that the time limit for providing "appropriate treatment" should not begin to run until DHS is permitted to provide the "appropriate treatment" that justifies the commitment in the first place.

Finally, the court observes in a footnote that if the statutory time limits are depleted by the appeal process, the State has alternative avenues of relief under Wis. Stat. chapter 51 or chapter 55. (Pet-App. 132.) There are two main reasons that this proposed solution is no solution at all.

First, the State's purpose in medicating Green to competency to stand trial under section 971.14 is to achieve justice for his victim and the community—not to commit him for mental health treatment or provide him with protective services. This proposed solution thus ignores and trivializes the importance of the prosecution in this case.

Second, to be committed or to receive services under these chapters, a person must meet certain standards. Under chapter 51, the mental health chapter, a person must satisfy one of several standards of dangerousness for commitment.

Wis. Stat. § 51.20(1)(a)2. But a homicide defendant, who has, allegedly, been violent and dangerous in the past, may not be *presently* dangerous for purposes of chapter 51. Thus, counterintuitively, a homicide defendant may not be eligible for involuntary commitment or medication because he's not dangerous enough. Under chapter 55, a person is eligible for protective services only if he is an "[a]dult at risk," i.e., one whose physical or mental condition "substantially impairs his or her ability to care for his or her needs and who has experienced, is experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation." Wis. Stat. § 55.01(1e). There is no reason to think the average criminal defendant would meet that standard.

The court of appeals' interpretation of the statute is unreasonable. Furthermore, it fails to give any serious consideration to the impact its ruling will have on the operation of section 971.14(5)(a)1. For these reasons, this Court should grant the State's petition and review that decision.

C. The tolling order in this case is moot, but this Court should review it nonetheless because it raises an issue of great public importance.

"An issue is moot when its resolution will have no practical effect on the underlying controversy." *Fitzgerald*, 387 Wis. 2d 384, ¶ 21 (quoting *Portage County v. J.W.K.*, 2019 WI 54, ¶ 11, 386 Wis. 2d 672, 972 N.W.2d 509). Nevertheless, this Court will "decide an otherwise moot issue if it fits under one of [several] exceptions." *Id.* ¶ 22. Pertinent here, the Court will excuse mootness to hear an issue "of great public importance." *Id.* (quoting *G.S. v. State*, 118 Wis. 2d 803, 805, 348 N.W.2d 181 (1984)). Relying on this exception to mootness, this Court heard a challenge to the facial constitutionality of subsection 971.14(3)(dm) and (4)(b) in

Fitzgerald. *Id.* It also relied on this exception to hear constitutional challenges to Wis. Stat. § 51.20(1)(ar) (allowing involuntary mental-health commitment of inmate without a showing of dangerousness) in *Winnebago County v. Christopher S.*, 2016 WI 1, ¶ 32, 366 Wis. 2d 1, 878 N.W.2d 109, and Wis. Stat. § 51.61(1)(g) (allowing involuntary medication of mentally ill inmate without a showing of dangerousness) in *Winnebago County v. C.S.*, 2020 WI 33, ¶ 11 n.5, 391 Wis. 2d 35, 940 N.W.2d 875.

The court of appeals found that the involuntary medication order in this case did not comport with *Sell* and vacated the order. (Pet-App. 136.) The vacation of the involuntary medication order renders the tolling order moot. That is because the tolling order runs with the involuntary medication order. Once the medication order is vacated, the tolling order is unnecessary and meaningless. The purpose of the tolling order is to preserve the statutory time limits available to bring the defendant to competency pursuant to an involuntary medication order. *See supra* at 8–10. If the medication order is struck down, there is nothing for the tolling order to preserve.

The Court should hear this case under the "great public importance" exception to the mootness doctrine. In a decision recommended for publication, the court of appeals has barred the use of tolling orders to preserve the legislatively created 12-month period to provide "appropriate treatment" to incompetent defendants. Without a reversal by this Court, that decision is the binding law in this State. But, as the State has shown, the court of appeals decision—in combination with this Court's ruling in *Scott*—seriously undermines the legislative intent of section 971.14(5)(a)1. A court of appeals decision on a procedural matter that threatens to upend a substantive legal framework carefully devised by the Legislature presents an issue of great public importance.

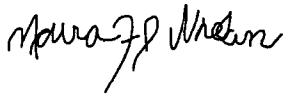
CONCLUSION

For the reasons stated, the State respectfully requests this Court to grant review on the question of whether a circuit court may toll the statutory time limits set forth in Wis. Stat. § 971.14(5)(a)1. pending the completion of an appeal filed by the defendant.

Dated this 26th day of March 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin



MAURA WHELAN
Assistant Attorney General
State Bar #1027974

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3859
(608) 294-2907 (Fax)
whelanmf@doj.state.wi.us

CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.62(4) for a petition for review produced with a proportional serif font. The length of this petition is 4,211 words.

Dated this 26th day of March 2021.

Maura FJ Whelan

MAURA F.J. WHELAN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(12).

I further certify that:

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

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

Dated this 26th day of March 2021.

Maura FJ Whelan

MAURA F.J. WHELAN
Assistant Attorney General