STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MATTHEW ALLEN LILEK,
Defendant-Appellant.

# BRIEF OF DEFENDANT-APPELLANT

Case No. 2012AP001855CR

Trial Case No. 2008CF002852 (Milwaukee Co.)

APPEALED FROM THE JUDGMENT OF CONVICTION AND SENTENCE ENTERED ON APRIL 13, 2010, AND FROM THE DECISION AND ORDER DENYING THE DEFENDANT'S POST-CONVICTION MOTION ENTERED ON AUGUST 6, 2012,
THE HONORABLE REBECCA F. DALLET, PRESIDING.

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## ISSUES PRESENTED

**1. Did the trial court err when it denied the defendant's Bangert motion without a hearing?**

**2. Did the court erroneously exercise its discretion when it sentenced the defendant?**

The circuit court denied the defendant's post conviction motions for plea withdrawal and resentencing without a hearing.

**3. Did the court lost competency to proceed, or in the alternative erroneously exercise its discretion, when it continued Matthew's competency hearing over objection?**

This issue was not addressed by the trial court.

## STATEMENT ON NECESSITY OF ORAL ARGUMENT & PUBLICATION OF OPINION

Defendant-Appellant does not request oral argument. The issues presented can be fully argued in the parties' briefs. We believe, given the individual characteristics of the defendant, that the case warrants consideration for publication.

## STATEMENT OF THE CASE
## STATEMENT OF FACTS

Matthew Lilek is a 44 year old first offender presently serving a 35 year sentence for 2nd Degree Sexual Assault and Aggravated Battery. His convictions arose out of an incident that allegedly occurred on May 31, 2008 at the Badger Home for the Blind, where Matthew and the

alleged victim were residents. Matthew's criminal case was initially assigned to Judge M. Joseph Donald, transferred to Judge Carl Ashley, with the ultimate sentencing presided over by Judge Rebecca Dallet. The criminal complaint was filed on June 5, 2008 (R. 2). Matthew entered his plea on January 14, 2010. His sentencing was held on April 12, 2010 (R. 123). Much of the delay in the resolution of the case can be attributed to issues regarding Matthew's competency. Competency was placed in issue by his attorney on July 11, 2008 (R. 5). Matthew was found to be competent on May 13, 2009 (R. 115:93). An NGI plea was also considered, and evaluations were completed. An NGI plea was not pursued.

According to documents submitted to the court, Matthew was born on February 8, 1967. He has been certified as legally blind and has received services for blindness throughout his life (R. 8:2, R. 30). Matthew has also suffered from multiple other disabilities.

At age three months Matthew suffered from encephalitis and acute inflammation of his brain. This was diagnosed as a chronic neurological disorder which caused reoccurring seizures. Controlling his seizures has been a life-long challenge. Multiple drug treatments through various doctors have been tried over the course of Matthew's lifetime (R. 46:2).

In 1997 Matthew underwent a procedure that involved mapping his brain to locate the cause of his seizures. A partial frontal lobectomy was performed. There was a complication and Matthew experienced a fluid build-up on his brain. He was in intensive care for three weeks and released from the hospital after two months. His seizures stopped for three years but then he started experiencing them again (R. 52:10).

In 2004 he underwent the same procedure that was performed in 1997. Again, a portion of Matthew's frontal lobe was removed, but the procedure did not alleviate his seizures. Since that procedure, Matthew was placed back on medications in an attempt to control or stop his seizures. Those medications have included experimental medications.

In addition to his seizure disorder, Matthew is cognitively disabled. Matthew cooperated with psychological testing as part of a competency evaluation performed by Dr. Eric Knudson at Mendota Mental Health Institute. It was not possible to obtain a full scale IQ because of his blindness, but his verbal IQ was measured at 75. Because available records showed "substantial adaptive functioning difficulties" it was determined that his cognitive functioning should be viewed in the range of mild mental retardation (R 8:4.)

Matthew also has a long history of psychiatric care. There is a letter to Judge Ashley in the record, dated October 13, 2008 from Dr. Lance Longo. Dr. Longo indicated that Matthew, at that time, had been under the Dr.'s care for approximately three years. Dr. Longo noted Matthew had a long and extensive history of brain abnormalities leading to his intractable seizure disorder and psychiatric illness. It was noted that Matthew had a diagnosis of schizoaffective disorder (R. 31).

Matthew has consistently been described as childish and immature, functioning at the level of a 12 year old. (R. 52:12).

Matthew lived with his mother while growing up, however he spent three years at the Oconomowoc Training Center as an adolescent (R. 8). He was placed there under a CHIPS order. After the court lost jurisdiction over him, his mother was named guardian (R. 15). Included in the record was a competency evaluation done of Matthew in 1985 by Dr. Stephen F. Emily for guardianship purposes. The report detailed Matthew's seizure history at that time, as well as his blindness, diminished mental capacity and psychiatric issues (R. 14).

At the time of the offense he was living independently at the Hawley Ridge Apartments provided by

the Badger Association for the Blind with a great deal of support from his mother. (R. 114:77-79).

**PROCEDURAL HISTORY**

This case commenced with the filing of a three-count criminal complaint on June 5, 2008. The complaint alleged one count of 2nd degree sexual assault by use of threat of force or violence, one count of aggravated battery, and one count of burglary. The complaint detailed allegations that Matthew assaulted a fellow resident at Hawley Ridge Apartments. The victim was described in the complaint as 75 years old, legally blind and hearing impaired. According to the complaint the victim was at home in her apartment when her doorbell rang. She allowed the man entry into her apartment believing that it was her son. Upon entry into her apartment, the man groped her and sexually assaulted her. At one point, it is alleged that the man carried the victim into the bathroom, put her in the bathtub, and started running water over her feet, then continued to assault her. During the assault the doorbell rang again and the man ran away (R. 2).

A preliminary hearing was held on June 16, 2008. Probable cause was found. Matthew was bound over for trial.

An Information was filed. Matthew entered a not guilty plea (R. 98).

A bail hearing was held on June 19, 2008. At that hearing it was noted that at both Matthew's initial appearance and preliminary hearing Sheriff's deputies had to escort him due to his blindness, once in a wheelchair for his safety and once holding the deputy's shoulder (R. 99).

A status conference was held on July 11, 2008. At that time Matthew's attorney requested a competency examination. The court ordered that an examination be done by the forensic unit. The case was scheduled for an August 20, 2008 hearing for a return on the doctor's report (R. 100).

At the August 20, 2008 hearing, the court indicated that Dr. Erik Knudson did not reach a conclusion. Dr. Knudson wanted more information from Matthew's physician (R. 101).

The record reflects that Dr. Knudson filed a report on August 28, 2008. The report found Matthew not competent and not likely to regain competence (R. 12).

On September 16, 2008 a hearing was to be held. Matthew refused to go to court. The court determined it could not proceed. At the hearing, the State requested a

second examination pursuant to sec. 971.14(2) Wis. Stats. (R. 102). Papers filed that day by the defense included the 1985 report from Dr. Stephen Emiley (R. 14), 1988 and 1989 Social Services reports (R. 15, 16, 17), a 1994 report from Randall L. Daut, PhD. (R. 18), and a 2008 Aurora Sinai Medical Center report dated June 5, 2008 (R. 19). The reports detailed Matthew's long history of disabilities, diagnosis and treatment.

At a hearing on September 25, 2008, the court was informed that the forensic unit would not conduct a second examination. The unit was concerned with that there might be an appearance of "doctor shopping". Matthew's defense attorney raised the issue of the delays in the case, and indicated that they did not challenge the report of Dr. Knudson. Counsel requested that the hearing proceed. The State requested that Dr. Anthony Jurek conduct a second examination of the defendant. The case was adjourned to September 30, 2008 for further proceedings (R. 102).

On October 15, 2008 a report was filed by Dr. Jurek. Dr. Jurek recommended that Matthew should be treated, and then reassessed (R. 28). At a hearing that day the court ordered that Matthew be reexamined by Dr. Knudson and by Dr. Jurek at Mendota Mental Health (R. 105).

A hearing was held on October 31, 2008 (R. 106). At that hearing the court received an addendum from Dr. Jurek to his earlier report. Dr. Jurek found Matthew competent to proceed (R. 106:11-12).

On November 18, 2008 Dr. Knudson filed a report dated November 17, 2008. He had reassessed his earlier position after considering recordings of Matthew talking to his mother while in custody. His conclusion was that Matthew was competent to stand trial, although he described it as a close case. He detailed a number of areas where Matthew would have difficulty assisting his attorney and understanding the process. For example, Dr. Knudson felt that Matthew did not understand the elements of the offenses. (R. 36).

On December 3, 2008 a hearing was held. The defense challenged the reports of Dr. Jurek and Dr. Knudson. The court adjourned the case for a status on January 12, 2009 and for a competency hearing to be held on January 29, 2009 (R. 107).

On February 27, 2009 and May 11, 2009 reports were filed by Dr. Leslie Taylor. Her opinion was that Matthew was not competent and not likely to become competent. Dr. Taylor had been hired by the defense (R. 39, R. 40).

On January 29, 2009 the competency hearing commenced. Matthew had an outburst during the hearing and was warned that he would have to appear by video conference if he had another one. At one point the hearing was adjourned until the afternoon. When the case was recalled the court noted that, when a deputy went to get Matthew for the afternoon hearing, Matthew was standing on a table asking for chips and a candy bar. A new date was obtained for a continued hearing (R. 109, 110).

On May 11, 2009 the competency hearing continued. Testimony was taken on May 11, 12, and 13. Matthew was ultimately found competent to proceed (R. 112,113,114,115).

On June 25, 2009 Attorney Kohn was substituted in for Attorney Nistler. An NGI plea was entered. Dr. Kenneth Smail was ordered to conduct an examination (R. 117).

On July 28, 2009 the parties were informed the case was being assigned to Judge Rebecca Dallet (R. 1:16).

On November 3, 2009 Attorney Kohn filed a report from Dr. R. Bronson Levin dated November 1, 2009 (R. 46). Both Dr. Levin and Dr. Smail agreed that an NGI plea was not appropriate (R. 45, 46).

On January 14, 2010 Matthew appeared with Attorney Kohn and entered no contest pleas to counts 1 and 2. Count

3 was dismissed. The court ordered a PSI. A sentencing hearing was scheduled for March 12, 2010 (R. 114).

On February 15, 2010 a defense motion was filed to adjourn the sentencing scheduled for March 12, 2010 (R. 54).

On March 1, 2010 the motion to adjourn sentencing was heard. The court was informed that the defendant had a protective placement hearing scheduled before Judge Amato on March 29, 2010. Defense counsel requested that the sentencing be scheduled after the civil hearing. The State objected to the adjournment. The court granted the motion, but informed the parties there would be no more adjournments whether the case in Judge DiMotto's court was adjourned or not. The sentencing hearing was scheduled for April 12, 2010 at 8:30 a.m. (R. 122).

The record reflects that on April 8, 2010 a defense motion was filed to adjourn the sentencing hearing and that the State filed additional materials for the court to review for sentencing (R. 57, 58).

At the sentencing hearing on April 12, 2010, the defendant's motion to adjourn was denied. The court proceeded with sentencing. Matthew received a controlling sentence of 35 years, consisting of 20 years of initial confinement, followed by 15 years of extended supervision

(R. 123). Matthew filed a post-conviction motion to withdraw his plea and for resentencing on June 4, 2012 (R. 84). The court denied Matthew's post-conviction motion without a hearing in a Decision and Order dated August 6, 2012 (R. 94).

## ARGUMENT

### I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S POSTCONVICTION MOTION FOR PLEA WITHDRAWAL WITHOUT A HEARING.

Whether to allow plea withdrawal itself is usually a discretionary decision. ***State v. Black,*** 2001 WI 31, ¶9, 242 Wis.2d 126, 624 N.W.2d 363. However, a guilty plea that is not voluntarily, intelligently, and knowingly entered violates due process. Withdrawal of such a plea is a matter of right. ***State v. Nichelson,*** 220 Wis.2d 214, 217, 582 N.W.2d 460 (Ct. App. 1998).

To withdraw his no contest plea after sentencing, a defendant must establish by clear and convincing evidence that failure to allow plea withdrawal would result in a manifest injustice. ***State v. Thomas***, 2001 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. "A plea which is not knowingly, voluntarily or intelligently entered is a manifest injustice." ***State v. Giebel***, 198 Wis. 2d 207, 212, 541 N.W.2d 815 (Ct. App. 1995), *citing* ***State v. Harrell,*** 182 Wis. 2d 408, 414, 513 N.W.2d 676, 678 (Ct.

App. 1994). "A plea violates due process unless the defendant has a full understanding of the nature of the charges against him." ***State v. Bollig,*** 2000 WI 6, 232 Wis. 2d 561, 583, 605 N.W.2d 199.

A defendant is entitled to an evidentiary hearing on a motion to withdraw a guilty plea when (1) the defendant makes a *prima facie* showing that the circuit court's plea colloquy did not conform with § 971.08 or other procedures mandated at a plea hearing; and (2) the defendant alleges he did not know or understand the information that should have been provided at the plea hearing. ***State v. Brown***, 2006 WI 100, 293 Wis. 2d 594, 716 N.W.2d 906 at ¶2.

Once the *prima facie* showing has been made, the burden shifts to the State to show by clear and convincing evidence that the plea was knowingly, voluntarily, and intelligently entered, ***State v. Bangert,*** *supra,* 131 Wis.2d 246, 274-75, 389 N.W.2d 12 (1986). The State may utilize the entire record to demonstrate that the totality of the circumstances show that the defendant knew and understood the relevant constitutional rights, and the plea was knowingly, voluntarily, and intelligently entered, *Id.*, ***State v. Bollig,*** 2000 WI 6, ¶49, 232 Wis.2d 561, 605 N.W.2d 199.

In his post conviction motion the defendant alleged he was entitled to withdraw his plea, claiming the plea colloquy was deficient under ***State v. Bangert.*** Alternatively, he argued he was entitled to relief under ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50, because it was asserted that, at the time he entered his plea, Matthew did not, in fact, understand the nature of the charges he faced, the constitutional rights he was waiving, the nature of the plea agreement and the likely consequences of his plea, despite the colloquy conducted by the court.

Rather than set this matter on for an evidentiary hearing, the trial court ordered the State to file a brief in response to the motion. The defense was ordered to file a reply brief (R. 85). The court then rendered a decision. A motion hearing was never held.

**A. The defendant sufficiently alleged that the trial court failed to comply with the requirements of § 971.08 Wis. Stats., *State v. Bangert,* 131 Wis. 2d 246, 389 N.W. 2d 12 (1986), and *State v. Brown,* 293 Wis. 2d 594, 716 N.W. 2d 906 because it did not engage in a meaningful colloquy with the defendant.**

In his post-conviction motion Matthew alleged that the trial court failed to comply with the requirements of § 971.08 Wis. Stats., ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W. 2d 12 (1986), and ***State v. Brown***, 293 Wis. 2d 594, 716

N.W. 2d 906, because the trial court did not engage in a meaningful colloquy with him establishing that he actually understood the elements of the offenses he was pleading to, the constitutional rights he was waiving, the nature of the plea agreement he entered into, and the likely consequences of his plea.

In ***State v. Brown***, 293 Wis. 2d 594, the Supreme Court observed that the method a circuit court employs to ascertain a defendant's understanding should depend upon the circumstances of the particular case, including the level of education of the defendant and the complexity of the charge[s]. The court indicated that the less a defendant's intellectual capacity and education, the more a court should do to ensure the defendant knows and understands the essential elements of the charges. ***Brown*** at 624, citing ***State v. Bangert***, 131 Wis. 2d at 267-268.

The Supreme Court in Brown noted that ***Bangert*** requires verification, independent of defense counsel's assertion, that a defendant understands the nature of the charges. ***Brown*** at 625. To ensure a knowing, intelligent, and voluntary plea, ***Bangert*** requires that a trial judge explore the defendant's capacity to make informed decisions. ***Brown*** at ¶30.

In ***Brown*** the Supreme Court instructed courts to "translate legal generalities into factual specifics when necessary to ensure the defendant's understanding of the charges." ***Brown*** at 626. The court stated: "(t)his court cannot overemphasize the importance of the trial court's taking great care in ascertaining the defendant's understanding" of the nature of the charges and the constitutional rights being waived. ***Brown*** at ¶32. The court said:

> We reiterate that *the duty to comply with the plea hearing procedures falls squarely on the trial judge.* We understand that most trial judges are under considerable calendar constraints, but it is of paramount importance that judges devote the time necessary to ensure that a plea meets the constitutional standard. The plea hearing colloquy must not be reduced to a perfunctory exchange. It demands the trial court's "utmost solicitude."

***Brown*** at ¶33.

Complying with the requisite standards is not optional. The method a circuit court employs to ascertain a defendant's understanding should depend upon "the circumstances of the particular case, including the level of education of the defendant and the complexity of the charges[s]." ***Bangert***, 131 Wis. 2d at 267-68. The less a defendant's intellectual capacity and education, the more a court should do to ensure the defendant knows and

understands the essential elements of the charges. ***Brown*** at ¶52.

In this case, it was alleged in the defendant's post conviction motion that, at the time of the plea hearing, the defendant was 44 years of age, was legally blind, was mentally retarded, had undergone two brain surgeries with removal of tissue, and was taking medications for treatment of mental illness (R. 84:5).

Furthermore, it was alleged that, at the time of the plea hearing the defendant's competency had been litigated over a period of many months and court dates, generating numerous doctors' reports. He had also been evaluated for a possible NGI plea by Dr. Kenneth Smail. Dr. Smail's report was dated August 24, 2009 (R. 45). In his report Dr. Smail indicated that Matthew met the criteria for a mental disease or defect, but that he could not find that Matthew could not conform his conduct to the requirements of the law. Dr. Smail opined however that "while I believe the facts do not support a special plea, I also do not conclude that Mr. Lilek is an unremarkable assailant in this case. He is a person with marked cognitive and personality limitations that give rise to a psychological explanation as to what occurred even though they do not constitute the basis for exculpatory mental disease" (R. 45:8).

It was alleged in the postconviction motion that Dr. R. Bronson Levin also conducted an examination for the purposes of a possible NGI plea. In summarizing Matthew's situation, Dr. Levin's report, submitted to the court, indicated "Matt Lilek certainly is not a normal defendant. ...[H]e is psychiatrically, neurologically, socially and behaviorally impaired. His brain is abnormal due to encephalitis as an infant, severe and intractable epilepsy, removal of brain tissue at age 25 with infection, and second brain tissue removal surgery at age 37. The frontal brain regions where tissue has been removed are responsible for higher-order thinking involving judgment, social appropriateness, common sense, and comprehension of ramifications and consequences, as well as inhibition urges, expression of personality, and control of impulsiveness. In addition, Mr. Lilek has chronic and serious mood and thought disorders which further diminish his ability to think and act normally. Seizures occur unpredictably and leave him disoriented and confused." (R. 46:3).

It was argued in the postconviction motion that even with all the information available to the court regarding Matthew's disabilities, the court engaged in a colloquy with Matthew at the time of his plea that consisted almost

entirely of leading "yes" and "no" questions. This was in spite of the numerous doctors' reports on file that detailed Matthew's significant disabilities. For example, the May 6, 2009 report from Dr. Leslie Taylor, also cited to the court in the post conviction motion, indicated that Matthew thought he was charged with molesting a child. The report indicated that Matthew was confused by that because, as he stated: "I have never really liked children, I do not really even like babies" (R. 40:1).

In spite of the information in the record detailing Matthew's cognitive, psychological and physical deficits, what can only be described as a routine plea colloquy was conducted. An example of the court's colloquy with the defendant, detailed in the defendant's post conviction motion, was the court's discussion with Matthew of the aggravated battery charge. The exchange went as follows:

> THE COURT: All right. And as to the aggravated battery charge, do you understand that the State would have to prove that on May 31st, 2008, at 920 North Hawley Road, No. 106, in the City of Milwaukee, that you caused bodily harm to Helen?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: That you intended to cause her bodily harm?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: And you know bodily harm means physical pain or injury --

THE DEFENDANT: Yes, Your Honor.

THE COURT: -- illness or impairment of physical condition?

THE DEFENDANT: Yes, Your Honor.

THE COURT: That your conduct created a substantial risk of bodily harm?

THE DEFENDANT: Yes, Your Honor.

THE COURT: I'm sorry, substantial risk of great bodily harm; do you remember that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you talked to your attorney about what great bodily harm means?

THE DEFENDANT: Yes, Your Honor.

THE COURT: That is serious injury, bodily injury?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And that is injury which creates a substantial risk of death or which causes serious permanent disfigurement, or which causes a permanent or projected loss or impairment of the function of any bodily member or organ, or other serious bodily injury?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you understand all those elements?

THE DEFENDANT: Yes, Your Honor.

(R. 121:12-14)

As can be seen from the above, Matthew responded "yes your honor" when the court misspoke regarding the harm that

had to be shown, i.e. harm vs. great bodily harm, and repeated "yes your honor" when the court corrected itself. Under the circumstances of this case, it was asserted that the defendant's "yes your honor" responses were insufficient to establish a knowing plea.

The post-conviction motion also pointed out that the plea questionnaire and waiver of rights form that had been submitted to the court did not detail the plea agreement, nor did it detail the elements of the offense. Also, although boxes were checked in the constitutional rights section of the questionnaire to indicate Matthew's understanding of the rights he was giving up, it was noted that the box indicating that Matthew was giving up his right to make the State prove him guilty beyond a reasonable doubt was left unchecked (R. 50).

It was alleged in the defendant's post-conviction motion that post-conviction interviews of the defendant indicated that Matthew was unable to explain what a plea bargain was, did not understand the elements of the offenses, and did not understand the rights he had given up; in fact, he reported that he believed that he had a trial (R. 84:9).

The defendant also asserted in his post-conviction motion that at the time he entered his plea he did not, in

fact, understand the constitutional rights he was waiving, the nature of the plea agreement he entered into, the elements of the offense pled to, and the likely consequences of his plea (R. 84:4).

The motion incorporated the doctors' reports on file. Given the clear record of Matthew's disabilities, it was asserted that the trial court failed in its obligation to establish that Matthew's pleas were knowing and voluntary. Included in the doctors' reports was the competency evaluation conducted by Doctor Knudson wherein he changed his opinion on Matthew's competency to stand trial. Even though he opined that Matthew was competent to stand trial, he termed it a close call and indicated he did not believe Matthew was capable of breaking the charges down into their individual elements (R.36:3,4).

After the motion was filed, rather than schedule a hearing, the court ordered briefs. In its brief the State did not argue that the defendant's ***Bangert*** motion failed to state a prima facie case. It argued however, by examining the record in total, that the court had complied with the requirements of the law. It is our position that it is plain that the motion made out a prima facie case entitling the defendant to an evidentiary hearing. The matter should have been set for a hearing.

We also do not believe that the State's arguments in its brief were persuasive, certainly not to the extent that no hearing was required. In its brief the State addressed Sec. 971.08 Wis. Stats.,[1] and other mandatory duties imposed on trial courts by case law, and argued that Matthew's responses to the court's inquiries were sufficient (R. 88). In its decision the court indicated that it agreed with the State's assessment (R. 94:2-3).

One of the requirements of a court is to determine a defendant's education and general comprehension so as to assess his capacity to understand the issues at the hearing. In that regard, the State cited the court's questioning of Matthew regarding his use of alcohol or drugs prior to his plea. The State characterized the questions and answers as supporting the knowing nature of Matthew's plea. We argued in our reply brief that those questions and answers did not establish Matthew's

[1] **971.08 Pleas of guilty and no contest; withdrawal thereof, (1)** Before the court accepts a plea of guilty or no contest, it shall do all of the following:

(a) Address the defendant personally and determine that the plea is made voluntarily with understanding of the nature of the charge and the potential punishment if convicted.

(b) Make such inquiry as satisfied it that the defendant in fact committed the crime charged.

(c) Address the defendant personally and advise the defendant as follows; "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

comprehension. The actual questions and answers were as follows:

> THE COURT: Have you used any alcohol or drugs in the last 24 hours?
>
> THE DEFENDANT: I am not right now.
>
> THE COURT: Do you take any medications --
>
> THE DEFENDANT: Well, actually I did not get any today because I left early actually.
>
> THE COURT: So when's the last time you took your medications?
>
> THE DEFENDANT: Last night I was notified to, but, and I saw a nurse today.
>
> THE COURT: And so when was the last time, do you remember the last time?
>
> THE DEFENDANT: Actually, last night actually.
>
> THE COURT: Okay. And what, do you remember what you take?
>
> THE DEFENDANT: I don't drink alcohol. I am not quite sure about that. I don't know how to describe that because I don't know.
>
> THE COURT: And does that medicine make you feel better?
>
> THE DEFENDANT: Somewhat. I am not sure how to describe it.
>
> THE COURT: Does it interfere with your ability to understand me or anything that is going on here today?
>
> THE DEFENDANT: Not that kind.
>
> THE COURT: Okay. So you are understanding everything that is going on?

THE DEFENDANT: Yes, Your Honor.

(R. 121:9-10)

As can be seen, when Matthew was asked whether he had used alcohol or drugs within the last 24 hours, he stated, "I am not right now." That is not a responsive answer. The court then asked "(d)o you take any medications", to which Matthew indicated he hadn't taken his medications because he left early. When asked when he remembered last taking medications, he indicated the night before. He was asked what he took. He replied that he didn't drink alcohol and "I am not quite sure about that. I don't know how to describe that because I don't know." The court then asked if his medications made him feel better, to which he answered "Somewhat. I am not sure how to describe it." His answer to whether or not the medications interfered with his ability to understand what was going on was, "Not that kind."

We argued that Matthew's answers were minimally responsive to the court's questions. His answers did not establish what medications he was taking, what the effects of the medications were, or whether they interfered with his ability to understand the proceedings. Matthew's

answers did not establish his capacity to understand the nature of the offense.

Also, in support of its argument that the trial court established Matthew's comprehension and capacity to understand the issues at the hearing, the State cited the court's questioning of Matthew regarding his attorney, and whether he was satisfied with his attorney's representation. Part of Matthew's response, relied upon by the State, was that if he had any questions, "Sam" would answer them for him (R. 88:4). "Sam" was not an attorney, but was a legal intern (R. 123:2). We are left to wonder if Matthew believed Sam was an attorney. We don't believe the court should consider Matthew's willingness to discuss his case with a legal intern as evidence of his understanding of the proceedings.

The State also argued that Attorney Kohn vouched for Matthew's understanding. In support of its argument the State quoted the following statement by Mr. Kohn:

> I think it's important to make that record because certainly in the future if were some doctor or lawyer to take a look at this record and then look at Matt's mental health history, an argument could be made that he was simply saying yes to everything and in response to your questions. But I believe based on the in-depth discussions we have had that he truly does understand the very basic rights that he is giving up, and he understands what those are.

(R.88:5)

We pointed out to the trial court that in its brief the State omitted a portion of Mr. Kohn's discussion with the court on that subject. In our reply brief we explained that when Attorney Kohn was asked whether he had any question about Matthew's competency to proceed, he responded:

> "Personally, Your Honor, I'm not a doctor. I have, however questioned his competency on a number of occasions and have turned to experts who have examined him both in the past, and ones that were retained after I came on this case, and they have advised me that he is, at a very basic level given the definition that is used in the criminal justice system, legally competent to proceed. And I rely on their judgment and their professional opinions regarding that."

(R. 121:18). This is certainly not an unqualified endorsement of the defendant's ability to comprehend the charges against him and the ramifications of the plea he was entering. This case is an example of why trial courts cannot, when dealing with a disabled defendant, rely on statements of defense counsel. ***Brown*** at ¶ 56. ***Bangert*** requires verification, independent of defense counsel's assertion, that a defendant understands the nature of the charges. ***Id***

In support of its argument that Matthew understood the nature of the crime and range of punishments he was

facing, the State cited Matthew's statement that he had originally been told that the maximum fine for the crime of 2nd Degree Sexual Assault was $5,000.00 (R. 88:7). The actual potential fine is $100,000.00. When the court told him the potential fine was $100,000, his reply, as detailed in the State's brief, was "It's just what I was told before I was told. Now I am told different. Now I understand" (R. 88:7).

We argued it is highly unlikely that Matthew was told that the maximum fine was $5,000.00. His response in that respect would seem to indicate confusion on his part, not understanding.

When arguing that the court performed its mandatory duty to advise Matthew that his plea could result in deportation, the State summarized the court's discussion of deportation and asserted that the record reflected Matthew's understanding of the consequences of his plea if he were not a citizen (R. 88:9). We do not believe the exchange on this point illustrates Matthew's understanding of the consequences of his plea. The exchange went as follows:

> THE COURT: Do you understand that if you are not a citizen of the United States that your pleas could result in deportation, the exclusion from admission to this country, or

the denial of naturalization under federal law?

THE DEFENDANT: I'm not quiet (sic) sure what that means.

THE COURT: It means if you are not a citizen --

THE DEFENDANT: Oh, yeah. I am, I am a citizen.

THE COURT: Oh, I take it, but you do understand if you weren't that that could happen?

THE DEFENDANT: Okay. Yes, Your Honor.

(R. 121:14)

We do not believe the exchange illustrates a knowing plea. It is not clear from his response that he understood deportation as a concept. The most that can be said is that he believed he was a citizen.

It is our contention that the circuit court erred by denying the defendant's post-conviction motion to withdraw his plea without an evidentiary hearing. We believe the defendant made out a prima facie case entitling him to an evidentiary hearing.

**B. The defendant also made out a prima facie case that he was entitled to relief under *State v. Bentley*.**

In the trial court Matthew also requested to withdraw his plea pursuant to ***State v. Bentley***, 201 Wis. 2d 303 (1996), because his plea was not knowingly and voluntarily

entered. An argument under ***Bentley*** was made because it was felt that even if the trial court had not erred in performing its duties under ***Bangert***, Matthew, in fact, did not enter a knowing plea.

In his post-conviction motion the defendant realleged and incorporated by reference all of the matters alleged in support of his ***Bangert*** motion. The allegations regarding his disabilities obviously applied to both motions. The motion also asserted that at the time he entered his plea Matthew did not understand the constitutional rights he was waiving, the nature of the plea agreement he entered into, the elements of the offense pled to, and the likely consequences of his plea.

The motion in its entirety alleged in detail Matthew's numerous disabilities, and Matthew's perfunctory responses to the questions put to him at the plea hearing. The motion also alleged that the plea questionnaire and waiver of rights form did not detail the plea agreement, nor did it detail the elements of the offense, nor was the box checked indicating that the State had an obligation to prove Matthew guilty beyond a reasonable doubt.

The post conviction motion also alleged that post-conviction interviews established that Matthew was unable to explain what a plea bargain was, did not understand the

elements of the offenses, did not understand the rights he had given up, and that he believed that he had a trial(R. 84:9). Those are all matters that are capable of proof at a post-conviction hearing. (When evaluating a defendant's request for a hearing, the court should consider the allegations made as true, ***Bentley*** at 309-310).

The upshot of the ***Bentley*** motion was that, given Matthew's disabilities, even if the court complied with its duties, the defendant did not, in fact, knowingly and intelligently enter his plea.

In denying the motion, the trial court held that a prima facie case had not been alleged. We believe that the motion did make out a prima facie case, and that Matthew should have been afforded a hearing.

**II. THE COURT ERRONEOUSLY EXERCISED ITS DISCRETION WHEN IT SENTENCED THIS DISABLED FIRST TIME OFFENDER TO A 35 YEAR SENTENCE CONSISTING OF 20 YEARS OF INITIAL CONFINEMENT FOLLOWED BY 15 YEARS OF EXTENDED SUPERVISION.**

A circuit court exercises its discretion at sentencing. ***State v. Gallion***, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197. Evidence of the exercise of discretion must be set forth on the record. ***Id.*** ¶ 3. Discretion is a process of reasoning, which must depend on facts that are of record or that are reasonably derived by

inference from the record and a conclusion based on a logical rationale founded upon proper legal standards. ***Gallion*** ¶ 19 citing ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971).

A sentencing court is required to specify the objectives of the sentence on the record, including the protection of the public, punishment of the defendant, rehabilitation of the defendant, and deterrence to others. ***Gallion*** ¶ 43. The court must identify the factors that were considered in arriving at the sentence and indicate how those factors fit the objectives and influence the decision. ***Id.*** ¶ 43.

The court determines how much weight to give each factor; however, it may erroneously exercise its discretion if too much weight is placed on any one factor in the face of contravening considerations. ***State v. Spears***, 147 Wis. 2d 429, 446, 433 N.W. 2d 595, 603 (Ct. App. 1988).

A court, in exercising its discretion, should impose a sentence calling for "the minimum amount of custody" consistent with the three factors. ***McCleary***, 49 Wis. 2d at 276.

In ***Gallion***, our Supreme Court reaffirmed the sentencing procedures mandated in ***McCleary***, holding that adherence to these procedures and a showing of an actual

exercise of discretion was even more pertinent due to the "increased responsibility placed upon the sentencing court in light of truth-in-sentencing." ***Gallion***, 270 Wis. 2d 535, ¶¶ 31, 38. While the general objectives of greatest import may vary from case to case, ***Id.*** ¶ 41, it is an erroneous exercise of discretion for a judge to sentence a defendant to a near-maximum prison sentence without a rational basis and without considering other factors that would not call for such a sentence, ***Harris v. State***, 75 Wis. 2d 513, 518, 250 N.W.2d 7 (1977).

A trial court may not employ a preconceived sentencing policy that is closed to individual mitigating factors. A sentence that fits the crime and not the criminal is improper. See ***State v. Ogden***, 199 Wis. 2d 566, 571. "Such inflexibility, which 'bespeaks a made-up mind,' is unacceptable." ***Id*** at 571.

In this case, we believe the court erroneously exercised its discretion because we do not believe its conclusion to sentence the defendant as it did was based on a logical rationale founded upon proper legal standards; we believe the court placed too much emphasis on one factor in the face of contravening considerations; we believe the court's actions at sentencing indicated that it approached sentencing with an inflexibility that bespoke a made up

mind; and, we believe, when sentencing the defendant to a near maximum term of initial confinement, the court failed to consider other factors that would not call for such a sentence.

We contend that no proper sentence could be handed down unless the court properly took Matthew's disabilities into account when fashioning his sentence. By not adequately considering Matthew's disabilities, we contend that the court's sentence was not logical, and was not a result of proper reasoning, and therefore was the result of an erroneous exercise of discretion.

Matthew's disabilities have been detailed above. They include the fact that, at the time of the offense he was 41 years old and legally blind. He was found incompetent to manage his affairs immediately upon turning 18 and had been subject to guardianship ever since. He was mildly mentally retarded. He suffered from a severe seizure disorder. As a result of his seizures, Matthew twice underwent brain surgery (R. 8:2). As we stated earlier in this brief, Dr. Levine indicated that the areas of the brain where tissue was removed are responsible for higher order thinking involving judgment, social appropriateness, common sense, and comprehension of ramifications and consequences (R.46:3).

Dr. Smail in his 8-24-09 report stated:

> "I also do not conclude that Mr. Lilek is an unremarkable assailant in this case. He is a person with marked cognitive and personality limitations that give rise to a psychological explanation as to what occurred even though they do not constitute the basis for exculpatory mental disease" (R. 45:8).

Furthermore, Matthew's emotional development was consistently characterized to the court as childlike, at a 12 year old level, sometimes younger (R. 52).

Matthew's knowledge of sexuality was described by the PSI as limited. The PSI indicated that his mental limitations, lack of formal sexual education and structured lifestyle impeded his development of a formal understanding of sex. It was noted in the PSI that Matthew committed the offense out of curiosity in that he wanted to know about a woman's body (R. 52). This is consistent with his statement to Dr. Taylor as detailed in her February 23, 2009 report to the court, that Matthew committed the offense to "check under the hood", i.e. see a woman's body (R. 39:2). Matthew's limited knowledge of sexual matters is also consistent with his explanation to Dr. Taylor that he attempted to place the victim in the bathtub because he felt that "in order to do it you need to be clean and wet" (R. 39:2).

In addition to his disabilities, Matthew had no prior convictions.

We do not believe Matthew's characteristics were properly considered by the court at sentencing.

To the extent the court considered Matthew's disabilities, the court appeared to treat his disabilities as aggravating factors. The court seemed to determine that, because of his disabilities; he could not be rehabilitated, treated, or monitored. To that end, the court commented on its perception of Matthew's "inability to appreciate the wrongfulness of this" (R. 123:128). To the extent that the court considered his disabilities, the court did so in the context of its belief that, in its opinion, Matthew could not conform his conduct to the requirements of the law. In that regard, the court said: "...there is this concern with the mental health issues and all of that, but I don't think Mr. Lilek can check his own behavior" (R. 123:129).

The resulting conclusion was that to protect the public a 20 year period of initial confinement was required.

The attitude of the court is at odds with the reports of Drs. Smail and Levine, who indicated that Matthew could conform his actions to the requirements of the law.

Otherwise, Matthew would have been an appropriate candidate for an NGI plea.

We believe the court's sentencing rationale did not reflect a proper process of reasoning. By acknowledging Matthew's mental condition, and by implicitly stating that, because of his mental condition, Matthew did not appreciate the wrongfulness of his conduct and could not check his behavior, the court made findings consistent with an NGI plea. These are exculpatory findings calling for commitment for treatment, rather than punishment. See ***State v. Szulczewski***, 216 Wis. 2d 495, 504, ¶ 22, 574 N.W.2d 660 (1998). We are not arguing that an NGI plea was appropriate, but that the court erroneously exercised its discretion by failing to properly consider Matthew's disabilities, and by failing to fashion a sentence in light of those disabilities.

Relatedly, we believe the court placed too much weight on one sentencing factor in the face of other contravening considerations. As stated above, the primary factors a trial court must consider in fashioning a sentence are the gravity of the offense, the character of the offender and the need for public protection. ***McCleary v. State***, 49 Wis. 2d at 274-76, 182 N.W. 2d 518-19.

In this case, there is no doubt that the court's focus at sentencing was the protection of the public. Perhaps as a result of the court's belief of a need to protect the public through extensive prison confinement, the court approached sentencing with a made up mind, and failed to consider other factors that did not call for such a harsh sentence. This is evidenced by the court's denial of a defense motion for a continuance to allow the completion of a protective placement proceeding prior to sentencing. Prior to sentencing, the defense filed a motion for a continuance (R. 57). It did so because Matthew's protective placement proceedings had not been completed by March 29, 2010 as had been hoped. The court had indicated that when it granted a previous adjournment, it would not grant another. It therefore denied the motion (R. 123: 3,4).

In spite of the court's refusal to grant a continuance to allow the protective placement process to be finalized, at sentencing Matthew's counsel asked the court to keep Matthew in custody until a protective placement determination could be made (R. 123:110). In its colloquy the court rejected the notion of a protective placement out of hand. The court stated:

> "I don't think any protective placement could possibly protect the community, so I really see no alternative. I see that

> prison is the place that I must put Mr. Lilek" (R. 123:131).

We do not know the basis for that assertion. To be protectively placed, an individual must be a danger to oneself or others. See sec. 55.08 Wis. Stats. Matthew is legally blind. A blanket assertion that such a placement could not protect the community certainly "bespeaks a made up mind". Certainly people with Matthew's characteristics have been appropriately monitored in settings other than prison. In fact, in Dr. Emiley's guardianship report in 1985 he noted that ultimately, because of Matthew's combination of disabilities, a group home setting would most likely eventually be an appropriate placement (R. 14:3). Furthermore, Wisconsin law has a procedure for protectively placing persons convicted of the most serious crimes, if they are determined not guilty by reason of mental disease or defect. See sec. 971.17 Wis. Stats. We see no basis in the record for concluding that Matthew is incapable of being monitored except in the prison system.

Another factor the court did not consider was whether there were appropriate placement options for Matthew in the prison system. Attorney Kohn's sentencing comments raised his concern that prison was inappropriate and would be dangerous for Matthew. Attorney Kohn was concerned that

Matthew, because of the nature of his disabilities, could be killed in prison. The State dismissed such concerns, arguing that Mendota and Winnebago were placement options. The court did not comment directly on the availability of Mendota and Winnebago as placement options. It merely stated that it had to "trust that the Department of Corrections would treat Matthew humanely", (R. 123:131).

In our post-conviction motion we alleged that Matthew had been placed by the Department of Corrections at the Wisconsin Resource Center and that, according to staff at the Center, placement at the facility is generally short term, not exceeding six months. Matthew had been there over one year because of the lack of a suitable alternative for him. However, given the length of his sentence, it was feared that Matthew will have to be transferred back to the general population. It was asserted in the motion that Mendota and Winnebago Mental Health Centers were not placement options (R. 84).

In its decision, the court ruled that Mendota and Winnebago Mental Health centers were options for placement, however, it also ruled that it did not factor the availability of the facilities into its sentencing decision (R. 94:5).

Regarding the mental health centers, we argued in our post-conviction motion that the court sentenced Matthew on erroneous information. We have not pursued that argument on appeal given the court's indication that it did not consider placement options in its sentencing decision. Nevertheless, we believe the placement options for Matthew in the prison system should have been a consideration. Whether Matthew could be placed at those facilities should have been taken into account by the court in determining an appropriate sentence. Furthermore, the court erred in ruling that they were placement options. The mental health centers are under the jurisdiction of the Department of Health and Human Services, not the Department of Corrections. A defendant can be transferred to the mental health centers when he has been found NGI under sec. 971.17 Wis. Stats. See ***State v. Wood,*** 323 Wis. 2d 321, 780 N.W.2d 63 (Ct. App. 2010).

## III. THE COURT SHOULD NOT HAVE ORDERED COMPETENCY EXAMINATIONS AFTER THE AUGUST 28, 2008 REPORT OF DR. KNUDSON FINDING MATTHEW INCOMPETENT AND NOT LIKELY TO REGAIN COMPETENCE.

The procedure to follow when ordering a competency examination is found in sec. 971.14 Wis. Stats. We believe the trial court violated the strict time limits imposed by that statute when it ordered serial competency evaluations.

We believe it will be helpful to list the events associated with the competency exams ordered by the court.

**A. Series of Events**

1. 7/11/08 - Counsel raises the issue of Matthew's competency. The court orders a competency evaluation and sets a hearing for 8/20/08 (R. 100).

2. 7/11/08 - Judge Donald signs an order for an evaluation. It does not specify an inpatient exam (R. 5).

3. 7/25/08 - Dr. Smail writes the court suggesting the examination be done at Mendota (R.6).

4. 7/31/08 - Matthew arrives at Mendota (R.8:1).

5. 8/13/08 - Dr. Knudson reports from Mendota Mental Health that Matthew is not competent; however the doctor is not sure if competency can be restored (R. 8).

6. 8/20/08 – At a hearing it was agreed that Matthew remain at Mendota and Dr. Knudson get more information. A hearing was scheduled for 9/16/08 (R.101).

7. 8/21/08 – Signed Order to transfer Matthew to Mendota and to remain until further order of court (R.10).

8. 8/25/08 – Signed Order for competency examination. Defendant is to be returned to Mendota until next date (R.11).

9. 8/28/08 - Report of Dr. Knudson finding Matthew not competent and not likely to regain competence (R.12).

10. 9/16/08 - Defense does not dispute Dr. Knudson's report; The State requests a second opinion. The defense expresses frustration with delays. The court says the State is entitled to another evaluation. The State requests Dr. Rawski of the Forensic Unit. 9/30/08 is set for return of doctor's report (R. 102).

11. 9/16/08 - Order signed re second competency exam (R.20).

12. 9/25/08 – The Forensic Unit declines the appointment (R.22).

13. 9/25/08 – Hearing–Defense objects to delays and asks for hearing based on Dr. Knudson's report. The defense is not challenging report. The State asks that Anthony Jurek be appointed. The defense never heard of him so it would not stipulate to his qualifications. The matter was scheduled for further proceedings on 9/30/08 (R. 103).

14. 9/30/08 – The court appoints Dr. Anthony Jurek at State's request to render second opinion on defendant's competency. The case was scheduled for return on the doctor's report for October 15, 2008 and a hearing was scheduled for October 28, 2008 (R. 104).

15. 10/13/08 – Letter from Dr. Knudson. Received information from D.A. Request return of Matthew for observation at Mendota (R. 27).

16. 10/13/08 – Letter from Dr. Jurek. He recommends treatment and reevaluation. (R. 28).

17. 10/15/08 – Order for reexamination at Mendota (R. 33).

18. 10/31/08 – Matthew had not been sent to Mendota. Court informed that it would take one and a half to two weeks for him to get there and then two weeks for a report after that. Defense requests that the report be done within two weeks. Defense counsel advised to take the issue to the Supreme Court because of lack of resources to get things done in a timely fashion. The court makes the finding that they don't have the resources to comply with the requirements of the statute (R. 106:9).

19. 11/17/08 – Letter from Dr. Knudson saying he changed his mind (R. 36).

20. 1/29/09 – Competency hearing commences (R. 108).

22. 2/23/09 – Dr. Taylor's report finding not competent (R. 39).

23. 5/6/09 – Dr. Taylor's second report finding not competent (R. 40).

24. 5/13/09 – Competency hearing concluded (R. 115).

### B. Wis. Stat. 971.14 does not envision serial court ordered examinations.

To determine whether serial examinations are authorized by statute, this court will need to interpret sec. 971.14 Wis. Stats.

In ***State v. McKenzie,*** 139 Wis. 2d 171, 176-177, 407 N.W.2d 274 (Ct. App. 1997), the Court of Appeals stated:

> In construing a statute, the primary source of statutory construction is the language of the statute itself. ***Wisconsin Evangelical Lutheran Synod v. City of Prairie du Chien,*** 125 Wis. 2d 541, 549, 373 N.W.2d 78, 82 (Ct. App. 1985). Absent ambiguity, it is the duty of the court to give statutory words their obvious and ordinary meaning. ***State v. Lossman,*** 118 Wis. 2d 526, 535, 348 N.W. 2d 159,164 (1984). In statutory construction, the use of the word "shall" is usually construed as mandatory, ***County of Walworth v. Spalding,*** 111 Wis. 2d 19, 24, 329 N.W.2d 925, 927 (1983), while the word "may" is generally construed as permissive, ***Hitchcock v. Hitchcock,*** 78 Wis. 2d 214, 220, 254 N.W.2d 230, 233 (1977). It is reasonable to presume that the legislature chose its terms carefully and precisely to express its meaning. ***Ball v. District No. 4, Area Bd.,*** 117 Wis. 2d 529, 539, 345 N.W.2d 389, 394 (1984). Finally, the entire section of a statute and related sections are to be considered in its construction or interpretation. ***State ex rel. Ondrasek v. Circuit Court,*** 133 Wis. 2d 177, 182, 394 N.W. 2d 912, 914 (Ct. App. 1986).

Sec. 971.14(2)(c) sets forth the procedure and time limits for conducting competency evaluations. Sec 974.14(2)(c) provides:

> Inpatient examinations shall be completed and the report of examination filed within 15 days after

> the examination is ordered or as specified in par. (am), whichever is applicable, unless, for good cause, the facility or examiner appointed by the court cannot complete the examination within this period and requests an extension. In that case, the court may allow one 15-day extension of the examination period. Outpatient examinations shall be completed and the report of examination filed with 30 days after the examination is ordered.

As can be seen, inpatient examinations shall be completed in 15 days, with one 15 day extension allowed for good cause. Outpatient examinations shall be completed within 30 days of being ordered.

Matthew's competency was first raised as an issue on July 11, 2008. Judge Donald signed an order for examination that day. The order did not specify an inpatient or outpatient evaluation. Within the 30 days allotted by statute, Dr. Smail recommended an inpatient evaluation. Matthew arrived at Mendota on July 31, 2008 (R. 8:1), and within 15 days there was a report from Dr. Knudson determining that Matthew was not competent. The doctor requested more information in order to determine the issue of regaining competency. One week after the return of the doctor's report, the parties agreed that Matthew should go back to Mendota to address that issue. A final report was generated within one week, finding Matthew not likely to regain competence.

We are not claiming that the above events violated the timelines set out in the statute. Dr. Knudson's 8/13/08 report was completed within 15 days of Matthew's arrival at Mendota. The doctor's 8/28/08 report was completed within 15 days of the 8/13/08 report. The request in the 8/13 report for more information so as to address the likelihood of regaining competency can reasonably be viewed as good cause for extending the time limits. However, subsequent reports were not completed in a timely fashion because 971.14 does not envision serial court appointments.

Because the State did not agree with Dr. Knudson's conclusions, it requested a second opinion on 9/16/08. At that hearing, defense counsel expressed his frustration with the delays. There were concerns over injuries Matthew had received in the jail (R. 102:8). Nevertheless, an order was signed that day for another court ordered examination. The process was delayed however because the Wisconsin Forensic Unit refused to conduct a second examination, in part because of its concern that there would be an "appearance of doctor shopping" (R. 22).

Because of the refusal of the forensic unit to conduct a second examination, the issue of who to appoint arose at the court hearing on September 25th. At that hearing the defense objected to more delays, and requested

that the case proceed on the reports as submitted (R. 103:11). Nevertheless, the court made clear that it was going to appoint another examiner. More delays ensued however because the examiner shopped for by the State was unknown to the defense, and apparently to the court. The State requested that Dr. Jurek be appointed, however it did not know if he was a psychiatrist or psychologist (R. 103:25). Not knowing who the proposed examiner was, defense counsel could not stipulate to his appointment. The case was adjourned for a hearing to address his qualifications.

The adjournment was unavoidable because, while Sec. 971.14(2)(a) stats., allows a court to appoint more than one examiner, that examiner must have "the specialized knowledge determined by the court to be appropriate". It seems clear therefore that the statute requires, for a court appointment, that the qualifications of the examiner be known by the court prior to appointment.

Our contention is that the appointment of Dr. Jurek was contrary to law. We believe that sec. 971.14 Wis. Stats., while it envisions more than one examiner being appointed, does not contemplate that court appointments will be serial in nature. The statute does not envision the doctor shopping that was done in this case.

We believe our contention that the statute does not contemplate serial court appointments is consistent with the structure of sec. 971.14. The statute clearly envisions that the process be expedited. That is evident from the mandatory language in the statute regarding the strict time limits set for completing inpatient and outpatient examinations. The statute requires that inpatient evaluations be completed within 15 days after the examination is ordered, or within 15 days of the defendant's arrival at the facility if sec. 971.14(2)(am) applies. Only one 15 day extension is allowed. Sec. 971.14(2)(c). Outpatient examinations shall be completed within 30 days. No extensions are provided for. We do not think that it is a coincidence that inpatient and outpatient examinations are to be completed within 30 total days. The statute clearly envisions prompt completion of court ordered inpatient or outpatient examinations.

The tight time limits envisioned by the statute are rendered meaningless if a court can serially issue any number of examinations upon the request of a party that does not agree with earlier reports. Since sec. 971.14 Wis. Stats., does not limit the number of court-appointed examiners to two, what would prevent a party from requesting a third appointed examiner if the first two

examiners split in their opinions, causing even more delays?

If the State wanted more than one court ordered evaluation, it should have requested that at the outset. The statute contemplates that a case may benefit from more than one court ordered professional evaluating a defendant.

Significantly, there was nothing preventing the State from hiring its own examiner. Sec. 971.14(2)(g) Wis. Stats., allows access to the defendant by examiners retained by the defense or the State throughout the proceedings, although it would be expected that those experts would be constrained by the case calendar. That is what the defense did in this case. The defense retained Dr. Leslie Taylor when it desired another opinion

We believe the appointment of Dr. Jurek violated sec. 971.14. When the defense objected on September 25, 2008, this case should have been scheduled for an evidentiary hearing on Dr. Knudson's then existing reports. Those reports indicated that Matthew was not competent, and not likely to retain competence. We believe therefore that Matthew's conviction should be vacated and that an order be entered consistent with those reports.

## CONCLUSION

For the reasons stated immediately above, we respectfully request that this court vacate Matthew's conviction, or, alternatively, pursuant to Section I above, Matthew be afforded a hearing on his request to withdraw his plea. We also request that Matthew be resentenced for the reasons stated in Section II.

Dated: _____.

Respectfully submitted,

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_____
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## CERTIFICATION

I hereby certify that the foregoing brief is in non-proportional type with a courier font and is 50 pages long including this page. I also certify that the text of the electronic copy of this brief is identical to the text of the paper copy.

Dated: _____.

GRAU LAW OFFICE

_____
John J. Grau