

SUPREME COURT OF WISCONSIN

NOTICE

This order is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 23-05

**In the Matter of Proposed Rules Relating to
Appellate Court Proceedings From Orders Entered
Pursuant to Wis. Stat. § 971.14 Regarding
Pretrial Competency Rulings in Criminal Cases**

FILED**MAY 2, 2024**

Samuel A. Christensen
Clerk of Supreme Court
Madison, WI

On October 12, 2023, the Wisconsin Judicial Council, by Attorney William C. Gleisner, III, Chair, and its Appellate Procedure Committee, by the Honorable Thomas M. Hruz, Chair, filed this rule petition to create Wis. Stat. § (Rule) 809.109 and amend Wis. Stat. §§ (Rules) 809.10(1)(d) and 809.801(5)(c) to establish an expedited appeals procedure from orders entered pursuant to Wis. Stat. § 971.14, which governs competency proceedings in criminal cases.

The Wisconsin Judicial Council states that the goal of this petition is to establish a uniform and expedited procedure for appeals from circuit court orders regarding criminal prejudgment competency determinations and orders for involuntary medication to restore a defendant to competency pursuant to Wis. Stat. § 971.14. The petition is filed pursuant to this court's rulemaking authority under Wis. Stat. § 751.12.

The petition 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. Representatives from the Wisconsin Department of Justice, the State Public Defender's Office, and the Wisconsin Department of Health Services joined the Appellate Procedure Committee as ad hoc members and participated in drafting the petition.

Before filing the petition, the ad hoc members circulated the draft rule with their respective entities. After the Appellate Procedure Committee addressed comments received from the ad hoc members, it circulated the proposed rule to: the Department of Justice; the State Public Defender's Office; the Department of Health Services; the State Bar of Wisconsin Litigation Section; the State Bar Appellate Practice Section; Court of Appeals staff; the Wisconsin Association for Justice; the Wisconsin Association of Criminal Defense Lawyers; Marquette Law School; University of Wisconsin Law School; the Wisconsin District Attorney's Association; and Disability Rights Wisconsin. The Appellate Procedure Committee's final petition was presented to the Wisconsin Judicial Council in September 2023, and was approved for filing.

The court voted to solicit public comments and schedule a public hearing. A letter soliciting public comments was sent to interested persons on October 31, 2023, and the same day, the court submitted written questions to the petitioners. On November 27, 2023, the petitioners responded to the court's questions and agreed to certain modifications to the petition.

A public hearing notice issued on December 21, 2023, and the court held a public hearing on January 25, 2024. Attorney Katie R. York, Acting State Public Defender, presented the petition to the court on behalf of the Wisconsin Judicial Council. Attorney Robert J. Kaiser, Jr., and Attorney Kara L. Janson from the Department of Justice spoke in favor of the petition. The Honorable Thomas M. Hruz addressed specific questions from the court.

At the ensuing open administrative conference, the court voted 5-2 to grant the petition and to revise the rules as requested and modified.

Therefore,

IT IS ORDERED that, effective July 1, 2024:

SECTION 1. Wisconsin Stat. § (Rule) 809.10 (1) (d) is amended to read:

809.10 (1) (d) *Docketing statement.* The person shall file in the circuit court a completed docketing statement on a form prescribed by the court of appeals. The docketing statement shall accompany the notice of appeal. Docketing statements need not be filed in appeals brought under s. 809.105, 809.107, 809.109, 809.32, or 974.06 (7), in cases under ch. 980, or in cases in which a party represents himself or herself. Docketing statements need not be filed in appeals brought under s. 809.30 or 974.05, or by the state or defendant in permissive appeals in criminal cases pursuant to s. 809.50, except that docketing statements shall be filed in cases arising under ch. 48, 51, 55, or 938.

SECTION 2. Wisconsin Stat. § (Rule) 809.109 is created to read:

Rule (Appeals from orders entered pursuant to s. 971.14).

(1) **APPLICABILITY.** This section applies to the appeal of an order under s. 971.14 and supersedes all inconsistent provisions of this chapter.

(2) **APPEAL OR POSTDISPOSITION MOTION.**

(a) *Appeal procedure; counsel to continue.* A person seeking postdisposition or appellate relief shall comply with this section. If the person desires to pursue postdisposition or appellate relief, counsel representing the person during circuit court proceedings under s. 971.14 shall continue representation by filing a notice under par.

(b) unless sooner discharged by the person or by the circuit court.

(b) *Notice of intent to pursue postdisposition or appellate relief.* Within 14 days of the entry of an order under s. 971.14 determining competency to proceed or ordering the involuntary administration of medication, the person shall file in the circuit court and serve on the prosecutor, any other party, and the department of health services, a notice of intent to pursue postdisposition or appellate relief. If the record discloses that entry of the order occurred after the notice of intent was filed, the notice shall be treated as filed after entry of the order appealed from on the day of the entry of the final order. The notice of intent shall include all of the following:

1. The circuit court case name, number, and caption.

2. An identification of the order from which the person intends to seek postdisposition or appellate relief and the date on which the order was entered.

3. The name and address of the person and the person's trial counsel.

4. Whether the person requests representation by the state public defender for purposes of postdisposition or appellate relief.

5. For a person who does not request representation by the state public defender, whether the person will proceed without counsel or will be represented by retained counsel. If the person has retained counsel to pursue postdisposition or appellate relief, counsel's name and address shall be included.

(c) *Clerk to send materials.* Within 5 days after a notice under par. (b) is filed, the clerk of the circuit court shall do all of the following:

1. If the person requests representation by the state public defender for purposes of postdisposition or appellate relief, the clerk shall send to the state public defender's appellate intake office a copy of the notice of intent that shows the date on which the notice was filed, a copy of the order specified in the notice that shows the date on which the order was entered, a list of the court reporters for each proceeding under s. 971.14 in the action in which the order was entered, and a list of those proceedings for which a transcript already has been filed with the clerk of circuit court.

2. If the person does not request representation by the state public defender, the clerk shall send or furnish to the person, if the person is appearing without counsel, or to the person's attorney, if one has been retained, a copy of the order or order specified in the notice that shows the date on which the order was entered, a list of the court reporters for each proceeding in the action in which the order was entered, and a list of those proceedings in which a transcript already has been filed with the clerk of circuit court.

(d) *State public defender appointment of counsel; request for transcript and circuit court case record.* Within 15 days after the state public defender appellate intake office receives the materials from the clerk of circuit court under par. (c), the state public defender shall appoint counsel for the person and request a transcript of the court reporter's verbatim record, if not ordered under par. (f) 1., and a copy of the circuit court case record.

(e) *Person not represented by public defender.* A person who does not request representation by the state public defender for purposes of postdisposition or appellate relief shall request a transcript of the court reporter's verbatim record, and may request a copy of the circuit court case record within 15 days after filing the notice of intent under par. (b). A person who is denied representation by the state public defender for purposes of postdisposition or appellate relief shall request a transcript of the court reporter's verbatim record, and may request a copy of the circuit court case record, within 30 days after filing a notice of intent under par. (b).

(f) *Filing and service of transcript and circuit court case record.*

1. If involuntary medication is ordered under s. 971.14, the subject of the order or counsel representing the person shall within 3 days of involuntary medication being ordered, request the transcript of any portion of the proceedings relating to the involuntary medication order. The court reporter shall file the transcript with the circuit court and serve copies on the parties within 14 days of the request.

2. Except transcripts requested under par. 1., the court reporter shall file the transcript with the circuit court and serve a copy of the transcript on the person within 30 days after the transcript is

requested; within 10 days after the request for a transcript of postdisposition proceedings brought under par. (g), the court reporter shall file the transcript with the circuit court and serve a copy on the parties entitled to a copy. The clerk of circuit court shall serve a copy of the circuit court case record on the person within 30 days after the case record is requested, and shall indicate in the case record the date and manner of service.

(g) *Notice of appeal, postdisposition motion.* The person shall file in the circuit court a notice of appeal or motion seeking postdisposition relief within 30 days after the later of the service of the transcript or circuit court case record. A notice of appeal filed under this section shall conform to the requirements set forth in 809.10. The appeal shall be initiated and docketed in accordance with ss. 809.10 and 809.11.

(h) *Order determining postdisposition motion.* Unless an extension is requested by a party or the circuit court and granted by the court of appeals, the circuit court shall determine by an order the person's motion for postdisposition relief within 30 days after the filing of the motion or the motion is considered to be denied and the clerk of circuit court shall immediately enter an order denying the motion. The person shall file a motion for postdisposition relief in the circuit court before a notice of appeal is filed unless the grounds for seeking relief are sufficiency of the evidence or issues previously raised.

(i) *Appeal from order.* The person shall file in the circuit court a notice of appeal from the order and, if necessary, from the order of the circuit court on the motion for postdisposition relief within 5 days of the entry of the order on the postdisposition motion. A notice

of appeal filed under this section shall conform to the requirements set forth in s. 809.10. The appeal shall be initiated and docketed in accordance with ss. 809.10 and 809.11.

(j) *Notice of abandonment of appeal.* If a person who filed a notice of intent to seek postdisposition relief under par. (b) and requested a transcript and case record under pars. (d) or (e) decides not to file a notice of appeal, the person shall notify the circuit court, prosecutor, and the Department of Health Services of the decision, within 30 days after the service of the transcript and case record under par. (f) 2.

(k) *Requesting transcripts for other parties.* The appellant shall request a copy of the transcript of the court reporter's verbatim record of the proceedings for each of the parties to the appeal and make arrangements to pay for the transcript and copies within 5 days after the filing of the notice of appeal.

(L) *Statement on transcript.* Within 5 days after filing the notice of appeal, the appellant shall file a statement on transcript with the clerk of circuit court, who shall transmit the statement on transcript to the clerk of the court of appeals within 3 days after its filing. The statement on transcript shall either designate the portions of the transcript that have been requested by the appellant or contain a statement by the appellant that a transcript is not necessary for prosecution of the appeal. If a transcript is necessary for prosecution of the appeal, the statement on transcript shall also contain a statement by the court reporter that the appellant has requested copies of the transcript or designated portions thereof for each of the other parties; that the appellant has made arrangements to pay for the

original transcript and for all copies for other parties; the date on which the appellant requested the transcript and made arrangements to pay for it; and the date on which the transcript must be served on the parties.

(m) *Service of transcript on other parties.* The court reporter shall serve copies of the transcript on the parties indicated in the statement on transcript within 5 days after the date the appellant requested copies of the transcript under par. (k).

(3) APPEAL BY STATE; APPOINTMENT OF COUNSEL. The State may appeal an order entered under s. 971.14 by filing a notice of appeal within 14 days after entry of the judgment or order. If the person who is the subject of the case or proceeding claims to be indigent, the court shall refer the person to the state public defender for the determination of indigency and the appointment of legal counsel under ch. 977.

(4) NO-MERIT REPORTS. A s. 809.32 no-merit report, response, and supplemental no-merit report may be filed in an appeal from an order entered under s. 971.14. The appointed attorney shall file in the court of appeals and serve on the appellant the no-merit report and certification within 15 days after the filing of the record on appeal. The appointed attorney shall serve on the appellant a copy of the transcript and the record on appeal at the same time that the no-merit report is served on the appellant. The appellant may file in the court of appeals a response to the no-merit report within 10 days after service of the no-merit report. The attorney may file a supplemental no-merit report and affidavit within 10 days after receiving the response to the no-merit report.

(5) SUBSEQUENT PROCEEDINGS IN COURT OF APPEALS; PETITION FOR REVIEW IN SUPREME COURT. Subsequent proceedings in the appeal are governed by the procedures for civil appeals and the procedures under subch. VI, except as follows:

(a) *Appellant's brief-in-chief.* The appellant shall file a brief within 15 days after the filing of the record on appeal.

(b) *Respondent's brief.* The respondent shall file a brief within 15 days after the service of the appellant's brief.

(c) *Appellant's reply brief.* The appellant shall file a reply brief, or a statement that a reply brief will not be filed, within 11 days after service of the respondent's brief.

(d) *Decision.* Cases appealed under this section shall be given preference and shall be taken in an order that ensures that a decision is issued within 30 days after the filing of the appellant's reply brief or statement that a reply brief will not be filed.

(e) *Petition for review.* A petition for review of an appeal in the supreme court, if any, shall be filed within 30 days after the date of the decision of the court of appeals. The supreme court shall give preference to a petition for review of an appeal filed under this paragraph.

(6) CONFIDENTIAL PARTY DESIGNATION. For appeals under this section, the notice of appeal and any other filed documents shall refer to the person subject to the s. 971.14 order that is being appealed by one or more initials or other appropriate pseudonym or designation.

(7) STAY PENDING POSTDISPOSITION PROCEEDING AND APPEAL.

(a) *Automatic stay.* The involuntary administration of medication ordered for purposes of restoring competency pursuant to s. 971.14 shall be automatically stayed for 14 days.

(b) *Notice of motion to continue stay.* If a notice of intent to pursue postdisposition or appellate relief is filed under sub. (2) (b), the person may file in the court of appeals a notice of motion to continue the stay under par. (a) pending postdisposition proceedings and appeal.

1. The stay is continued upon filing the notice in par. (b), and continues until the motion is decided by the court;

2. The moving party shall file a memorandum in support of the motion for stay within 11 days after service of the transcript in sub. (2) (f) 1.

3. The respondent shall file a response within 11 days after service of the memorandum.

4. The court shall decide the motion for stay of the medication order within 14 days after the response is filed.

SECTION 3. A Judicial Council Note to Wis. Stat. § (Rule) 809.109 is created to read:

Judicial Council Note, 2024: This section provides a uniform, organized, and expedited handling of appeals from orders under s. 971.14. Such appeals are unique in that the underlying case is criminal, but the nature of the appeal involves the defendant's mental health and is deemed a special civil proceeding. Further, the competency orders are final for purposes of appeal, even though the criminal case has not been resolved. See State v. Scott, 2018 WI 74, ¶31, 382 Wis. 2d 476, 914 N.W.2d 141.

The unique nature of these appeals, including the short timeline within which the State must restore a defendant to competency per s. 971.14 (5) (a) 1., supports an expedited procedure for handling these appeals. Section 809.109 also codifies miscellaneous aspects of court decisions. To the extent that any provision of this section is inconsistent with preexisting case authority, this rule governs. For example, this section creates a limited automatic stay of involuntary medication orders in the prejudgment context, even though case law no longer requires an automatic stay. See State v. Green, 2022 WI 30, ¶36, 401 Wis. 2d 542, 973 N.W.2d 770.

SECTION 4. Wisconsin Stat. § (Rule) 809.801 (5) (c) is amended to read:

809.801 (5) (c) *Appeals from circuit court.* A user seeking to initiate an appeal under s. 809.10, 809.103, 809.104, 809.105, 809.107, 809.109, 809.30, 809.32, or 809.40 shall file a notice of appeal in the circuit court case appealed from as provided in that section. The clerk of circuit court shall transmit the notice of appeal to the clerk of the court of appeals. The docketing statement, motions under s. 809.41 (1) or (4), and statement on transcript, where applicable, shall also be filed with the clerk of circuit court and transmitted to the clerk of the court of appeals. Service shall be as provided in s. 809.10 (1) (h).

IT IS FURTHER ORDERED that the Judicial Council Note to Wis. Stat. § (Rule) 809.109 is not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule.

IT IS FURTHER ORDERED that notice of the above amendments be given by a single publication of a copy of this order in the official

publications designated in SCR 80.01, including the official publishers' online databases, and on the Wisconsin court system's web site. The State Bar of Wisconsin shall provide notice of this order.

Samuel A. Christensen
Clerk of Supreme Court

¶1 REBECCA FRANK DALLET, J. (*concurring*). This rule petition creates an expedited appeals process for pre-trial criminal competency and involuntary medication orders, and provides that an automatic 14-day stay pending appeal applies to such involuntary medication orders, abrogating our decision in State v. Green, 2022 WI 30, 401 Wis. 2d 542, 973 N.W.2d 770. These procedural changes are important because they create a process for protecting a substantive right: An individual's strong liberty interest in avoiding the unwanted administration of antipsychotic medication. See State v. Scott, 2018 WI 74, ¶44, 382 Wis. 2d 476, 914 N.W.2d 141 (citing Sell v. United States, 539 U.S. 166, 177 (2003)). And the automatic stay is central to the expedited appeals process because it helps to ensure that this substantive right isn't rendered "a nullity" by the administration of involuntary medication before an individual can appeal. See id. (citing Sell, 539 U.S. at 177). Additionally, the automatic stay will reduce the need for emergency filings in the circuit court and court of appeals, and prevent the harmful effects of medicating individuals before an appeal can conclusively determine whether individuals have the substantive right to refuse involuntary medication.

¶2 In short, the petition streamlines the process for such appeals while balancing the important interests at play in pre-trial competency and involuntary medication cases. It should be no surprise, then, that we received no statements in opposition to the petition at any point in the process, and that the petition is

supported by both the Department of Justice and the State Public Defender's Office. I join the order adopting the rule petition.

¶3 I write separately to emphasize that these rule changes, particularly the automatic stay, fit squarely within the court's authority to adopt rules regulating "pleading, practice, and procedure" and do not "abridge, enlarge, or modify the substantive rights of any litigant." See Wis. Stat. § 751.12(1). As our prior cases have explained, "a procedural law is that which concerns the manner and order of conduct suits or the mode of proceeding to enforce legal rights" Trinity Petroleum, Inc. v. Scott Oil Co., Inc., 2007 WI 88, ¶41, 302 Wis. 2d 299, 735 N.W.2d 1 (quoting another source). A substantive law, by contrast, "is one that establishes the rights and duties of a party." Id.

¶4 This distinction can sometimes be difficult to see, because virtually all procedural rules have some effect on substantive rights. See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 407 (2010). For example, a rule authorizing sanctions against individuals who bring frivolous lawsuits has obvious practical effects on parties' substantive rights. See Wis. Stat. § 802.05. Nonetheless, we held that such a rule was procedural because it was adopted as part of the state's rules of civil procedure in an effort to deter frivolous filings and to promote efficient adjudication of legal claims on the merits. See Trinity Petroleum, 302 Wis. 2d 299, ¶¶46-51. What mattered was that the rule regulated the process by which litigants could enforce their substantive rights, and did not alter the underlying rights themselves. See id.

¶5 Here, the line between substance and procedure is easy to draw. Substantively, pre-trial criminal defendants have the right to refuse the unwanted administration of antipsychotic medication unless the state shows a countervailing "'essential' or 'overriding' state interest" See Sell, 539 U.S. at 178-79. Nothing in the petition alters that substantive right, which is determined by a circuit court and is subject to review on appeal. Instead, the petition creates an expedited appeals process whereby defendants may seek review of a circuit court order that implicates their substantive rights. All the automatic 14-day stay of the circuit court's order pending that appeal does is ensure that this appeals process remains meaningful and accessible. In other words, the rule is procedural, and thus falls within our authority to regulate "procedure in judicial proceedings in all courts, for the purposes of simplifying the same and of promoting the speedy determination of litigation upon its merits." See Wis. Stat. § 751.12(1). Moreover, nothing in the petition restricts the legislature's right to "enact, modify, or repeal" the rule if it disagrees with our judgment. See id. (4). Accordingly, I respectfully concur.

¶6 I am authorized to state that Justices ANN WALSH BRADLEY, JILL J. KAROFSKY, and JANET C. PROTASIEWICZ join this concurrence.

¶7 REBECCA GRASSL BRADLEY, J. (*dissenting*). This rule petition asks the court to establish an expedited appellate procedure for pretrial competency and involuntary medication orders in criminal cases. Attorneys practicing in the criminal justice system advocate for the court to adopt this rule to "ensure a fair and timely resolution of litigation" in which the State seeks to medicate a criminal defendant, without his consent, prior to trial. In adopting this proposed rule, the court abrogates its own decision from just two years ago, which concluded that involuntary medication orders are not subject to automatic stays, State v. Green, 2022 WI 30, ¶36, 401 Wis. 2d 542, 973 N.W.2d 770, and adopts the dissent's position in that case. Id., ¶¶70-72 (Ann Walsh Bradley, J., concurring in part, dissenting in part). Without the benefit of adversarial proceedings, the majority decrees involuntary medication orders are now stayed for 14 days pending appeal. Overruling a case in this manner appears to be without precedent, in derogation of this court's custom, and in violation of the statutory limits on this court's rulemaking authority. Because granting this rule petition creates a dangerous precedent for overturning the holdings of prior cases by fiat, I dissent.

¶8 Although as a policy matter the new rule may promote the majority's sense of justice, judicial lawmaking lies beyond this court's constitutional and statutory authority. In Green, the court considered the constitutional rights of the defendant to refuse medication, the interests of the state in restoring a

criminal defendant to competency for trial, and the statutory limitations governing attempts to restore a defendant's competency. Id., ¶35. Weighing these interests, the court held that involuntary medication orders are not subject to an automatic stay pending appeal.¹ Id., ¶36. The court distinguished an earlier case² in declining to exercise its superintending authority to institute an automatic stay for pretrial involuntary medication orders. Id., ¶¶34-36. Invoking this court's rulemaking authority, the majority in this matter reverses course, declaring involuntary medication orders automatically stayed for 14 days, thereby significantly changing the law.

¶9 In granting this rule petition, the majority abandons judicial restraint and forges a new avenue for swiftly overturning decisions outside of normal appellate procedure. This appears to be the first time the court has overturned or modified precedent via rule. During the open administrative conference on this rule petition, Justice Rebecca Frank Dallet cited purported precedent for this action: "The United States Supreme Court has done it before in 1993 when they adopted amendments to the Federal Rules

¹ Justice Ann Walsh Bradley, joined by Rebecca Frank Dallet and Jill J. Karofsky, dissented in part and would have ruled pretrial involuntary medication orders must be stayed pending appeal. State v. Green, 2022 WI 30, ¶¶70-72, 401 Wis. 2d 542, 973 N.W.2d 770 (Ann Walsh Bradley, J., concurring in part, dissenting in part).

² Pursuant to its "superintending authority," the court decided "involuntary medication orders are subject to an automatic stay pending appeal" in postconviction proceedings. State v. Scott, 2018 WI 74, ¶43, 382 Wis. 2d 476, 914 N.W.2d 141.

of Civil Procedure 11 that overturned [Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989),] so it is something that there is precedent for" ³ She claimed the only alternative to resolving the issue raised by the Judicial Council would be another case making its way through the court system. Of course, Justice Dallet failed to acknowledge the law could be changed by the only branch of government the people of Wisconsin gave constitutional authority for lawmaking: the legislature. Although regulating appellate practice and procedure lies within this court's purview, see Wis. Const. Art. VII, § 3(1); Wis. Stat. § 751.12(1), the majority's action on this rule goes beyond appellate procedure by instituting a 14-day automatic stay in direct contravention of this court's precedent and the statutory prohibition on changing the substantive rights of litigants.

¶10 Pavelic does not support Justice Dallet's suggestion that the United States Supreme Court has overturned precedent by rule. In that case, the Court held that Rule 11 of the Federal Rules of Civil Procedure did not allow sanctions against an attorney's law firm. Pavelic, 493 U.S. at 126-27. At that time, Rule 11 provided: "'If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it . . . an appropriate sanction.'" Id. at 121 (ellipses in original). Writing for the Court, Justice

³ Justice Rebecca Frank Dallet at 25:55-26:15, Wisconsin Supreme Court Rules Open Conference, Jan. 25, 2024 available at <https://wiseeye.org/2024/01/25/wisconsin-supreme-court-rules-open-conference-2/>.

Antonin Scalia observed: "Our task is to apply the text, not to improve upon it." Id. at 126. After that decision, Rule 11 was amended through standard procedures to permit sanctions against law firms.⁴ Under federal law, the United States Supreme Court submits changes to the rules of civil procedure for legislative review before they go into effect.⁵ See 28 U.S.C. § 2074(a). "Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence for the federal courts, subject to the ultimate legislative right of the Congress to reject, modify, or defer any of the rules."⁶

¶11 Unlike the analogous federal procedure under which Congress may review, revise, and ultimately reject proposed changes to the rules of appellate practice and procedure, this court's authority to promulgate rules is not subject to preemptive legislative review. If this court's decisions produce consequences unpalatable to those affected by them, proposed policy changes should be presented to the people's representatives to address them through the legislative process. To the extent proposed rule changes affect a party's substantive rights, this court has no authority to adopt them; under Wis. Stat. § 751.12(1),

⁴ The Notes of Advisory Committee on Rules for the 1993 Amendment to Rule 11 explain this new provision was "designed to remove the restrictions of the former rule" established in Pavelic.

⁵ Overview for the Bench, Bar, and Public, U.S. Cts., <https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public> (last visited Mar. 25, 2024).

⁶ Id.

rules promulgated by this court "shall not abridge, enlarge, or modify the substantive rights of any litigant." Petitioners acknowledge this rule enlarges the substantive rights of criminal defendants for whom the state seeks involuntary medication orders by reducing the "risk of such defendants receiving the intermittent [sic] administration of involuntary medication." See Appendix 1 at 3-4.

¶12 Although the Judicial Council's proposed procedures for appeals of Wis. Stat. § 971.14 orders may have merit, abrogating this court's holding in Green via rule change in order to adopt them establishes an unprecedented practice. This type of maneuver should not become the norm. "[T]he further our rules depart from our traditional practices, the more troubling becomes the question of our rulemaking authority." Bus. Guides, Inc. v. Chromatic Commuc'ns Enters., 498 U.S. 533, 565 (1991) (Kennedy, J. dissenting).

¶13 The coalition of advocates who support this rule change sought to rebalance the rights of criminal defendants and the interests of the State in restoring their competency. But process matters, and this court already ruled on the matter in Green. Using this court's rulemaking authority to overrule precedent, despite a statutory prohibition on this court's power to modify defendants' substantive rights in this manner, threatens the rule of law by paving a path toward bypassing judicial decisionmaking to facilitate the imposition of judicial will by decree. I dissent.

¶14 I am authorized to state that Chief Justice ANNETTE KINGSLAND ZIEGLER joins this dissent.

Appendix 1

**PETITION FOR RULE-MAKING
IN THE SUPREME COURT OF WISCONSIN**

COVER SHEET

IN THE MATTER OF

AMENDMENT

CREATION

OF Creation of WIS. STAT. 809.109 and Amendment of RULES
809.10(1)(d) and 809.801(5)(c)

(list statute, rule, or administrative matter)

1. Petitioner(s): Wisconsin Judicial Council

Contact Person's Information

Name Hon. Thomas M. Hruz

Address

[REDACTED]

[REDACTED]

Telephone

[REDACTED]

E-mail

[REDACTED]

2. Subject matter of petition:

To establish a procedure for appeals from orders entered pursuant to WIS. STAT. § 971.14, which governs competency proceedings in criminal cases, including the ordering of involuntary medication aimed at restoring a criminal defendant to competency to stand trial.

3. Type of petition (check all that apply):

Pleading and practice (Wis. Stat. § 751.12)

Supreme Court Rule

Administrative matter (e.g. Electronic Filing)

Other. Please explain.

4. Type of change (check all that apply):

- Creation of statute (Wis. Stat. § 751.12)
- Creation of Supreme Court Rule
- Creation of Administrative rule
- Amendment of existing statute (Wis. Stat. § 751.12)
- Amendment of existing Supreme Court Rule
- Amendment of existing Administrative rule

5. Supreme Court Rule, statute, or administrative matter to be amended or created:

Create WIS. STAT. RULE 809.109 and amend RULES 809.10(1)(d) and 809.801(5)(c) of the Rules of Appellate Procedure.

6. Principal reason or purpose for this petition:

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.

7. Identify Supreme Court Rule, statute, or administrative matter that may be affected by, or are in conflict with, the petition.

None that currently exist. One of the realities prompting this petition is the lack of any specific procedural rules regarding appeals from orders entered pursuant to WIS. STAT. § 971.14.

8. Rules that the supreme court promulgates to regulate pleading, practice, and procedure in judicial proceedings shall not abridge, enlarge, or modify the substantive rights of any litigant. Wis. Stat. § 751.12(1).

- a. How would the petition affect any person's procedural rights?

Overall, it will enhance, clarify, and expedite the handling of often time-sensitive appeals and motions to stay involuntary medication orders. In addition, adoption of a limited automatic stay will eliminate 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 otherwise brief the stay issue.

- b. How would the petition affect any person's substantive rights?

The most notable impact is that criminal defendants who are ordered to receive involuntary medication aimed at restoring them to competency to stand trial will receive an automatic stay of such an order and have the ability to seek further relief pending appeal. As such, there is a

much lesser risk of such defendants receiving the intermittent administration of involuntary medication.

9. Potential fiscal impact of petition (further explanation may be provided in supporting memorandum to the petition).

Minimal. Such impact, if any, is reflected in the supporting memorandum. As the appeals of the orders at issue are already made as a matter of right, the petition is net neutral in terms of the costs of appeals.

10. Potential administrative impact of the petition (further explanation may be provided in supporting memorandum to the petition).

Minimal. Such impact, if any, is reflected in the supporting memorandum.

11. Identify any related pending petition. For a list of petitions, see <https://www.wicourts.gov/srules/pending.htm>

None.

12. Are you requesting a public hearing? If so, please explain.

Yes.

No.

While we are not requesting a public hearing, the committee and stakeholders who worked on the proposed rule are certainly willing to provide testimony if it would be helpful to the court.

13. Is expedited consideration necessary?

Yes. If so, please explain.

No.

14. Proposed effective date.

Note: A rule change under Wis. Stat. § 751.12 shall have an effective date of January 1 or July 1.

July 1, 2024.

