STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

MATTHEW ALLEN LILEK,
Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

Case No. 2014AP784-CR

Trial Case No. 2008CF002852 (Milwaukee Co.)

APPEALED FROM THE JUDGMENT OF CONVICTION AND SENTENCE ENTERED ON APRIL 13, 2010, FROM THE DECISION AND ORDER DENYING THE DEFENDANT'S POST-CONVICTION MOTION ENTERED ON AUGUST 6, 2012, HON. REBECCA F. DALLET, PRESIDING, AND FROM THE ORDER DENYING MOTION TO WITHDRAW PLEA FILED APRIL 1, 2014, HON. STEPHANIE ROTHSTEIN PRESIDING.

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STATEMENT OF ISSUES

1. Did the State prove by clear and convincing evidence that Matthew entered his plea voluntarily, knowingly, and intelligently?

The trial court denied the defendant's motion.

2. Did the court erroneously exercise its discretion when it sentenced the defendant?

The circuit court denied the defendant's post conviction motion.

3. Did the court lose competency to proceed, or in the alternative erroneously exercise its discretion, when it continued Matthew's competency hearing over objection?

This issue was not addressed by the trial court.

STATEMENT ON NECESSITY OF ORAL ARGUMENT & PUBLICATION OF OPINION

Defendant-Appellant does not request oral argument. The issues presented can be fully argued in the parties' briefs. We believe, given the individual characteristics of the defendant, that the case warrants consideration for publication.

STATEMENT OF THE CASE
STATEMENT OF FACTS

Matthew Lilek is a 44 year old first offender presently serving a 35 year sentence for 2nd Degree Sexual

Assault and Aggravated Battery. His convictions arose out of an incident that allegedly occurred on May 31, 2008 at the Badger Home for the Blind, where Matthew and the alleged victim were residents. Matthew's criminal case was initially assigned to Judge M. Joseph Donald, transferred to Judge Carl Ashley, with the ultimate sentencing presided over by Judge Rebecca Dallet. The criminal complaint was filed on June 5, 2008 (R. 2). Matthew entered his plea on January 14, 2010. His sentencing was held on April 12, 2010 (R. 123). Much of the delay in the resolution of the case can be attributed to issues regarding Matthew's competency. Competency was placed in issue by his attorney on July 11, 2008 (R. 5). Matthew was found to be competent on May 13, 2009 (R. 115:93). An NGI plea was also considered, and evaluations were completed. An NGI plea was not pursued.

According to documents submitted to the court, Matthew was born on February 8, 1967. He has been certified as legally blind and has received services for blindness throughout his life (R. 8:2, R. 30). Matthew has also suffered from multiple other disabilities.

At age three months Matthew suffered from encephalitis and acute inflammation of his brain. This was diagnosed as a chronic neurological disorder which caused reoccurring seizures. Controlling his seizures has been a life-long

challenge. Multiple drug treatments through various doctors have been tried over the course of Matthew's lifetime (R. 46:2).

In 1997 Matthew underwent a procedure that involved mapping his brain to locate the cause of his seizures. A partial frontal lobectomy was performed. There was a complication and Matthew experienced a fluid build-up on his brain. He was in intensive care for three weeks and released from the hospital after two months. His seizures stopped for three years but then he started experiencing them again (R. 52:10).

In 2004 he underwent the same procedure that was performed in 1997. Again, a portion of Matthew's frontal lobe was removed, but the procedure did not alleviate his seizures. Since that procedure, Matthew was placed back on medications in an attempt to control or stop his seizures. Those medications have included experimental medications.

In addition to his seizure disorder, Matthew is cognitively disabled. Matthew cooperated with psychological testing as part of a competency evaluation performed by Dr. Eric Knudson at Mendota Mental Health Institute. It was not possible to obtain a full scale IQ because of his blindness, but his verbal IQ was measured at 75. Because available records showed "substantial adaptive functioning

difficulties" it was determined that his cognitive functioning should be viewed in the range of mild mental retardation (R 8:4.)

Matthew also has a long history of psychiatric care. There is a letter to Judge Ashley in the record, dated October 13, 2008 from Dr. Lance Longo. Dr. Longo indicated that Matthew, at that time, had been under the Dr.'s care for approximately three years. Dr. Longo noted Matthew had a long and extensive history of brain abnormalities leading to his intractable seizure disorder and psychiatric illness. It was noted that Matthew had a diagnosis of schizoaffective disorder (R. 31).

Matthew has consistently been described as childish and immature, functioning at the level of a 12 year old. (R. 52:12).

Matthew lived with his mother while growing up, however he spent three years at the Oconomowoc Training Center as an adolescent (R. 8). He was placed there under a CHIPS order. After the court lost jurisdiction over him, his mother was named guardian (R. 15). Included in the record was a competency evaluation done of Matthew in 1985 by Dr. Stephen F. Emily for guardianship purposes. The report detailed Matthew's seizure history at that time, as

well as his blindness, diminished mental capacity and psychiatric issues (R. 14).

At the time of the offense he was living independently at the Hawley Ridge Apartments provided by the Badger Association for the Blind with a great deal of support from his mother. (R. 114:77-79).

PROCEDURAL HISTORY

This case commenced with the filing of a three-count criminal complaint on June 5, 2008. The complaint alleged one count of 2nd degree sexual assault by use of threat of force or violence, one count of aggravated battery, and one count of burglary. The complaint detailed allegations that Matthew assaulted a fellow resident at Hawley Ridge Apartments. The victim was described in the complaint as 75 years old, legally blind and hearing impaired. According to the complaint the victim was at home in her apartment when her doorbell rang. She allowed the man entry into her apartment believing that it was her son. Upon entry into her apartment, the man groped her and sexually assaulted her. At one point, it is alleged that the man carried the victim into the bathroom, put her in the bathtub, and started running water over her feet, then

continued to assault her. During the assault the doorbell rang again and the man ran away (R. 2).

A preliminary hearing was held on June 16, 2008. Probable cause was found. Matthew was bound over for trial. An Information was filed. Matthew entered a not guilty plea (R. 98).

A bail hearing was held on June 19, 2008. At that hearing it was noted that at both Matthew's initial appearance and preliminary hearing Sheriff's deputies had to escort him due to his blindness, once in a wheelchair for his safety and once holding the deputy's shoulder (R. 99).

A status conference was held on July 11, 2008. At that time Matthew's attorney requested a competency examination. The court ordered that an examination be done by the forensic unit. The case was scheduled for an August 20, 2008 hearing for a return on the doctor's report (R. 100).

At the August 20, 2008 hearing, the court indicated that Dr. Erik Knudson did not reach a conclusion. Dr. Knudson wanted more information from Matthew's physician (R. 101).

The record reflects that Dr. Knudson filed a report on August 28, 2008. The report found Matthew not competent and not likely to regain competence (R. 12).

On September 16, 2008 a hearing was to be held. Matthew refused to go to court. The court determined it could not proceed. At the hearing, the State requested a second examination pursuant to sec. 971.14(2) Wis. Stats. (R. 102). Papers filed that day by the defense included the 1985 report from Dr. Stephen Emiley (R. 14), 1988 and 1989 Social Services reports (R. 15, 16, 17), a 1994 report from Randall L. Daut, PhD. (R. 18), and a 2008 Aurora Sinai Medical Center report dated June 5, 2008 (R. 19). The reports detailed Matthew's long history of disabilities, diagnosis and treatment.

At a hearing on September 25, 2008, the court was informed that the forensic unit would not conduct a second examination. The unit was concerned that there might be an appearance of "doctor shopping". Matthew's defense attorney raised the issue of the delays in the case, and indicated that they did not challenge the report of Dr. Knudson. Counsel requested that the hearing proceed. The State requested that Dr. Anthony Jurek conduct a second examination of the defendant. The case was adjourned to September 30, 2008 for further proceedings (R. 102).

On October 15, 2008 a report was filed by Dr. Jurek. Dr. Jurek recommended that Matthew should be treated, and then reassessed (R. 28). At a hearing that day the court ordered that Matthew be reexamined by Dr. Knudson and by Dr. Jurek at Mendota Mental Health (R. 105).

A hearing was held on October 31, 2008 (R. 106). At that hearing the court received an addendum from Dr. Jurek to his earlier report. Dr. Jurek found Matthew competent to proceed (R. 106:11-12).

On November 18, 2008 Dr. Knudson filed a report dated November 17, 2008. He had reassessed his earlier position after considering recordings of Matthew talking to his mother while in custody. His conclusion was that Matthew was competent to stand trial, although he described it as a close case. He detailed a number of areas where Matthew would have difficulty assisting his attorney and understanding the process. For example, Dr. Knudson felt that Matthew did not understand the elements of the offenses. (R. 36).

On December 3, 2008 a hearing was held. The defense challenged the reports of Dr. Jurek and Dr. Knudson. The court adjourned the case for a status on January 12, 2009 and for a competency hearing to be held on January 29, 2009 (R. 107).

On February 27, 2009 and May 11, 2009 reports were filed by Dr. Leslie Taylor. Her opinion was that Matthew was not competent and not likely to become competent. Dr. Taylor had been hired by the defense (R. 39, R. 40).

On January 29, 2009 the competency hearing commenced. Matthew had an outburst during the hearing and was warned that he would have to appear by video conference if he had another one. At one point the hearing was adjourned until the afternoon. When the case was recalled the court noted that, when a deputy went to get Matthew for the afternoon hearing, Matthew was standing on a table asking for chips and a candy bar. A new date was obtained for a continued hearing (R. 109, 110).

On May 11, 2009 the competency hearing continued. Testimony was taken on May 11, 12, and 13. Matthew was ultimately found competent to proceed (R. 112,113,114,115).

On June 25, 2009 Attorney Kohn was substituted in for Attorney Nistler. An NGI plea was entered. Dr. Kenneth Smail was ordered to conduct an examination (R. 117).

On July 28, 2009 the parties were informed the case was being assigned to Judge Rebecca Dallet (R. 1:16).

On November 3, 2009 Attorney Kohn filed a report from Dr. R. Bronson Levin dated November 1, 2009 (R. 46). Both

Dr. Levin and Dr. Smail agreed that an NGI plea was not appropriate (R. 45, 46).

On January 14, 2010 Matthew appeared with Attorney Kohn and entered no contest pleas to counts 1 and 2. Count 3 was dismissed. The court ordered a PSI. A sentencing hearing was scheduled for March 12, 2010 (R. 114).

On February 15, 2010 a defense motion was filed to adjourn the sentencing scheduled for March 12, 2010 (R. 54).

On March 1, 2010 the motion to adjourn sentencing was heard. The court was informed that the defendant had a protective placement hearing scheduled before Judge Amato on March 29, 2010. Defense counsel requested that the sentencing be scheduled after the civil hearing. The State objected to the adjournment. The court granted the motion, but informed the parties there would be no more adjournments whether the case in Judge DiMotto's court was adjourned or not. The sentencing hearing was scheduled for April 12, 2010 at 8:30 a.m. (R. 122).

On April 8, 2010 a defense motion was filed to adjourn the sentencing hearing. The State filed additional materials for the court to review for sentencing (R. 57, 58).

At the sentencing hearing on April 12, 2010, the defendant's motion to adjourn was denied. The court proceeded with sentencing. Matthew received a controlling sentence of 35 years, consisting of 20 years of initial confinement, followed by 15 years of extended supervision (R. 123). Matthew filed a post-conviction motion to withdraw his plea and for resentencing on June 4, 2012 (R. 84). The court denied Matthew's post-conviction motion without a hearing in a Decision and Order dated August 6, 2012 (R. 94). Matthew appealed. After briefing, the court of appeals remanded the case for an evidentiary hearing on Matthew's motion for plea withdrawal. The court of appeals did not address other issues raised on appeal. A post-conviction motion hearing was held on March 25, 2014. After hearing testimony from Matthew's trial attorney, the court denied Matthew's motion. Matthew is now appealing from the judgment of conviction and from the orders denying his post-conviction motions.

ARGUMENT

I. THE STATE DID NOT PROVE BY CLEAR AND CONVINCING EVIDENCE THAT MATTHEW ENTERED HIS PLEA VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY.

As mentioned above, this is the second time this case has been before this appellate court. In a post-conviction

motion Matthew alleged that the trial court failed to comply with the requirements of § 971.08 Wis. Stats., ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W. 2d 12 (1986), and ***State v. Brown***, 293 Wis. 2d 594, 716 N.W. 2d 906, because the trial court did not engage in a meaningful colloquy establishing that he actually understood the elements of the offenses he was pleading to, the constitutional rights he was waiving, the nature of the plea agreement he entered into, and the likely consequences of his plea (R.84). The trial court denied his motion without a hearing (R.94). This court remanded for an evidentiary hearing (R. 125).

Applicable Law

In ***State v. Brown***, 293 Wis. 2d 594, the Supreme Court observed that the method a circuit court employs to ascertain a defendant's understanding should depend upon the circumstances of the particular case, including the level of education of the defendant and the complexity of the charge[s]. The court indicated that the less a defendant's intellectual capacity and education, the more a court should do to ensure the defendant knows and understands the essential elements of the charges. ***Brown*** at 624, citing ***State v. Bangert***, 131 Wis. 2d at 267-268.

The Supreme Court in ***Brown*** noted that ***Bangert*** requires verification, independent of defense counsel's assertion,

that a defendant understands the nature of the charges. ***Brown*** at 625. To ensure a knowing, intelligent, and voluntary plea, ***Bangert*** requires that a trial judge explore the defendant's capacity to make informed decisions. ***Brown*** at ¶30.

In ***Brown*** the Supreme Court instructed courts to "translate legal generalities into factual specifics when necessary to ensure the defendant's understanding of the charges." ***Brown*** at 626. The court stated: "(t)his court cannot overemphasize the importance of the trial court's taking great care in ascertaining the defendant's understanding" of the nature of the charges and the constitutional rights being waived. ***Brown*** at ¶32. The court said:

> We reiterate that *the duty to comply with the plea hearing procedures falls squarely on the trial judge.* We understand that most trial judges are under considerable calendar constraints, but it is of paramount importance that judges devote the time necessary to ensure that a plea meets the constitutional standard. The plea hearing colloquy must not be reduced to a perfunctory exchange. It demands the trial court's "utmost solicitude."

Brown at ¶33.

Complying with the requisite standards is not optional. The method a circuit court employs to ascertain a defendant's understanding should depend upon "the

circumstances of the particular case, including the level of education of the defendant and the complexity of the charges[s]." ***Bangert***, 131 Wis. 2d at 267-68. The less a defendant's intellectual capacity and education, the more a court should do to ensure the defendant knows and understands the essential elements of the charges. ***Brown*** at ¶52.

In our original brief to this court, prior to remand, we quoted at length from the plea transcript. All of what we quoted, and more, was recited in this court's remand opinion, which is in the appendix. This court, in its remand opinion, stated: "Lilek asserts that the circuit court had an obligation to do more than just ask questions seeking "yes" or "no" responses because of his substantial cognitive disabilities. In the context of Lilek's significant disabilities, we agree" (R.125, ¶12).

This court noted that ***State v. Howell*** instructs that the circuit court's colloquy must go beyond asking mere "yes" or "no" type questions. See ***State v. Howell,*** 2007 WI 75, 301 Wis.2d 350, 734 N.W.2d 48. In discussing ***Howell***, this court stated in its remand opinion that:

> ***Howell's*** admonition is especially pertinent in cases where a defendant's cognitive abilities are substantially impaired, as they are here; a circuit court must take extra steps *to make sure* the defendant understands all the things that

underlie a valid guilty or no-contest plea. The circuit court did not do that here; most of its questions to Lilek called for a "yes" or "no" answer. And when the circuit court's question did not call for a "yes" or "no," Lilek's non-responsive comments exposed his apparent lack of understanding.

(R. 125, ¶14)

This court went on to state:

Lilek's non-responsive answers, together with the history of his severe and significant cognitive disabilities were blazing red flags that should have triggered the circuit court's extra vigilance to make sure Lilek *really* understood what was happening and that he was not just repeating what he either believed or was told he should say. Thus, the circuit court's assertion in its written decision: "there is no indication at the plea hearing that the defendant was confused or did not understand what the court said to him" is not supported by the Record. As we have seen, ***Howell*** emphasized the "paramount importance" of making sure the "plea hearing colloquy [is] not ... reduced to a perfunctory exchange," and "the importance of the trial court's taking great care in ascertaining the defendant's understanding of the nature of the charges and the constitutional rights being waived." ***Howell,*** 2007 WI 75, ¶71, 301 Wis. 2d at 383, 734 N.W.2d at 65 (quotation marks, citation and footnote omitted). The Record here shows that the circuit court did exactly what ***Howell*** warned against: it engaged in a "perfunctory exchange" and did not take the required "great care" to ensure this cognitively disabled, legally blind, child-like man understood what was going on and what he was doing. Further, ***Bangert***, warns that the "[d]efense counsel may not speak for the defendant; the defendant must affirmatively state his own knowledge and understanding when he is capable of doing so." ***Bangert,*** 131 Wis. 2d at 270, 389 N.W.2d at 24. Accordingly, the circuit court erroneously relied on Kohn's statement that Lilek understood what he

> was doing instead of getting that information directly from Lilek, as ***Bangert*** requires.

(R. 125, ¶15)

At the post conviction hearing, the burden shifted to the State to show by clear and convincing evidence that Matthew's plea was knowingly, voluntarily, and intelligently entered, ***State v. Bangert,*** *supra,* 131 Wis.2d 246, 274-75, 389 N.W.2d 12 (1986). At the hearing the State was free to utilize the entire record to demonstrate that the totality of the circumstances show that the defendant knew and understood the relevant constitutional rights, and the plea was knowingly, voluntarily, and intelligently entered, *Id.,* ***State v. Bollig,*** 2000 WI 6, ¶49, 232 Wis.2d 561, 605 N.W.2d 199.

On appellate review, the issue of whether Matthew's plea was voluntarily, knowingly, and intelligently entered is a question of constitutional fact. *See* ***State v. Van Camp,*** 213 Wis. 2d 131, 569 N.W.2d 577 (1997), ¶15. The Court of Appeals reviews constitutional questions independent of the conclusion of the lower courts. *See* ***id.***

The Record

What the record shows in this case, is that at the time of the plea hearing, the defendant was 44 years of age, was legally blind, was mentally retarded, had

undergone two brain surgeries with removal of tissue, and was taking medications for treatment of mental illness (R. 84:5).

Furthermore, at the time of the plea hearing the defendant's competency had been litigated over a period of many months and court dates, generating numerous doctors' reports. He had also been evaluated for a possible NGI plea by Dr. Kenneth Smail. Dr. Smail's report was dated August 24, 2009 (R. 45). In his report Dr. Smail indicated that Matthew met the criteria for a mental disease or defect, but that he could not find that Matthew could not conform his conduct to the requirements of the law. Dr. Smail opined however that "while I believe the facts do not support a special plea, I also do not conclude that Mr. Lilek is an unremarkable assailant in this case. He is a person with marked cognitive and personality limitations that give rise to a psychological explanation as to what occurred even though they do not constitute the basis for exculpatory mental disease" (R. 45:8).

Dr. R. Bronson Levin also conducted an examination for the purposes of a possible NGI plea. In summarizing Matthew's situation, Dr. Levin's report, submitted to the court, indicated "Matt Lilek certainly is not a normal defendant. ...[H]e is psychiatrically, neurologically,

socially and behaviorally impaired. His brain is abnormal due to encephalitis as an infant, severe and intractable epilepsy, removal of brain tissue at age 25 with infection, and second brain tissue removal surgery at age 37. The frontal brain regions where tissue has been removed are responsible for higher-order thinking involving judgment, social appropriateness, common sense, and comprehension of ramifications and consequences, as well as inhibition urges, expression of personality, and control of impulsiveness. In addition, Mr. Lilek has chronic and serious mood and thought disorders which further diminish his ability to think and act normally. Seizures occur unpredictably and leave him disoriented and confused." (R. 46:3).

The record reflects that with all the information available to the court regarding Matthew's disabilities, the court engaged in a plea colloquy with Matthew that consisted almost entirely of leading "yes" and "no" questions. This was in spite of the numerous doctors' reports on file that detailed Matthew's significant disabilities. For example, the May 6, 2009 report from Dr. Leslie Taylor indicated that Matthew thought he was charged with molesting a child. The report indicated that Matthew was confused by that because, as he stated: "I have never

really liked children, I do not really even like babies" (R. 40:1).

In spite of the information in the record detailing Matthew's cognitive, psychological and physical deficits, what can only be described as a routine plea colloquy was conducted. That much was found by this court in its remand opinion.

With the above as context, we believe it is clear that the State did not meet its burden of proof at the post conviction hearing. As stated in ***Van Camp***, to meet its burden the State may use any evidence at the post conviction hearing which substantiates that the plea was knowingly and voluntarily made, including examining the defendant and the defendant's counsel. ***Van Camp*** at ¶29.

Post-Conviction Hearing

At the post-conviction motion hearing the State called one witness, Attorney Steven Kohn. The State began its questioning of Attorney Kohn by establishing that he represented Matthew at the time of Matthew's plea, and that 99% of Attorney Kohn's practice consisted of the practice of criminal law (R. 132:6).

After establishing Attorney Kohn's credentials, the following exchange took place:

Q. And you were the attorney who represented Mr. Lilek at the plea hearing; is that correct?

A. That is correct.

Q. You were aware during your representation of Mr. Lilek that he suffers from mental, possibly physical limitations; is that correct?

A. Yes.

Q. And what was your understanding of who Mr. Lilek was and his ability to function in the criminal system and understand what was going on?

A. Well, my personal impression was that he was not able to function other than at a very low level, did not understand many of the terms that were used or words that were used when first spoken to him. One had to take a long time to explain to Matt what certain words meant, what different theories were, how the process worked. He just -- you know, from my personal opinion, while I think that he could -- if one took the time to explain things to him so that he understood them, I don't know how well he retained them after we took the time to go through things.

But he would, if you took the time that we took, I believe he could understand the very, very basic concepts that we were dealing with.

(R. 132:7-8).

Following the above exchange Attorney Kohn acknowledged the plea questionnaire that was submitted to the court at the time of the plea, and testified to the efforts he made to prepare Matthew for his plea. Attorney

Kohn testified that he could not remember the words he exchanged with Mr. Lilek, but stated: "I can give you an overall description of how we communicated as far as legal concepts were concerned and that is that Mr. Lilek was a big fan of Andy Griffith and his lawyer show" (R. 132:10).

After Attorney Kohn explained how he discussed legal concepts with Matthew in terms of the Matlock T.V. show, the State read an extensive exchange from the plea hearing into the record, and then asked Attorney Kohn whether he remembered any specifics that he discussed with Mr. Lilek. Attorney Kohn indicated that the transcript reflected how Attorney Kohn explained to Matthew as best he could the difference between a guilty plea and a no contest plea (R. 132:14).

The State then asked Attorney Kohn if he would describe the amount of time he spent with Mr. Lilek in preparation for his pleas. Attorney Kohn indicated:

> I think I spent as much time with Mr. Lilek than any other client I've represented in the 37 years I've practiced from the standpoint of explaining what everything meant. There were certainly other clients that I have spent as much or more time with discussing whether they should enter a plea as opposed to go to trial. But as far as explaining definitions, terms, etcetera, I would say Matt's probably No. 1 (R. 132.15).

When discussing what he did to prepare Matthew for the plea hearing, Attorney Kohn addressed the presence of an intern at his meetings with Matthew. The intern had been referenced as Mr. Pendergast in a passage read into the record by the State (R.132:16). (Matthew's statement to the trial court at the time of his plea, that if he had any questions Sam, the intern, could answer them for him, was commented on by this court in its remand opinion R. 125:15) Regarding the intern, Attorney Kohn stated:

> A. ... I might also like to clarify something that you referred to. This person who was with me was an intern. The name was Sam Pendergast. This is a female. Why it says "Mr." I don't know because I did not refer to her as "Mr." She was sitting right next to me when we did the plea and the sentencing as I recall. She was not a law intern. She was an intern from UWM who was majoring, I believe, in psychology and was interested in cases such as the one that Matt presented as far as the mental health issues that were presented in his case. So that the world knows when this again has been printed, Sam Pendergast is a girl."

THE COURT: And not a law student?

THE WITNESS: And not a law student.

THE COURT: Okay. Thank you.

(R. 132:16-17).

The State went on to question Attorney Kohn about his statement to the trial court at the time of the plea that others might have questions, reviewing the transcript,

regarding the knowing nature of Matthew's plea, and Attorney Kohn's indication that Matthew understood the basic rights that he was giving up at the time he entered his plea. Attorney Kohn, without elaboration at that time, indicated that he remembered making the comment (R. 132:20).

The State then went on to question Attorney Kohn further regarding his attempts to discuss the elements of the offenses with Matthew (R. 132:20-21). Attorney Kohn indicated he discussed the elements in "phases", i.e. on separate occasions (R. 132:21). The State asked Attorney Kohn why he had gone to meet with Matthew on more than one occasion to prepare for the plea. Attorney Kohn's response was:

> Mr. Lilek had some mental challenges that the rest of us do not share. I don't think I've ever represented an individual, certainly not one who the doctors have said is competent in the legal sense, who is as challenged mentally as Mr. Lilek is.

(R. 132:24)

Attorney Kohn went on to say:

> To do all of that in one sitting would have, I think, been very wearing. Matt, when he became stressed, sometimes had seizures. He had at least two during the times that I met with him over the course of the months that I represented him. And so I didn't want to push him to that limit. And so I had to do it in phases.

(R. 132:25)

The State then went on to address with Attorney Kohn his discussions with Matthew regarding the definition of sexual contact. (R. 132:26). Attorney Kohn indicated that when he and his intern discussed the element, they did so at "... a very basic level" (R.132:26).

The State then questioned Attorney Kohn regarding his discussions of the elements of the battery count with Matthew. Attorney Kohn indicated that he discussed with Matthew the fact that when he tried to put the victim in the bath tub, that that would have hurt her (R.132:27). The State then asked Attorney Kohn if he had any doubts about Matthew's understanding of the elements. Attorney Kohn's response was:

> "I had doubts about his competency from the day I met him. But the problem was that as frustrated as I was with working with Matt and questioning whether he understood anything I had told him, this had been litigated by a number of doctors over a fairly substantial period of time prior to me representing Mr. Lilek. And what I was observing, having read the doctors' reports, those who said he was competent, those who said he was not, I was observing the same conduct that had already been litigated."
>
> ...
>
> "So my personal opinion was oftentimes at odds with what the doctor said. And that's why I couched my answer and some of the

> comments I made in terms of it really doesn't matter what I think. It matters what the doctors have told me and they told me he was competent. But I always questioned whether he truly understood every word he was told or heard."

(R. 132:27-28).

The State then went into a discussion of the plea questionnaire. Attorney Kohn indicated that Attorney Kohn had filled out the questionnaire given Matthew's sight limitations. He detailed how he had discussed Matthew's rights with him in terms of the Matlock T.V. show (R.132:29-34).

On cross examination, attorney Kohn testified regarding his need to go over concepts multiple times with Matthew, and Matthew's difficulty retaining what they had discussed (R.132:36,37). Regarding the elements of the offenses, attorney Kohn indicated he did not recall things that were said four years ago, and although his practice was to review applicable jury instructions with clients, he could not remember if he discussed with Matthew the jury instruction regarding the definition of sexual contact, as that definition was used to establish second degree sexual assault (R.132:41, 42).

When asked a question focusing on comments made by Matthew at the plea hearing that indicated he might not

have retained what he had been told regarding the penalties he was facing, Attorney Kohn indicated:

> As I sit here now, I do not recall the specifics. I know there were times when Matt said something and I was not sure that the plea would go forward. But I don't remember what specific examples those were. Matt speaks his mind.

(R. 132:42)

When asked about possible confusion, as exhibited by the plea hearing transcript and commented on by the court of appeals, regarding the length of sentence, attorney Kohn indicated:

> As I said, I don't recall the specific items. I recall that those types of incidents occurred and that I was concerned that even though we had gone through all that with him that he was saying things where a Court would not accept his plea.

(R. 132:43)

Attorney Kohn could not shed any light on another issue commented on by the court of appeals in its decision to remand, which was apparent confusion over medications that had been taken (R. 132:43).

Attorney Kohn also agreed that he did not know what Matthew would have retained from the time of their discussions to the time of the plea. He testified:

> That's true. And I can tell you that I have reflected on this since both you and Mr. Tiffin contacted me regarding this. And the

> one thing I guess I regret as far as the colloquy with Judge Dallet when she asked me my belief, whether this was a knowing and understanding and voluntary plea, I think it was voluntary as far as knowing and understanding, I probably should have couched that in terms of my interaction with him as opposed to what he was necessarily saying in court that day. Although what he was saying in court that day mirrored what I had gone through with him on the 12th and the week before. I don't know if that makes sense but I think that's important.

(R. 132:47-48)

When the State followed up on the above response, and asked what he wished he had said to the court, Attorney Kohn stated:

> Well, I wish I would have said, and this may be based on the issues that have since arisen, that I believe that it is knowing and voluntary based on my interaction with him on the days that I explained this to him. Whether he retained that and whether the questions that the Court asked him, I guess, are why we're here today, why the decision of the Court of Appeals sent this back. And I don't know exactly what Matt was thinking that day because I wasn't the person doing the questioning.
>
> But when I was the person doing the questioning, I believe that was on a very basic level, which is what the doctors said that was all that was necessary, I believe that he understood.

(R. 132:48-49)

The court, in rendering its decision from the bench, began its comments by saying:

> All right. Thank you. Well, it is -- I won't say "easy" but it is oftentimes a case where when we sit back and take an appraisal of how things are conducted in the circuit courts, things may not be conducted in exactly the same fashion as they were envisioned when laws were made and the rules were made. And this is not an excuse by any means to whoever reads this transcript.
>
> But these courts, especially in this county, preside over hundreds of cases. There are a finite number of hours in the day and there are limitations as to how long a Court has, in terms of available time, to take a plea. And the question becomes how much of the obligation of preparing a client, a defendant, for a plea do we want to take off of the shoulders of the defense attorney and put upon the Court? There are ideal circumstances and there are less than ideal circumstances?

(R. 132:67-68). The court went on to deny the motion.

We do not disagree that the burden is on defense counsel to prepare a client, as best counsel can, for a plea. In this case, we respectfully assert however, that the trial court's findings reflect an impermissible shift to counsel of the obligation to establish, at a plea hearing, that a plea is a knowing plea. We believe that the law is clear that courts cannot rely on the assertions of counsel, especially with a defendant as compromised as Matthew. We believe a fair reading of the comments of the court in its decision indicates that that is precisely what the court has done. We believe the clear import of the

court's comments is that courts are busy, and they need to rely on the assertions of defense counsel when taking pleas. As this court pointed out on remand however, it is the court's obligation to establish the knowing nature of the plea. The court cannot rely on defense counsel. Defense counsel may not speak for the defendant (R. 125:20).

Furthermore, we believe reliance on counsel's assertions was clearly inappropriate, given counsel's testimony. Counsel's testimony did not establish that Matthew's plea was knowingly and intelligently entered on the day it was taken. Counsel explained his statement at the time of the plea that Matthew was entering a knowing plea, by clarifying that counsel believed Matthew understood what they had discussed when they discussed it. However, because of things that Matthew said at the plea hearing, counsel could not vouch for Matthew's understanding at the time the plea was taken, which is the operative time. See ***State v. Van Camp***, 213 Wis.2d 131, 149.

Furthermore, Attorney Kohn's testimony did not dispel the concerns raised by the inadequate plea colloquy. For example, as noted above, Attorney Kohn could shed no light on Matthew's confusion regarding medications he had taken, which was commented on by this court at ¶14 of its remand opinion. Nor was Matthew's confusion regarding the

potential penalties he was facing explained through Attorney Kohn's testimony.

Attorney Kohn's testimony at the post conviction hearing established what was apparent to this court from the printed record reviewed by this court prior to remand: Matthew Lilek was one of the most compromised, disabled individuals to ever have a plea accepted by a court.

Because the record from the plea hearing did not establish that Matthew's plea was a knowing plea, and because the testimony of Attorney Kohn did not establish by clear and convincing evidence that the plea was knowingly entered at the time it was entered, we respectfully request that Matthew's plea be withdrawn, and the judgment of conviction vacated.

II. THE COURT ERRONEOUSLY EXERCISED ITS DISCRETION WHEN IT SENTENCED THIS DISABLED FIRST TIME OFFENDER TO A 35 YEAR SENTENCE CONSISTING OF 20 YEARS OF INITIAL CONFINEMENT FOLLOWED BY 15 YEARS OF EXTENDED SUPERVISION.

A circuit court exercises its discretion at sentencing. ***State v. Gallion***, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 678 N.W.2d 197. Evidence of the exercise of discretion must be set forth on the record. ***Id.*** ¶ 3. Discretion is a process of reasoning, which must depend on facts that are of record or that are reasonably derived by

inference from the record and a conclusion based on a logical rationale founded upon proper legal standards. ***Gallion*** ¶ 19 citing ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971).

A sentencing court is required to specify the objectives of the sentence on the record, including the protection of the public, punishment of the defendant, rehabilitation of the defendant, and deterrence to others. ***Gallion*** ¶ 43. The court must identify the factors that were considered in arriving at the sentence and indicate how those factors fit the objectives and influence the decision. ***Id.*** ¶ 43.

The court determines how much weight to give each factor; however, it may erroneously exercise its discretion if too much weight is placed on any one factor in the face of contravening considerations. ***State v. Spears***, 147 Wis. 2d 429, 446, 433 N.W. 2d 595, 603 (Ct. App. 1988).

A court, in exercising its discretion, should impose a sentence calling for "the minimum amount of custody" consistent with the three factors. ***McCleary***, 49 Wis. 2d at 276.

In ***Gallion***, our Supreme Court reaffirmed the sentencing procedures mandated in ***McCleary***, holding that adherence to these procedures and a showing of an actual

exercise of discretion was even more pertinent due to the "increased responsibility placed upon the sentencing court in light of truth-in-sentencing." ***Gallion***, 270 Wis. 2d 535, ¶¶ 31, 38.

A trial court may not employ a preconceived sentencing policy that is closed to individual mitigating factors. A sentence that fits the crime and not the criminal is improper. See ***State v. Ogden***, 199 Wis. 2d 566, 571. "Such inflexibility, which 'bespeaks a made-up mind,' is unacceptable." ***Id*** at 571.

In this case, we believe the court erroneously exercised its discretion because we do not believe its conclusion to sentence the defendant as it did was based on a logical rationale founded upon proper legal standards; we believe the court placed too much emphasis on one factor in the face of contravening considerations; we believe the court's actions at sentencing indicated that it approached sentencing with an inflexibility that bespoke a made up mind; and, we believe, when sentencing the defendant to a near maximum term of initial confinement, the court failed to consider other factors that would not call for such a sentence.

We contend that no proper sentence could be handed down unless the court properly took Matthew's disabilities

into account when fashioning his sentence. By not adequately considering Matthew's disabilities, we contend that the court's sentence was not logical, and was not a result of proper reasoning, and therefore was the result of an erroneous exercise of discretion.

Matthew's disabilities have been detailed above. They include the fact that, at the time of the offense he was 41 years old and legally blind. He was found incompetent to manage his affairs immediately upon turning 18 and had been subject to guardianship ever since. He was mildly mentally retarded. He suffered from a severe seizure disorder. As a result of his seizures, Matthew twice underwent brain surgery (R. 8:2). As we stated earlier in this brief, Dr. Levine indicated that the areas of the brain where tissue was removed are responsible for higher order thinking involving judgment, social appropriateness, common sense, and comprehension of ramifications and consequences (R.46:3).

Dr. Smail in his 8-24-09 report stated:

> I also do not conclude that Mr. Lilek is an unremarkable assailant in this case. He is a person with marked cognitive and personality limitations that give rise to a psychological explanation as to what occurred even though they do not constitute the basis for exculpatory mental disease (R. 45:8).

Furthermore, Matthew's emotional development was consistently characterized to the court as childlike, at a 12 year old level, sometimes younger (R. 52).

Matthew's knowledge of sexuality was described by the PSI as limited. The PSI indicated that his mental limitations, lack of formal sexual education and structured lifestyle impeded his development of a formal understanding of sex. It was noted in the PSI that Matthew committed the offense out of curiosity in that he wanted to know about a woman's body (R. 52). This is consistent with his statement to Dr. Taylor as detailed in her February 23, 2009 report to the court, that Matthew committed the offense to "check under the hood", i.e. see a woman's body (R. 39:2). Matthew's limited knowledge of sexual matters is also consistent with his explanation to Dr. Taylor that he attempted to place the victim in the bathtub because he felt that "in order to do it you need to be clean and wet" (R. 39:2).

In addition to his disabilities, Matthew had no prior convictions.

We do not believe Matthew's characteristics were properly considered by the court at sentencing.

To the extent the court considered Matthew's disabilities, the court appeared to treat his disabilities

as aggravating factors. The court seemed to determine that, because of his disabilities; he could not be rehabilitated, treated, or monitored. To that end, the court commented on its perception of Matthew's "inability to appreciate the wrongfulness of this" (R. 123:128). To the extent that the court considered his disabilities, the court did so in the context of its belief that, in its opinion, Matthew could not conform his conduct to the requirements of the law. In that regard, the court said:

> ...there is this concern with the mental health issues and all of that, but I don't think Mr. Lilek can check his own behavior (R. 123:129).

The resulting conclusion was that to protect the public a 20 year period of initial confinement was required.

The attitude of the court is at odds with the reports of Drs. Smail and Levine, who indicated that Matthew could conform his actions to the requirements of the law. Otherwise, Matthew would have been an appropriate candidate for an NGI plea.

We believe the court's sentencing rationale did not reflect a proper process of reasoning. By acknowledging Matthew's mental condition, and by implicitly stating that, because of his mental condition, Matthew did not appreciate the wrongfulness of his conduct and could not check his

behavior, the court made findings consistent with an NGI plea. These are exculpatory findings calling for commitment for treatment, rather than punishment. See ***State v. Szulczewski***, 216 Wis. 2d 495, 504, ¶ 22, 574 N.W.2d 660 (1998). We are not arguing that an NGI plea was appropriate, but that the court erroneously exercised its discretion by failing to properly consider Matthew's disabilities, and by failing to fashion a sentence in light of those disabilities.

Relatedly, we believe the court placed too much weight on one sentencing factor in the face of other contravening considerations. As stated above, the primary factors a trial court must consider in fashioning a sentence are the gravity of the offense, the character of the offender and the need for public protection. ***McCleary v. State***, 49 Wis. 2d at 274-76, 182 N.W. 2d 518-19.

In this case, there is no doubt that the court's focus at sentencing was the protection of the public. Perhaps as a result of the court's belief of a need to protect the public through extensive prison confinement, the court approached sentencing with a made up mind, and failed to consider other factors that did not call for such a harsh sentence. This is evidenced by the court's denial of a defense motion for a continuance to allow the completion of

a protective placement proceeding prior to sentencing. Prior to sentencing, the defense filed a motion for a continuance (R. 57). It did so because Matthew's protective placement proceedings had not been completed by March 29, 2010 as had been hoped. The court had indicated that when it granted a previous adjournment, it would not grant another. It therefore denied the motion (R. 123: 3,4).

In spite of the court's refusal to grant a continuance to allow the protective placement process to be finalized, at sentencing Matthew's counsel asked the court to keep Matthew in custody until a protective placement determination could be made (R. 123:110). In its colloquy the court rejected the notion of a protective placement out of hand. The court stated:

> I don't think any protective placement could possibly protect the community, so I really see no alternative. I see that prison is the place that I must put Mr. Lilek (R. 123:131).

We do not know the basis for that assertion. To be protectively placed, an individual must be a danger to oneself or others. See sec. 55.08 Wis. Stats. Matthew is legally blind. A blanket assertion that such a placement could not protect the community certainly "bespeaks a made up mind". Certainly people with Matthew's characteristics have been appropriately monitored in settings other than

prison. In fact, in Dr. Emiley's guardianship report in 1985 he noted that ultimately, because of Matthew's combination of disabilities, a group home setting would most likely eventually be an appropriate placement (R. 14:3). Furthermore, Wisconsin law has a procedure for protectively placing persons convicted of the most serious crimes, if they are determined not guilty by reason of mental disease or defect. See sec. 971.17 Wis. Stats. We see no basis in the record for concluding that Matthew is incapable of being monitored except in the prison system.

Another factor the court did not consider was whether there were appropriate placement options for Matthew in the prison system. Attorney Kohn's sentencing comments raised his concern that prison was inappropriate and would be dangerous for Matthew. Attorney Kohn was concerned that Matthew, because of the nature of his disabilities, could be killed in prison. The State dismissed such concerns, arguing that Mendota and Winnebago were placement options. The court did not comment directly on the availability of Mendota and Winnebago as placement options. It merely stated that it had to "trust that the Department of Corrections would treat Matthew humanely", (R. 123:131).

In our post-conviction motion we alleged that Matthew had been placed by the Department of Corrections at the

Wisconsin Resource Center and that, according to staff at the Center, placement at the facility is generally short term, not exceeding six months. Matthew had been there over one year because of the lack of a suitable alternative for him. However, given the length of his sentence, it was feared that Matthew will have to be transferred back to the general population. It was asserted in the motion that Mendota and Winnebago Mental Health Centers were not placement options (R. 84).

In its decision, the court ruled that Mendota and Winnebago Mental Health centers were options for placement, however, it also ruled that it did not factor the availability of the facilities into its sentencing decision (R. 94:5).

Regarding the mental health centers, we argued in our post-conviction motion that the court sentenced Matthew on erroneous information. We have not pursued that argument on appeal given the court's indication that it did not consider placement options in its sentencing decision. Nevertheless, we believe the placement options for Matthew in the prison system should have been a consideration. Whether Matthew could be placed at those facilities should have been taken into account by the court in determining an appropriate sentence. Furthermore, the court erred in

ruling that they were placement options. The mental health centers are under the jurisdiction of the Department of Health and Human Services, not the Department of Corrections. A defendant can be transferred to the mental health centers when he has been found NGI under sec. 971.17 Wis. Stats. See ***State v. Wood,*** 323 Wis. 2d 321, 780 N.W.2d 63 (Ct. App. 2010).

III. THE COURT SHOULD NOT HAVE ORDERED COMPETENCY EXAMINATIONS AFTER THE AUGUST 28, 2008 REPORT OF DR. KNUDSON FINDING MATTHEW INCOMPETENT AND NOT LIKELY TO REGAIN COMPETENCE.

The procedure to follow when ordering a competency examination is found in sec. 971.14 Wis. Stats. We believe the trial court violated the strict time limits imposed by that statute when it ordered serial competency evaluations.

We believe it will be helpful to list the events associated with the competency exams ordered by the court.

A. Series of Events

1. 7/11/08 - Counsel raises the issue of Matthew's competency. The court orders a competency evaluation and sets a hearing for 8/20/08 (R. 100).

2. 7/11/08 - Judge Donald signs an order for an evaluation. It does not specify an inpatient exam (R. 5).

3. 7/25/08 - Dr. Smail writes the court suggesting the examination be done at Mendota (R.6).

4. 7/31/08 - Matthew arrives at Mendota (R.8:1).

5. 8/13/08 - Dr. Knudson reports from Mendota Mental Health that Matthew is not competent; however the doctor is not sure if competency can be restored (R. 8).

6. 8/20/08 – At a hearing it was agreed that Matthew remain at Mendota and Dr. Knudson get more information. A hearing was scheduled for 9/16/08 (R.101).

7. 8/21/08 – Signed Order to transfer Matthew to Mendota and to remain until further order of court (R.10).

8. 8/25/08 – Signed Order for competency examination. Defendant is to be returned to Mendota until next date (R.11).

9. 8/28/08 - Report of Dr. Knudson finding Matthew not competent and not likely to regain competence (R.12).

10. 9/16/08 - Defense does not dispute Dr. Knudson's report; The State requests a second opinion. The defense expresses frustration with delays. The court says the State is entitled to another evaluation. The State requests Dr. Rawski of the Forensic Unit. 9/30/08 is set for return of doctor's report (R. 102).

11. 9/16/08 - Order signed re second competency exam (R.20).

12. 9/25/08 – The Forensic Unit declines the appointment (R.22).

13. 9/25/08 – Hearing–Defense objects to delays and asks for hearing based on Dr. Knudson's report. The defense is not challenging report. The State asks that Anthony Jurek be appointed. The defense never heard of him so it would not stipulate to his qualifications. The matter was scheduled for further proceedings on 9/30/08 (R. 103).

14. 9/30/08 – The court appoints Dr. Anthony Jurek at State's request to render second opinion on defendant's competency. The case was scheduled for return on the doctor's report for October 15, 2008 and a hearing was scheduled for October 28, 2008 (R. 104).

15. 10/13/08 – Letter from Dr. Knudson. Received information from D.A. Request return of Matthew for observation at Mendota (R. 27).

16. 10/13/08 – Letter from Dr. Jurek. He recommends treatment and reevaluation. (R. 28).

17. 10/15/08 – Order for reexamination at Mendota (R. 33).

18. 10/31/08 – Matthew had not been sent to Mendota. Court informed that it would take one and a half to two weeks for him to get there and then two weeks for a report after that. Defense requests that the report be done

within two weeks. Defense counsel advised to take the issue to the Supreme Court because of lack of resources to get things done in a timely fashion. The court makes the finding that they don't have the resources to comply with the requirements of the statute (R. 106:9).

19. 11/17/08 – Letter from Dr. Knudson saying he changed his mind (R. 36).

20. 1/29/09 – Competency hearing commences (R. 108).

22. 2/23/09 – Dr. Taylor's report finding not competent (R. 39).

23. 5/6/09 – Dr. Taylor's second report finding not competent (R. 40).

24. 5/13/09 – Competency hearing concluded (R. 115).

B. Wis. Stat. 971.14 does not envision serial court ordered examinations.

To determine whether serial examinations are authorized by statute, this court will need to interpret sec. 971.14 Wis. Stats.

In ***State v. McKenzie,*** 139 Wis. 2d 171, 176-177, 407 N.W.2d 274 (Ct. App. 1997), the Court of Appeals stated:

> In construing a statute, the primary source of statutory construction is the language of the statute itself. ***Wisconsin Evangelical Lutheran Synod v. City of Prairie du Chien,*** 125 Wis. 2d 541, 549, 373 N.W.2d 78, 82 (Ct. App. 1985). Absent ambiguity, it is the duty of the court to give statutory words their obvious and ordinary meaning. ***State v. Lossman,*** 118 Wis. 2d 526, 535,

> 348 N.W. 2d 159,164 (1984). In statutory construction, the use of the word "shall" is usually construed as mandatory, ***County of Walworth v. Spalding,*** 111 Wis. 2d 19, 24, 329 N.W.2d 925, 927 (1983), while the word "may" is generally construed as permissive, ***Hitchcock v. Hitchcock,*** 78 Wis. 2d 214, 220, 254 N.W.2d 230, 233 (1977). It is reasonable to presume that the legislature chose its terms carefully and precisely to express its meaning. ***Ball v. District No. 4, Area Bd.,*** 117 Wis. 2d 529, 539, 345 N.W.2d 389, 394 (1984). Finally, the entire section of a statute and related sections are to be considered in its construction or interpretation. ***State ex rel. Ondrasek v. Circuit Court,*** 133 Wis. 2d 177, 182, 394 N.W. 2d 912, 914 (Ct. App. 1986).

Sec. 971.14(2)(c) sets forth the procedure and time limits for conducting competency evaluations. Sec 974.14(2)(c) provides:

> Inpatient examinations shall be completed and the report of examination filed within 15 days after the examination is ordered or as specified in par. (am), whichever is applicable, unless, for good cause, the facility or examiner appointed by the court cannot complete the examination within this period and requests an extension. In that case, the court may allow one 15-day extension of the examination period. Outpatient examinations shall be completed and the report of examination filed with 30 days after the examination is ordered.

As can be seen, inpatient examinations shall be completed in 15 days, with one 15 day extension allowed for good cause. Outpatient examinations shall be completed within 30 days of being ordered.

Matthew's competency was first raised as an issue on July 11, 2008. Judge Donald signed an order for examination that day. The order did not specify an inpatient or outpatient evaluation. Within the 30 days allotted by statute, Dr. Smail recommended an inpatient evaluation. Matthew arrived at Mendota on July 31, 2008 (R. 8:1), and within 15 days there was a report from Dr. Knudson determining that Matthew was not competent. The doctor requested more information in order to determine the issue of regaining competency. One week after the return of the doctor's report, the parties agreed that Matthew should go back to Mendota to address that issue. A final report was generated within one week, finding Matthew not likely to regain competence.

We are not claiming that the above events violated the timelines set out in the statute. Dr. Knudson's 8/13/08 report was completed within 15 days of Matthew's arrival at Mendota. The doctor's 8/28/08 report was completed within 15 days of the 8/13/08 report. The request in the 8/13 report for more information so as to address the likelihood of regaining competency can reasonably be viewed as good cause for extending the time limits. However, subsequent reports were not completed in a timely fashion because 971.14 does not envision serial court appointments.

Because the State did not agree with Dr. Knudson's conclusions, it requested a second opinion on 9/16/08. At that hearing, defense counsel expressed his frustration with the delays. There were concerns over injuries Matthew had received in the jail (R. 102:8). Nevertheless, an order was signed that day for another court ordered examination. The process was delayed however because the Wisconsin Forensic Unit refused to conduct a second examination, in part because of its concern that there would be an "appearance of doctor shopping" (R. 22).

Because of the refusal of the forensic unit to conduct a second examination, the issue of who to appoint arose at the court hearing on September 25th. At that hearing the defense objected to more delays, and requested that the case proceed on the reports as submitted (R. 103:11). Nevertheless, the court made clear that it was going to appoint another examiner. More delays ensued however because the examiner shopped for by the State was unknown to the defense, and apparently to the court. The State requested that Dr. Jurek be appointed, however it did not know if he was a psychiatrist or psychologist (R. 103:25). Not knowing who the proposed examiner was, defense counsel could not stipulate to his appointment. The case was adjourned for a hearing to address his qualifications.

The adjournment was unavoidable because, while Sec. 971.14(2)(a) Wis. Stats., allows a court to appoint more than one examiner, that examiner must have "the specialized knowledge determined by the court to be appropriate". It seems clear therefore that the statute requires, for a court appointment, that the qualifications of the examiner be known by the court prior to appointment.

Our contention is that the appointment of Dr. Jurek was contrary to law. We believe that sec. 971.14 Wis. Stats., while it envisions more than one examiner being appointed, does not contemplate that court appointments will be serial in nature. The statute does not envision the doctor shopping that was done in this case.

We believe our contention that the statute does not contemplate serial court appointments is consistent with the structure of sec. 971.14. The statute clearly envisions that the process be expedited. That is evident from the mandatory language in the statute regarding the strict time limits set for completing inpatient and outpatient examinations. The statute requires that inpatient evaluations be completed within 15 days after the examination is ordered, or within 15 days of the defendant's arrival at the facility if sec. 971.14(2)(am) applies. Only one 15 day extension is allowed. Sec.

971.14(2)(c). Outpatient examinations shall be completed within 30 days. No extensions are provided for. We do not think that it is a coincidence that inpatient and outpatient examinations are to be completed within 30 total days. The statute clearly envisions prompt completion of court ordered inpatient or outpatient examinations.

The tight time limits envisioned by the statute are rendered meaningless if a court can serially issue any number of examinations upon the request of a party that does not agree with earlier reports. Since sec. 971.14 Wis. Stats., does not limit the number of court-appointed examiners to two, what would prevent a party from requesting a third appointed examiner if the first two examiners split in their opinions, causing even more delays?

If the State wanted more than one court ordered evaluation, it should have requested that at the outset. The statute contemplates that a case may benefit from more than one court ordered professional evaluating a defendant.

Significantly, there was nothing preventing the State from hiring its own examiner. Sec. 971.14(2)(g) Wis. Stats., allows access to the defendant by examiners retained by the defense or the State throughout the proceedings, although it would be expected that those

experts would be constrained by the case calendar. That is what the defense did in this case. The defense retained Dr. Leslie Taylor when it desired another opinion.

We believe the appointment of Dr. Jurek violated sec. 971.14. When the defense objected on September 25, 2008, this case should have been scheduled for an evidentiary hearing on Dr. Knudson's then existing reports. Those reports indicated that Matthew was not competent, and not likely to retain competence. We believe therefore that Matthew's conviction should be vacated and that an order be entered consistent with those reports.

CONCLUSION

For the reasons stated above, we respectfully request that this court vacate Matthew's conviction or alternatively we request that Matthew be resentenced.

Dated: _____.

Respectfully submitted,

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_____
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CERTIFICATION

I hereby certify that the foregoing brief is in non-proportional type with a courier font and is 50 pages long including this page. I also certify that the text of the electronic copy of this brief is identical to the text of the paper copy.

Dated: _____, 2014.

GRAU LAW OFFICE

_____
John J. Grau

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 § 809.19(12).

I further certify that this electronic brief is identical to the printed form of the brief filed as of this date.

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

Dated: _____, 2014.

GRAU LAW OFFICE

_____
John J. Grau

APPELLANT'S BRIEF 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 s. 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;

(2) the findings or opinion of the circuit court;

(3) a copy of any unpublished opinion cited under Wis. Stat. § 809.23(3)(a) or (b); and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decision showing the circuit court's reasoning regarding those issues.

I 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 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.

Dated: _____, 2014.

GRAU LAW OFFICE

By: _____
John J. Grau

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