STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2013-AP-1228-CR

vs.

Trial No. 09-CF-56

JIMMIE LEE SMITH,

Defendant-Appellant.

Appeal from a judgment of conviction entered December 15, 2009
and an order denying postconviction relief entered May 13, 2013
in the Circuit Court of Milwaukee County,
Hon. Jeffrey A. Conen, presiding at trial and sentencing and
Hon. David L. Borowski presiding in postconviction proceedings

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

JOHN T. WASIELEWSKI
Bar ID No. 1009118
Attorney for Defendant-Appellant

Wasielewski & Erickson
1442 North Farwell Avenue
Suite 606
Milwaukee, WI 53202

(414) 278-7776
jwasielewski@milwpc.com

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Whether the postconviction court erred in finding that Mr. Smith's trial counsel was not ineffective in failing to raise competency. (Ineffective assistance incompetency claim)

Whether the postconviction court erred in finding that the trial court did not err in failing to order a competency evaluation. (Procedural incompetency claim)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication may be appropriate, in that this case involves three distinct theories of relief based upon a defendant having been tried and sentenced while incompetent. No Wisconsin case discusses all three of these theories. The court may find an explanation and differentiation of these claims helpful. See *James v. Singletary*, 957 F.2d 1562 (11th Cir. 1992) (Noting and then addressing the need to distinguish substantive competency claims and procedural competency claims.)

STATEMENT OF THE CASE

Procedural history

Trial and sentencing

A complaint dated January 7, 2009 charged Mr. Smith with one count of second degree sexual assault in violation of Wis. Stat. §940.225(2)(a). 2: 1-2 . On October 12-14, 2009 the case was tried to a jury before the Honorable Jeffrey A. Conen. The jury returned a verdict of guilty. 14: 1; 78: 37. On December 11, 2009, Judge Conen imposed a sentence of 40 years imprisonment consisting of 25 years initial confinement and 15 years of extended supervision. 79: 22. Mr. Smith's trial counsel filed a notice of intent to seek postconviction relief. 19: 1.

Postconviction competency proceedings

On June 16, 2010 Mr. Smith's postconviction counsel filed a motion to determine Mr. Smith's competency to assist in postconviction proceedings.

On June 29, 2010 Mr. Smith appeared before Judge Jeffrey Conen by video. 80: 3. Judge Conen ordered a competency evaluation be performed. 80: 5. Dr. Deborah Collins submitted to the court a report offering the opinion "to a reasonable degree of professional certainty that defendant Jimmy [sic] Smith is presently incompetent to

proceed." 27: 6. She further opined that if provided appropriate inpatient treatment, Mr. Smith is "more likely than not to attain a level of functioning which would render him competent." 27: 6.

On August 12, 2010 Mr. Smith appeared via video and stated his opinion, contrary to that of Dr. Collins, that he is competent. 82: 3-4. The court then scheduled the matter for an evidentiary competency hearing. 82: 7. On September 13, 2010 Judge Jean DiMotto, after hearing testimony from Dr. Collins, found Mr. Smith not competent to assist his counsel or to understand postconviction proceedings. 83: 24-25. However, she found it reasonably certain that he may regain competency upon receiving treatment. 83: 25. Judge DiMotto set a review date for December 10, 2010. 83: 25-26.

Prior to the December 10 hearing, Dr. John Pankiewicz filed a report in which he stated that Mr. Smith "remains incompetent," but that he "has demonstrated some improvement," and opined that "it is clinically possible that with alteration in treatment regimen, he could gain further improvement in stabilizing his mental illness." 32: 3. Dr. Pankiewicz thus recommended that Mr. Smith continue treatment efforts. 32: 3. At the December 10,

2010 hearing, the court set another hearing for review of competency for March 14, 2011.

On March 14, 2011 the court received a report from Dr. Pankiewicz and set an evidentiary hearing for March 31, 2011. 98: 1-3; 84: 3-4. At that hearing, after hearing testimony, Judge Conen found that Mr. Smith remains incompetent to assist in postconviction proceedings and is not likely to regain competence within a reasonable period of time. 85: 18. Judge Conen, pursuant to *State v. Debra A.E.*, 188 Wis.2d 111, 523 N.W.2d 727 (1994), appointed Attorney Scott Phillips to serve as Mr. Smith's guardian for purposes making decisions regarding seeking postconviction relief. 85: 19-20.

Postconviction motion challenging competency at trial and sentencing

Mr. Smith's postconviction counsel retained Dr. Deborah Collins to evaluate Mr. Smith with regard to his competency at the time of his trial and sentencing. On September 30, 2011 Mr. Smith's counsel filed a postconviction motion to vacate his conviction and sentence based upon Mr. Smith's incompetency at the times of his trial and sentencing. 43: 1-6. Dr. Collins' report was attached as an appendix in support of the

motion. 43: apx. 101-113. (Note: the record on appeal erroneously lists this postconviction motion as dated September 10, 2011, but it is dated and file-stamped September 30, 2011; in addition, it consists of a 6 page motion and a 13 page appendix, and thus has 19 total pages rather than 31.)

On October 14, 2011 the Honorable David L. Borowski held a status hearing on the postconviction motion, as he was new to the case. At this hearing, Assistant District Attorney Paul Tiffin requested that the court appoint an expert to evaluate Mr. Smith's competency. 86: 2-3. The court indicated that it was inclined to grant this request, but did not immediately do so. 86: 8-9. Judge Borowski expressed skepticism that the defense could raise the issue of competency to stand trial in postconviction proceedings:

> THE COURT: And if no one knew he was incompetent at the time [of trial and sentencing], that's a separate issue [from ineffective assistance of counsel]. Someone's going to have to brief me, starting with defense, how Dr. Collins can even offer an opinion on whether he was competent to stand trial which was two years ago.
>
> MR. WASIELEWSKI: He [sic] did it based on a review of –
>
> THE COURT: I'm not satisfied that's enough legally. The defense is going to have to provide me

> with legal authority that she can even – Dr. Collins is an absolute expert in the field; I have the utmost respect for her; she's testified multiple times, but the defense is going to need to brief for me that she even has ability legally to, in retrospect, two years earlier say someone was not competent to proceed.
>
> She's making a decision based not which [sic] she's observing, not what she's seeing at the time, not what he is or is not perceiving, not his ability in an interview contemporaneous to the proceedings. She's going back two years.
>
> I need legal authority that Dr. Collins can even offer this opinion. She may be able to. She's extremely competent. But I'm not satisfied she can even – this meets muster, frankly.
>
> To say someone – if this opens a door, you can do this on every case then. Defense can do this on every case. Come back and challenge the defense attorney at the time, say he or he she [sic] didn't raise competency two years later. Oh, now find the doctor.

86: 4-5. Judge Borowski set the case for a status hearing on December 1, 2011 to address the issues whether the court has legal authority to make a retrospective determination of competency and whether to grant the State's request to appoint an expert to evaluate Mr. Smith. This December 1, 2011 hearing was adjourned by Judge Borowski's court to January 13, 2012 due to a jury trial in progress.

On January 13, 2012, after reviewing briefs submitted by both Mr. Smith and the State, the Judge Borowski accepted the State's concession that Mr. Smith may pursue a retrospective determination of incompetency

at the time of trial, and granted the State's request for appointment of a second expert to evaluate Mr. Smith. 87: 3-5. On February 1, 2012, the case again came before Judge Borowski at the State's request to address whether the expense of this second evaluation should be borne by the District Attorney's office or by the county. 88: 2-4. Judge Borowski ordered the county to pay. 88: 4.

After delay due to Mr. Smith not being produced, an evidentiary hearing proceeded on August 2, 2012; the court heard testimony from two psychologists but was unable to complete testimony, and adjourned the hearing to September 14, 2012. On that date, testimony concluded, and the court set a briefing schedule.

Evidence regarding competency at trial and sentencing

The Defense retained Dr. Deborah Collins to evaluate Mr. Smith with regard to his competency at the time of trial and sentencing, resulting in a report dated September 16, 2011 and admitted at the hearing as exhibit 8. 91: 36-37; 43: apx. 101-113. Dr. Collins testified it was "not common" to do a retrospective competency determination, but that she had done so about four times among the hundreds of competency evaluations she had

performed. 91: 37. Such a retrospective review is hampered by absence of a contemporaneous interview. 91: 46-47. However, while not common, Dr. Collins has conducted competency evaluations where, due to circumstances such as non-cooperation or incapacity of the defendant, she could not conduct a contemporaneous interview and had to rely primarily on collateral information. 91: 48-50.

In Mr. Smith's case, Dr. Collins listed in her report the factors upon which she relied in determining Mr. Smith's competency. 91: 37; 43: apx. 101-102. She addressed these factors in her testimony.

Her interview of Mr. Smith in July of 2011 did not "shed much light on the relevant question." 91: 38. Mr. Smith, although receiving treatment at this time, "responded with rambling comments that weren't relevant," which gave Dr. Collins minimal confidence that Mr. Smith understood either the nature of the evaluation or the limits on confidentiality. 91: 38-39.

Department of Corrections (DOC) records indicate that Mr. Smith had been identified with a psychotic disorder as early as 1993, and was subject to court proceedings at that time regarding medication for his mental illness. 91: 39. DOC records from January 6, 2010,

less than a month after sentencing, and a formal evaluation on January 21, 2010 show that Mr. Smith was "actively psychotic," was not speaking logically or coherently and was delusional. 91: 40.

Records from the jail covered from January 7, 2009 to his sentencing in December of 2009. 91: 41. As early as February, these records suggest Mr. Smith was drawing clinical attention because of his bizarre comments. 91: 41. On March 1, 2009 after Mr. Smith "'lost it'" after being told to "'take his pants out of his socks,'" Mr. Smith was evaluated by Dr. Holloway; Mr. Smith was found to be obsessing ("perseverating") on family members and not realizing that he was in custody in the jail. 91: 41-42; 43: apx. 107. By August of 2009, Mr. Smith's behavior warranted a crisis page of a psychiatric social worker due to his agitation, behavioral instability, "ranting," and refusal of treatment "for moderately sever psychotic symptoms." 43: apx. 108. At the end of August, Mr. Smith was "viewed as unstable" due to concerns about his "rambling and non-stop speech and lack of psychiatric treatment." 43: apx. 108.

In October of 2009, records most proximate to the trial indicate that Mr. Smith was showing severe behavioral

problems. 91: 43; 43: apx. 108. Dr. Collins explained in her report:

> Some of the records most proximate to Mr. Smith's trial date to 10/25/2009. On that date, Mr. Smith was seen by a social worker. His speech was observed as rambling and circumstantial. He was viewed as appearing cognitively delayed and "out of touch with reality." Mr. Smith was also viewed as behaviorally unstable and emotionally agitated. Indeed, on that same date, he required physical restraints after threatening behavior toward a correctional officer while ranting about sexual behavior. He made numerous rambling comments regarding claims of having posted bail for a woman in 1992 and concluding, "That's why the police are after me . . .they think she's in my case. . . I don't want to pay her bail anymore." Indeed, some of the comments attributed to Mr. Smith in clinical records suggest that his evident delusional beliefs were intertwined with his understanding of case related information at the time.
>
> On the following day, 10/26/2009, Mr. Smith was evaluated for transfer from the CCF-South to the CCF-Central. Related assessment records note his odd behavior and that he had been observed talking to himself. Mr. Smith presented as rambling, confrontational and with "unclear thought process." He was not easily redirected by a clinician. He made a bizarre claim that he, while at the CCF-S, had attended church and this was the explanation for why he was dressed in a red jump suit. A red jumpsuit, I understand, is typically indicative however of disciplinary status. Mr. Smith continued to refuse psychiatric treatment. One clinical record dating to 10/26/2009 noted that he was "convoluting speech," "confusing his case," "losing property and SSI payments" and, "confusing past cases with current."

43: apx. 108.

At the hearing, the prosecutor asked Dr. Collins about information from the trial transcripts that she did not consider in her evaluation of Mr. Smith. 91: 54-59. This consisted of brief colloquies from the trial transcript regarding waiver of *Miranda-Goodchild* (91: 54-55, quoting from 74: 3-5), rejection of the plea offer (91: 55-56, quoting from 75: 3), counsel conferring with Mr. Smith during voir dire (91: 56-57, quoting from 75: 63), Mr. Smith not testifying (91: 57-58, quoting from 78: 78-79) and confirming Mr. Smith's wish that a juror who recognized a police officer witness be struck (91: 58-59, quoting from 78: 4). After considering these colloquies, Dr. Collins found their contribution "minimal to knowing what was going on in his thought process or content at the time of the trial." 91: 59. Dr. Collins contrasted the short answers in these colloquies with the more open-ended allocution (79: 14-19; apx. 111-116), and noted that when given latitude to speak, Mr. Smith's "symptoms became readily obvious." 91: 64.

Dr. Collins' ultimate "opinion, to a reasonable degree of professional certainty, [is] that the factors, as I've outlined those on Pages 11, 12, and 13 of my report, all

weigh in favor of the conclusion of incompetence, both at the time of trial and at the time of sentencing." 91: 46, referencing 43: apx. 111-113.

Dr. John Pankiewicz drafted a report as to his findings regarding Mr. Smith's competency at the time of trial and sentencing, which was received at the hearing as exhibit 7. 91: 6; 99: 1-6. At the time he wrote his report, Dr. Pankiewicz did not have Dr. Collins' report either to rely on or to influence him, and therefore reached his conclusions independently. 91: 8. Dr. Pankiewicz addressed the factors he considered.

Dr. Pankiewicz noted a substantial record of mental illness going back at least 20 years documented in jail and DOC records and elsewhere. 91: 10; 99: 3. These records typically diagnosed Mr. Smith with psychotic disorder or schizophrenia, which is consistent with Dr. Pankiewicz' findings. 91: 10; 99: 4. Jail records were a major component in Dr. Pankiewicz' findings, as they contained observations by clinical staff and correctional officers near in time to the trial and sentencing. 91: 10-11. Review of Mr. Smith's allocution transcript demonstrated rambling speech and thought disorder similar to observations made by jail staff, which Dr. Pankiewicz considered further

evidence that Mr. Smith was symptomatic at the time. 91: 12-13; apx. 111-116; 79: 14-19; 61: apx. 101-106. While Dr. Pankiewicz considered other factors in reaching his conclusions, the allocution transcript alone "would raise my concern about his competency to proceed." 91: 13-14.

Dr. Pankiewicz' opinion regarding Mr. Smith is that "there was substantial reason to doubt his competency to stand trial in October 2009. And I also believed that he lacked substantial capacity to participate in sentencing December of 2009." 91: 9; 99: 4-6.

Trial counsel's role

Attorney Stephen Sargent is a staff attorney for the State Public Defender. 92: 5. He represented Mr Smith from the outset of proceedings in the trial court. 92: 5. During the course of his representation, Mr. Sargent met with Mr. Smith about seven times. 92: 20-21.

Mr. Sargent did not recall having concerns about Mr. Smith's mental health; he was concerned, however, that on the day of the offense Mr. Smith had drunk so much alcohol that his ability to recall was compromised. 92: 21. Referring to his notes, Mr. Sargent testified Mr. Smith asserted that "If he had sex it was consensual." 92: 22. Mr. Sargent felt that Mr. Smith was "guarded" with regard to

discussion of sexual matters, and despite Mr. Sargent explaining that Mr. Smith's DNA was found on the victim's underwear, Mr. Smith apparently never stated he had sex with the victim. 92: 23-25.

As Mr. Smith's defense counsel, Mr. Sargent had to formulate a defense. 92: 22. The defense was consent, and Mr. Sargent never considered any alternative defense. 92: 25-26. Mr. Sargent had no recollection that Mr. Smith had given him an account of events consistent with consent. 92: 26-27. Mr. Sargent does not recall Mr. Smith using the word "consent." 92: 46. Mr. Sargent was unable to obtain an account from Mr. Smith of how the victim conveyed or expressed her consent. 92: 47. Mr. Sargent advised Mr. Smith not to testify, as Mr. Smith and the victim had been drinking all day, and Mr. Sargent did not think Mr. Smith would come off well before the jury. 92: 26.

In preparing for sentencing, Mr. Sargent's notes indicated that Mr. Smith was very angry, "very animated, very upset." 92: 30. In discussing Mr. Smith's prior convictions, Mr. Sargent stated that Mr. Smith "has convinced himself that he's completely innocent of those charges. . . ." 92: 30. Mr. Sargent would normally give practical advice to clients regarding allocution, but did not

recall if he gave such advice to Mr. Smith. 92: 31. Regarding Mr. Smith's allocution, Mr. Sargent did not recall or know the significance of Yvonne Carter or Lee Ellen Wash, two persons Mr. Smith talked about during allocution. 92: 32-33, referring to apx. 111-116, 79: 14-19. He attempted to stop Mr. Smith's allocution because he felt his was drifting off, and not helping his cause at sentencing, but did not see Mr. Smith's allocution as a mental health problem. 92: 33-35.

Mr. Sargent never, at any point, perceived any reason to be concerned about Mr. Smith's ability to understand and assist in proceedings. 92: 38. That Mr. Smith seemed guarded in his conversations did not ever seem to Mr. Sargent to be the result of any lack of understanding. 92: 53.

Trial court's decision

Quoting from the concluding paragraph of the State's brief (62: 11), Judge Borowski found that the persons having direct contact with Mr. Smith at the time of trial and sentencing – trial counsel and the trial judge – who failed to notice that Mr. Smith was not competent, should be heeded over the opinions of doctors who did not have such contact. Apx. 104-105; 94: 4-5. The court noted

that both doctors agreed that their respective opinions could not be as certain as they might be had they been able to conduct contemporaneous interviews with Mr. Smith. Apx. 105-106; 94: 5-6. Trial counsel, with 20 to 25 years of experience, testified he had no reason to question Mr. Smith's competence. Apx. 106; 94: 6. The doctors agreed that retrospective determination of competency are rare. Apx. 107-108; 94: 7-8.

In conclusion, Judge Borowski found the State's argument persuasive and expressly adopted the arguments in the State's brief. Apx. 108; 94: 8.

ARGUMENT

The trial court erred in finding that Mr. Smith was competent at the times of trial and sentencing

Wisconsin statute provides:

> No 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.

Wis. Stat. §971.13(1). Conviction of an accused person while he is legally incompetent violates due process. *Pate v. Robinson*, 383 U.S. 375, 378, 86 S.Ct. 836, 838, 15 L.Ed.2d 815 (1966), citing *Bishop v. United States*, 350

U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956).

The issue of competency may not be waived. *State v. Johnson*, 133 Wis.2d 207, 395 N.W.2d 176 (1986) (holding that defense counsel having reason to doubt his client's competency has a duty to raise competency irrespective of any strategic consideration). See also *Pate v. Robinson*, 383 U.S. at 384, 86 S.Ct. at 841 (1966) ("The State insists that Robinson deliberately waived the defense of his competence to stand trial by failing to demand a sanity hearing as provided by Illinois law. But it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial.")

Mr. Smith is asserting three distinct legal claims regarding his competency at trial and sentencing. He presented these to the trial court. 46: 1-9; 61: 13-23.

Substantive incompetency claim.

A substantive claim of incompetency is simply a claim that a defendant was tried and sentenced while incompetent:

> A substantive incompetency claim implicates the Fourteenth Amendment's prohibition against deprivations of life, liberty, or property without due

> process of law by identifying a specific deprivation. While such a claim assigns responsibility for the deprivation to the state, it need not assign responsibility for the absence of due process to the state as well. To try an incompetent defendant makes for an undue process regardless whether or not any person, state actor or not, could or should have diagnosed the defendant's incompetency. This absence of due process blossoms into a constitutional violation if it occurred during a proceeding in which the state deprived a person of life, liberty, or property.

James v. Singletary, 957 F.2d 1562, 1573 (11th Cir. 1992). Thus, a substantive claim does not seek to assign fault to the trial court, trial counsel or anyone else for any failure to address competency. Such a claim is entitled to no presumption of incompetency, and the person making the claim must demonstrate incompetency by a preponderance of the evidence. *James*, 957 F.2d at 1571.

Dr. Collins and Dr. Pankiewicz have given professional opinions that the greater weight of the evidence supports the claim that Mr. Smith was not competent at the times of trial and sentencing. While Dr. Collins was retained by the Defense, Dr. Pankiewicz was appointed by the Court at the request of the State to render a second opinion. Dr. Pankiewicz did not have access to Dr. Collins' report when making his assessment of Mr. Smith's competence at the time of trial and sentencing. 91:

8. Thus, each of the opinions was reached independently from the other. However, each opinion was based on the same principle factors.

Mr. Smith has a long history of mental illness going back at least 20 years, and past diagnoses of psychotic disorder or schizophrenia. 91: 10, 39; 43: apx. 104; 99: 3. These diagnoses are consistent with the diagnoses currently made in favor of Mr. Smith's current incompetency. 91: 10. Neither doctor examined Mr. Smith proximate to the times of his trial and sentencing, and thus both opinions are necessarily retrospective. 91: 7-8, 37. However, while retrospective competency determinations are not common, both doctors have conducted such evaluations previously. 91: 15, 37.

Moreover, while neither doctor could evaluate Mr. Smith in late 2009, jail records from this time demonstrated that Mr. Smith's condition drew clinical attention from jail personnel shortly after his arrival; these records show Mr. Smith displaying psychotic symptoms throughout his stay in the jail, and that he refused offered treatment. 91: 10-12, 16, 40-43; 43: apx. 107-108; 99: 3. Specifically, Dr. Collins found that from at least March of 2009, Mr. Smith was "actively symptomatic." 91: 42. Thus, both Dr.

Collins and Dr. Pankiewicz had access to sound information about Mr. Smith's condition and behavior in the months prior to and encompassing Mr. Smith's trial and sentencing.

The doctors also considered the limited evidence in the trial transcripts reflecting on Mr. Smith's thought processes.

During cross-examination, the Court read to Dr. Pankiewicz Mr. Smith's colloquy regarding not testifying at trial. 91: 24-25. Dr. Pankiewicz indicated that this colloquy weighed in favor of Mr. Smith understanding his right not to testify, although he would, ideally, like to know more about Mr. Smith's thought processes than the colloquy reveals. 91: 26-27. He noted that a person such as Mr. Smith diagnosed with psychotic disorder is not necessarily uniformly and globally impaired, and doing something in an organized and unimpaired way does not necessarily mean the person is not sick and symptomatic. 91; 28-29. Ultimately, the colloquy regarding not testifying did not alter Dr. Pankiewicz' opinion that Mr. Smith more likely was not competent at the time of trial. 91: 33.

In cross-examining Dr. Collins, the prosecutor read five portions of the trial transcript in which Mr. Smith

made responses on the record. 91: 54-59. Dr. Collins found the contribution of these transcript portions to understanding Mr. Smith's thought processes to be "minimal." 91: 59.

Mr. Smith's allocution at sentencing proved more useful in assessing Mr. Smith's mental state. In this allocution, Mr. Smith related how he bailed a girl, Yvonne Carter, out of jail, which somehow resulted in him serving 12 years in jail and also somehow caused him to be shot in the stomach, and how he paid $40 for a marriage license fee and was unable to get it back. Apx. 111-116; 61: apx. 101-106. Judge Borowski, in a question to Dr. Pankiewicz, characterized the allocution as "a rather rambling, arguably incoherent statement that went on for three or four pages of the transcript before he was cut off by Judge Conen." 91: 22. Dr. Pankiewicz found this allocution demonstrated "rambling speech, which was similar to observations made by staff at the jail." 91: 12. Dr. Collins found the allocution transcript "consistent with a thought disorder that was actively in play at the time of sentencing." 91: 50.

In addition, shortly after his sentencing and arrival at Dodge Correctional, Mr. Smith again drew quick clinical attention, which prompted his transfer to the Wisconsin

Resource Center. Both doctors considered a mental health evaluation of Mr. Smith on January 21st, 2010 91: 14, 17, 40. Dr. Pankiewicz noted that this evaluation described Mr. Smith as "exhibiting delusional beliefs and cognitive impairments" and lead to another evaluation a week later by psychiatrist Ken Burg , who found Mr. Smith showed "rambling speech, derailed thoughts and paranoid references" 99: 3.

In postconviction proceedings, prior to the filing of any substantive postconviction motion, Mr. Smith's present competence was raised. Mr. Smith was evaluated three times, and each evaluation resulted in an opinion Mr. Smith was not competent. He was initially found not competent, but likely to regain competency, on September 13, 2010. 83: 24-25; 27: 1-6. After months of treatment, he has failed to reach a level of competency and on March 31, 2011 was adjudged unlikely to regain competency within a reasonable time. 85: 18-19; 98: 1-3. Mr. Smith's legal status as not competent continued throughout his postconviction proceedings, and continues as of this writing. The only question for the postconviction court was whether the onset of this incompetency occurred before or after the times of trial and sentencing.

Judge Borowski indicated skepticism towards Mr. Smith's incompetency motion from the outset of his involvement in the case. At the first hearing over which he presided, he questioned how Dr. Collins could render a retrospective opinion. 86: 4-5 (quoted at length at pages 4-5, above). He required Mr. Smith to submit further legal authority, stating: "The defense, in my view, has a long ways to go before this is even something that can go forward." 86: 6. He expressed concern that "this opens a door, you can do this on every case." 86: 5.

At the evidentiary hearing, Judge Borowski addressed questions to Dr. Pankiewicz, starting with how a retrospective competency determination is possible. 91: 20-21. Using leading questions, Judge Borowski confirmed that Dr. Pankiewicz did not interview Mr. Smith at the times of trial or sentencing, and Dr. Pankiewicz conceded that his opinion is necessarily weaker than if would have been had he been able to conduct a contemporaneous interview of Mr. Smith. 91: 21-22, 33. Judge Borowski then read aloud the transcript of Mr. Smith's colloquy with Judge Conen regarding not testifying, and asked Dr. Pankiewicz his opinion; Dr. Pankiewicz acknowledged it would favor a finding of "a limited aspect" of capacity or

competency. 91: 22-26. However, the colloquy did not alter his ultimate opinion that Mr. Smith was more likely not competent at trial. 91: 33.

Judge Borowski also questioned Dr. Collins. In response, Dr. Collins agreed that a contemporaneous interview is typically done, and was not done here. 91: 47-48. Judge Borowski asked about the possibility of Mr. Smith feigning mental illness at sentencing; Dr. Collins answered that if this was done, then Mr. Smith "has done so over a period of time and with skilled observers of his behavior in a way that I've never known possible." 91: 65-66. Finally, Judge Borowski asked Dr. Collins how Mr. Sargent could have missed the competency issue; his question had a lengthy preface:

> One of my thoughts in this case is whenever you have a post-conviction motion and it goes to the performance of a trial attorney is, and I'm not criticizing anybody. but these are just my thoughts, you have effectively Monday morning quarterbacking. And the defense at this point comes in and basically, in a nutshell, argues, and this may be too simplistic, too blunt, but basically argues that either Mr. Sargent had to have been basically incompetent because he missed all these thing that you see and other doctors saw and Dr. Pankiewicz saw or he had to, at the risk of his license, not raised competency.
>
> My questions is what would Mr. Sargent have missed. . . ?

91: 66. Dr. Collins replied that attorney-client conferences "can be very time bound and very structured," and that Mr. Sargent apparently did not know of Mr. Smith's history of mental illness, and for these reasons may have failed to perceive a competency problem. 91: 66-67.

In his decision denying the postconviction motion, Judge Borowski started by reading the concluding paragraph of the State's brief and announcing his agreement with it. Apx. 104-105; 94: 4-5. This court strongly disfavors such a method of decision making.

> From time to time district judges extract portions of briefs and use them as the basis of opinions. We have disapproved this practice because it disguises the judge's reasons and portrays the court as an advocate's tool, even when the judge adds some words of his own. . . . Unvarnished incorporation of a brief is a practice we hope to see no more.

State v. McDermott, 2012 WI App 14, footnote 2, 339 Wis.2d 316, 810 N.W.2d 237, quoting from *DiLeo v. Ernst & Young*, 901 F.2d 624, 626 (7th Cir. 1990). After quoting this language from *DiLeo*, the *McDermott* court stated: "We agree."

The substance of the paragraph Judge Borowski adopted from the State's brief is an invitation to disbelieve Dr. Pankiewicz and Dr. Collins because they, unlike the

court and trial counsel, had no contact with Mr. Smith at the times of trial and sentencing.

Using his own words, Judge Borowski noted that both doctors conceded that an opinion could not possibly be as solid without such contact as it could be with such contact. Apx. 105-106; 94: 5-6. He also noted that Mr. Sargent, an experienced attorney, did not raise competence because he perceived no reason to do so. Apx. 106-107; 94: 6-7. Thus, despite repeated expressions of respect for Dr. Collins and Dr. Pankiewicz, Judge Borowski rejected their separately reached conclusion that Mr. Smith was not competent during his trial and sentencing.

Judge Borowski gave great weight to the absence of interviews with Mr. Smith at the time or trial or sentencing. However, Judge Borowski's decision is remarkable for the complete absence of any of the factors citing by Dr. Collins and Dr. Pankiewicz as supporting their respective opinions. Jail records showed Mr. Smith's behaving erratically in the jail as early as February of 2009, leading to an evaluation in March in which Dr. Holloway found Mr. Smith was obsessing with family members and did not understand that he was in jail. A meeting with a social worker on October 25, 2009, very close to the time of trial, lead to

observations that Mr. Smith's speech was rambling and he was out of touch with reality. At his sentencing, Mr. Smith insisting on relating his troubles concerning a woman he bailed out of jail who has no discernable connection to his case. The month after sentencing, Mr. Smith was evaluated in prison and found to be actively psychotic. (These facts are set forth more fully above at pages 7-10.) After his sentencing, Mr. Smith was three times found to be not competent to assist in postconviction proceedings, and remains adjudicated not competent. Judge Borowski mentioned none of these facts.

Instead, Judge Borowski focused on a straw-man: although both doctors who evaluated Mr. Smith opined that he was more likely not competent during his trial and sentencing, these opinions fell short of ideal because both were necessarily rendered without an interview at the time of trial and sentencing.

Judge Borowski's decision reflects not a fair consideration of the evidence, but a rationalization to decide in accordance with his initial preconceptions. Overwhelming evidence supports the two uncontradicted professional opinions that Mr. Smith was more likely than not incompetent during his trial and sentencing. Judge

Borowski's ruling to the contrary was clearly erroneous.

Ineffective assistance incompetency claim

Ineffective assistance of counsel claims are based on the two prong test under which a defendant must establish deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The question of deficient performance normally turns on whether counsel's actions or inactions were based on reasonable strategic choices made after a reasonable investigation; however, this is not so when the inaction is a failure to raise competency:

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Strickland*, 466 U.S. at 690-691, 104 S.Ct. at 2066. However, when defense counsel has a reason to doubt his client's competency, counsel must advise the court, without regard to any strategic consideration:
> When a defense counsel fails to bring evidence of a client's incompetency to the court's attention, the court is deprived of the evidence necessary to determine whether a competency hearing is required. It follows then that, where the evidence withheld is sufficient to raise a bona fide doubt (reason to doubt) as to the defendant's competence, the failure to

> present this information to the court deprives the defendant of his or her constitutional right to a fair trial.

State v. Johnson, 133 Wis.2d 207, 395 N.W.2d 176 (1986). Thus, since strategic considerations are not relevant, the deficient performance inquiry where counsel failed to raise competence is limited to whether counsel had reason to doubt competency.

Prejudice is shown when a defendant demonstrates "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. However, in the specific instance where a trial counsel had reason to doubt competency and failed to raise the issue, a defendant shows prejudice upon demonstrating "that there is a reasonable probability he would have been found incompetent to stand trial." *Hummel v. Rosemeyer*, 564 F.3d 290, 303 (3rd Cir. 2009).

Mr. Sargent failed to raise competency, and testified he saw no reason to do so. However, he noted that Mr. Smith was often more concerned with his far less serious sex offender registration charge than with the charge in this case. 92: 15. He noted that Mr. Smith could not give a

version of the facts of the case consistent with his consent defense, and never indicted whether he had sex with the victim; Mr. Sargent recounted: "He states he's innocent of charges. If he had sex it was consensual." 92: 22. He noted prior to sentencing that Mr. Smith was very angry. He certainly noticed that in his allocution Mr. Smith wandered astray, such that first Mr. Sargent, and then the court, had to intercede to terminate the allocution. However, Mr. Sargent viewed the allocution not as showing a mental health problem, but an anger problem. 92: 30-31, 35. Dr. Pankiewicz testified that the allocution testimony viewed in isolation (and thus ignoring other records regarding Mr. Smith) raised concerns in his mind about competency. 91: 13.

Mr. Sargent also testified about five letters he received from Mr. Smith. 92: 7-18, 28-30.

In a letter of May 29, 2009 Mr. Smith wrote he was concerned about telling the jail nurse of his diabetes, because if he did so he would be cited for public loitering and given a $160 citation. 92: 29. Confronted with this letter, Mr. Sargent acknowledged only that Mr. Smith complained generally about his treatment at the House of Corrections. 92: 29.

In a letter dated October 12, 2009, which is the first day of trial, Mr. Smith wrote to ask Mr. Sargent to cancel his Social Security Disability application from 1989. 92: 17. The letter also complained rather incoherently of favoritism apparently involving which inmates were allowed to use a black ink pen. 92: 18. When asked if these concerns seem odd coming from someone in the process of jury trial, Mr. Sargent replied only that he is not sure when he received the letter. 92: 18.

In a letter dated October 13, 2009, the second day of trial, Mr. Smith advised Mr. Sargent that he had written to the Department of Corrections and asked that his criminal record be cleared. 92: 14-15. When asked if this letter, written during trial, seemed odd, Mr. Sargent replied that Mr. Smith was always angry about his sex offender registry charge. 92: 15.

Despite the allocution, and the letters he received from Mr. Smith, Mr. Sargent asserted he had to reason to doubt competency. So how could Mr. Sargent have failed to notice Mr. Smith's symptoms? Mr. Sargent, like any defense counsel, had his own agenda: preparing for trial, or preparing for sentencing. His notes reflected early in his representation that the defense at trial would be consent.

With Mr. Smith's DNA in the victim's underwear, he had no other option. He also decided quite early in his representation that Mr. Smith should not testify. But at each meeting, in each conference with Mr. Smith, Mr. Sargent is focused on the task at hand. Is he also looking for whether Mr. Smith might be mentally impaired? As Mr. Sargent conceded: "I think if I had an inclination of that, I would have addressed the court right away. So *it's not something that you always question or always look for*." 92: 51 (emphasis added). As Dr. Collins indicated in a colloquy with the court during testimony, to see Mr. Smith's symptoms, "you would have to talk to him; you would have to listen to him talk." 91: 61. The symptoms might not be apparent in a brief colloquy, but became apparent in the open-ended allocution. 91: 62-64. However, even in retrospect, viewing the allocution transcript, Mr. Sargent never corrected or modified his assertion that the allocution reflected merely an anger problem, and not a mental health problem. 92: 32-35. Dr. Collins provides one possible explanation:

> Meetings with attorneys can be very time bound and very structured. And when very structured, the likelihood of seeing Mr. Smith's symptoms is reduced. So depending on the structure, the length of

time of those meetings, it's possible that it got missed.

91: 67.

In his decision, Judge Borowski noted Mr. Sargent had 20 years experience, and handled thousands of criminal cases, including many before his court. Apx. 106-107; 94: 6-7. He concluded that Mr. Sargent was not ineffective in failing to raise competence because the issue "did not exist." Apx. 106; 94: 6.

Contrary to Judge Borowski's findings, the record demonstrates that by the point of allocution, Mr. Sargent had reason to doubt Mr. Smith's competency, and thus a duty to raise the issue. His failure to do so is deficient performance. The evidence set forth above clearly shows a reasonable probability he would have been found incompetent to stand trial had he raised the issue. This establishes prejudice. Raising competency even as late as sentencing would have brought to light all the jail and other records calling into question Mr. Smith's competency during the time of his trial. Thus, Mr. Smith prays that this court reverse Judge Borowski's decision, vacate the conviction, and grant a new trial.

Procedural incompetency claim

Procedural competency claims are sometimes

referred to as *Pate* claims. *James v. Singletary*, 957 F.2d 1562 (11th Cir. 1992), with reference to *Pate v. Robinson*, 383 U.S.375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). In *Pate*, the defendant's counsel at trial argued an insanity defense, but also insisted that "'present sanity'" was at issue. *Pate*, 383 U.S. at 384 and footnote 6 (noting the confusion in state law where both criminal responsibility and competence are addressed using the term "insanity"). The defendant in *Pate* produced testimony from four witnesses regarding his long history of disturbed behavior, which the court recounts at length. *Pate*, 383 U.S. at 378-383. The court found that the evidence entitled the defendant to a hearing on competency, and that failure to hold such an inquiry deprived the defendant of a fair trial. *Pate*, 383 U.S. at 385.

Thus, a procedural competency claim is based upon the trial court's alleged failure to hold a competency hearing. *McGregor v. Gibson*, 248 F.3d 946, 952 (10th Cir. 2001); *James*, 957 F.2d at 1570-1571. In *James*, because lower courts had confused the concepts of procedural and substantive competency claims, the court took pains to distinguish the two types of claims; regarding procedural or *Pate* claims, the court stated:

> *Pate* therefore put another spin on the already well-established prohibition against trying and convicting an incompetent defendant. *Pate*, in essence, established a rebuttable presumption of incompetency upon a showing by a habeas petitioner that the state trial court failed to hold a competency hearing on its own initiative despite information raising a bona fide doubt as to the petitioners competency. According to *Pate*, the state could rebut this presumption by proving that the petitioner in fact had been competent at the time of trial.

James, 957 F.2d at 1570. Thus, a procedural incompetency claim requires establishing that the trial court had information raising a bona fide doubt as to competency. *James*, 957 F.2d at 1571 and footnote 6.

The remedy in *Pate* was to issue a writ requiring discharge unless the state retried the case within a reasonable time. *Pate*, 383 U.S. at 386. The court specifically rejected the idea of a remand for a retrospective determination of competency under the facts, in part because of the passage of six years since the trial. *Pate*, 383 U.S. at 387. However, subsequent cases have stated that while retrospective competency hearings on procedural competency claims are generally disfavored, they are permissible if a meaningful retrospective determination can be made. See, e.g., *McGregor v. Gibson*, 248 F.3d 946, 962 (10th Cir. 2001). To determine if a

"meaningful" retrospective determination can be made, the court in *McGregor* set forth the relevant factors a court should consider. *McGregor*, 248 F.3d at 962-963, quoting from *Clayton v. Gibson*, 199 F.3d 1162, 1169 (10th Cir. 1999). However, in Mr. Smith's case, the court has already held a retrospective competency hearing.

At the current stage of proceedings, the procedural competency claim is only relevant as a question of the burden of proof. If the court has declined to grant relief on substantive incompetency or ineffective assistance claims, then the court must consider whether the court had reason to doubt competency. If so, then incompetency is presumed. The court must then determine whether the State has overcome this presumption by the preponderance of the evidence.

Mr. Smith's allocution, both in its bizarre and irrelevant content and the insistent manner in which Mr. Smith made it, should have raised doubt in mind of the trial court regarding Mr. Smith's competency. Prompt inquiry at the sentencing stage would have also logically prompted inquiry into Mr. Smith's competency at the time of his trial two months earlier. The trial court's failure to inquire into competence raises a presumption of incompetency which

the State may seek to rebut. Based on the facts set forth above, Mr. Smith asserts that the State has failed to meet its burden to prove Mr. Smith's competency at the times of trial and sentencing.

CONCLUSION

Jimmie Lee Smith prays the this court vacate his conviction and sentence and remand the case for a new trial.

Respectfully submitted,

_____
John T. Wasielewski
Attorney for
Jimmie Lee Smith

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 8108 words.

_____
John T. Wasielewski

APPENDIX CERTIFICATION

I hereby certify that I filed, as a part of this brief, an appendix that complies with §809.19(2)(a) which contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decision showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of person, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

_____

John T. Wasielewski
Attorney for
Jimmie Lee Smith

CERTIFICATE OF COMPLIANCE

I hereby certify that I have submitted an electronic copy of this brief, identical to the printed form of the brief, but excluding any appendix, as required by Wis. Stat. §809.19(12).

_____
John T. Wasielewski

APPENDIX CONTENTS