

**STATE OF WISCONSIN  
IN THE SUPREME COURT**

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In the Matter of proposed rules relating to appellate court proceedings from orders entered pursuant to WIS. STAT. § 971.14 regarding prejudgment competency rulings in criminal cases

**PETITION 23-\_\_\_\_  
Memorandum in Support**

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The petitioner, the Wisconsin Judicial Council, submits this memorandum in support of its petition to create a new rule to establish a procedure for appeals from circuit court orders regarding prejudgment determinations of whether a criminal defendant is competent to stand trial, including possible orders permitting involuntary medication aimed at restoring the defendant to competency pursuant to WIS. STAT. § 971.14, *et. seq.* The petition is directed to the Supreme Court’s rule-making authority under WIS. STAT. § 751.12 and is offered by the Judicial Council under WIS. STAT. § 758.13(2)(a), (g).

**Introduction**

In May of 2019, the Judicial Council approved a proposed project to study and then create statutory procedures regarding “postconviction and appeal procedure relating to competency of criminal defendants,” and it assigned the Appellate Procedure Committee to work on it.<sup>1</sup> In particular, the Committee was tasked with studying the gap between the

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<sup>1</sup> Minutes of the Wisconsin Judicial Council, dated May 17, 2019, at <http://wilawlibrary.gov/judicialcouncil/docs/minutes1905.pdf> (last accessed October 11, 2023). For a list of the Appellate Procedure Committee’s current membership, please see Appendix 1.

provisions in WIS. STAT. § 971.14 (concerning prejudgment competency proceedings), relevant case law, and the absence of procedural rules on how to pursue an appeal of an involuntary treatment order and how to proceed in light of postconviction competency problems. The Committee was tasked with drafting rules to codify controlling case law and provide a structure for postconviction and appellate competency proceedings, including the possible structure for an expedited appeal of an involuntary treatment order entered before trial aimed at restoring the defendant to competency.

Subsequent to the original assignment of this large project, work on it was bifurcated such that the Committee was to focus on such issues related to determinations and orders regarding *prejudgment* incompetency and related involuntary medication orders, while the Council's Criminal Law and Procedure Committee was to focus on issues regarding *postconviction* competency determinations. The Criminal Law and Procedure Committee's work will continue on a parallel track.

This petition concerning *prejudgment* incompetency is designed and limited to address appellate procedures for challenging prejudgment orders regarding a criminal defendant's competency to participate in pretrial hearings, trial, sentencing, and other proceedings up to the entry of the judgment of conviction or an acquittal.

WISCONSIN STAT. § 971.14 provides a procedure to evaluate whether a defendant is competent to proceed to trial and provides a mechanism to restore competency with treatment and, in some cases, the administration of involuntary medication. The impetus of the project was a two-fold concern. First, numerous entities involved in criminal litigation, as well as those charged with the care of individuals found incompetent to stand trial, saw the need for

rules to guide appeals from orders entered pursuant to § 971.14. These included the Wisconsin Department of Justice (DOJ), the State Public Defender's Office (SPD), and the Wisconsin Department of Health Services (DHS). To that end, individuals from each of these organizations with knowledge and expertise on the subject joined the Committee as ad hoc members to work on the project. Indeed, throughout this project, the level of constructive disagreement and solution-orientated work from all contributors has produced a draft rule that all interested parties believe is both workable and in the overall public interest.

Second, and relatedly, circuit courts across the state have handled proceedings challenging WIS. STAT. § 971.14 orders in disparate ways, and WIS. STAT. ch. 809 does not provide the appellate courts with a formal procedure regarding appeals of such orders. As a result, many cases involving an appeal of a § 971.14 order were disjointed and lasting too long relative to the time period within which to restore a criminal defendant to competency. *See* § 971.14(5)(a)1. The Committee observed that to aid practitioners and litigants, it is desirable to have procedures set forth in the statutes.

As the Committee reviewed the current procedures, it was keenly aware of case law developments based on litigation in the Wisconsin Supreme Court. The Committee even paused its work intermittently to await guidance from two of those cases. This petition has been drafted after a careful review of the following cases: *State v. Scott*, 2018 WI 74, ¶31, 382 Wis. 2d 476, 914 N.W.2d 141; *State v. Fitzgerald*, 2019 WI 69, ¶32, 387 Wis. 2d 384, 929 N.W.2d 165; and *State v. Green*, 2022 WI 30, 401 Wis. 2d 542, 973 N.W.2d 770.

The relevant case law and the experience of the Committee members informed the Committee's belief that time is of the essence when reviewing WIS. STAT. § 971.14 orders

because the State has either twelve months or the maximum sentence for the most serious offense charged, whichever is shorter, to restore the defendant to competency so that the criminal proceedings can continue. *See* § 971.14(5)(a)1. Currently, appeals from § 971.14 orders are civil appeals initiated by a notice of appeal and follow the normal briefing deadlines established in WIS. STAT. RULE 809.19. These § 971.14 appeals are unique in that the underlying case is criminal, but the nature of the appeal involves the defendant's mental health. Accordingly, the appeals governed by the proposed rule are properly viewed—as this court stated in *Scott*, 382 Wis.2d 476, ¶31—as special civil proceedings that are related to an underlying criminal case but are not part of that case. Further, the competency orders are final for purposes of appeal, even though the criminal case has not been resolved. *See id.*

The unique nature of these appeals, including the short timeline within which the State must restore a defendant to competency, calls out for an expedited procedure for handling appeals from WIS. STAT. § 971.14 orders. Additionally, all parties involved have important concerns regarding the administration of involuntary medication, especially if it were to begin and then end—perhaps multiple times.

Accordingly, there is a need for special procedures to handle appeals of WIS. STAT. § 971.14 orders that involve the administration of involuntary medication, which are the most common § 971.14 orders that are appealed. In recent decisions, the Wisconsin Supreme Court found WIS. STAT. § 971.14(3)(dm) and (4)(b) unconstitutional, to the extent those subsections do not comport with *Sell v. United States*, 539 U.S. 166 (2003), when ordering involuntary medication. *See Fitzgerald*, 387 Wis. 2d 384, ¶32, *Green*, 401 Wis. 2d 542, ¶15, fn. 6. The Court also grappled with the need for an automatic stay pending appeal from an involuntary

medication order so as to avoid nullifying the right to refuse unwanted medication while recognizing the limited time allotted for the State to restore a defendant to competency.

Ultimately, *Green* eliminated the automatic stay of involuntary medication for prejudgment competency orders. See *Green*, 401 Wis. 2d 542, ¶36. This proposed rule provides for a limited automatic stay of involuntary medication orders, a procedure for seeking to extend the automatic stay in the appellate court, and short deadlines to address the automatic stay and the appeal of the circuit court orders. As explained in greater detail below, the stakeholders involved in drafting this rule believe the process established in this rule will address the needs of all parties and ensure a fair and timely resolution of litigation concerning competency orders, including involuntary medication orders.

## **Discussion**

### Applicability.

The applicability provisions in the petition are very precise. As noted in Subsection (1) of the draft rule, it only “applies to the appeal of an order under s. 971.14.” To be clear that all appeals from such orders follow only the new provisions, the rule expressly states that it “supersedes all inconsistent provisions of this chapter.”

### Postdisposition and Appeal Processes.

The heart of the draft rule is in Subsection (2) and its various paragraphs. Broadly speaking, it is designed to intelligently and fairly expedite the appellate process following the entry of WIS. STAT. § 971.14 orders. These include paragraphs (a)-(e) and (g)-(j), which provides procedures for appeals of § 971.14 orders that include short timelines for initiating the appeal. The procedures are modeled on those used for termination-of-parental-rights (TPR) appeals under WIS. STAT. RULE 809.107, which are expedited appeals. The process begins with the filing of notice of intent, which is used in both TPR appeals and WIS. STAT. RULE 809.30 appeals, and accounts for the appointment of counsel.

### Preparation of Transcripts.

The Committee repeatedly discussed issues related to the preparation of relevant transcripts needed for the appeal of a WIS. STAT. § 971.14 order, and service of the same on parties. As part of this discussion, Committee members are sensitive to the challenges of court-reporter shortages and backlogs, especially in certain counties, but the Committee also recognized that with the twelve-month deadline imposed by 971.14(5)(a)1. and issues with the administration of involuntary medication, it is imperative that transcripts for these appeals be created quickly. The relevant paragraphs in subsection (2) of the rule regarding transcripts are (f), (k), (L) and (m). It should be noted that subsection (2)(f) provides shorter deadlines for filing transcripts if an involuntary medication order is being appealed.

### Use of Expedited One-Judge Appeals.

The Committee extensively discussed whether and how to expedite appeals from WIS. STAT. § 971.14 orders, including whether to employ the procedures used in TPR cases. At one level, most appeals from criminal matters are determined by their severity—*i.e.*, felony offenses are reviewed by a three-judge panel, while misdemeanors are reviewed only by one judge. But we are advocating for all § 971.14 appeals to be one-judge decisions.<sup>2</sup> In addition to helping expedite a process that is very time-sensitive, the Committee believes these competency issues are a bit removed from the underlying criminal merits, and, importantly, are more akin to mental health-related appeals that the court of appeals otherwise often deals with as one-judge appeals (*e.g.*, WIS. STAT. ch. 51, ch. 55). If the Court adopts the rule outlined in this Petition and agrees that the cases should be heard by a single judge, it will also be necessary for the legislature, or this Court if the change is deemed procedural, to amend WIS. STAT. § 752.31, which identifies the types of cases that can be heard by a one-judge panel.

The proposed rule also requires the court of appeals to issue a decision within 30 days after the filing of the appellant's reply brief or statement that a reply brief will not be filed. This is the same deadline applied in TPR appeals. While difficult to pin point, members of our ad hoc committee with close knowledge of these types of appeals of WIS. STAT. § 971.14 orders anticipate that the total number of such appeals will be limited, and certainly much lower than the number of appeals in TPR cases.

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<sup>2</sup> The court of appeals could still grant a motion to decide the case with a three-judge panel, or on its own motion do so, which would make the decision eligible for publication. *See* WIS. STAT. § 752.31(3).

### Appeals by the State.

Subsection (3) of the proposed rule recognizes that, on occasion, the State may wish to appeal an order entered under WIS. STAT. § 971.14, such as to challenge a circuit court decision not to order involuntary medication as a tool to be used to restore a defendant's competency for trial. In addition to also using the 14-day deadline by which to file a notice of appeal, the rule includes requirements for obtaining counsel for indigent defendants for such appeals.

### No-Merit Reports.

Subsection (4) of the rule provides for the normal WIS. STAT. RULE 809.32 procedures for appointed counsel to file a no-merit report, along with a truncated version of the normal response process to such a report. Of note, the rule requires the appointed attorney to serve on the appellant-defendant a copy of the transcript and the record on appeal at the same time that the no-merit report is served on the appellant.

### Processing of Cases in Court of Appeals and Supreme Court.

While the focus of the rule is on the procedures leading up to the commencement on briefing of a challenge to a WIS. STAT. § 971.14 order, Subsection (5) of the proposed rule states that subsequent proceedings in the appeal are governed by the procedures for civil appeals and the procedures under subch. VI, except that the briefing period is shorter, see paras. (a)-(c), and the Court of Appeals is to issue a decision within 30 days after the reply brief is filed or was due (which is similar to a TPR appeal, see para. (d)). The standard 30-day deadline for the filing of a petition for review in the Supreme Court remains, though the rule directs the Supreme Court to give preference to petitions for review under this rule.



### Confidential Party Designation.

The Committee extensively discussed how to balance the public nature of criminal proceedings with the fact that WIS. STAT. § 971.14 appeals involve detailed confidential information about a person's mental health treatment. The Committee recognized that competency reports in a criminal case are generally treated as confidential, but the existence of competency proceedings in the criminal case is not. *See* GF-244 (court form used to transmit confidential records including medical records and "Criminal competency determinations prior to competency hearing"). Ultimately, in subsection (6) we used this language: "For appeals from s. 971.14 orders, the notice of appeal and any other filed documents shall refer to the appellant by one or more initials or other appropriate pseudonym or designation." This language is modeled on WIS. STAT. RULE 809.81(8), for cases that are designated confidential, but appeals under the proposed rule will not themselves be confidential.

To explain, with the proposed language, the defendant's name would not appear on the Court of Appeals website or in filings, but members of the public could still look at the circuit court case number and also review transcripts, etc., that are filed in the circuit court in the underlying criminal proceedings, which, of course, are open matters of public record. However, general online searches of released decisions and briefs would not identify the defendant. The Committee has proposed this unique, hybrid approach in the hopes that there will be some measure of protecting individuals from the disclosure of personal medical information, while at the same time honoring the rights of other individuals to competently follow underlying criminal cases. In this regard, we note that this Supreme Court employed initials in reference to one of the underlying defendants in *State v. Debra A.E.*, 188 Wis. 2d 111, 523 N.W.2d 727 (1994).

In working on this issue, the Committee particularly included insights from the representative of DHS, the agency charged with treating such individuals to competency, as well as from the clerk of the appellate courts (which must process appeals under these new rules). The clerk's office will be adding a new class code for these particular types of appeals, and incorporating procedures similar to those in ch. 51 and ch. 55 civil proceedings involving mental health issues. These and related policies and procedures will help the clerk's office processing of these expedited appeals.

#### Limited Automatic Stay of Involuntary Medication Orders.

Heading into work on this project, the DOJ and SPD held differing views on issues related to an automatic stay of any order under WIS. STAT. § 971.14, especially in relation to involuntary medication orders. Indeed, related issues have been actively litigated in recent years, including a number of such cases in this Court. *See Scott*, 382 Wis. 2d 476, ¶43; *Green*, 401 Wis. 2d 542, ¶36.

Subsection (7) of the proposed rule creates an agreed-to, compromise uniform procedure for automatic stays. After much discussion, the Committee agreed the fourteen-day automatic stay should be limited to orders of involuntary medication for purposes of restoring competency to stand trial.

We recognize that this proposed rule takes a different approach than in *Green*, which eliminated the automatic stay of involuntary medication orders in the prejudgment context, as the State had urged in *Green*. After significant discussion, the members of the Committee concluded that creating a limited automatic stay of involuntary medication orders with certain

briefing and decisional deadlines would meet the needs of stakeholders and best address the challenges presented when an involuntary medication order is not stayed. Specifically, having a limited automatic stay eliminates the need for emergency motions filed with the circuit courts and appellate courts where judges are asked to make immediate decisions about whether to prevent or discontinue the use of involuntary medication while the parties brief the stay issue.

This pause is especially important because according to DHS, starting and then stopping medication is generally medically contraindicated. Having a limited automatic stay also reduces the need for urgent calls to and from DHS to communicate about the status of a motion to stay an involuntary medication order and whether medication should be started or discontinued. Ultimately, all interested parties represented in the ad hoc committee—including representatives of the Attorney General and DHS—agreed to this new approach, which provides a clear roadmap with certain briefing and decisional deadlines that will ensure a prompt and orderly resolution of litigation concerning involuntary medication orders.

#### Need for Further Amendments to other Statutes and Rules.

In addition to proposing this draft rule, the Committee recognizes that there may be a need to update existing statutes and rules. For instance, and as noted above, the Committee recommends that appeals of WIS. STAT. § 971.14 orders be heard by a single Court of Appeals judge, just like appeals of orders pursuant to WIS. STAT. ch. 51. This approach would require an amendment to WIS. STAT. § 751.31(2), which lists the types of cases decided by a single judge. Without such an amendment to this legislatively enacted provision, the courts have no enabling authority to treat the appeals subject to the rule proposed in this petition as reviewable by a single Court of Appeals judge.

Further, it is necessary to amend WIS. STAT. RULE 809.10(1)(d) with respect to docketing statements. Section two of the petition notes the proposed amended text, as well as a minor edit to a relevant part of the appellate electronic filing rule in WIS. STAT. RULE 809.801(5)(c).

Judicial Council Note.

The Judicial Council Note proposed in section three of the petition provides readers of the rule with the underlying policy motivations behind it. The note also clarifies that the rule supersedes case authority that is inconsistent with the rule's provisions. The Judicial Council respectfully requests that the note be adopted and published with the new provisions.

**Feedback from Interested Persons**

In late 2022, certain members of the ad hoc committee on this petition project shared the then-current draft rule with their respective entities—namely, the DHS, the DOJ, the SPD, Court of Appeals staff attorneys, and Court of Appeals judges. The Committee discussed many of these comments at its early 2023 meetings, which led to some additional changes to the draft rule.

Comments received were from members of the SPD and DOJ, as well as from numerous Court of Appeals staff attorneys. The Committee considered all of these comments and, to the extent necessary, addressed them in the draft rule. No Court of Appeals judge objected to the rule, including its providing for an expedited decisional deadline as a one-judge appeal. Indeed, one judge expressly advocated for this procedure.

In March 2023, the Committee’s draft of proposed provisions were again circulated, this time to a broader audience that including the foregoing entities and many more. These interested parties were the DOJ, State Bar of Wisconsin Litigation & Appellate Practice Sections, Court of Appeals, Wisconsin Association for Justice, Wisconsin Association of Criminal Defense Lawyers, Marquette Law School, University of Wisconsin Law School, the Wisconsin District Attorney’s Association, Disability Rights Wisconsin, SPD, and DHS. See Appendix 2. No group or individual submitted any opposition to the proposed amendments. Indeed, all comments received were favorable to having such proposed rules and their content.

The Appellate Procedure Committee’s final draft proposal was forwarded to the full Judicial Council for consideration in advance of its September 2023 meeting. Only one minor change was made to the proposed rule, based on discussion. Namely, we had originally set the due date for the merits reply brief as being “within 10 days after service of the respondent’s brief,” which would thereby trigger WIS. STAT. § 801.15(1)(b) (which states, in part, that, “When the period of time prescribed or allowed is less than 11 days, Saturdays, Sundays and holidays shall be excluded in the computation.”) Rather than excluding intermediate Saturdays, Sundays and holidays in terms of setting the deadline, and in the interest of expediting matters, the due date was changed to “within 11 days after service of the respondent’s brief.” The Judicial Council then unanimously directed the Committee to file the petition and supporting memorandum, which also was approved by the Judicial Council for filing.

## Conclusion

The provisions proposed in the petition are designed to clarify and make much more efficient the procedures and rights related to appeals of decisions under WIS. STAT. § 971.14. They will aid practitioners, litigants, judges, individuals being involuntarily treated to restore to mental competency in order to stand trial, victims of crime, and the public at large, and improve court efficiency. Therefore, the Wisconsin Judicial Council respectfully requests the court to adopt the proposed provisions in the accompanying petition.

Respectfully submitted this 12th day of October, 2023

Wisconsin Judicial Council

*Electronically signed by:*

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## APPENDIX 1

### Judicial Council Appellate Procedure Committee Members During Rule Drafting

#### Committee Chairs and Reporters:

Professor Steven Wright  
University of Wisconsin Law School  
Chair, 6/2018 to 8/2019

Atty. Jennifer Andrews (ad hoc)  
Chief Staff Attorney, Court of Appeals  
Temporary Chair, 10/2019-3/2020  
Committee reporter, 2015-4/2021

Hon. Thomas Hruz  
Wisconsin Court of Appeals Judge  
Chair, 3/2020-present

Atty. Christina Plum (ad hoc)  
Chief Staff Attorney, Court of Appeals  
Committee reporter, 4/2021-present

#### Judicial Council Members:

Sarah Walkenhorst Barber  
Senior Legislative Attorney  
Legislative Reference Bureau  
2015-present

Dennis Meyers  
Governor appointee  
2015-2022

Molly E. McNab  
Wisconsin Dep't of Natural Resources  
8/2022-present

Nick Zales  
Zales Law Office  
8/2022-7/2023

#### Ad Hoc Members:

*Clerks of the Supreme Court and Court of Appeals*

Diane Fremgen, 2015-4/2018

Sheila Reiff, 5/2018-6/2023

Samuel Christensen, 6/2023-present

*Department of Justice Representatives*

Karla Keckhaver, 2015-present

Winn Collins, 11/2019-present

Maura Whelan, 1/2021-7/2021

Robert Kaiser, Jr., 1/2021-present

Kara Janson, 7/2021-present

*State Public Defender Representatives*

Jeremy Perri, 2015-9/2019

Colleen Ball, 11/2019-6/2023

Katie York, 11/2019-present

Faun Moses, 6/2023-present

*Department of Health Services Representatives*

Dennis C. Schuh, 12/2019-1/2021

Holly O. Audley, 12/2019-7/2022

Kevin Bailey, 1/2021-7/2021

Anne Bensky, 7/2021-present

## APPENDIX 2

Judicial Council Appellate Procedure Committee  
Proposed Rule for Appeals from WIS. STAT. § 971.14 Decisions and Orders  
Request for Comments—Potentially Interested Persons  
*Distribution List - March 2023*

### **Department of Justice**

Attorney General Josh Kaul  
Assistant Attorney General Karla Keckhaver  
Assistant Attorney General Kara Janson

### **Director of State Courts**

Randy Koschnik, Director  
Karley Downing, Chief Legal counsel

### **Disability Rights Wisconsin**

Barbara Beckert  
Kit Kerschensteiner

### **Marquette Law School**

Dean Joseph Kearney

### **State Bar of Wisconsin Criminal Law, Litigation & Appellate Practice Sections**

Nick Grode  
Lynne Davis  
Christine Casey

### **State Public Defender's Office**

Public Defender Kelli S. Thompson  
Assistant Public Defender Katie York

### **University of Wisconsin Law School**

Dean Daniel Tokaji

### **Wisconsin Association of Criminal Defense Lawyers**

Executive Director Jessica Giesen  
Executive Director Lindsay Marty

### **Wisconsin Association for Justice**

Executive Director Bryan Roessler

### **Wisconsin Court of Appeals**

Chief Staff Attorney Christina Plum

### **Wisconsin District Attorneys Association**

President Eric Toney  
Legislative Committee Chair Barry Braatz

### **Wisconsin Defense Counsel**

Executive Director Jenni Kilpatrick