STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case Nos. 2013AP2859-CR and 2013AP2860-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDREW L. JACKSON,

Defendant-Appellant.

APPEAL FROM ORDERS DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MEL FLANAGAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

J.B. VAN HOLLEN
Attorney General

NANCY A. NOET
Assistant Attorney General
State Bar #1023106

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809
(608) 266-9594 (Fax)
noetna@doj.state.wi.us

TABLE OF CONTENTS

CASES CITED

Page

STATUTES CITED

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case Nos. 2013AP2859-CR and 2013AP2860-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDREW L. JACKSON,

Defendant-Appellant.

APPEAL FROM ORDERS DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MEL FLANAGAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. This court may resolve this case by applying well-established legal principles to the facts presented.

ISSUES PRESENTED

(1) In Wisconsin, a circuit court is required to prevent a criminal defendant from representing himself if it finds either that the defendant has not deliberately (knowingly, intelligently, and voluntarily) waived the right to counsel, or if he is not competent to proceed without an attorney. The circuit court in this case found that Jackson did not deliberately waive his right to counsel and that he was not competent to try his cases without an attorney. Did the court correctly deny his request to represent himself?

(2) Not only are states permitted under the Constitution to adopt different standards for evaluating a defendant's competency to represent himself as opposed to his competency to stand trial, such an approach is favored by the United States Supreme Court. In Wisconsin, a defendant's competency to represent himself is subject to a different standard than his competency to stand trial. Is Wisconsin's standard constitutional?

SUPPLEMENTAL STATEMENT OF FACTS AND STATEMENT OF THE CASE

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § 809.19(3)(a)2.[1] Instead, the State presents the following summary and will present additional facts, if necessary, in the argument portion of its brief.

On June 1, 2011, Andrew Jackson was charged with multiple felonies after he doused his estranged wife, P.M., with boiling oil and water and then attacked her with a knife (2013AP2859:2). In the months that followed, he was charged with four counts of intimidation

[1] All citations to Wisconsin Statutes refer to the 2011-12 edition unless otherwise indicated.

of a witness for his efforts to prevent P.M. and another witness from testifying against him (2013AP2860:2).[2, 3]

Just before the witness intimidation charges were filed, Jackson appeared with his attorney for jury trial on the domestic violence offenses (56). At that time, Jackson's counsel explained that Jackson had just informed him of a new witness who might supply an alibi or third-party defense (56:3-4). During the hearing, Jackson expressed dissatisfaction with his current representation and asked for a new attorney (56:8-31). The circuit court adjourned the trial and delayed a final decision on Jackson's request for new counsel (56:23-30). Given the then-existing and forthcoming charges, the court also restricted Jackson's mail and telephone privileges to communication with his attorney for purposes of preparing his defense (56:20).

On April 24, 2012, Jackson appeared in court with his second attorney and again took issue with his representation (61:2-12). Jackson's primary complaint, based on his telephone and mail restrictions, was lack of communication with counsel (61:2-12). Jackson asked for permission to contact his family about retaining a new attorney (61:12-13). When the court explained that he would have to comply with his mail and telephone restrictions while making those arrangements, Jackson replied "Well, if that's the case, ma'am, I will like to represent myself, ma'am" (61:13).

---

[2] Generally, this brief will refer only to the record in Case No. 2013AP2859, which appears to be the primary appellate record in this consolidated appeal. Citations to the record in Case No. 2013AP2860 will be included only when necessary.

[3] Ultimately, the two cases, Milwaukee County Circuit Court Case Nos. 2011CF2437 and 2012CF230, were joined with a third misdemeanor charge, Milwaukee County Circuit Court Case No. 2011CM1107 (*see* 61:19-21).

The court told Jackson that it would not rule on his request that day, but that the court would consider the possibility of allowing him to represent himself "[i]f I find that you are capable of and ready and prepared to do so. It's not a given you can do it" (61:13). After the court warned Jackson about the amount of work he would have to do (including the preparation of an opening statement and a list of questions for witnesses), as well as some of the pitfalls he would face, Jackson said "I would prefer for the Court to appoint me another attorney" (61:14-15). The court found there was insufficient reason to appoint a third attorney for Jackson (61:15).

The circuit court put off a decision on Jackson's request to proceed without counsel (61:17-18, 32). Jackson renewed his request to contact his mother about hiring a new attorney, which the court said would have to be done through his current counsel (61:28-36). The court and the parties discussed how to provide Jackson with discovery materials, and Jackson's attorney agreed to have a telephone conference with Jackson to assist with his trial preparation:

> THE COURT: Okay. So in June you're going to have that conference on the phone after you have gone over all those materials and make a list of all your questions and all your issues so that [your attorney] can address them for you, but in July you will be here for the – In July you will be here for the pretrial and in August we will be back for the trial.

(61:37).

Jackson did not attend the next hearing on July 17, 2012, but his attorney confirmed that he had received the discovery materials and was working to prepare for trial (62:3-4). The court then explored the issue further with Jackson's attorney:

> THE COURT: And from what you have told me, I had some concerns given the amount of litigation that is involved here, a tremendous amount, that anyone would be able to do this.

> MR. WRIGHT: (Nods head up and down.)
>
> THE COURT: It would be a big job.
>
> If he were able to convince me at some point he has really prepared and he really knows what he is doing, I would certainly continue you as stand-by Counsel, yeah.
>
> MR. WRIGHT: That's fine, I don't have an issue with that. I just believe that Mr. Jackson feels more comfortable based on my conversations with him representing himself.
>
> THE COURT: Until he gets into a jam and doesn't know what to do, you know, and that's when it is nice to have a warm body next to you that you can ask a question of; and there is a million ways he could fall into problems given all of this litigation.
>
> I mean we have four, five, six, seven, eight charges on three different dates and all different charges, all different elements, a lot of information. This is not an easy job.

(62:7-8). The court also observed that the limits on Jackson's ability to review the discovery materials in custody "puts another little rock in the road" (62:8-9).

The circuit court addressed Jackson's request to try his case without counsel on August 17, 2012, after he had even more time to prepare (63). At the outset of the hearing, Jackson told the court he still wished to represent himself at trial (63:6). The court first remarked on the complexity of the trial, telling Jackson, "I would not trust this to somebody who went through three years of law school and didn't have five years experience, minimum" (63:7).

The court continued to quiz Jackson about how and why he intended to represent himself and then asked him about the State's pending motions to admit expert testimony and certain witness statements (63:10). Jackson said he had just received the motion and then proceeded to

complain about his inability to communicate with his attorney (63:10-11).

The court pointed out that Jackson suffered problems like this because he was in custody:

> THE COURT: These are the impediments because of your institutional placement.
>
> I'm not saying it's easy. It's not easy. But I can't change the fact that you're a convicted person, and you're under the restrictions of your conviction.
>
> I can't make it easier for you. You are subject to your problems, and your problems are tremendous.

(63:11). The court adjourned the case one last time, but denied Jackson's request to represent himself because he was not able to do so despite the time he had received to prepare:

> This is the situation. When we last talked, I told you you had to come back here and prove to me that you were gonna be ready for this case.
>
> I wanted to see who – a list of your witnesses. I wanted to see the questions you were gonna ask the jury on voir dire. I wanted to see what you were gonna say to the jury on your opening statement.
>
> We haven't gotten anything done. Now, you – I think rightfully – claimed there are a lot of impediments while you're in custody. I don't doubt that. There are impediments. Communication, getting information, being able to talk to the attorney, those are all real impediments, but they're not gonna go away.
>
> You are in custody. You're staying there for a while, so that's not going to go away. We can't change that.
>
> Given your status and given everything we've tried to do, we've opened – I mean, I think that the prison has been extremely accommodating

> in getting all this information to you, even CDs and all kinds of materials that they normally don't let into the institution, they've let you have 'em, they've given you access to 'em, you've been able to review them.
>
> You've had as much as we can possibly allow within that setting, because of security issues.
>
> And it's not enough. You don't know – You can't answer the motions. You can't be prepared by Monday. This –
>
> And this is now another delay which does impact on this Court and everybody else involved in this case.
>
> Wait.
>
> You are not ready for trial. That's a given. You admit it yourself.

(63:19-20).

Given the nature of the case and Jackson's custody status, the circuit court determined that Jackson was not able to represent himself:

> He is your attorney. I am not relieving him of that responsibility. He is not standby counsel. He is the attorney.
>
> You have a lot that you want to do in this trial. You need to work with him in order to get that done.
>
> It's clear, after all the months that we've been working on this, that you are not able to pull this together, partly because of the – of the situation that you're in, largely because of the complexity and massiveness of this case.
>
> It's an enormous case. An attorney – One attorney has a hard time with a case like this. They got two over there for a reason, because they have the burden, they have to prove it, and it's organizing it, it's a lot of work for one attorney.

> It's not something you – even if you were out of custody, I think, would be capable of doing in a way that would be safe for you and for your – for the rest of us have to go through.
>
> You just don't have the ability to do it, the training, the knowledge, and the time to properly prepare it. Because the time is up now. We can't keep adjourning this.
>
> ****
>
> I cannot let you continue, clearly incompetent, to present a case of this complexity.
>
> Now, I gave you a chance to prove to me you could do it. It didn't work. We're not going back there. That train has passed.

(63:21-23).

Some time before the next court date, Jackson submitted a letter to the circuit court indicating that he wished to enter a plea (18; 64:5-6). Jackson appeared, acknowledged the letter and pleaded guilty to four felony charges with the others dismissed and read-in for sentencing (64:5-31).[4] The court later sentenced Jackson to an aggregate prison term of thirty-one years (eighteen years of initial confinement and thirteen years of extended supervision) (2013AP2859:25; 2013AP2860:23).

Jackson sought to withdraw his pleas, claiming that the circuit court improperly denied him his right to self-representation (33). Related to that motion, Jackson sought a declaration from the court that Wisconsin's standard for evaluating a defendant's competency to represent himself at trial was unconstitutional (68).

[4] Jackson pleaded guilty to First-Degree Reckless Injury (Domestic Abuse), Wis. Stat. §§ 940.23(1)(a) and 968.075(1), and Aggravated Battery – Intent to Cause Bodily Harm (Domestic Abuse), Wis. Stat. §§ 940.19(4) and 968.075(1) (25). He also pleaded guilty to two counts of Intimidation of Witness, Wis. Stat. § 943.43(7) (2013AP2860:20).

The circuit court denied Jackson's motion to withdraw his pleas, first because he was not improperly denied his right to represent himself:

> In this instance, the court agrees with the State that the defendant's requests to represent himself were "episodic driven," coming on the heels of an unsuccessful hearing or issues of dissatisfaction with his attorney. As further evidence of the episodic nature of the defendant's requests, the record shows that he simultaneously asked the court to write to his mother about hiring an attorney. These circumstances reflect impulsive decision-making and not a true deliberate choice of self-representation, as required by ***Klessig***[5] and ***Imani***.[6] This reason alone is a sufficient basis to support the court's ruling in this matter. ***Imani***, *supra*. But moreover, the record shows that the court found the defendant to be incompetent to represent himself based upon the complexity of these cases, his attitude and demeanor and his thorough unpreparedness for trial. The court stands by that determination, and consequently, its decision [] denying the defendant's requests for self-representation.

(42:2).

The court also rejected Jackson's argument that Wisconsin's standard for determining defendants' competency to represent themselves was unconstitutional:

> Courts have recognized that states are permitted to adopt a heightened standard for competency for the decision to waive counsel and represent oneself at trial than the federal minimum standard of competence for self-representation. *See* ***Brooks v. McCaughtry***, 380 F.3d 1009, 1011-13 (7th Cir. 2004); ***Indiana v. Edwards***, 554 U.S. 164, 177

[5] *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997).

[6] *State v. Imani*, 2010 WI 66, 326 Wis. 2d 179, 786 N.W.2d 40.

> (2008). Consequently, the defendant's motion to reconsider and his supplemental postconviction motion are denied.

(72).

Jackson appeals.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY FOUND THAT JACKSON WAS NOT COMPETENT TO REPRESENT HIMSELF NOT ONLY BECAUSE HE HAD NOT MADE A TRULY DELIBERATE CHOICE TO DO SO, BUT BECAUSE HE WAS UNABLE TO DO SO GIVEN HIS LIMITATIONS AND THE COMPLEXITY OF HIS UPCOMING TRIAL.

Because in most situations a defendant would be better off with counsel than without, the right to counsel is "regarded as one of the most significant elements of due process." *State v. Imani*, 2010 WI 66, ¶ 21, 326 Wis. 2d 179, 786 N.W.2d 40 (citations omitted). In fact, the right to counsel is so important that nonwaiver of that right is presumed. *Id*. ¶ 22 (citations omitted).

Nonetheless, a circuit court must permit a defendant to proceed on his own if "the defendant (1) has knowingly, intelligently, and voluntarily waived the right to counsel, and (2) is competent to proceed pro se." *Imani*, 326 Wis. 2d 179, ¶ 21. If, however, the court concludes that either of these two requirements is not satisfied, it "must prevent the defendant from representing himself or deprive him of his constitutional right to the assistance of counsel." *State v. Klessig*, 211 Wis. 2d 194, 203-04, 564 N.W.2d 716 (1997).

When a defendant seeks to represent himself, a court may not find that he has made a valid waiver of his right to an attorney unless the court conducts a colloquy to ensure that:

> [T]he defendant: (1) made a deliberate choice to proceed without counsel, (2) was aware of the difficulties and disadvantages of self-representation, (3) was aware of the seriousness of the charge or charges against him, and (4) was aware of the general range of penalties that could have been imposed on him.

Klessig, 211 Wis. 2d at 206 (citation omitted). Should the court find that a defendant has failed to satisfy any one of these criteria, however, a full colloquy is not necessary because:

> [A]s long as the circuit court finds that one of the four conditions is not met, the court cannot permit the defendant to represent himself. We do not impose on circuit courts the requirement of placing form over substance and using "magic words" when the reality of the circumstances dictate the answer.

Imani, 326 Wis. 2d 179, ¶ 26.

"An improper denial of a defendant's constitutional right to self-representation is a structural error subject to automatic reversal." *Imani*, 326 Wis. 2d 179, ¶ 21 (citations omitted). Unless a circuit court's decision that a defendant is not competent to act as his own attorney is "'totally unsupported by the facts,'" a reviewing court will uphold that determination. *Id.* ¶ 19 (citations omitted).

The circuit court in this case properly denied Jackson's request to represent himself. Despite his requests to go to trial pro se, Jackson also kept asking the court for permission to contact his mother about hiring another attorney. He did take issue with the attorney he had, but his primary complaint was that he did not feel he

was able to contact his attorney as easily or as frequently as he would have liked.

The record also demonstrates that Jackson failed to understand how his circumstances affected his ability to represent himself at trial. In court, he complained about his limited access to legal materials and the restrictions on his mail and telephone privileges, but still claimed that he was ready for trial. When the court warned him about the pitfalls he faced, he again said he was ready for trial. Although the circuit court gave Jackson months to prepare himself, he was never able to show that he was in any way able to try a case that the court aptly described as complex.

The circuit court properly considered all of these factors in deciding that Jackson was not competent to represent himself:

> A judge who, having explained the consequences [of proceeding without counsel], finds the defendant doesn't understand them is entitled to conclude that although competent to stand trial, the defendant has not made an effective waiver of his right to counsel and therefore may not represent himself.

Brooks v. McCaughtry, 380 F.3d 1009, 1012-13 (7th Cir. 2004).

Jackson did not knowingly, intelligently, and voluntarily waive his right to counsel, and he was not competent to proceed without counsel. *Imani*, 326 Wis. 2d 179, ¶ 21. Under the circumstances, the circuit court was required to prevent him from representing himself at trial. *Klessig*, 211 Wis. 2d at 203-04.

II. WISCONSIN'S STANDARD FOR EVALUATING A DEFENDANT'S COMPETENCY TO REPRESENT HIMSELF IS CONSTITUTIONAL UNDER *BROOKS v. MCCAUGHTRY*, AND *INDIANA v. EDWARDS*.

In Wisconsin, a defendant's competency to represent himself is subject to a higher standard than his competency to stand trial. *Klessig*, 211 Wis. 2d at 212. The difference makes sense:

> Surely a defendant who, while mentally competent to be tried, is simply incapable of effective communication or, because of less than average intellectual powers, is unable to attain the minimal understanding necessary to present a defense, is not to be allowed to go to jail under his own banner.

Pickens v. State, 96 Wis. 2d 549, 292 N.W.2d 601 (1980), *overruled on other grounds* by *Klessig*, 211 Wis. 2d at 206 (internal quotation marks and quoted source omitted).

This higher standard comports with federal case law addressing the question. In *Brooks*, the Seventh Circuit rejected the same claim that Jackson makes in this case: that Wisconsin's higher standard is unconstitutional because the standard for competence to stand trial must be identical to the standard for competence to proceed without counsel:

> But Brooks argues that in *Godinez v. Moran*, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993), the Supreme Court held that the standard for competence to stand trial and the standard for competence to waive counsel are identical, and if [Brooks'] interpretation . . . is correct, it might seem to follow that we must order a new trial for Brooks. But we doubt both the premise and the conclusion.

Brooks, 380 F.3d at 1011 (citations omitted). The Seventh Circuit noted that the *Godinez* court also held that "'states are free to adopt competency standards that are more elaborate than'" the standard provided for competence to stand trial in *Dusky v. United States*, 362 U.S. 402 (1960), even though "'the Due Process Clause does not impose these additional requirements.'" *Brooks*, 380 F.3d at 1012 (citing *Godinez v. Moran*, 509 U.S. 389, 402 (1993)).

The Seventh Circuit held, therefore, that Wisconsin's competency rule under *Pickens* and *Klessig* was consistent with *Godinez*:

> [E]ven if the standards for competence to stand trial and for competence to waive the right of counsel are the same, the existence of an effective waiver need not be automatically deduced from a finding that the defendant is competent to stand trial. This would be obvious if having determined that the defendant was competent to stand trial the judge had asked the defendant whether he wanted a lawyer but had not explained the consequences of going to trial without one.
>
> ****
>
> Because being competent to stand trial and having waived the right to counsel do not require the same information, and because the former competence does not imply an effective waiver in all cases, we do not think Wisconsin's approach violates the rule of *Godinez*.

Brooks, 380 F.3d at 1011.

In *Indiana v. Edwards*, 554 U.S. 164 (2008), the United States Supreme Court reached a similar conclusion. First the court explained that:

> *Godinez* involved a State that sought to *permit* a gray-area defendant to represent himself. *Godinez*'s constitutional holding is that a State may do so. But that holding simply does not tell a State whether it may *deny* a gray-area defendant the right to represent himself – the matter at issue here.

Edwards, 554 U.S. at 173 (emphasis in original). Then the court ended any remaining confusion about a state's ability to establish a higher standard for evaluating a criminal defendant's competency to represent himself:

> We now turn to the question presented. We assume that a criminal defendant has sufficient mental competence to stand trial (*i.e.*, the defendant meets *Dusky*'s standard) and that the defendant insists on representing himself during that trial. We ask whether the Constitution permits a State to limit that defendant's self-representation right by insisting upon representation by counsel at trial – on the ground that the defendant lacks the mental capacity to conduct his trial unless represented.
>
> Several considerations taken together lead us to conclude that the answer to this question is yes.

Edwards, 554 U.S. at 174.

The Supreme Court concluded that its prior cases, including *Godinez*, "suggest (though they do not hold) that an instance in which a defendant who would choose to forgo counsel at trial presents a very different set of circumstances, which in our view, calls for a different standard." *Edwards*, 554 U.S. at 174-75. The court also found that "the nature of the problem before us cautions against the use of a single mental competency standard for deciding both (1) whether a defendant who is represented by counsel can proceed to trial and (2) whether a defendant who goes to trial must be permitted to represent himself." *Id*. 175.

While *Edwards* involved a defendant who suffered from a mental illness that impacted his competency to represent himself, the opinion is not, as Jackson argues, limited to criminal defendants who have mental illnesses. The above-quoted passages clearly have broader application to defendants found to lack mental capacity to represent themselves, as courts in other jurisdictions have recognized. *See People v. Taylor*, 220 P.3d 872, 882-83 (Cal. 2009) (interpreting *Edwards* as authorizing states to

deny the right of self-representation to defendants who lack "mental health or capacity" to conduct their own defense), and *State v. Connor*, 973 A.2d 627, 633 (Conn. 2009) (interpreting *Edwards* to apply to "mentally ill or mentally incapacitated" defendants). Not surprisingly, Jackson has not cited a single case that has adopted his restrictive reading of *Edwards*.

Wisconsin may well have been ahead of the curve when it adopted a higher standard for evaluating a defendant's competency to represent himself, but that standard is constitutionally sound.

CONCLUSION

For the foregoing reasons, this court should affirm the circuit court's denial of Andrew Jackson's motions for postconviction relief, as well as his judgments of conviction.

Dated this 23rd day of October, 2014.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

NANCY A. NOET
Assistant Attorney General
State Bar #1023106

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809
(608) 266-9594 (Fax)
noetna@doj.state.wi.us

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 3,848 words.

Dated this 23rd day of October, 2014.

_____
Nancy A. Noet
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 23rd day of October, 2014.

_____

Nancy A. Noet
Assistant Attorney General