STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2012AP2692-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RODDEE W. DANIEL,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, REVERSING AN ORDER OF THE CIRCUIT COURT FOR KENOSHA COUNTY, WILBUR W. WARREN III, JUDGE

BRIEF OF THE PLAINTIFF-RESPONDENT

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BRIEF OF THE PLAINTIFF-RESPONDENT

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. To what extent should the statutory framework of Wis. Stat. § 971.14(4)(b)[1] apply in establishing and rebutting a presumption of competency to pursue postconviction relief?

While the circuit court was guided by Wis. Stat. § 971.14(4)(b), this question was not specifically addressed.

[1] All citations to Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

This question was not presented to the court of appeals.

2. What procedures should be followed when a defendant wants to be found competent to forego postconviction relief, is evaluated by court order and found to be competent, but defense counsel disagrees with the evaluator's conclusion?

The circuit court concluded that when defense counsel raises the issue of competency and the defendant personally asserts that he is competent, the court must presume the defendant competent unless defense counsel proves by clear and convincing evidence that the defendant is incompetent.

The court of appeals concluded that when defense counsel raises the issue of competency and the defendant personally asserts that he is competent, the court must presume the defendant competent unless defense counsel proves by the greater weight of the credible evidence that the defendant is incompetent.

3. Should a reviewing court give great deference to the circuit court's postconviction competency determination when the same court that presided over trial makes the postconviction competency determination?

The circuit court had no reason to decide this issue.

The court of appeals concluded that a high level of deference is owed to a circuit court's postconviction competency determination.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with most cases accepted for review by this Court, oral argument and publication are appropriate.

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

Roddee Daniel asserted his right to forego postconviction relief (108; A-App. 2). Questioning Daniel's competence, defense counsel asked the court to determine if Daniel was competent to make that choice (108; 149:5-6; A-App. 2, 26-27). Once the issue of competency was raised, the court ordered a competency evaluation and scheduled an evidentiary hearing (109; 110). Daniel refused to cooperate with the first evaluator and, as a result, that evaluator did not reach an opinion on Daniel's competency (114; A-App. 11). The court then ordered an in-patient evaluation (115). The second evaluator did reach an opinion and concluded that Daniel was competent (117:4; A-App. 15).

At the hearing, and in an attempt to follow the procedures in Wis. Stat. § 971.14(4)(b), the court asked Daniel personally whether Daniel believed he was competent to make decisions about how to proceed (149:10-14; A-App. 31-35). Daniel replied "Yeah" (149:11; A-App. 32). The State did not seek to challenge Daniel's assertion of competency (149:16; A-App. 37). Defense counsel, however, maintained that Daniel was incompetent and wished to present other evidence (149:18; A-App. 39). Not finding direction in Wis. Stat. § 971.14(4)(b) for this exact situation, the circuit court concluded that since defense counsel sought a determination contrary to Daniel's assertions of competence, defense counsel had the burden of proving incompetency (149:15-19; A-App. 36-40). While disagreeing with the court's conclusion, defense counsel ultimately accepted that burden (149:19; A-App. 40). After the presentation of additional evidence, the court found Daniel competent to make decisions on how to proceed (150:12-14; A-App. 225-27).

Defense counsel[2] sought review (134). The court of appeals concluded that a competency determination could not be reviewed as a matter of right, but on its own motion, accepted the matter as a permissive appeal. On appeal, defense counsel challenged only the court's competency determination (*see generally*, Daniel Ct. App. Br.). The court of appeals did not reach the issue of Daniel's competency and rather found that the circuit court erred when it concluded that incompetency had to be proven by clear and convincing evidence. *State v. Daniel*, 2014 WI App 46, ¶¶ 10-11, 354 Wis. 2d 51, 847 N.W.2d 855. The court of appeals concluded that the appropriate standard was the greater weight of the credible evidence and remanded the case for a new competency hearing. *Id.* ¶¶ 10-14. Defense counsel then petitioned this Court for review.

ARGUMENT[3]

In the postconviction context, competency determinations serve to protect the defendant's fair opportunity to postconviction review as of right. This Court previously concluded in *State v. Debra A.E.*[4] that if a circuit court holds a postconviction competency hearing, the court should seek guidance from Wis. Stat. § 971.14(4) (1993-94). The issues raised in this case

[2] The State does not wish to unnecessarily confuse this case by using Mr. Daniel's name when this appeal was not taken at his direction. From this point forward, the State will refer to the arguments presented as those of defense counsel. Mr. Daniel's name will be used only when the attribution to Mr. Daniel is appropriate.

[3] The issues presented for review were not directly raised in the court of appeals. Generally issues not raised on appeal are deemed abandoned. *A.O. Smith Corp. v. Allstate Ins. Companies*, 222 Wis. 2d 475, 491-92, 588 N.W.2d 285 (Ct. App. 1998). However, since waiver is a rule of judicial administration, the State assumes that the court, by granting the petition for review, has determined that this case warrants relief from the waiver rule. *Id.* at 493.

[4] 188 Wis. 2d 111, 523 N.W.2d 727 (1994).

concern whether a court should follow the procedures for establishing rebuttable presumptions found in subsection 971.14(4)(b).[5]

Subsection 971.14(4)(b) creates rebuttable presumptions of competency or incompetency based upon a defendant's personal assertion of competency or incompetency. In hearings on competency to stand trial, those presumptions protect an incompetent defendant from being tried and to protect a competent defendant from a deprivation of liberty absent an adjudication of guilt. The interests served by those presumptions are not applicable in the postconviction context and Wis. Stat. § 971.14(4)(b) unnecessarily complicates postconviction competency determinations. As such, this Court should take this opportunity to clarify the procedures to be followed at a postconviction competency hearing insofar as those procedures depart from Wis. Stat. § 971.14(4)(b).

Meaningful review of Daniel's competency to decide whether to forego postconviction relief should start with the presumption that Daniel is competent. Not only does the general proposition of law presume competence rather than incompetence, Daniel was previously determined to be competent to stand trial. That competency determination should continue in force and effect until it is proven that Daniel is no longer competent.

When postconviction competency is challenged and the circuit court orders a competency evaluation, the defendant, defense counsel, and the district attorney should be given the opportunity to present evidence if there is a hearing. If the district attorney and the defendant do not challenge the conclusion of the evaluator but defense counsel has evidence that conflicts with that conclusion, defense counsel may produce that evidence at the competency hearing for consideration. Placing the burden of production on defense counsel under these

[5] The 2011-12 version and the 1993-94 version of subsection 971.14(4)(b) are substantively identical.

circumstances furthers the interest of the competency hearing, which is the protection of the defendant's fair opportunity to seek postconviction review as of right.

It is then the circuit court's task to weigh the evidence and determine if the greater weight of the credible evidence rebuts the presumption of competency. Once the competency determination is made, it should be afforded great deference as the circuit court is in the best position to determine competency.

I. A POSTCONVICTION COMPETENCY HEARING SHOULD NOT BE GUIDED BY THE STATUTORY FRAMEWORK OF WIS. STAT. § 971.14(4)(b) FOR CREATING AND REBUTTING A PRESUMPTION OF COMPETENCY OR INCOMPETENCY.

A criminal defendant enjoys a due process right not to be tried unless he or she is competent. *Pate v. Robinson*, 383 U.S. 375, 378 (1966). The test for competency under the Due Process Clause is whether the accused "'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as a factual understanding of the proceedings against him.'" *Dusky v. United States*, 362 U.S. 402, 402 (1960) (citation omitted). Wisconsin codified the *Dusky* standard for competency to stand trial in Wis. Stat. § 971.13(1), which provides that "[n]o person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures."

Once there is reason to doubt a defendant's competency to stand trial, there must be an examination of the defendant by an examiner with "specialized

knowledge determined by the court to be appropriate to examine and report upon the condition of the defendant." Wis. Stat. §§ 971.14(1r)(b), 971.14(2)(a). That examiner must issue a report regarding the defendant's competency, Wis. Stat. § 971.14(3), and there must be a competency hearing (unless waived by the parties) once the examination is completed and the report is distributed. Wis. Stat. § 971.14(4)(b). If the circuit court determines that the defendant is competent after the hearing, criminal proceedings resume. Wis. Stat. § 971.14(4)(c). If the court determines that the defendant is incompetent and is not likely to become competent, the criminal proceedings are suspended, and commitment procedures may be initiated. Wis. Stat. §§ 971.14(4)(d), 971.14(5).

In the postconviction context, a defendant has the right to a "fair opportunity to pursue postconviction relief as of right." *State v. Debra A.E.*, 188 Wis. 2d 111, 128 & n.12, 523 N.W.2d 727 (1994) (citing Article I, sec. 21, of the Wisconsin Constitution). Postconviction competency determinations serve to protect that right. *Id.* In doing so, a postconviction competency determination protects both parties. It protects the defendant's right to postconviction review and protects the State from an unwarranted expansion of that right. A postconviction competency determination that finds a defendant competent limits the defendant's ability to bring successive attacks. Similarly, a postconviction competency determination that finds a defendant incompetent puts the State on notice as to what types of successive attacks a defendant will have the right to raise once competency is regained. *See Debra A.E.*, 188 Wis. 2d at 136 (once competency is regained the defendant has the right to bring a successive challenge if that challenge could not have been raised earlier because of incompetency).

In *Debra A.E.*, this Court concluded that Wis. Stat. §§ 971.13 and 971.14 govern competency determinations only through the sentencing stage of criminal proceedings. 188 Wis. 2d at n.14. Because "the meaning of competency in the context of legal proceedings changes according to

the purpose for which the competency determination is made," the court concluded that a "defendant is incompetent to pursue postconviction relief [of right] when he or she is unable to assist counsel or to make decisions committed by law to the defendant with a reasonable degree of rational understanding." *Id.* at 124-26. The court then concluded that like competency to stand trial, if any party has a good faith doubt about the defendant's competency to pursue postconviction relief, the issue of competency must be brought to the appropriate court's attention. *Debra A.E.*, 188 Wis. 2d at 131. *See also*, *State v. Johnson*, 133 Wis. 2d 207, 219-21, 395 N.W.2d 176 (1986). Once a question of postconviction competency is raised, if the court concludes that there is reason to doubt the defendant's competency, it has the discretion to determine the method for evaluating competency. *Debra A.E.*, 188 Wis. 2d at 131-32.

That is the significant procedural difference between determinations of competency to stand trial and postconviction competency determinations. In determining competency to stand trial, the circuit court is bound by mandatory procedures. Wis. Stat. § 971.14. In *Debra A.E.*, this Court specifically concluded that postconviction competency procedures are left to the discretion of the court. *Debra A.E.*, 188 Wis. 2d at n.14 & 131-32.

The other significant difference between a determination of competency to stand trial and a determination of competency to pursue postconviction relief is the effect of the determination. When a defendant is determined incompetent to stand trial, the defendant may be committed and proceedings are suspended until competency is regained. Wis. Stat. §§ 971.14(4)(d), 971.14(5). In *Debra A.E.*, this Court specifically concluded that when a court determines that a defendant is incompetent to pursue postconviction relief, postconviction proceedings are not suspended and there is no attempt to restore competency because "meaningful

postconviction relief can be provided even though a defendant is incompetent." *Debra A.E.*, 188 Wis. 2d at 130.

This case specifically calls into question whether all of the procedures relating to a hearing on competency to stand trial, as defined in Wis. Stat. § 971.14(4)(b), are relevant and helpful to a postconviction competency hearing. Defense counsel complains that the court did not follow procedures described in Wis. Stat. § 971.14(4)(b), which defense counsel asserts is contrary to the instructions in *Debra A.E.* that a circuit court be guided by Wis. Stat. § 971.14(4) to the extent feasible. (Pet'r's Br. at 10-12). *See also*, *Debra A.E.*, 188 Wis. 2d at 132. Specifically, defense counsel asserts that the circuit court improperly presumed Daniel to be competent based on Daniel's personal assertion of competence, and then improperly placed the burden on defense counsel to rebut that presumption (Pet'r's Br. at 10-11).

Section 971.14(4)(b) reads in relevant part:

> 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.

The statute is clear that a defendant's personal assertion creates a presumption of competence or incompetence when the issue is competency to stand trial.[6]

[6] In this case, while the circuit court characterized this presumption as a mandatory "initial determination," the effect is the same. The court correctly concluded that Wis. Stat. § 971.14(4)(b) guides the court to find Daniel competent based upon Daniel's personal assertion and unless proven otherwise.

This specific portion of Wis. Stat. § 971.14(4)(b) serves to protect two competing interest. When a criminal defendant personally asserts that he is not competent to stand trial, he is asserting his fundamental right not to be tried while incompetent. *State v. Wanta*, 224 Wis. 2d 679, 691, 592 N.W.2d 645 (Ct. App. 1999). In doing so, he is essentially agreeing to competency proceedings and conceding that his liberty may be deprived by an involuntary commitment. When the defendant personally asserts that he is competent to stand trial, he is asserting his fundamental right to liberty. *Wanta*, 224 Wis. 2d at 692 & n.5. In doing so, he is opposing competency proceedings and opposing any involuntary commitment that may result from those proceedings. Section 971.14(4)(b) was constructed to balance these competing interests:

> The statute is narrowly tailored to achieve the State's interest in prosecuting competent criminal defendants and in restoring the competency of those who are incompetent as soon as practicable, while being sufficiently protective of a defendant's fundamental right to liberty, when he asserts his competency and an incompetent defendant's fundamental right not to be tried while incompetent.

Wanta, 224 Wis. 2d at 695.

Unlike a determination of competency to stand trial, a postconviction competency determination serves to protect only the "defendant's fair opportunity to pursue postconviction relief as of right." *Debra A.E.*, 188 Wis. 2d at 128 & n.12 (citing Article I, sec. 21, of the Wisconsin Constitution). There are no competing interests in a postconviction competency determination; the only interest is the protection of the *fair* opportunity to seek review as of right. The State has already prosecuted the defendant and the defendant's liberty has already been restrained due to an adjudication of guilt. The defendant also has no right to the restoration of competency before postconviction proceeding may continue. *Debra A.E.*, 188 Wis. 2d at 130.

Because the creation of a rebuttable presumption based on a defendant's personal assertion in Wis. Stat. § 971.14(4)(b) is narrowly tailored to serve specific interests not present in the postconviction context, courts should not look to that specific part of Wis. Stat. § 971.14(4)(b) when conducting postconviction competency hearings. This Court should take this opportunity to clarify that the instruction in *Debra A.E.* to follow Wis. Stat. § 971.14(4) to the extent feasible does not include the framework of Wis. Stat. § 971.14(4)(b) for establishing a presumption of competency or incompetency based upon the defendant's personal assertion.

II. WHEN A POSTCONVICTION COMPETENCY HEARING IS HELD, A DEFENDANT PREVIOUSLY DETERMINED TO BE COMPETENT SHOULD BE PRESUMED COMPETENT UNLESS PROVEN OTHERWISE BY THE GREATER WEIGHT OF THE CREDIBLE EVIDENCE.

Because establishing a presumption of competency or incompetency based upon a defendant's personal assertion seeks to protect specific interest not relevant in the postconviction context, this Court should provide direction on how to conduct a postconviction competency hearing when a defendant was previously determined to be competent to stand trial. In doing so, this Court should conclude that a previous determination of competency to stand trial creates a presumption of competency to pursue postconviction relief, which can be rebutted by the greater weight of the credible evidence. As addressed more fully below, and in the context of the facts of this case, establishing a presumption of competency based upon a previous determination provides for a meaningful review of what, if any, actions are necessary to protect a defendant's fair opportunity to seek postconviction relief as of right.

A. A defendant previously determined to be competent to stand trial should be presumed competent to pursue postconviction relief.

Wisconsin is the only state that creates a presumption of competency or incompetency to stand trial based upon a defendant's personal assertion. As addressed above, while Wisconsin has found sound reason to establish a presumption of competence or incompetence to stand trial based upon a defendant's personal assertion, the specific interests protected by those presumptions are not applicable to postconviction competency determinations. Whether a defendant previously determined to be competent to stand trial should be presumed competent to pursue postconviction relief is a matter of first impression for this Court.

Defense counsel argues that a presumption of incompetence should be created upon an assertion by defense counsel that the defendant is incompetent (Pet'r's Br. at 16). Defense counsel further argues that when that occurs, the State should be required to prove the defendant competent (Pet'r's Br. at 16). The State, however, sees no reason to heighten defense counsel's assertion above all else. The notion that defense counsel knows best was expressly renounced in *State v. Guck*, 176 Wis. 2d 845, 500 N.W.2d 910 (1993), and *State ex rel. Matalik v. Schubert*, 57 Wis. 2d 315, 204 N.W.2d 13 (1973), and there are no due process concerns that would require a presumption of incompetence. *See Medina v. California*, 505 U.S. 437, 449 (1992) ("Once a State provides a defendant access to procedures for making a competency evaluation, [ ] we perceive no basis for holding that due process [ ] requires the State to assume the burden of vindicating the defendant's constitutional right by persuading the trier of fact that the defendant is competent to stand trial.").[7]

[7] Some jurisdictions have adopted defense counsel's position for determinations of competency to stand trial. *See, e.g., Hodges v.*

The better approach is to presume that a defendant previously determined to be competent is still competent. *See Haraden v. State*, 32 A.3d 448, 452-53 (Me. 2011) (citing *State v. Buzynski*, 330 A.2d 422, 425-31 (Me. 1974); *Dessaure v. Florida*, 55 So.3d 478, 482-83 (Fla. 2010)). The State acknowledges that it is inappropriate to presume competency from the fact that the issue of competency was not raised in a prior proceeding. *State v. Meeks*, 2003 WI 104, ¶ 50, 263 Wis. 2d 794, 666 N.W.2d 859. *But see First Nat. Bank of Appleton v. Nennig*, 92 Wis. 2d 518, 529, 285 N.W.2d 614 (1979) (the law generally presumes competency rather than incompetency).[8] However, when a previous determination

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State, 926 So.2d 1060, 1068-69 (Ala. Crim. App. 2005) (once evidence of incompetency is presented, the prosecution must prove competency); *Diaz v. State*, 508 A.2d 861, 863 (Del. 1986) (if competency is questioned, the prosecution has the burden to prove competency); *Gregg v. State*, 833 A.2d 1040 (Md. 2003) (competency must be proven); S.D. Codified Laws § 23A-10A-6.1 (2004) (the prosecution has the burden to prove competency). However, creating a presumption of incompetence once some evidence of incompetence is presented serves a specific purpose when a defendant's competency to stand trial is challenged. It offers greater protections in an attempt to ensure that an incompetent defendant is not tried. In the postconviction context, there is no analogous reason to heighten the protections afforded to a defendant because there is no bar on initiating or continuing postconviction proceedings after a finding of incompetency. *See Debra A.E.*, 188 Wis. 2d at 130. To the contrary, courts have found that it is in the best interest of all parties if postconviction proceedings continue with incompetent defendants. *See Haraden v. State*, 32 A.3d 448, 453 (Me. 2011) (collecting cases).

[8] Many states follow the general principle that the law presumes competency. *See, e.g.*, Alaska Stat. § 12.47.100(c) (2012) (competency is presumed and the party asserting incompetency bears the burden of proof); Colo. Rev. Stat. § 16-8.5-103(7) (2014) (the party asserting incompetency bears the burden of submitting evidence of incompetency and the burden of proof); Conn. Gen. Stat. Ann. § 54-56d(b) (West Supp. 2014) (competency is presumed and the party asserting incompetency bears the burden of proof); *Mora v. State*, 814 So.2d 322, 327 (Fla. 2002) (competency is presumed and the trial court is responsible for considering all of the evidence); *Tiegreen v. State*, 726 S.E.2d 468, 470 (Ga. App. 2012) (Georgia's statutes create a rebuttable presumption that every person is

was made, presuming competency protects the defendant's fundamental right to choose whether to seek postconviction review and to choose what relief to seek if review is sought.

As this Court has acknowledged, competency determinations are issue specific. *Debra A.E.*, 188 Wis. 2d at 125. In the postconviction context, there are two main issues concerning competency: 1) is the defendant competent to make the decision to proceed with or forego postconviction relief; and 2) can the defendant assist counsel in raising new issues and in developing any necessary factual foundations. This case deals with the first issue: is Daniel competent to make the decision to forego postconviction relief?

Presuming Daniel to be competent protects Daniel's fundamental right to choose whether to seek postconviction review and to choose what relief to seek if review is sought. *See Debra A.E.*, 188 Wis. 2d at 125-26 (the defendant has the right to choose to forego postconviction relief and the right to decide what objectives to pursue if relief is sought). When a defendant like Daniel chooses to forego postconviction review of a case "replete" with meritorious issues for appeal, it is far

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competent to stand trial); 725 Ill. Comp. Stat. Ann. 5/104-10, 11 (West 2006) (competency is presumed, but when a bona fide doubt is raised the prosecution has the burden of proving the defendant competent); *State v. Lyman*, 776 N.W.2d 865, 874 (Iowa 2010) (competency is presumed and the defendant has the burden of proving his or her incompetency); *Jackson v. Commonwealth*, 319 S.W.3d 347, 350-51 (Ky. 2010) (the defendant bears the burden of proving incompetency); 50 Pa. Stat. Ann. § 7403(a) (West 2001) (competency is presumed and the party asserting incompetency bears the burden of proof); R.I. Gen. Laws § 40.1-5.3-3(b) (Supp. 2013) (competency is presumed and the party asserting incompetency bears the burden of proof); Tex. Code Crim. Proc. Ann. art. 46B.003(b) (Vernon 2006) (competency is presumed and a defendant should be found competent unless proven otherwise); Utah Code § 77-15-5 (2013) (competency is presumed and the party asserting incompetency bears the burden of proof); VA Code Ann. § 19.2-169.1(E) (Supp. 2014) (competency is presumed and the party asserting incompetency bears the burden of proof).

too easy for a legal professional to presume that Daniel must be incompetent if he is making such an unwise choice. But the wisdom of that decision and his competency to make that decision are two very different things. *See id.* at 126 (‘“the defendant may not wish to appeal based on any number of personal, practical, or even idiosyncratic reasons.’”) (quoting *State ex rel. Flores v. State*, 183 Wis. 2d 587, 607, 516 N.W.2d 362 (1994)).

It is shortsighted to believe that it is always in the interest of the defendant to pursue relief when there are meritorious issues for review. Because the interest served by a decision to forego postconviction review may be personal, it may be in Daniel’s best interest to accept responsibility for his crimes. Daniel may wish to accept the punishment for his crimes and avoid of the stress of postconviction proceeding, or spare the victim’s family that stress. No matter how unwise the choice seems to Daniel’s counsel, Daniel should be allowed to accept responsibility for his actions and forego postconviction review if he is competent to make that choice.[9] Therefore, presuming Daniel to be competent protects Daniel’s fundamental right to choose whether to seek postconviction review and to choose what relief to seek if review is sought.

B. The presumption of competency to pursue postconviction relief can be rebutted by the greater weight of the credible evidence.

The State agrees with the court of appeals and defense counsel that, in this case, the appropriate standard for determining incompetency is by the greater weight of

[9] After the competency hearing, Daniel sent a letter to the circuit court admitting to the murder of Capri Walker (129). While the letter expressed Daniel’s desire to “plead guilty,” the court found the letter to be Daniel’s personal expression of an acceptance of responsibility and his choice to forego postconviction review (150:14).

the credible evidence. (Pet'r's Br. at 8-9); *Daniel*, 354 Wis. 2d 51, ¶¶ 10-11. That agreement is predicated on the conclusion that Daniel should be presumed to be competent unless proven otherwise. When there is a presumption of competence, placing too high of a burden on establishing incompetency risks denying Daniel his fair opportunity to postconviction review as of right.

The State, however, disagrees with the court of appeals' classification of a postconviction competency determination as no different than a determination of competency to stand trial. *Id.* As addressed in Section I, *supra*, there is a significant difference between a determination of competency to stand trial and a determination of competency to pursue postconviction relief. Therefore, it must be made clear that the outcome of this case only applies to postconviction competency determinations.

In determining who should bear the burden of establishing Daniel's incompetence, the State cautions against viewing a postconviction competency hearing as akin to any other type of evidentiary hearing. In general, the adversarial nature of a competency proceeding is diminished because the court is focused on reaching the "right" result. *Bishop v. Superior Court*, 724 P.2d 23, 29 (Ariz. 1986). In the postconviction context, the adversarial nature is further diminished by the minimal effect of a determination of incompetency. Defense counsel and the prosecuting attorney will not always advocate for adverse positions at a postconviction competency hearing and it is best not to assign the burden of proof to any particular party. Rather, the postconviction competency hearing should be viewed as a fact-gathering exercise in which the defendant will be found competent unless the greater weight of the credible evidence establishes that the defendant is incompetent.

This case illustrates the problem of looking at a postconviction competency hearing through the lens of a specific party bearing the burden of proof. Here, there was

a court-ordered competency evaluation that found Daniel competent (115; 117:4). Wisconsin Stat. § 971.14(4)(b) instructs that the circuit court should make its competency determination based upon that report unless Daniel, defense counsel, and the district attorney waive the opportunity to present other evidence. Here, defense counsel did not waive that opportunity. It is logical, then, that defense counsel would produce the other evidence that he wished the court to consider. However, in framing the issue as defense counsel being forced to prove Daniel incompetent against Daniel's wishes, defense counsel has constructed ethical issues that are simply not present.

For example, defense counsel argues that placing the burden on him to advocate for a position contrary to that of his client's makes it impossible for counsel to act ethically because counsel is abandoning the normal attorney-client relationship (Pet'r's Br. at 19-20, relying on SCR 20:1:14). A normal attorney-client relationship, however, does not require that counsel blindly follow his client's wishes at the expense of counsel's candor to the court. *See McCoy v. Court of Appeals*, 486 U.S. 429 (1988) (in the no-merit process it is ethical for counsel to present information to the court that is contrary to the client's interests).

It is undisputed that defense counsel had an obligation to inform the court of a bona fide doubt of Daniel's competency even if it was strategically disadvantageous or contrary to Daniel's wishes. *See Johnson*, 133 Wis. 2d at 221-24. The State sees no reason why it should be considered ethical and necessary for counsel to inform the court of facts supporting a finding of incompetency before a hearing is held, but it considered unethical to do so at the hearing itself. Counsel need not zealously advocate for a determination of incompetency at the hearing and exacerbate any divide caused by counsel's request that the court review and determine Daniel's competency. Rather, similar to the no-merit process, defense counsel may present facts to the court in a neutral manner so that the court can independently determine if

Daniel is competent to proceed. Again, the goal of the competency determination is to reach the right result, not to reach the result most advantageous to the interests of the defendant or of defense counsel.

Moreover, placing the burden of production on defense counsel will not result in the divulgence of attorney-client confidences. Similar to determinations of competency to stand trial, "[t]here is no requirement that the attorney testify about his or her reasons for raising the issue or the opinions, perceptions, or impressions that form the basis for his or her reason to doubt the client's competence." *Meeks*, 263 Wis. 2d 794, ¶ 46. As defense counsel concedes, the question in this case does not concern counsel testifying in support of a position contrary to his client (Pet'r's Br. at 18), and the additional evidence presented by defense counsel in this case did not concern any additional divulgences of privileged attorney-client communications. This case concerns defense counsel's request that the court weigh conflicting competency evaluations. Such a request is a proper and ethical exercise of counsel's duty to Daniel and to the court.

The notions of convenience and fairness also support assigning the burden of production to defense counsel in this case. Here, prior to moving for a postconviction competency determination, defense counsel discussed his concern about Daniel's ability to rationally decide to forego postconviction relief with a psychologist (A-App. 17). Daniel was subsequently interviewed by that privately retained psychologist (A-App. 19). Defense counsel asked the circuit court to weigh the findings of that psychologist's evaluation of Daniel's competency against the findings of the court-ordered evaluation (149:131; A-App. 152). Because defense counsel was in possession of that information and knew what information within that report was relevant to the court's determination, defense counsel should bear the burden of producing that evidence. *See State v. McFarren*, 62 Wis. 2d 492, 500-01, 215 N.W.2d 459 (1974) (when

facts lie in the knowledge of a party, that party has the burden of establishing those facts).

To protect Daniel's fair opportunity to postconviction review as of right, it is important that the circuit court have the information necessary to determine competency. When, as in this case, defense counsel has a conflicting competency evaluation that the court should consider, placing the burden on defense counsel to produce the evidence relevant to that evaluation furthers the goal of the competency hearing without intruding upon the attorney-client relationship.

III. GREAT DEFERENCE SHOULD BE GIVEN TO A POSTCONVICTION COMPETENCY DETERMINATION MADE BY THE SAME COURT THAT PRESIDED OVER TRIAL.

In *State v. Byrge*, 2000 WI 101, ¶¶ 32-45, 237 Wis. 2d 197, 614 N.W.2d 477, this Court discussed, at length, why the clearly erroneous standard of review applies to a determination of competency to stand trial. Defense counsel invites this Court to conclude that a less deferential standard should be applied to postconviction competency determinations (Pet'r's Br. at 20-22). The court should decline that invitation.

Contrary to defense counsel's assertion,[10] Wisconsin's circuit courts have a vast wealth of knowledge about how Wisconsin's postconviction procedures are impacted by an incompetent defendant. Postconviction procedures are generally initiated in the circuit courts and it is the circuit courts that conduct the evidentiary hearings on the factual issues that require the assistance of the defendant on appeal. It is the circuit

[10] Pet'r's Br. at 21. ("circuit courts are less familiar with the appellate process and what is required of defendants during that process").

courts that man the frontlines of the appellate process in Wisconsin.

Additionally, postconviction motions are generally decided by the judge that presided over the defendant's trial. Therefore, many of the same considerations that led this Court to conclude that great deference is owed to a determination of competency to stand trial also apply to determinations of postconviction competency. The circuit court is still in the best position to weigh the evidence presented at the competency hearing and the circuit court would also be the most familiar with the defendant and the defendant's skills and abilities. *Byrge*, 237 Wis. 2d 33, ¶¶ 33, 45 (quoting and later reaffirming *State v. Garfoot*, 207 Wis. 2d 214, 222-23, 558 N.W.2d 626 (1997)). A postconviction court may even be more familiar with a defendant's skills and abilities because the court would have the benefit of observing the defendant throughout the entire trial. Because the circuit court that presided over trial remains in the best position to judge competency, great deference is owed to its conclusion.

CONCLUSION

For the foregoing reasons, this Court should affirm the court of appeals decision that defense counsel bears the burden of proving Daniel incompetent by the greater weight of the credible evidence and remand for further proceedings consistent with this opinion. Since the competency evaluations in this case are now more than three years old, on remand the circuit court should exercise its discretion to determine the method for evaluating whether Daniel is currently competent to choose to forego postconviction relief.

Defense counsel requests that this Court conclude that Daniel was proven incompetent at the prior hearing and remand only for the appointment of a guardian (Pet'r's Br. at 22-23). That request is inappropriate. Even if Daniel could be found incompetent by the greater weight of the credible evidence submitted at the 2012

hearing, if Daniel has regained competency since that time, appointing a guardian to make decisions for a now competent defendant would violate Daniel's fundamental right to choose whether to seek postconviction relief.[11]

Dated this 10th day of November, 2014.

Respectfully submitted,

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[11] Moreover, defense counsel failed to argue in his brief-in-chief that the facts presented at the hearing established that Daniel was incompetent.

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,627 words.

Dated this 10th day of November, 2014.

_____
Tiffany M. Winter
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 10th day of November, 2014.

_____
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