STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP1228-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JIMMIE LEE SMITH,

Defendant-Appellant.

APPEAL FROM A COURT OF APPEALS' DECISION REVERSING A CIRCUIT COURT ORDER AND A JUDGMENT OF CONVICTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID L. BOROWSKI AND JEFFREY A. CONEN, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

ISSUES PRESENTED FOR REVIEW

1. The Wisconsin Constitution limits the court of appeals' jurisdiction to appellate jurisdiction, which this court has held does not include fact finding. Here, the court of appeals found facts that the circuit court rejected. Did the court of appeals exceed its constitutional authority by engaging in fact finding?

2. The court of appeals accepts a circuit court's reasonable inference from facts and only disturbs clearly erroneous decisions.

Here, the circuit court reasonably found Smith's attorney and the trial court more credible than competency evaluations conducted six months and one year after sentencing, but the court of appeals disagreed by drawing inferences the circuit court rejected. Did the court of appeals impermissibly weigh the evidence rather than defer to the circuit court?

3. No person who lacks substantial mental capacity to understand the proceedings or assist in his own defense may be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures. The circuit court heard testimony from two psychiatrists and Smith's attorney and concluded that Smith was competent at the time of his trial. Did the circuit court erroneously exercise its discretion?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in most cases accepted for Wisconsin Supreme Court review, both oral argument and publication appear warranted.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The State charged Jimmie Lee Smith with one count of second degree sexual assault with use of force (2:1). A.H. testified that on October 2, 2007, Smith and another man approached her while she was drinking outside (76:14). She described Smith as "hyper" (76:14). When A.H. finished her drink, she started walking to Oakton Manor, a home for people with chronic mental illness (76:15-16). She was intoxicated and asked to leave Oakton Manor (76:18). A.H. left, and Smith followed her into a bar (76:26-27). She left the bar, and he followed her out (76:29-30).

All of a sudden, Smith grabbed her hands behind her back, and A.H. started shouting "No" and "Help me" (76:30-31). Smith said to "Shut up you fucking bitch" (76:31). He shoved her into a parking lot and pushed her to the ground (76:33-34). Smith unbuttoned and unzipped her pants and lowered them (76:35). He pushed her underwear to the side and put his penis into her vagina

(76:35). Smith hit A.H. in the face, choked her, pulled her hair, and slammed her head against the concrete (76:36). Smith knocked A.H. unconscious (76:37).

When she came to, Smith was gone (76:39). A.H. walked to a house across the street, knocked on the door, and asked them to call 911 because she had been raped (76:40-41).

The morning the trial began, the court had this exchange with Smith.

> THE COURT: All right. Mr. Smith, do you understand that you have the right to challenge both -- well, challenge any statements that you made to the police on two grounds. The first ground is that you did not receive your Miranda warnings; do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: The second ground would be that the statement was not voluntary; do you understand that?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Voluntariness goes to police impropriety or coercion only; do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you wish to have a motion on either of those two issues?
>
> THE DEFENDANT: I don't think so, Judge.
>
> THE COURT: You don't think so or you don't want to?
>
> THE DEFENDANT: No.
>
> THE COURT: All right. Have you had enough time to talk to your lawyer?

THE DEFENDANT: Yes.

THE COURT: Do you believe that's in your best interest to proceed in this manner?

THE DEFENDANT: Yes.

THE COURT: Do you understand that your lawyer could argue the fact that you may have been confused, which may go to the weight of the confession?

THE DEFENDANT: Yes.

THE COURT: But certainly does not go to the admissibility; do you understand that?

THE DEFENDANT: Yes.

THE COURT: All right. Mr. Sargent, have you gone over your client's rights to have these motions heard with him?

MR. SARGENT: Yes, I have.

THE COURT: Do you believe he's choosing to waive the Miranda Goodchild hearing freely, voluntarily and intelligently?

MR. SARGENT: Yes.

THE COURT: Do you believe it's in his best interest to proceed in this manner?

MR. SARGENT: Yes.

(74:3-5).

Before voir dire, the court conducted this exchange with Smith.

THE COURT: All right. Mr. Sargent, you want to make a record.

MR. SARGENT: I would just like to place on the record that Mr. Smith and I have discussed the case and Mr. Smith has stated his innocence and does not want to accept any plea offer. Correct, sir?

THE DEFENDANT: Right.

MR. SARGENT: Say it a little louder.

THE DEFENDANT: Correct.

THE COURT: You do understand that once we get started, which is going to be in a matter of a couple of minutes, that there will be no resolution of this matter mid-stream unless you plead to the charge with no negotiations. Do you understand that?

THE DEFENDANT: Correct.

(75:3).

After voir dire, Mr. Sargent told the court that he conferred with Smith throughout the jury process and selection, and Smith said that was correct (75:63).

After the State rested its case, the court conducted a colloquy with Smith:

THE COURT: All right. Mr. Smith, you have the right to testify in this matter, you have the right to remain silent. Do you understand that?

THE DEFENDANT: Correct.

THE COURT: You make that choice yourself, sir. Do you understand that?

THE DEFENDANT: Correct.

THE COURT: Have you had enough time to talk to your lawyer?

THE DEFENDANT: Yes.

THE COURT: What's your choice?

THE DEFENDANT: My choice was to waive it.

THE COURT: I'm sorry?

THE DEFENDANT: Waive it.

THE COURT: To waive it? So do you want to testify or do you not want to testify?

THE DEFENDANT: I don't want to testify.

THE COURT: All right. And has anyone forced you to do this?

THE DEFENDANT: No.

THE COURT: Do you believe it's in your best interest?

THE DEFENDANT: Yes.

THE COURT: And are you making this choice freely and voluntarily?

THE DEFENDANT: It's freely and voluntarily.

(77:78-79).

The jury found Smith guilty (14).

At sentencing, the court again heard from Smith. Smith told the court:

> Today I want to say in court that I have been through a lot in my life. I help peoples and I got -- I got this. I bail peoples out of jail, I got this. I let peoples stay in my house, I got this. I let peoples eat at my house, I got this.

Today [the victim], I don't know what she lookin' for out of me and why is she comin' to court like this? What it is that she want from me? She in love with me or something? Sayin' that she haven't took a shower since this happened to her? What is wrong with her? I let bygones be bygones. Peoples done throw salt on me every day, every day out there on the street. Peoples took money from me at the court sale, at the courthouse. But I let it ride, they wouldn't even give it back. I let it go.

I sit up North, did time behind bailin' this girl, Yvonne Carter, out of jail in Chicago, Illinois for child neglect, because I went to court the day that she was -- she was in court, and I went and bailed her out of jail. And then I hear all of this about me? And she supposed to have been back in court. She never go back. She never go back for her -- for -- to get her bail back. But I'm the one who had to sign her bail as being right to this day.

I am very, very sorry that I even helped this lady. But these ladies are sayin' things like this about me. And she ain't white like her, the lady that -- that I bailed out of jail, she's black. And her daughter, I looked out for them when they was starvin' to death, livin' out on the street corner. I'm out here tryin' to make a living every day at my job workin', lost my job behind all of that, feedin' them, lettin' them stay in the house, ended up gettin' in trouble with my landlord by buyin' air-conditionin' and things without asking his permission, could I have it in my apartment with the rent and -- and included with the lights.

And this is the thanks I get out of it? 12 years like I murdered someone out there on the street? I sat in there 12 years for bailin' her out of jail. I didn't see all these troubles until I bailed her out of jail. Helped her and her family.

And then my brothers, them too, I even brought them to my house and helped them. When I lived with them, they couldn't even pay the light bill. Wouldn't even pay the light bill. The landlord was lettin' them work off his job to pay the rent. And told him to switch the lights in his name. He didn't even do it.

So by me handin' over parts of my Quest card, because I never gained footage after being locked up after bailing Yvonne out of jail for being convicted of child neglect, for $200 I had to put my name to that, and now she's on the run and I get all of this out of that? She never -- She ain't -- wouldn't go back to court because I just see her last year. She worked at the same company as I did, I see her there on the 27th and National. She there.

And then this other lady back in -- Lee Ellen Wash, she don't even know her name. She callin' me every day. I'm over by my -- my -- my livin' relatives after I got out of jail, never gained footage, never got a job, never got back to my feet. I know nobody in this courtroom don't care.

And -- And at that one time I didn't care about my $40 that I gave away to the courthouse, I gave away $40 for a marriage license fee and I couldn't even get it back from the courts. And this happened before all of this stuff about bailin' Yvonne out of jail. And the courts seemed like this is all my fault? This is not all my fault.

I also talked to Lee Ellen Wash, I sent her a letter last year. And then Yvonne Carter, I went back to her house after I got out of jail and she still wasn't workin' out right. And then we -- I ended up gettin' shot behind all this. I got a bullet hole through my body and laid up at Froedtert Hospital for almost six months out there fightin' for my life because of these people that hates on me.

I can prove it to you that I got the shot, it is right here in my stomach. I got shot, laid up almost 90 days, I was fightin' for my life at Froedtert because I bailed her out.

MR. SARGENT: Excuse me, your Honor. (Brief discussion off the record.)

THE DEFENDANT: It's got to be out there. I need to put this out there on the table.

THE COURT: Well, we're going to have to put an end to this because none of this really has a whole lot to do --

THE DEFENDANT: I know it don't have a whole lot, but, here, I didn't set up in jail and then I got out and then I couldn't even stay on my money, and then I get on SSI and stay on it for like four or five checks and then they cut it off. I get these lawyers $2,300 to represent me. They -- I still ain't on for all of this pain and sufferin' that I'm goin' through for not lookin' out for my life after I got my finger injured by my family work helpin' this guy getting' on the job there. And he didn't even have the decency enough to say I will invite you out to dinner for lookin' out for me. He didn't even have the decency to do that for me.

And then Miss Wash, she come over to my house, I got the settlement from the -- from my gunshot, I buy a car, I take her down there to see her family, she want to run both of us off the highway, kill us both.

THE COURT: All right. Well, Mr. Smith, none of this really has anything to do with --

THE DEFENDANT: But this has got a lot to do with this case.

THE COURT: It really doesn't. So we're going to cut it off if you are not going to get to the point.

THE DEFENDANT: The point is, if you want to hear what my goal are, my goal is to get out of here to get back to work and to get my Social Security. That's it. You don't want to hear what I gotta say but you want to sentence me, though. You want to give me the maximum time, say that I'm a mean person. But I'm not mean. This place is mean. They took money from me here. And then when I write a letter to my family about it back in Chicago telling them how could I stay in Wisconsin with a stolen car from Chicago here, how could I stay here, how could I stay here, I had to sign my letters that I written to them because these peoples here took my -- took my marriage license fee and then they took my adoption fee. Now, that is not fair to me. you guys are not being fair.

THE COURT: We're done.

> THE DEFENDANT: I'm done but y'all -- I just want to address -- When I want to talk, y'all don't want to hear the truth.

(79:14-19).

The court sentenced Smith to 25 years of initial confinement followed by 15 years of extended supervision (20; 79:22).

Postconviction, the circuit court ordered Smith to be examined for competency (26). Dr. Deborah Collins believed Smith was not competent to proceed, but that he was more likely than not to attain competency (27:6). The circuit court suspended the postconviction proceedings for Smith to regain competency (31:2).

After the suspension, Dr. John Pankiewicz examined Smith and concluded that he was still incompetent (32:3). The circuit court appointed a guardian ad litem to represent Smith (35).

Smith moved to vacate his conviction due to his lack of competence at trial and sentencing (43). The State opposed the motion (44). The circuit court appointed Dr. Pankiewicz to examine Smith to determine Smith's competency at the time of trial and sentencing (48).

The circuit court held a competency hearing (91). Dr. Pankiewicz testified that he examined Smith and reviewed records of past interviews with Smith to determine his competency to participate in postconviction proceedings (91:7). He concluded that there was substantial reason to question Smith's competency at trial and sentencing (91:9). Dr. Pankiewicz normally would meet with the person as part of a competency evaluation, but did not do that with Smith (91:21). Dr. Pankiewicz had not reviewed portions of the trial transcript where Smith answered questions prior to the hearing, but after review, he believed those exchanges weighed in favor of Smith being competent at trial (91:26).

Dr. Collins testified that reaching a conclusion was challenging because the data was incomplete and she was missing a contemporaneous interview (91:46). She said that the interview is

normally the most important part of the evaluation (91:48). She said Smith could have been competent and psychotic at the same time (91:62). Dr. Collins thought that Smith's recorded statements at trial did not change her opinion (91:59). Dr. Collins concluded that Smith was incompetent at the time of trial and sentencing (91:46).

At the continued hearing, Smith's attorney, Stephen Sargent testified. Mr. Sargent testified that he met with Smith seven times during his representation and received four letters from Smith during the relevant time. Nothing caused Mr. Sargent to question Smith's competency (92:38).

The first letter Mr. Sargent received was a notice of a court date, but the letter did not strike the attorney as "odd" because he receives a lot of communication from clients (92:7-8). The court felt that the information about court dates supported Smith's competence (92:9).

The second letter, dated during the trial, said Smith had contacted the Department of Corrections about clearing his criminal record (92:15). Mr. Sargent said that throughout his representation Smith was concerned about a charge of failure to register as a sex offender (92:16). Smith was homeless at the time and did not feel his registry violation was fair (92:22).

The third letter asked Mr. Sargent to cancel a social security disability application Smith had filed (92:17). Mr. Sargent did not remember this letter or discussion about social security, but it was beyond the scope of his representation (92:17). The letter also told Mr. Sargent that a corrections officer took a black pen from Smith and loaned it to another inmate (92:18). That information also had no relation to Mr. Sargent's representation in the criminal case (92:18).

The fourth relevant letter complained about the sex offender registry and his treatment in jail (92:28-29).

Mr. Sargent also reviewed a recorded interview with Smith, but did not have any recollection at the postconviction hearing of

what the interview showed (92:19). That interview was recorded ten months before trial (92:37).

Smith and Mr. Sargent met seven times (92:21). Mr. Sargent was never concerned about Smith's mental health during those meetings (92:21). He was concerned that Smith had drunk enough alcohol to compromise his recollection of the assault (92:21). Smith agreed to present a defense that the victim consented to intercourse (92:23-24). Mr. Sargent explained that Smith was very upset at sentencing and saw his allocution not as a mental health problem, but an anger problem (92:35).

Mr. Sargent did not doubt Smith's competency and felt Smith could assist in his own defense (92:38). Mr. Sargent felt that Smith did assist him at trial (92:41). If he had thought that Smith was incompetent, he would have raised the issue with the court right away (92:51). He explained that he might not actively look for competency, but would consider it if there was any reason to question a defendant's competence (92:51).

The circuit court heard all the testimony, and found Smith had been competent at trial and sentencing (94:8) (Pet-Ap. 128). The court summed up Smith's argument as "people who were not present at the relevant time know more than the people who were present," and the court rejected that claim (94:4-5) (Pet-Ap. 124-25). It respected the doctors and their concessions that the interviews of Smith would ideally have been before trial and sentencing (94:5-6) (Pet-Ap. 125-26). The court relied upon Smith's experienced attorney who did not have any reason to question Smith's competence during the proceedings (94:6) (Pet-Ap. 126).

The court rejected the doctor's opinions based on the fact that they retrospectively evaluated Smith (94:7-8) (Pet-Ap. 127-28). The court felt that the lack of an interview before trial was important (94:8) (Pet-Ap. 128). The court also felt that the doctor's opinions were their own, but that the court was the entity called upon to make the legal determination (94:8) (Pet-Ap. 128). The court placed more weight on Mr. Sargent's opinion from observations at trial and sentencing than on the doctor's opinions from years later (94:8) (Pet-

Ap. 128). The court found Smith competent at trial and sentencing (94:9) (Pet-Ap. 129).

The court of appeals articulated the standard of review as "clearly erroneous." *State v. Smith*, 2014 WI App 98, ¶ 19, 357 Wis. 2d 582, 855 N.W.2d 422 (Pet-Ap. 114). It noted that Wisconsin has recognized an occasional need for a mental competency evaluation after the relevant time frame. *Id.* ¶ 22 (Pet-Ap. 115-16).

The court found that the circuit court weighed heavily the "uninformed competence opinions of defense counsel and the trial court . . . and discounted the experts' evaluations." *Id.* ¶ 23 (Pet-Ap. 116-17). The court of appeals did not give deference to the postconviction court because it was not the same court that presided over the trial. *Id.* The court relied on *State v. Johnson*, 133 Wis. 2d 207, 395 N.W.2d 176 (1986), and concluded that the circuit court could not reject the opinions of the experts simply because the evaluations were conducted post-trial and post-sentencing. *Smith*, 357 Wis. 2d 582, ¶ 24 (Pet-Ap. 117-18). The court found that the expert reports, expert testimony, DOC records, and jail records provided ample evidence to doubt Smith's competence at the time of trial and sentencing. *Id.* ¶ 26 (Pet-Ap. 118). It reversed Smith's conviction and remanded for a new trial. *Id.*

The State filed a petition asking this court to review the decision of the court of appeals. This court granted that petition.

SUMMARY OF ARGUMENT

The court of appeals' decision is legally flawed because it conducted improper fact finding. The court of appeals impermissibly found facts in violation of the Wisconsin Constitution and without jurisdiction. It weighed the evidence rather than defer to the circuit court in reaching its conclusion.

The court of appeals owed deference to the circuit court's conclusion. *See State v. Garfoot*, 207 Wis. 2d 214, 558 N.W.2d 626 (1997) and *State v. Byrge*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d

477. It applied the wrong standard of review. Accordingly, the State respectfully requests that this court reverse the decision of the court of appeals.

ARGUMENT

I. The court of appeals exceeded its constitutional authority by engaging in fact finding.

A. Standard of review.

The question on review is "whether the court of appeals exceeded its authority by making factual determinations, based on conflicting evidence, in lieu of, and in addition to, the findings made by the trial court." *Wurtz v. Fleischman*, 97 Wis. 2d 100, 107, 293 N.W.2d 155 (1980). This raises a constitutional issue, and this court reviews constitutional claims de novo. *State v. Johnson*, 2009 WI 57, ¶ 22, 318 Wis. 2d 21, 767 N.W.2d 207.

B. Legal principles.

The Wisconsin Constitution limits the court of appeals jurisdiction to appellate jurisdiction.

> The appeals court shall have such appellate jurisdiction in the district, including jurisdiction to review administrative proceedings, as the legislature may provide by law, but shall have no original jurisdiction other than by prerogative writ. The appeals court may issue all writs necessary in aid of its jurisdiction and shall have supervisory authority over all actions and proceedings in the courts in the district.

Wis. Const. art. VII, § 5(3).

This limit effectively removes the ability of the court of appeals to engage in any kind of fact finding. *Wurtz*, 97 Wis. 2d at 107 n.3. If the evidence on an issue conflicts, that issue will not be determined by the appellate court. *Id.* The court of appeals is "precluded from making findings of fact where the facts are in dispute." *Tourtillott v. Ormson Corp.*, 190 Wis. 2d 291, 294, 526

N.W.2d 515 (Ct. App. 1994). The court of appeals must accept a reasonable inference drawn by a circuit court from established facts if more than one reasonable inference may be drawn. *Pfeifer v. World Serv. Life Ins. Co.*, 121 Wis. 2d 567, 571, 360 N.W.2d 65 (Ct. App. 1984). This court searches the record to support the circuit court's findings of fact. *Hofflander v. St. Catherine's Hosp., Inc.*, 2003 WI 77, ¶ 70, 262 Wis. 2d 539, 664 N.W.2d 545. If, however, the facts are undisputed or are so clear that only one conclusion can follow, the issue may be determined by the appellate court. *Kannenberg Granite Co. v. Indus. Comm'n of Wisconsin*, 212 Wis. 651, 250 N.W.2d 821 (1933).

This court has held the court of appeals exceeded its constitutional authority where it found facts when the circuit court did not make an explicit finding on the issue. *Gottsacker v. Monnier*, 2005 WI 69, ¶¶ 33-35, 281 Wis. 2d 361, 697 N.W.2d 436.

C. The court of appeals exceeded its constitutional authority when it engaged in fact finding.

The court of appeals found the expert testimony more reliable than the testimony of Smith's former attorney. That finding by the court of appeals is improper. *See Tourtillott*, 190 Wis. 2d at 294. The court of appeals exceeded its constitutional authority by engaging in fact finding. *See* Wis. Const. art. VII, § 5(3); *Wurtz*, 97 Wis. 2d at 107 n.3.

The circuit court needed to determine whether, at the time of trial, Smith lacked the mental capacity to understand the proceedings or assist in his defense. *See* Wis. Stat. § 971.13(1). The court listened to evidence from two psychiatrists and Smith's trial attorney, Mr. Sargent. Mr. Sargent testified about his own experiences with Smith including preparing for trial, during trial, and after trial (92:7-38). Mr. Sargent never questioned Smith's competency to assist in his defense or understand the proceedings (92:38). The psychiatrists, Dr. Pankiewicz and Dr. Collins, relied on historical documents and interviews conducted post-sentencing. They each concluded that Smith was incompetent to assist in his defense or understand the proceedings (91:9, 46).

The circuit court found Mr. Sargent's testimony more credible (94:8) (Pet-Ap. 128). The court believed that Mr. Sargent's contact with Smith at the relevant time rendered his opinion more trustworthy than the psychiatrists.

The court of appeals rejected the circuit court's findings, and made its own findings in violation of its constitutional authority. It found that Mr. Sargent and the circuit court did not know about the jail records, but the experts knew about the records and relied upon them. *Smith*, 357 Wis. 2d 582, ¶ 25 (Pet-Ap. 118). The court found that the experts' opinions were more reliable than Mr. Sargent. *Id.* The court exceeded its authority by making this finding of fact.

II. The court of appeals impermissibly weighed the evidence rather than defer to the circuit court.

A. Standard of review.

The United States Supreme Court used to consider a competency determination to be a mixed question of law and fact. *Byrge*, 237 Wis. 2d 197, ¶ 40 (citing *Maggio v. Fulford*, 462 U.S. 111 (1983) (per curiam)). But it changed that approach and "now treats competency determinations more like questions of fact." *Id.* ¶ 41.

The Supreme Court held that such decisions require deference because their resolution hinges on witness credibility, and hence, evaluation of demeanor. *Miller v. Fenton*, 474 U.S. 104, 114 (1985). Competency determinations embody more than basic, historical facts, but still fall in the category of factual issues. *Thompson v. Keohane*, 516 U.S. 99, 111 (1995).

This court concluded that "the Supreme Court classifies competency to stand trial within a discrete category in which the resolution of the legal issue is better left to the trial court." *Byrge*, 237 Wis. 2d 197, ¶ 44. The circuit court is in the best position to apply the legal standard to the facts of a competency determination. *Id.*

This court will only disturb the circuit court's determination of whether a defendant is competent to stand trial "only if the trial

court exhibited an erroneous exercise of discretion or if the trial court decision was clearly erroneous." *Garfoot*, 207 Wis. 2d at 223-24; *see also Byrge*, 237 Wis. 2d 197, ¶ 45.

B. The court of appeals failed to defer to the circuit court and independently weighed the evidence.

Two reasonable inferences can be drawn from the evidence: one that Smith was competent at the time of trial, and the other that he was not competent. The circuit court needed to choose who was more credible: the experts or Mr. Sargent. The circuit court found Mr. Sargent more credible. The court of appeals owed deference to the circuit court's findings.

The circuit court found Mr. Sargent credible (94:6) (Pet-Ap. 126). The court placed more weight on Mr. Sargent's opinion that he did not have any reason to question Smith's competency than on the doctor's opinions (94:8) (Pet-Ap. 128). The circuit court did not exhibit an erroneous exercise of discretion and the circuit court's decision was not clearly erroneous. *See Byrge*, 237 Wis. 2d 197, ¶ 45.

The court of appeals described Mr. Sargent's opinion as "uninformed" because Mr. Sargent "knew nothing of Smith's extensive mental health history, the DOC records, the jail records or the two experts' opinions." *Smith*, 357 Wis. 2d 582, ¶ 23 (Pet-Ap. 116-17). The court of appeals failed to apply the correct standard of review.

The court of appeals rejected the standards from *Garfoot* and *Byrge* and refused to give deference to the circuit court's competency determination. *Id.* The court of appeals attempted to distinguish *Garfoot* and *Byrge* by noting that the postconviction court was not the same court who observed Smith at trial and sentencing. *Id.* The court said that, "The deference accorded the trial court's competence assessment in *Garfoot* and *Byrge* does not apply to the postconviction court here because the basis for that deference does not exist here." *Id.* The court of appeals conclusion is wrong.

The postconviction court was not the same court that conducted the trial and sentencing. It was the court that heard the evidence presented at the postconviction motion hearing. The postconviction court heard testimony from Mr. Sargent, Dr. Collins, and Dr. Pankiewicz (92). It was able to "appraise witness credibility and demeanor." *See Byrge*, 237 Wis. 2d 197, ¶ 45. The court found Mr. Sargent more credible (94:8) (Pet-Ap. 128). It made the factual finding that Smith was competent.

The court of appeals failed to defer to the circuit court's findings simply because the postconviction court was a different court from the court at trial and sentencing. It impermissibly found facts and weighed evidence, and by doing so applied the improper standard of review.

III. The circuit court did not erroneously exercise its discretion.

A. Legal principles.

"[T]he criminal trial of an incompetent defendant violates due process." *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (citations omitted). "A defendant may not be put to trial unless he '"has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and] a rational as well as factual understanding of the proceedings against him."'" *Id.* (quoted sources omitted).

The test for determining competency is whether the person "possesses sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding" and "he or she possesses a rational as well as factual understanding of a proceeding against him or her." *Garfoot*, 207 Wis. 2d at 222. *See also* Wis. Stat. § 971.13(1).

At a competency hearing, the court must determine whether the defendant can satisfy the understand-and-assist test. *Byrge*, 237 Wis. 2d 197, ¶ 48. The determination is judicial and legal, not clinical and medical. *Id.* A clinical diagnosis does not necessarily speak to competency to proceed. *Id.*

> A history of irrational behavior and prior medical opinions about a defendant's condition, like a defendant's demeanor, can serve as indicia in the competency determination. . . . But clinical reports occasionally state that a defendant is incompetent 'when what really was meant was merely that the defendant had some mental illness which required treatment.'

Id. ¶ 48 (citations omitted).

Not every mentally disordered defendant is incompetent. *Id.* ¶ 48 n.21. Many mentally ill defendants are legally competent to stand trial. Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 Wis. L. Rev. 65, 70.

The court must examine the "present mental capacity" of the defendant. *Byrge*, 237 Wis. 2d 197, ¶ 49. The history of behavior and prior medical opinions can serve as indicia in the competency proceeding, but past psychiatric episodes may mean a defendant is still presently competent to proceed. *Id.* ¶¶ 48-49. It is difficult to retroactively determine an accused's competence to stand trial. *Pate v. Robinson*, 383 U.S. 375, 387 (1966).

B. The circuit court properly exercised its discretion.

The circuit court did not erroneously exercise its discretion when it concluded that Smith was competent at trial and sentencing. The court of appeals applied the wrong standard by independently reviewing and weighing the evidence. This court should reverse the court of appeals' decision.

Mr. Sargent did not have any doubt about Smith's competency and believed Smith could assist in his own defense (92:38). Mr. Sargent felt that Smith did assist him at trial (92:41). Mr. Sargent met with Smith seven times, received four letters from Smith, and sat with him at every hearing and at trial, and Mr. Sargent never questioned Smith's competency (92:38). Smith satisfied the understand-and-assist test. *See Byrge*, 237 Wis. 2d 197, ¶ 48. The circuit court's reliance on this testimony was proper.

The court rejected the doctors' testimony. Each of the doctors admitted that a contemporaneous examination is better than one done after the fact (91:22, 48). Dr. Collins believed the interview was the most important part of the evaluation (91:48). The court is not required to establish a psychiatric classification of the defendant's condition. *Byrge*, 237 Wis. 2d 197, ¶ 48. The court must apply a legal — not a medical — standard. *Id.* The court took its duty seriously, and properly exercised its discretion.

Jail records showed that Smith displayed psychotic symptoms before and during trial (91:11). But psychotic symptoms alone are insufficient to show incompetence to stand trial. Not every mentally disordered defendant is incompetent. *Byrge*, 237 Wis. 2d 197, ¶ 48 n.21. That alone is insufficient to allow this court to overturn the circuit court's decision.

The court of appeals implied that the circuit court rejected the expert's conclusions because it believed retroactive evaluations were impermissible. *Smith*, 357 Wis. 2d 582, ¶ 24 (Pet-Ap. 117-18). The circuit court did not reject the expert's conclusion of incompetency because the evaluations happened after the fact. Instead, it found them less credible than Mr. Sargent's conclusion that Smith was competent because of Mr. Sargent's contemporaneous interactions with Smith. The circuit court properly exercised its discretion.

The court of appeals should have affirmed the circuit court's conclusion. The circuit court listened to the doctors' testimony, Mr. Sargent's testimony, read arguments by Smith and the State, and came to a rational conclusion. The circuit court's decision is not clearly erroneous. It was a proper exercise of its discretion.

CONCLUSION

Accordingly, the State respectfully requests that this court reverse the court of appeals' decision reversing the circuit court's order denying postconviction relief.

Dated this 13th day of July, 2015.

Respectfully submitted,

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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 5,585 words.

Dated this 13th day of July, 2015.

_____
Christine A. Remington
Assistant Attorney General

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 13th day of July, 2015.

_____
Christine A. Remington
Assistant Attorney General

STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP1228-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JIMMIE LEE SMITH,

Defendant-Appellant.

APPEAL FROM A COURT OF APPEALS' DECISION REVERSING A CIRCUIT COURT ORDER AND A JUDGMENT OF CONVICTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID L. BOROWSKI AND JEFFREY A. CONEN, PRESIDING

APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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PLAINTIFF-RESPONDENT-PETITIONER STATE OF WISCONSIN

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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 persons, 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.

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Christine A. Remington
Assistant Attorney General

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