

claiming that the court of special appeals erred in determining that the statute did not require an on-the-record assessment of his waiver of his statutory right to counsel. The court granted *cert.*

Ruling and Reasoning

The Maryland Court of Appeals found that the plain language of Md. Code Ann. Health-Gen. § 10–708 established that, at a hearing to appeal a clinical review panel’s decision, a patient had a right to request counsel. The court ruled that procedural due process required verification of the patient’s knowing and voluntary waiver of the right to request counsel, but an on-the-record colloquy is not required. In addition, the patient’s right to request counsel is not subject to a time limit.

The court was cognizant of the potential delays that having no time limit on requesting counsel could create. Patients, as a delaying tactic, could wait until the hearing before the ALJ before requesting counsel. Delays could place undue burden on the mental health system and potentially put the patient and others at risk of harm. On the other hand, the law clearly stated that Mr. Mercer had a right to request council.

To determine whether Mr. Mercer was erroneously deprived of procedural due process, the court turned to the balancing test provided in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The court determined that, because the appeal request form was deficient and the administrative hearing took place beyond the seven days prescribed by law, Mr. Mercer had been erroneously deprived of procedural due process. The court suggested that the appeal request form could be redrafted to advise individuals of their right to request counsel and also include information on the consequences of declining counsel. Verification of the waiver could be accomplished through this modified appeals request form or an in-person procedure.

Discussion

Mr. Mercer argued that procedural due process required an on-the-record colloquy for patients to waive their right to counsel. In *Mathews*, the U.S. Supreme Court formulated a balancing test to evaluate procedural due process questions. The *Mathews* test consists of balancing three factors: the affected private interest and potential injury; the risk that the procedures may cause an erroneous deprivation of the affected private interest and the probable value of additional procedural safeguards; and the state’s interest in

efficient adjudication, including the potential administrative burden of additional procedural requirements.

In this case, the court weighed Mr. Mercer’s interest in avoiding psychiatric medication administration over his objection against that of existing state procedures. Because the appeal request form was deficient, there was a high risk of an erroneous deprivation of due process. Mr. Mercer’s hearing was also delayed beyond the seven-day statutory requirement. These concerns were not addressed by the ALJ. Thus, the court concluded Mr. Mercer was deprived of his procedural due process rights when his request for counsel was denied at the hearing.

Due process rights are enshrined in the due process clauses of the Fifth and Fourteenth Amendments. Due process has been subdivided into procedural due process and substantive due process. Procedural due process requires that the individual be given notice, the opportunity to be heard, and a decision by a neutral decision-maker before the government may deny a citizen of life, liberty, or property. Substantive due process is inferred and holds that certain rights are fundamental and free from governmental interference. Substantive due process has been the chief consideration in a number of landmark mental health cases. *Mercer* is notable for its focus on procedural due process.

Automatic Stay of Involuntary Medication Orders and Tolling of Statutory Limitations

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Automatic Stay of Involuntary Medication Orders and Tolling of Statutory Limitations for Competency Restoration Does Not Apply in the Pretrial Context

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In *State v. Green* 973 N.W.2d 770 (Wis. 2022), the Wisconsin Supreme Court held that the automatic

stay of involuntary medication orders pending appeal does not apply to pretrial proceedings and the statutory limitation for achieving a defendant's competency is also not subject to tolling in the same context.

Facts of the Case

In December 2019, Joseph Green fatally shot his sister and was charged with first degree intentional homicide with use of a dangerous weapon. The Dane County Circuit Court ordered a competency to stand trial evaluation at the defense counsel's request. The court-appointed psychiatrist testified that Mr. Green was not competent but could be restored to competency within a 12-month timeframe if treated with antipsychotic medications. The circuit court subsequently found Mr. Green incompetent to proceed with his legal charges. He was committed to Mendota Mental Health Services for an unspecified term not to exceed 12 months. The order of commitment also included involuntary medications.

In February 2020, Mr. Green appealed both decisions, the 12-month commitment term and the involuntary medication order. In response, the Dane County Circuit Court granted him an automatic stay of the involuntary medication order pending appeal pursuant to the Wisconsin Supreme Court decision in *State v. Scott*, 914 N.W.2d 141 (Wis. 2018). In *Scott*, a post-conviction defendant was granted an automatic stay of an involuntary medication order pending appeal.

The state responded to Mr. Green's appeal in two ways: by filing motions to lift the automatic stay of the involuntary medication order, and to toll the statutory period to bring Mr. Green to competency to stand trial. During the evidentiary hearing in May 2020, the circuit court decided to lift the automatic stay of the order for involuntary medication and grant the state's motion to toll the statutory period to bring Mr. Green to competency to stand trial.

Mr. Green appealed to the Wisconsin Court of Appeals. He argued that the state did not present sufficient evidence to support the involuntary medication order. The court agreed and determined that the state failed to meet both the second *Sell* factor (referring to *Sell v. United States*, 539 U.S. 166 (2003)), that the involuntary medication order was substantially likely to render him competent to stand trial, and the fourth *Sell* factor, that the state did not present an individual treatment plan on the basis of a medically informed record, by clear and convincing evidence.

Mr. Green also argued that the circuit court erred in lifting the automatic stay of the involuntary medication order. The court, referencing prior Wisconsin Supreme Court case law from *Scott*, agreed. Mr. Green contended that the circuit court did not have authority to toll the statutory period to bring him to competency. The court, referencing Wis. Stat. § 971.14(5)(a) (2021), agreed and determined that the circuit court erred in tolling the statutory period to bring Mr. Green to competency.

Finally, Mr. Green argued that the circuit court did not have the authority to hear the state's motion to lift the automatic stay of the involuntary medication order. The court disagreed and determined that the circuit court indeed had the authority to hear the state's motion.

As a result of the Wisconsin Court of Appeals decisions, the orders for involuntary medication and the automatic stay were reversed and Mr. Green was to be discharged from the 12-month commitment, as the statutory term period had expired. In response, the state appealed to the Wisconsin Supreme Court.

Ruling and Reasoning

The Wisconsin Supreme Court reversed the Wisconsin Court of Appeals decision and held that the postconviction automatic stay of involuntary-medication orders pending appeal does not apply to pretrial proceedings. Although Mr. Green argued that two of the *Sell* factors were not met, the court reasoned that the second *Sell* factor, involuntary medication will significantly further the governmental interest, and the fourth *Sell* factor, involuntary medication is medically appropriate, were met by clear and convincing evidence. The court also affirmed that the state has a substantial pretrial interest in bringing a defendant to competency for trial.

The Wisconsin Court of Appeals relied on prior Wisconsin Supreme Court case law, from *Scott*, where a postconviction defendant was granted an automatic stay of an involuntary medication order pending appeal. But, Mr. Green was a pretrial defendant, so the Wisconsin Supreme Court thus narrowed their interpretation of precedent in ruling on *Scott*. The Wisconsin Supreme Court noted that providing timely justice to victims outweighs upholding a defendant's liberty interest in refusing involuntary medications. The court clarified that this urgency is not similarly existent in the postconviction process as it is during the pretrial stage of criminal proceedings.

The Wisconsin Supreme Court also affirmed the Wisconsin Court of Appeals decision that the 12-month statutory limitation for achieving a defendant's competency is not subject to tolling in the pretrial context. The court based its decision on §971.14(5) (a) of the state code, which declares that if a defendant is not competent but would likely become competent within a statutory timeframe, "it shall suspend the proceedings and commit the defendant to the custody of the department for treatment for a period not to exceed 12 months." The court stated that the legislature has decided that 12 months was the maximum time during which to "determine whether there is a substantial probability that a defendant will attain competency in the foreseeable future" (*Green*, p 783). The court concluded that the plain meaning of the 12-month treatment limit does not permit tolling of its limit on confinement for pretrial treatment to achieve competency.

Discussion

The outcomes in *Green* set new legal precedent in Wisconsin for pretrial proceedings regarding involuntary medication orders and tolling of statutory limitations for restoration of competency to stand trial.

Tolling is a legal principle defined as a pause of the running of a period of time set forth by a statute of limitations. In *Green*, the state argued that the 12-month commitment term should be tolled, that is, paused, throughout the appeals process which was granted by the circuit court. But, both the Wisconsin Court of Appeals and the Wisconsin Supreme Court disagreed with the lower court decision. Generally, statutory tolling is permitted, but only in certain circumstances. The Wisconsin Supreme Court relied on interpretation of the Wis. Stat. §971.14(5)(a) in its decision. That statute states that the pretrial proceedings will be suspended, and the defendant will be committed to the custody of the mental health department for treatment for a period not to exceed 12 months if the defendant is not competent but would likely become competent within the statutory timeframe. The court made a clear distinction that although the defendant is in custody for purposes of treatment, the total amount of time that the defendant has spent in custody must not exceed 12 months, even if the defendant has spent a portion of that statutory timeframe in an appeals process and not receiving treatment for restoration of competency to stand

trial. This has potential implications for treatment providers in considering the relevant timeframe for which the person can be subject to treatment.

In *Sell*, the U.S. Supreme Court reviewed the constitutionality of involuntary antipsychotic medication orders to mentally ill criminal defendants to restore their competency to stand trial by local jurisdictions. The Court established four specific criteria that must be met by clear and convincing evidence to medicate a pretrial defendant over objection to restore competency. These criteria, known as the *Sell* factors, are: the government has an important interest in proceeding to trial; involuntary medication will significantly further the governmental interest; involuntary medication is necessary to further the governmental interest; and involuntary medication is medically appropriate.

In *Green*, the Wisconsin Supreme Court applied the *Sell* factors and found that they were met by clear and convincing evidence. The court emphasized that at the pretrial point in criminal proceedings, the government has an important interest in proceeding to trial, which is not similarly existent in the postconviction process. The court weighed the urgency of the pretrial process versus Mr. Green's constitutionally protected liberty interest of avoiding unwanted administration of antipsychotic drugs. The court determined that the proposed involuntary medications were medically appropriate and were necessary to further the government's interest. This is another example of the application of *Sell*, similar to what other states have required to meet the criteria, during the pretrial process as it pertains to restoration of competency and administration of involuntary medications.

Involuntary Medication Despite Power of Attorney Treatment Refusal

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