STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2012AP2692-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RODDEE W. DANIEL,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District II, Reversing an Order Determining the Defendant's Competency, Entered in the Circuit Court, Kenosha County, the Honorable Wilbur W. Warren III, Presiding

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BRIEF OF THE DEFENDANT-APPELLANT-PETITIONER

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Issues Presented

1. Should a defendant bear the burden of proving incompetency in Wisconsin?

The circuit court decided that defense counsel bore the burden of proving incompetency by clear and convincing evidence.

The court of appeals decided that the circuit court could burden the Defendant or defense counsel with proving incompetency but that the circuit court had erred in weighing the evidence by the clear and convincing standard rather than by the preponderance of the evidence standard.

2. What procedure should be employed when a defendant and defense counsel disagree as to the defendant's competency?

The circuit court burdened defense counsel with proving the Defendant's incompetency.

The court of appeals implicitly sanctioned the circuit court's reassignment of the burden.

3. What standard of review should be applied to a circuit court's postconviction competency determination?

This issue was not presented to the circuit court.

The court of appeals did not decide this issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

In a case important enough to merit this Court's review, oral argument and publication are warranted.

FACTS

Roddee Daniel was convicted of First Degree Intentional Homicide and Burglary for the murder of Capri Walker, which occurred when he was 15 years old. (R. 96; R. 97.)

While Roddee was awaiting trial, he was assessed by Dr. Suzanne Lisowski, Ph.D., for the purposes of reverse waiver. (R. 127; A-App. 201-208.) Dr. Lisowski reported that Roddee was born premature and cocaine-positive, had been treated at Rogers Memorial for behavioral difficulties, failed 9th grade, and has an I.Q. of 71. (*Id*.) Prior to trial, after learning that Roddee had received treatment for auditory hallucinations well before being criminally charged (R. 142, April 28, 2010 Hearing at 3, 10), Roddee's defense counsel requested a competency determination. (R. 71; R.72.) Roddee was examined by Dr. Deborah Collins, Psy.D., who noted after a half hour meeting with Roddee (R. 149:95, Postconviction Competency Hearing; A-App. 116) that "available information supports a conclusion that Roddee is competent to proceed." (R. 75; A-App. 192.) Defense counsel asked for another evaluation, and while the judge was inclined to permit one because of uncertainty in Dr. Collins' report, trial defense counsel was privately retained and did not have the funds to hire another expert. (R. 142, April 28, 2010 Hearing at 17-18.) The court did not appoint another expert. (*Id*.)

Roddee was convicted after a jury trial. (R. 96; R. 97.) He was sentenced to life without the possibility of extended supervision, plus fifteen years. (*Id*.) The case is replete with potential issues of arguable merit. Contested motions for reverse waiver (R.5), to dismiss the criminal complaint for the unconstitutionality of the statute (R. 21), to sever defendants for trial (R.49), for change of venue (R. 50), to suppress statements (R. 53), to determine competency (R. 71), etc., were all decided against the Defendant. As with any case of this nature, other issues of arguable merit are exceedingly likely.

Appellate counsel has been unable to bring those issues because Roddee has inconsistently wanted to terminate representation. (R.108, Motion for Postconviction Competency Ruling; A-App. 1-7.) On the basis of Roddee's erratic behavior, in light of *State v. Debra A.E.*, 188 Wis.2d 111, 523 N.W.2d 727 (1994), appellate counsel moved the circuit court to rule on Roddee's competency to pursue postconviction relief. (*Id*.)

After Roddee refused to cooperate with a court appointed expert, he was sent to Mendota for evaluation. (R. 115.) After a brief stay at Mendota the evaluator, who had almost completed a fellowship that would allow him to sit for forensic boards, opined that Roddee was competent. (R.117, April 20, 2012 Phelps Report; A-App. 12-16.)

A postconviction competency hearing was held. (R. 149, Hearing on Postconviction Competency; A-App. 22-186.) The court inquired personally of the Defendant whether he was competent and Roddee responded "Yeah." (R. 149:11; A-App. 32.) Appellate counsel urged the court to conduct an open-ended colloquy, and while the court persisted in asking closed questions, the court permitted counsel to question the Defendant:

> MR. JUREK: Roddee, can you explain for the Court what it means to appeal a conviction?
>
> MR. DANIEL: No.
>
> MR. JUREK: Well, what happens if you decide to appeal?
>
> MR. DANIEL: I don't want to talk.
>
> MR. JUREK: I understand you might not want to talk. I think it's important for this Court to know that if you don't want to appeal or if you want to fire me that you're able to do that. So what happens if you don't appeal?
>
> MR. DANIEL: I can get charged with a crime.
>
> MR. JUREK: You'll get charged with a crime?
>
> MR. DANIEL: Uh-huh.
>
> MR. JUREK: And what happens then?
>
> MR. DANIEL: I don't want to talk.
>
> MR. JUREK: I know you don't want to talk. We're almost done. What happens if you get charged with a crime?
>
> MR. DANIEL: I don't want to talk.

(R. 149:12-15; A-App. 33-36.) The court then expressed the belief that under Wis. Stat. § 971.14, it needed to make an initial determination of competency. (R. 149:15-18; A-App. 36-39.) Undersigned counsel argued against that, advising the court that no initial determination was required, and that the court ought to just proceed with the hearing. (*Id*.) The State, on the other hand, advised the court that the State did not intend to contest Roddee's competency and argued for a "directed verdict" finding the Defendant competent. (*Id*.)

The court made a preliminary determination that Roddee was competent based on Roddee's "declaration," and noted that the State did not intend to present evidence to the contrary. (*Id*.) The court then advised counsel "So now if you're not waiving your right to present evidence as to incompetency, then I think you probably have the burden to do that." (R. 149:19; A-App. 40.) Counsel accepted that burden, and the court advised that the burden was "preponderance of the evidence." (*Id*.)

The doctor who opined Roddee was competent admitted he did not know any steps in the appellate process. (R. 149:62; A-App. 83.) On the other hand, Roddee's treating psychiatrist at the Wisconsin Resource Center testified that he successfully had Roddee committed for the purposes of involuntarily medicating him under Chapter 51 (R. 149:31-32; A-App. 52-53); his WRC social worker testified that his daily presentation was disorganized and

inconsistent, and that he often endeavored to do things like take classes but failed to follow through for long (R. 149:105-110; A-App. 126-131.); and an independent psychologist familiar with the appellate process outlined how Roddee lacked the ability to understand where he was in the process, with cites to accepted authorities in the field and Roddee's records. (R. 149:123-159; A-App. 144-180.)

The circuit court nonetheless found Roddee competent, deciding that appellate counsel had failed to meet his burden by clear and convincing evidence. (R. 150, Oral Ruling on Postconviction Competency; A-App. 214-229.)

Appellate counsel appealed the circuit court's determination that Roddee was competent, requesting that the court of appeals find the circuit court's ruling that Roddee was competent clearly erroneous and appoint a guardian to make those decisions allocated to Roddee by law. Instead, based on *Cooper v. Oklahoma*, 517 U.S. 348 (1996), the court of appeals found that the circuit court had employed an unconstitutional burden of proof, and remanded with instructions that defense counsel might again be burdened with proving incompetency, but by a lesser standard. *See Decision*, A-App. 231-239.)

ARGUMENT

I. The Burden to Prove Incompetency Cannot be Reassigned to a Defendant or Defense Counsel in Wisconsin.

Until the court of appeals' decision in this case, there was nothing in current Wisconsin law to suggest that the burden to prove incompetency could be reassigned to a defendant or defense counsel. To the contrary, the statute governing competency hearings[1] specifically assigns the burden to the State under any of several scenarios.[2] By applying a case about a state with the opposite statutory burden and ignoring applicable Wisconsin law, the court of

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[1] Wis. Stat. § 971.14(4) (b) in relevant part: If the district attorney, the defendant and defense counsel waive their respective opportunities to present other evidence on the issue, the court shall promptly determine the defendant's competency and, if at issue, competency to refuse medication or treatment for the defendant's mental condition on the basis of the report filed under sub. (3) or (5). In the absence of these waivers, the court shall hold an evidentiary hearing on the issue. [. . .] At the commencement of the hearing, the judge shall ask the defendant whether he or she claims to be competent or incompetent. If the defendant stands mute or claims to be incompetent, the defendant shall be found incompetent unless the state proves by the greater weight of the credible evidence that the defendant is competent. If the defendant claims to be competent, the defendant shall be found competent unless the state proves by evidence that is clear and convincing that the defendant is incompetent.

[2] While the statute governs competency proceedings pre-sentencing, under *Debra A.E.*, the same procedure is to be applied post-conviction, as discussed below.

appeals ruling in this case invites confusion as to the appropriate procedure to use in competency determinations.[3]

A. *Cooper v. Oklahoma* does not apply.

The court of appeals decision in this case sanctions the reassignment of the burden to defense counsel to prove incompetency with reference to a U.S. Supreme Court case about a state that has the opposite statutory burden of Wisconsin. Oklahoma burdens defendants with proving incompetency. *Cooper v. Oklahoma*, 517 U.S. 348, 350 (1996), Wisconsin burdens only the State. Wis. Stat. § 971.14(4)(b). Because of that statutory difference, the court of appeals sanction of burden reassignment in Wisconsin is inappropriate.

In *Cooper v. Oklahoma*, the U.S. Supreme Court considered whether Oklahoma's statute burdening a defendant to prove incompetency by clear and convincing evidence violated his due process right under the Fourteenth

[3] While the court of appeals characterized this case as presenting an issue of first impression because of its postconviction posture (Decision at ¶¶1; 6), the court of appeals later finds that pre-sentencing/post-conviction posture to be a "distinction without a difference." Decision at ¶11. Indeed, since there is no difference in the distinction, the real issue of first impression in this case is the procedure to employ when a defendant and defense counsel disagree as to competency. The court of appeals decision in this case could be cited as authority for burdening a defendant or defense counsel in pre-sentencing competency contexts when a defendant and defense counsel disagree as to competency. See Concurrence, A-App. 139.

Amendment. *Cooper* at 350. The Court decided that Oklahoma's statute was a violation of due process, because it permitted a defendant who was more likely than not incompetent to nonetheless be convicted. *Id.* at 369. The Court found that preponderance of the evidence is the appropriate standard when a defendant is burdened with proving his incompetence. *Id.* at 355, 362.

The court of appeals is therefore correct that the circuit court in this case employed an unconstitutional standard when it required defense counsel to show the Defendant incompetent by clear and convincing evidence. But burdening defendants to prove incompetency by a preponderance of the evidence is a constitutional floor for those states which by statute burden a defendant. Since Wisconsin statutes place the burden only on the State, that constitutional floor is irrelevant to the question at hand in this case: Whether the burden can be reassigned to the Defendant or Defense Counsel to prove incompetency in Wisconsin at all.

B. *Debra A.E.* does apply.

To reassign the burden to defense counsel is to disregard the instruction in *State v. Debra A.E.*, 188 Wis.2d 111, 523 N.W.2d 727 (1994), that the circuit court should be guided by Wis. Stat. § 971.14(4) to the extent feasible. In *Debra A.E.*, this court considered as an issue of first impression the appropriate role of the circuit court when

counsel requests a competency hearing for a defendant during postconviction relief proceedings. *Debra A.E.* at 124. In *Debra A.E.*, this Court instructed circuit courts conducting postconviction competency hearings to be guided by the statute governing presentencing competency hearings. *Debra A.E.* at 132. Presentencing competency hearings place the burden only on the State. Wis. Stat. § 971.14(4)(b).

Wisconsin is relatively unique among the states in burdening only the State with proving competency or incompetency. *Cooper v. Oklahoma*, 517 U.S. 348, 362 n. 18 (1996). While *Debra A.E.* affords a circuit court discretion in determining a method for evaluating a defendant's competency, it requires courts that decide to hold a hearing to be guided by the statute to the extent feasible. *Debra A.E.* at 132. There is no reason why being guided by the statute was not feasible in this case. The circuit court attempted to, as is demonstrable from the record. (R. 149, June 13, 2012 Postconviction Competency Hearing, 15:19-19:17.) Also demonstrable from the record is that the circuit court got it wrong. (R. 149:17:19-25; 18:14-21; 18:24-19:7; A-App. 38-40.)

The circuit court got it wrong by deciding that it needed to make an "initial determination" or "initial finding" of competency based on the Defendant's "declaration of competency." (R.149:17:19-25; 18:14-21; A-App. 38-39) Based then on that initial finding the circuit court determined

that it should reassign the burden to defense counsel. (R. 149:18:24-19:7; A-App. 39-40.) As undersigned counsel pointed out at the hearing, that is not what the statute requires. (R.149:18:1-11; A-App. 39.) The statute requires a prompt determination of competency only if the defendant, defense counsel and the State waive their respective opportunities to present evidence on the issue. Wis. Stat. § 971.14(4)(b). In the absence of waivers, an evidentiary hearing is held. *Id*. At the beginning of the hearing, the judge shall ask the defendant whether he claims to be competent or incompetent. *Id*. The statute says nothing about an "initial determination" or "initial finding" of competency, only a "prompt finding" if the opportunity to present evidence is waived. While the court was demonstrably trying to abide by the statute, if failed by making an unnecessary initial determination and then reassigning the burden to defense counsel based on that unnecessary finding.

Under the statute the burden is the State's if a defendant claims to be competent, the burden is the State's if a defendant claims to be incompetent, and the burden is the State's if a defendant stands mute. The instruction in *Debra A.E.* to "be guided" suggests that there may be circumstances in which it is not possible to apply the statute exactly: The mandate to "be guided" applies in such situations. Being guided by the statute to the extent feasible would mean sticking closely to the statute even if unforeseen

circumstances arise, like a defendant and defense counsel disagreeing as to the defendant's competency. "Be guided" cannot mean that statute should be ignored and the burden should be reassigned to defense counsel. Nor can it mean that the reassignment should be sanctioned on the basis of a Supreme Court case about a state with the opposite statutory burden. While the statute is silent as whose position represents the defense's when a defendant and defense counsel disagree as to a defendant's competency, to burden defense counsel with proving incompetency is to ignore *Debra A.E.*

II. The Appropriate Procedure to Follow When the Defendant and Defense Counsel Disagree as to Competency is to Have a Hearing with the Burden to Prove Competency on the State.

A. While the statute does not specify whether the defendant's or defense counsel's position represents the defense's position when the defendant and defense counsel disagree as to competency, Wisconsin law suggests that either's position of incompetency should require a hearing with the State bearing the burden of proving competency.

While the statute distinguishes between the defendant and defense counsel in regard to their right to present evidence, the statute does not prescribe whose opinion of the defendant's competency represents the defense's position. A

hearing is required if either the defendant or defense counsel raise incompetency. Wis. Stat. § 971.14(4)(b). The State should bear the burden regardless of who raises the issue, or whether the defendant and defense counsel agree. The statute applies the burden to the State if the defendant asserts incompetency or stands mute. It does not address differences in agreement between a defendant and defense counsel as to the defendant's competency.

A comparison of the various incarnations of Wis. Stat. § 971.14(4) reveals that for a short time the legislature did permit burdening whoever asserted incompetency with proving it. From 1980 to 1987, the statute required that "the burden of persuasion shall rest on the party seeking to establish that the defendant is not competent." *See* Wis. Stat. § 971.14(4)(b) from 1980 to 1986. In 1987 the statute was changed to the burden exclusively the State.

The statute requires that either the defendant's or defense counsel's position that the defendant is incompetent necessitates a hearing. In *State v. Guck*, 176 Wis. 2d 845, 500 N.W.2d 910 (1993), this Court considered whether Wis. Stat. § 974.14(4)(b) required a court to inquire of a defendant personally whether he waived the right to present evidence at a competency hearing or if defense counsel might waive the defendant's opportunity to present evidence on behalf of the defendant. *Guck* at 853. Reasoning that the legislature had required personal inquiry of the defendant in other statutes

but not in Wis. Stat. § 974.14(4)(b), this Court found that defense counsel's waiver of the opportunity to present evidence on the defendant's behalf was not error. *Guck* at 854.

Guck also recounts that an earlier change in the statute was occasioned by a disagreement as to competency between a defendant and defense counsel. *Guck* at 852. *Guck* recounts that in *State ex rel. Matalik v. Schubert*, 57 Wis. 2d 315, 204 N.W.2d 13 (1973), despite the fact that a defendant vigorously demanded to challenge a psychiatrist's conclusion that he was incompetent, defense counsel waived the defendant's right to present evidence. *Id*. This Court found that due process required a meaningful hearing in the absence of the defendant's waiver. *Id*. *Guck* recounts that it was in response to *Matalik* that the legislature amended Wis. Stat. § 971.14(4)(b) to require that both a defendant and defense counsel have the opportunity to present evidence at a competency hearing. *Guck* at 853.

The decision to raise competency is not a strategic decision. *State v. Johnson*, 133 Wis.2d 207, 385 N.W.2d 176 (1986). The decision to present evidence rests with both the defendant and with defense counsel. Wis. Stat. § 971.14(4)(b). The statute also uses the word "defendant" in referencing the position of the defense. Wis. Stat. § 971.14(4)(b). However, *State v. Guck* sanctioned defense

counsel's representation of the defense's position in lieu of personally inquiring of a defendant.

The distinction between client-governed decisions and attorney-governed decisions is discussed by Professor LaFave:

> [T]he Supreme Court has indicated, in dictum or in holding, that counsel has the ultimate authority in deciding whether or not to advance the following defense rights: barring prosecution use of unconstitutionally obtained evidence; obtaining dismissal of an indictment on the ground of racial discrimination in the selection of the grand jury; wearing civilian clothes, rather than prison garb, during the trial; striking an improper jury instruction; including a particular nonfrivolous claim among issues briefed and argued on appeal; foregoing cross-examination; calling a possible witness (other than defendant) to testify; being tried within the 180 day time period specified in the Interstate Agreement on Detainers; and providing discovery to the prosecution (even where the failure to do so risks possible sanctions of exclusion).

3 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, AND ORIN S. KERR, CRIMINAL PROCEDURE § 11.6(a), at 780-781(2007)(footnotes omitted).

On the other hand, there are certain decisions left to a defendant exclusively. "[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal…" *Jones v. Barnes*, 463

U.S. 745 (1983). In this case, the right in question is fundamental, yet the difficulty with leaving that decision to the defendant exclusively is the obvious fact that an incompetent might not know he is incompetent.

While the statute does not anticipate a situation exactly like the one presented in this case, where the Defendant and defense counsel disagree as to the Defendant's competency, being guided by the statute will mean leaving the burden to prove competency with the State, which is the only party the statute burdens. *Guck* suggests that while the statute reads "the defendant," it means "the defense." Further reason to leave the burden with the State is required by policy considerations, discussed below.

B. Permitting the burden to be reassigned to defense counsel will drive a wedge between the defendant and defense counsel.

In *State v. Johnson*, 133 Wis.2d 207, 385 N.W.2d 176 (1986), this Court considered whether defense counsel's failure to raise competency to the court when defense counsel had reason to doubt the defendant's competency constituted ineffective assistance of counsel. In *Johnson*, defense counsel was given reason to doubt the defendant's competency through the reports of mental health professionals authored in preparation for presenting a defense. *Johnson* at 220. Defense counsel nonetheless did not raise competency to the court. *Johnson* at 213. At a hearing on the matter, defense

counsel explained that he had a strategic basis for not raising competency. *Johnson* at 214. This Court found that failing to alert a court to questions of the defendant's competency when there was reason to doubt the defendant's competency did constitute ineffective assistance of counsel. *Johnson* at 224. This Court reasoned that, given the proposition that an incompetent may not be subjected to trial, failure to raise competency undermined the fundamental fairness of the proceeding. *Johnson* at 223. The defense of incompetency cannot be waived. *Johnson* at 218, n.1 (citing *Pate v. Robinson*, 383 U.S.375, 384 (1966)). This Court held that strategic considerations are inappropriate in mental competency situations, and that they do not eliminate defense counsel's duty to request a competency hearing. *Johnson* at 221.

This Court has imposed a duty to raise incompetency if there is reason to believe a defendant may be incompetent. *Johnson.* This Court has recognized that duty as a limited breach of attorney-client privilege. *State v. Meeks*, 2003 WI 104, 263 Wis.2d 794, 666 N.W.2d 859. In *Meeks*, this Court considered whether a defendant's former defense counsel violated attorney-client privilege when she testified at her former client's competency hearing. *Meeks* at ¶ 18. Observing that confidentiality is fundamental to attorney-client privilege and the objectives the privilege promotes, this Court characterized even the generalized testimony of former

counsel related to competency as violating attorney-client privilege. *Meeks* at ¶ 40.

This Court recognized that the breach of privilege required by *Johnson* occasions a tension in a lawyer's conflicting obligations to maintain client confidences and to assist the court. *Meeks* at ¶¶ 45-46. This Court should not exacerbate the divide between client and counsel by requiring counsel to bear the burden in presenting a case against his client's stated position.

Meeks also directs that because attorney-client privilege is so important, the prosecution should exhaust all investigatory powers before calling a defendant's former attorney to testify as to competency. *Meeks* at ¶ 52. While *Meeks* was about former counsel testifying, not current counsel bearing the burden of an argument presented against his client's wishes, it is clear that the policy concerns articulated by the court in *Meeks* are just as applicable to this case. *Meeks* at ¶ ¶46-49. To burden the State is in keeping with the statute and presents no greater difficulty than if the defendant and defense counsel had agreed or the defendant had stood mute.

C. Permitting the burden to be reassigned to defense counsel will make it impossible for defense counsel to perform ethically.

For defense counsel to comply with SCR 20.1.14,[4] the burden to prove competency must remain with the State. SCR 20.1.14(b) authorizes a lawyer to take protective action when a client with diminished capacity cannot take such action. Raising competency and seeking the appointment of a guardian consistent with *Debra A.E.* would be such an action. *Debra A.E.* at 135. SCR 20.1.14(a) requires that in such circumstances, the lawyer shall maintain a normal client-lawyer relationship with the client. In regard to what a normal client-lawyer relationship consists of, SCR 20:1.2(a) requires

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[4] SCR 20:1.14:

Client with diminished capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by SCR 20:1.6. When taking protective action pursuant to par. (b), the lawyer is impliedly authorized under SCR 20:1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

that a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by SCR 20:1.4, shall consult with the client as to the means by which they are to be pursued. It would therefore be impossible to maintain a normal client-lawyer relationship if counsel is required to bear the burden of proving a position contrary to his client's position.

III. The Standard of Review of a Circuit Court's Determination of Postconviction Competency Should be Less Deferential.

While there is no good reason for the assignment of the burden to be different than it is pre-sentencing, there is good reason for appellate review of a circuit court's decision to be afforded less deference. In *State v. Byrge*, 2000 WI 101, 237 Wis.2d 197, 614 N.W.2d 477, this Court found that the determination of competency to stand trial was primarily a factual determination. "The findings of a circuit court in a competency to stand trial determination will not be upset unless they are clearly erroneous because a competency hearing presents a unique category of inquiry in which the circuit court is in the best position to apply the law to the facts." *Byrge* at ¶ 4. "Because a competency determination depends on the circuit court's ability to appraise witness credibility and demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to

the trial court." *Byrge* at ¶ 45 (internal citations omitted). While the only witness at Byrge's competency hearing was a psychiatrist (*Byrge* at ¶ 47), the court addressed the credibility and demeanor of the witness and of the defendant. *Byrge* at ¶ 52. An evaluation for competency assesses the defendant's *present* mental capacity to understand the proceedings and assist in his or her defense. *Byrge* at ¶¶ 47; 49 (emphasis added).

Therefore, part of the rationale supporting the great level of deference to circuit court determinations of competency was that circuit courts are more familiar with the defendant. However, by the time a postconviction motion will have been offered, the circuit court's familiarity with the Defendant, especially the *present* mental state of the defendant referenced in *Byrge*, will by necessity be more attenuated than it would be in a competency to stand trial hearing.

Additionally, circuit courts are less familiar with the appellate process and what is required of defendants during that process, and therefore their assessment may not be as sound as a trial court determining trial competency. In *State v. Knight*, 168 Wis. 2d 509, 521, 484 N.W.2d 540 (1992), this Court held that ineffective assistance of appellate counsel "involve[s] questions of law within the appellate court's expertise and authority to decide de novo," and that the appellate court will be familiar with the case and the appellate

proceedings. Likewise, an appellate court will be more familiar with postconviction procedure and what demands will be placed on that defendant on appeal. A court of appeals reviewing a circuit court decision regarding postconviction competency should thus owe the circuit court less deference than it would if the circuit court had made a competency to stand trial determination. It would therefore be appropriate that review of circuit court determinations of postconviction competency be decided independently of the circuit court but benefiting from the analysis and observational advantage of the circuit court. *See Byrge* at ¶76 (concurrence of Chief Justice Abrahamson).

CONCLUSION

This Court should find that under Wisconsin law, the burden to prove incompetency cannot be shifted to a defendant or defense counsel, and that the appropriate procedure when a defendant and defense counsel disagree as to competency is to hold a hearing with the state bearing the burden of proving competency. This court should further find that the standard of review to be employed in reviewing circuit court determinations of postconviction competency should be less deferential than circuit court determinations of competency to stand trial. Finally, this court should find that the circuit court clearly erred in finding Roddee competent to pursue

postconviction relief, and remand for the appointment of a guardian to make those decisions allocated to him by law.

Dated this 20th day of October, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,352 words.

Dated this 20th day of October, 2014.

Signed:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 20th day of October, 2014.

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