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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP275

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD L. WHITE,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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INTRODUCTION

Donald L. White petitions this Court to review the court of appeals' decision in *State v. White*, No. 2020AP00275-CR (Wis. Ct. App. November 3, 2022) (unpublished). (App. 3-28.) In that decision, the court of appeals affirmed Mr. White's criminal conviction and the circuit court's determination that Mr. White was competent to stand trial, a decision made without an admissible expert opinion on Mr. White's competency.

When a criminal defendant's competency to stand trial is in question, the circuit court must appoint an expert examiner to evaluate the defendant and provide a report opining whether the defendant is competent to proceed. Wis. Stat. § 971.14(2), (3). If the defendant maintains he is incompetent, it is the State's burden to prove competence by the greater weight of the credible evidence at a competency hearing. Wis. Stat. § 971.14(4)(b). Here, the circuit court had reason to doubt that Mr. White, a pro se defendant, was competent to stand trial and initiated competency proceedings. The appointed expert was unable to offer an opinion to a reasonable degree of professional certainty as to Mr. White's competence and recommended that inpatient examination was necessary to come to an opinion with the required certainty. Instead, the court proceeded to the competency hearing, ruled the examiner's opinion on competency inadmissible, but allowed testimony regarding the examiner's interactions with Mr. White and review of collateral records. The court then found Mr. White competent.

ISSUES PRESENTED

I. Is Wisconsin's statutory scheme for preventing an incompetent defendant from standing trial violated when a circuit court finds a defendant competent with no admissible expert on opinion on competency?

The circuit court denied Mr. White's request for the recommended inpatient competency evaluation. The court did not admit the expert's ultimate opinion on competency because it was not made to a reasonable degree of professional certainty. The circuit court found Mr. White competent to stand trial.

The court of appeals affirmed, concluding that Wis. Stat. § 971.14 does not preclude a circuit court from ruling on a defendant's competency in the absence of an expert's ultimate conclusion, offered to a reasonable degree of professional certainty, that the subject is competent.

This Court should grant review and hold that Wis. Stat. § 971.14 requires not just an expert evaluation and report when competency is questioned, but that a defendant must be afforded an expert's ultimate conclusion as to competency that satisfies the reasonable degree of professional certainty standard, because to require less would render meaningless the statutory protection of an expert evaluation to potentially incompetent individuals.

II. Is a state procedure that does not afford a potentially incompetent defendant an admissible expert opinion on competency adequate under the Due Process Clause?

The circuit court did not address the due process implications of its decision to proceed with the competency determination without affording Mr. White an admissible expert opinion. In his appeal of the circuit court's ruling, Mr. White argued that an interpretation of Wis. Stat. § 971.14 that allowed the court to determine competency without such an opinion violated his due process right to not be criminally tried while incompetent.

The court of appeals concluded that the issue was primarily one of statutory interpretation rather than a constitutional question. The court opined that a requirement for an admissible expert opinion is not sufficiently rooted in the nations traditions so as to render the statute unconstitutional for failing to make that requirement, but did not address whether fundamental fairness requires it.

This Court should grant review and hold that, in order for Wisconsin's competency proceedings to be sufficiently protective of the due process right not to be criminally tried while incompetent, a potentially incompetent defendant must be afforded an admissible expert opinion on competency.

CRITERIA FOR REVIEW

This case raises a novel and important questions of statutory interpretation and constitutional law regarding what a circuit court should do when it receives a competency examiner report that does not contain an admissible opinion on a defendant's competency. This issue implicates questions about the levels of protection that Wisconsin's statutory scheme affords to a criminal defendant whose competency to stand trial is in question, and whether those procedures are adequate to satisfy the Due Process Clause. This petition asks the courts the court to interpret the statute's requirement that a defendant whose competency is in question be afforded expert opinion on the issue, and to clarify both the statutory and constitutional protections that must be afforded to such an individual.

The trial of an incompetent defendant violates not just the United States and Wisconsin constitutions, but also Wisconsin state law. Wis. Stat. § 971.13(1) (codifying the constitutional standard). The statutory competency procedures are "a critically important failsafe device for the benefit of accused persons who may not be able to fully cooperate and assist in their defense." *State ex rel. Matalik v. Schubert*, 57 Wis. 2d 315, 322, 204 N.W.2d 13 (1973). Thus, while it is within the purview of the state to establish specific competency procedures, those procedures must be sufficiently protective of the right not to be criminally tried while incompetent. *Cooper v. Oklahoma*, 517 U.S. 348, 367-68, 116 S.Ct. 1372 (1996).

During the pendency of Mr. White's criminal case, the circuit court had reason to doubt his competency to

stand trial and appropriately began competency proceedings under Section 971.14. But when the appointed examiner reported an inability to opine on Mr. White's competence to a reasonable degree of professional certainty after her initial meeting with Mr. White, the court disregarded the competency examiner's recommendation for further evaluation and proceeded with a competency hearing without an admissible expert opinion on competency, ultimately finding him competent to stand trial.

Mr. White appealed his conviction arguing that by finding Mr. White competent to stand trial despite there being no admissible expert opinion as to his competency as required by Wis. Stat. § 971.14(3), the circuit court deprived Mr. White of both statutory and constitutional due process protections. The court of appeals concluded that the requirement for an expert opinion on competency in Section 971.14 does not preclude a circuit court from ruling on a defendant's competency in the absence of an expert's opinion, offered to a reasonable degree of professional certainty, that the individual is competent. Further, the court concluded that Mr. White had no right to receive additional competency examination in order to obtain an admissible expert opinion and the court did not err in not ordering further examination.

The court of appeals based its decision on the principle that a court is not bound by an expert's opinion, but simply weighs it along with other evidence. Therefore, the court found that an expert report containing "information," "findings," and "professionally informed data" would satisfy the statutory requirement for an expert

opinion. The decision below is the first interpretation of the statutory requirement for an examiner's opinion, and though unpublished, as an authored decision it can be used persuasively to impact the way future courts handle situations in which an examiner cannot determine an individual's competency after an initial meeting. The resolution of this novel legal question will have statewide impact given the potential for the facts of this case to be repeated in other cases involving questions of competency. *See* Wis. Stat. (Rule) 809.62(1r)(c)2, 3.

Additionally, while the court of appeals focused on the issue as one of statutory interpretation, Mr. White maintained on appeal that the circuit court's actions were a violation of his constitutional due process right to not be tried while incompetent. Thus, a real and significant question of federal and state constitutional law is presented – whether Section § 971.14 is adequate under the Due Process Clause to protect defendants whose competency is in question. *See* Wis. Stat. (Rule) 809.62(1r)(a).

For these reasons, this Court should grant review.

STATEMENT OF FACTS

In January 2018, Mr. White, an inmate at the Wisconsin Secure Program Facility (WSPF), was charged with one count of assault by prisoner for allegedly spitting at a correctional officer. (1:1-2.) (*Id.*)

Mr. White made several initial appearances in the case by videoconference from WSPF without counsel, during which he made comments referencing Abraham

Lincoln and requested First Lady Eleanor Roosevelt be appointed as his attorney. (36:2-3.) The court in a later hearing stated these statements "made me wonder whether you were oriented to time and place." (37:3.)

Mr. White appeared in person, without counsel, for the preliminary hearing on May 3, 2018. (37:2.) Mr. White told the court that Eleanor Roosevelt was his payee and that the court should speak to him through her; Mr. White did not otherwise respond to the court during this hearing. (37:2-7.) The court proceeded with the preliminary hearing, found probable cause, and bound the case over for trial. (37:12.)

Because of questions about Mr. White's "orientation to the world" due to his behavior at the hearing, the court ordered a competency examination. (37:13.)

Competency Evaluation and Report

Dr. Christina Engen, a psychologist with the Wisconsin Forensics Unit, was appointed to examine Mr. White. (11; App.36-37.) On June 5, 2018, Dr. Engen submitted her report concluding that, because Mr. White did not cooperate with her attempt to examine him, an opinion on competency could not be offered to a reasonable degree of professional certainty. (12:4.)

The report stated that examination of Mr. White was "unproductive" because he provided "outlandish" answers to questions and "behaved in a manner that appeared to me theatrical." (12:2.) Dr. Engen's informally opined that Mr. White was competent, based on collateral information, including prior determinations that Mr. White was

competent a decade earlier, a lack of documentation of any mental health diagnosis in Department of Corrections records, records Dr. Engen believed demonstrated Mr. White's ability to advocate for himself in communications with DOC staff, and Mr. White's presumed knowledge gained from his prior experience as a defendant. (12:5.) However, Dr. Engen concluded:

> I am unable to offer this opinion to a reasonable degree of professional certainty. This is based on the fact that (1) he did not cooperate with my examination, (2) I am aware of the possibility that malingering can co-exist with incompetency, and (3) ten years have passed since he was last evaluated and adjudicated competent. As such, this is a situation in which it might be prudent to continue examination on an inpatient basis.

(12:5.)

At a hearing on August 2, 2018, Mr. White contended that he was not competent. (38:3; App.39.) The court acknowledged it was required to hold an evidentiary hearing and that the State had the burden of proving by Mr. White competent. (*Id.*) The State considered the lack of an opinion on competency to a reasonable degree of professional certainty to be "a problem" and argued that Mr. White should be further evaluated.[1] (37:4; App. 40.) Regarding the examiner's opinion, the court held, "If she can't offer an opinion to a reasonable degree of certainty it's

[1] However, the State did not believe further evaluation should be on an inpatient basis, so that Mr. White "should not be getting sort of a benefit by being uncooperative." (37:4; App.40.)

not an admissible opinion. And so her opinion doesn't get in." (*Id.*) However, the court held that details of the examiner's observations and conversations, and information about previous evaluations would be admissible. (37:4-5; App.40-41.)

The Competency Hearing

A competency hearing was held on August 28, 2018. Dr. Engen testified regarding her examination of Mr. White at WSPF. (39:4-6; App.43-45.) She testified that Mr. White expressed confusion about why she was there and indicated he believed Eleanor Roosevelt would be the recipient of the doctor's report. (39:6; App.45.) In response to questions about Mr. White's personal history, current mental status, and his understanding of his current legal situation, Dr. Engen testified that Mr. White provided limited information of questionable reliability. (39:6-7; App.45-46.) Dr. Engen opined that Mr. White understood her questions but was "choosing to respond to them in a way that I characterize as theatrical or outlandish," and that his answers "were not appropriate and it was my impression…that that was volitional. So he answered them incorrectly based on an effort to manipulate the situation or perhaps for diversion, for some sort of fun for him." (39:7, 11; App.46, 50.)

Dr. Engen also reviewed collateral sources including older evaluations of Mr. White's competency to stand trial by the Wisconsin Forensics Unit and his Department of Corrections psychological services unit file. (39:5; App.44.) Dr. Engen testified that the prior competency evaluations from the decade prior did not indicate any diagnosis of a

major mental illness. (39:7-8; App.46-47.) On three prior occasions, in 1992, 2006, and 2007, doctors conducting competency evaluations were unable to form an opinion and recommended inpatient evaluation. (39:8-9; App.47-48.) In each of those cases, Mr. White was ultimately deemed competent to proceed. (39:9; App.48.) Dr. Engen did not review records from Mr. White's inpatient evaluations and was unaware of how he responded to inpatient evaluations. (39:11; App.50.)

Dr. Engen testified that information from WSPF psychological services was consistent with Mr. White being "generally uncooperative." (39:9; App.48.) The prison records indicated that Mr. White was diagnosed with antisocial personality disorder, and that while there had been instances where Mr. White had reported self-harm behavior or suicidal ideation, the self-harm was determined to be unfounded. (39:9-10; App.48-49.)

Dr. Engen believed that Mr. White was competent to proceed, however her opinion was not offered to a reasonable degree of professional certainty. (39:11-12; App.50-51.) She believed Mr. White competent because he had previously been found competent to proceed following inpatient evaluation on more than one occasion and because Mr. White's records did not indicate he suffered from a major mental illness that would interfere with competency. (39:12; App.51.) Dr. Engen inferred from Mr. White's request to transfer from WSPF to the Wisconsin Resource Center, as documented in his prison file, that he was able to self-advocate and therefore likely competent to assist in his defense. (*Id*.) She noted that Mr. White had prior experience as a defendant in the criminal justice

system from which he could draw to inform his current understanding. (*Id*.)

The State did not present any other evidence. (39-13; App.52.)

Mr. White declined to question Dr. Engen, though he did ask the court when he was last determined competent in a previous case. (*Id*.) The court informed him that Dr. Engen's report stated that the last competency determination was ten years prior, in 2008. (39:14.) Mr. White told the court that since then, he had been approved for Supplemental Security Income (SSI) due to suffering from a mental illness. (*Id*.) Mr. White argued that Dr. Engen was lying when she reported that he had never been diagnosed with a mental illness. (39:13, 16.) Mr. White was unable to tell the court what he had been diagnosed with but, because he had received SSI, knew he had received a mental health diagnosis. (39:16-17.) Ultimately, the court accepted the proposition that Mr. White had a mental illness and assumed it to be the case. (39:18; App.53.)

The court questioned Mr. White regarding his understanding of the criminal justice system, and Mr. White denied having knowledge, experience, or understanding. (39:14-16.) Mr. White stated his understanding of the roles of the prosecutor and judge were that they are "murderers." (*Id*.)

When the court asked if Mr. White wanted an attorney, Mr. White asked, "What good would a lawyer do me if I don't understand what's going on? You keep asking me if I want a lawyer; what good would a lawyer do me if I don't understand nothing that's going on now?" (39:18.)

The court opined that Mr. White understood what was going on, and that "people seem to think that you're faking it." (39:18-19.) Mr. White responded that he does "un-normal things. It's not the mind of a mind of a normal person." (39:19.) Mr. White went on to draw analogies between Charles Manson, Saddam Hussein, Hitler, and John Wayne Gacy and his own abnormal thinking. (39:19-20.) The court responded, "I can tell from the storehouse of knowledge that you keep in your head that you are not an un-bright fellow. I can tell by the way that you think about appropriate examples of how to quiz me that you are a bright man." (39:21.) The court asked Mr. White additional questions regarding his knowledge of the legal process, to which Mr. White answered that he did not know or care. (39:22-23.)

In support of his contention that he was not competent, Mr. White argued that he needed psychological treatment, had needed it for years, and had not received it in prison. (39:24-25.) He acknowledged that the prison denied that he had a mental health diagnosis but argued that was because the prison did not wish to provide him treatment. (*Id.*) He further argued that the impact of his incarceration was making his mental condition worse. (*Id.*)

Regarding the expert testimony, the court informed Mr. White, "I cannot accept her opinion." (39:18; App.53.) The court found Mr. White competent to stand trial:

> I believe that you are competent to stand trial. You are clearly oriented to time and place and person. You are clearly intelligent. You are clearly articulate. You clearly have a grasp of history and culture and

> sociology and a grasp of a lot of things you need to know. That's what I need to decide today.
>
> You may well have a mental illness, but it's not such as prevents you from standing trial in this case. I find that you know that [the prosecutor] is not a murderer. You use that, perhaps, in a colorful sense. But you understand the criminal justice system and who does what and you understand, based upon your comments to me, my role to make decisions for better or for worse.

(39:28-29; App.55-56.)

After finding Mr. White competent to proceed to trial, the court found that Mr. White had "not so much…waived his right to a lawyer as he has forfeited by refusing to accept indigent public defender counsel when he is aware of that possibility and that it could help." (39:30.) The court found Mr. White competent to represent himself. (*Id*.)

Jury Trial

On the day of trial, Mr. White appeared in person for the sole purpose of delivering a document to the court and did not remain for the jury trial. (40:2.) The court read the document into the record:

> "To whomever the person may be who it may concern. I have been advised by the voice in my head of my payee, Eleanor Roosevelt, that you order me be sent to the Winnebago or Mendota Mental Health Institute for a 30 day inpatient competency evaluation. This request is being made and submitted to the Court by

> the accused while being under the duress of being incompetent and unable to fully understand anything that's happening." With the… accused's signature, Donald L. White.

(40:3; App.58.)

The court informed Mr. White, "We have had extensive competency proceedings. I have found you to be competent… I accept that you have mental health difficulties." (*Id*.) Mr. White objected to that finding on the basis that the court was not a doctor and had made the competency determination without relying on an expert opinion from a doctor. (40:3-4; App.58-59.)

After Mr. White left, the court found he had waived his right to personally appear at the trial and proceeded to the jury selection and trial in his absence. (40:8-9.) The jury found Mr. White guilty. (23; 40:45.)

Postconviction Proceedings

Mr. White filed a timely notice of intent to seek postconviction relief. (30.) On appeal, counsel filed a no merit report. The court of appeals ordered further review of the circuit court's decision that White was competent to proceed, and whether the court erred by making that decision without first obtaining an expert opinion of sufficient certainty to be admissible. (App.29-33.) Mr. White requested to proceed with an appeal under Wis. Stat. § 809.30, the court of appeals rejected the no merit report, and Mr. White proceeded with this appeal.

The court of appeals affirmed the conviction, holding that Wis. Stat. § 971.14 does not preclude a circuit court

from determining that a defendant is competent without an expert's ultimate conclusion, offered to a reasonable degree of professional certainty, that the subject is competent. (App.5, ¶ 6.) The court also concluded that the circuit court did not err when it declined to follow the expert's recommendation that Mr. White required inpatient evaluation. (*Id.*)

ARGUMENT

Ensuring a defendant is competent to stand trial is "a cornerstone of our criminal justice system," *State v. Byrge*, 2000 WI 101, ¶ 26, 237 Wis. 2d 197, 614 N.W.2d 477, and "fundamental to an adversary system of justice." *Drope v. Missouri*, 420 U.S. 162, 172, 95 S.Ct. 896 (1975) "[T]he conviction of an accused person while he is legally incompetent violates due process." *Pate v. Robinson*, 383 U.S. 375, 378, 86 S.Ct. 836 (1966). States are free to establish procedures for determining competency, but must afford a criminal defendant whose competency is in question "a reasonable opportunity to demonstrate that he is not competent to stand trial." *State v. Guck*, 176 Wis. 2d 845, 850-51, 500 N.W. 2d 910 (1993).

The standard for competency established by the United States Supreme Court was codified by Wisconsin in Wis. Stat. § 971.13(1): "No person who lacks substantial mental capacity to understand the proceeding or assist in his or own defense may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures." *State v. Garfoot*, 207 Wis. 2d 214, 221, 558 N.W.2d 626 (1997), *citing Dusky v. United States*, 362 U.S. 402, 403, 80 S.Ct. 788 (1960) *and Drope*, 420 U.S. at 171.

Section 971.14 mandates procedures for determining competency, "whenever there is reason to doubt a defendant's competency to proceed." Wis. Stat. § 971.14(1r)(a). The court "shall" appoint one or more examiners having appropriate specialized knowledge to examine and report upon the condition of the defendant. Wis. Stat. § 971.14(2)(a). The examiner "shall" personally observe and examine the defendant and have access to his or her past or present treatment records. Wis. Stat. § 971.14(2)(e).

After examining the defendant, the examiner "shall submit to the court a written report which shall include all of the following": a description of the nature of the examination and the individual interviewed, the clinical findings of the examiner, the examiner's opinion regarding the defendant's present mental capacity to understand the proceedings and to assist in his defense, and the facts and reasoning upon which the findings and opinions are based. Wis. Stat. § 971.14(3)(a)-(c). If the examiner opines that a defendant is not competent, the statute also requires that the report include the examiner's opinion on whether competency may be restored, and, "[i]f sufficient information is available to the examiner to reach an opinion, the examiner's opinion on whether the defendant needs medication or treatment and whether the defendant is not competent to refuse medication or treatment." Wis. Stat. § 971.14(3)(d), (dm).

Unless the parties waive the opportunity to present additional evidence, the court "shall" hold an evidentiary hearing on the defendant's competency. Wis. Stat. § 971.14(4)(b). If the defendant stands mute or claims to be

incompetent, "the defendant shall be found incompetent unless the state proves by the greater weight of the credible evidence that the defendant is competent." *Id.*

Wisconsin's competency statutes demonstrate the importance of the competency determination to a fair trial. Competency is so important that even if not raised by defendant or defense counsel, the court must act if competency is in doubt. Wis. Stat. § 971.14(1r)(a). While a defendant may waive a contested hearing on competency, *see* Wis. Stat. § 971.14(4)(b), there is no similar ability to waive a competency examination. *See* Wis. Stat. § 971.14(2). Rather, the law goes so far as to allow for inpatient examination for up to 15 days, even if involuntary, and even if the defendant is released on bail if the defendant fails to cooperate in the examination or the examiner deems an inpatient evaluation necessary. Wis. Stat. § 971.14(2)(a)-(c). This section anticipates the possibility that an incompetent defendant's behavior may make a competency evaluation difficult and provides for inpatient examination where necessary. *Id*.

Here, although Mr. White did not receive the full benefit of the protections of Section 971.14 when the circuit court found him competent without an admissible expert opinion on Mr. White's competency to stand trial. This Court should grant review to interpret the requirements of Section 971.14 and to determine whether that section adequately satisfies due process standards.

I. This Court should grant review to interpret the level of protections afforded to a potentially incompetent individual by Section 971.14's requirement for an expert competency evaluation

Section 971.14 sets forth the procedures for determining competency for the purpose of protecting an individual's right to not be tried while incompetent. Thus, this statutory scheme is not merely procedural, but a set of protections that must be afforded to a defendant whose competency is in question. *State ex rel. Matalik v. Schubert*, 57 Wis. 2d 315, 322, 324, 204 N.W.2d 13 (1973) (Section 971.14 is an "important failsafe device for the benefit of accused persons who may not be able to fully cooperate and assist in their defense" whose purpose is to "maximize rather than minimize the rights afforded criminally accused persons").

Despite concluding that Section 971.14(3)(c) requires an opinion on whether the individual satisfies the elements of competency – a requirement separate from other required components of the competency report contained in other subsections of section 971.14(3), (app.16, ¶ 29), the court of appeals went on to hold that section 971.14(3)(c) does not, in all cases, require that an appointed examiner render an opinion to a particular degree of certainty. (App.20, ¶ 38.)[2]

[2] The court of appeals assumed without deciding that the circuit court properly ruled that, as an evidentiary matter, the examiner's ultimate conclusion regarding competency was inadmissible because it was not offered to a reasonable degree of professional certainty. (App.18-19, ¶ 33.) Courts require experts to testify to a reasonable degree of professional certainty or probability, even where such a standard is not laid out within the relevant statute.

The court found it "would be unreasonable in light of the judicial nature of the determination" to "elevate to the level of a statutory requirement that an examiner must render an ultimate conclusion at a particular level of certainty." (App.21, ¶ 40.) The court cited *State v. Smith*, 2016 WI 23, ¶ 37, 367 Wis. 2d 483, 878 N.W.2d 135, for the proposition that "a circuit court is free to completely reject the opinion of examiners, reached to a reasonable degree of professional certainty, when such a determination can be supported by other evidence." (App.21, ¶ 40.) The court found it "difficult to see how the legislature could have intended an expert conclusion at a particular level of certainty as a requirement when a circuit court could, based on the preponderance of other information available to the court, treat an expert's conclusion as erroneous." (*Id.*)

Of course, it is correct that competency is a judicial question, and the court must "weigh evidence that the defendant is competent against evidence that he or she is not." *Garfoot*, 207 Wis.2d at 222. The issue in this case is not whether the circuit court is bound to follow an expert examiner's option, but whether a defendant whose competency is in question is entitled to receive an admissible opinion on competency that *can* be considered by the court at all. Mr. White was not afforded that protection and was left to proceed with only the clinical

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McGarrity v. Welch Plumbing Co., 104 Wis. 2d 414, 429, 312 N.W.2d 37 (1981); *Pucci v. Rausch*, 51 Wis. 2d 513, 519-20, 187 N.W.2d 138 (1971); *Casimere v. Herman*, 28 Wis. 2d 437, 445, 137 N.W.2d 73 (1965). The court of appeals did not suggest that the circuit court could rely on an opinion not made to this level of certainty; rather, it concluded that the opinion itself was not required because the court could base its decision on other evidence.

observations and collateral information contained in the expert report – that is, a report that did not satisfy the requirements of section 971.14(3)(c). This was not the situation in *Smith*, which does not stand for the proposition that a defendant's competency may be determined without an admissible expert opinion. [3]

Similarly, that section 971.14(4) places the burden of proof on the State to prove a defendant is competent by a preponderance of all the evidence, (app.21, ¶ 41), does not impact the plain language requirement of section 971.14(3)(c) that an examiner report is to contain an ultimate conclusion on the defendant's competency. Neither the burden of proof at the competency hearing, nor the court's ability to weigh and credit or discredit evidence as it sees fit, changes the separate statutory protection afforded to individuals who may be incompetent that they receive an expert evaluation and opinion regarding their competency to stand trial.

The court of appeals acknowledged that Section 971.14 "clearly recognizes the legislature's belief that

[3] In *Smith*, competency was only addressed after trial and sentencing. *Smith*, 2016 WI 23, ¶¶ 2, 9. Smith's postconviction motion argued his conviction should be vacated because he was incompetent at the time of trial and sentencing. *Id.* at ¶. 2. Two experts were appointed to conduct a retroactive competency evaluation. *Id.* at ¶¶ 2, 11. The doctors testified at an evidentiary hearing regarding their level of certainty in opining that the defendant was not competent at the time of trial, and at least one opined to a reasonable degree of certainty. *Id.* at ¶¶ 14-17. Though it considered the expert opinions, the court gave more credence to the testimony of the trial judge and trial counsel who had observed Smith at the relevant time periods. *Id.* at ¶ 21.

psychiatric testimony is highly relevant" to the competency determination. (app.21, ¶ 39 *citing State ex rel. Haskins v. Cnty. Court of Dodge Cnty.*, 62 Wis. 2d 250, 266, 214 N.W.2d 575 (1974), and that the plain language of section 971.14(4)(b) anticipates the use of the expert report to determine competency. (*Id.*) However, the court held that an ultimate opinion on competency was unnecessary in Mr. White's case because the court could base its decision on its own observations, as well as "information," "findings," and "professionally informed data" contained in the examiner report. (App.23-25, ¶¶ 45-47.)

But "information," "findings," and "professionally informed data" are not an opinion on whether the defendant meets the standard of competency, and that is what the plain language of Section 971.14(3)(c) requires. *See also State v. Green*, 2021 WI App 18, ¶¶ 49-50, 396 Wis. 2d 658, 957 N.W.2d 583, *reversed in part on other grounds* 2022 WI 30, 401 Wis.2d 542, 973 N.W.2d 770 (distinguishing mandatory requirements for expert reports set forth in subsection (c) – reports must include "the examiner's opinion regarding the defendant's present mental capacity to understand the proceedings and assist in his or her defense" – with subsection (dm), which requires the examiner to make a determination regarding whether the defendant requires medication to be restored to competency only "if sufficient information is available to the examiner to reach an opinion" on the issue). "[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 1102004 WI 58.

Finally, the court of appeals concluded that the court did not err in declining to order additional evaluation of Mr. White for the purpose of reaching an ultimate conclusion to a reasonable degree of professional certainty, because it is within a circuit court's discretion to decide whether to order a competency evaluation. (App.25-27, ¶ 48.) But the standard relied upon by the court of appeals is the standard for whether there is reason to doubt competency so as to require competency proceedings at all. *State v. Weber*, 146 Wis. 2d 817, 823, 433 N.W.2d 583 (Ct. App. 1998).

Here, the circuit court *did* have reason to doubt competency and ordered the competency evaluation. The circuit court was therefore required to follow the procedures set forth in Section 971.14. *See* Wis. Stat. § 971.14(1r)(a) (Once there is reason to doubt a defendant's competency to proceed, the court "shall proceed" under section 971.14). The mandates of Section 971.14 are not discretionary. The question then is not whether the circuit court had reason to doubt Mr. White's competency at this point, but whether Mr. White had received the statutory protections he was entitled to under Section 971.14 where his competency evaluation did not result in a report with an admissible opinion.[4]

[4] The court of appeals relied on *State v. Meeks*, 2002 WI App 65, ¶¶ 44-46, 251 Wis. 2d 361, 643 N.W.2d 526, *rev'd on other grounds*, 2003 WI 104, 263 Wis. 2d 794, 666 N.W.2d 859. The facts of *Meek* are distinguishable. Meeks had first been found incompetent to proceed to trial and spent eleven months receiving treatment and additional evaluations from multiple doctors. *Id.* at ¶¶ 5-6. The circuit court then conducted a lengthy competency hearing at which it considered "numerous reports and extensive testimony from psychiatrists and psychologists" who had examined Meeks. *Id.* at ¶ 6. Meeks was found

The statutory requirement for an examiner report containing an opinion on competency is rendered meaningless if, as here – *after* finding reason to doubt competency under Wis. Stat. § 971.14(1r)(a) – a court can simply proceed without the benefit of an admissible expert opinion, or can rely on "information," "findings", or "professionally informed data" in lieu of an opinion that satisfies the professional standards within the expert's field. This Court should grant review to clarify the correct interpretation of this statutory requirement.

II. This Court should grant review to determine whether a state procedure that does not afford a potentially incompetent defendant an admissible expert opinion is adequate under the Due Process Clause

States are free to establish procedures for determining competency, but must afford a criminal defendant whose competency is in question "a reasonable opportunity to

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competent to proceed to trial. *Id.* at ¶ 7. He went on to plead guilty months later, but prior to both the plea and sentencing hearings, defense counsel again raised competency. *Id.* at ¶ 44. Requests for additional evaluations were denied by the court because the defense had not offered anything to establish a change in Meeks' condition since the last competency determination. *Id.* at ¶ 46. The appellate court upheld the denial of additional evaluations – *after* the competency statutory procedure had already been followed and competency determined – on the basis that "[t]he determination…of whether there is evidence giving rise to a reason to doubt competency is a question left to the sound discretion of the trial court." *Id.* at ¶ 45 (internal quotes omitted). Here, the question is not whether the court had reason to doubt Mr. White's competency – the court had already found reason to begin competency proceedings.

demonstrate that he is not competent to stand trial." *Guck*, 176 Wis. 2d at 850-51; *see also Cooper*, 517 U.S. at 367-68 (state procedures must be "sufficiently protective" of the fundamental right not to be criminally tried while incompetent).

The court of appeals found that "the constitutional issue as framed by White is primarily one of statutory interpretation," and the decision below addressed it as such. (App.18, ¶33.) In briefly addressing Mr. White's constitutional arguments, the court did found that the standard set forth in *Medina v. California*, 505 U.S.437, 445, 112 S.Ct. 2572 (1992) provided that "a state-imposed criminal procedure is 'not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" (App.19, ¶ 34, *citing Medina*, 505 U.S. at 445.) The court found that Mr. White had failed to show a due process violation. (App.19, 27-28, ¶¶ 34, 49.)

In *Medina*, the Supreme Court addressed the constitutionality of a state competency statute that established a presumption of competency and placed the burden of proving incompetency on the defendant, by a preponderance of the evidence. 505 U.S. at 440. In analyzing whether the state law violated due process, the court applied a standard first set forth in *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319 (1977), which involved a due process challenge to a state law placing the burden of proving the statutory affirmative defense of extreme emotional disturbance on the defendant. *Medina*, 505 U.S. at 445. That standard provided that State procedure

"including the burden of producing evidence and the burden of persuasion," does not violate the Due Process Clause "unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson*, 432 U.S. at 201-202.

Applying this standard, the *Medina* court found that "there is no settled tradition on the proper allocation of the burden of proof in a proceeding to determine competence." 505 U.S. at 446. The court then addressed "whether the rule transgresses any recognized principle of fundamental fairness in operation." *Id.* at 448 (internal quotes omitted). The court distinguished the case from *Pate*, in which the defendant had not received a competency hearing at all, noting, "[o]nce a competency hearing is held, … psychiatric evidence is brought to bear on the question of the defendant's mental condition." *Id.* at 450. The court held that "[c]onsistent with our precedents, it is enough that the State affords the criminal defendant on whose behalf a plea of incompetence is asserted a reasonable opportunity to demonstrate that he is not competent to stand trial." *Id.* at 451. The court upheld the statute placing the burden of proving incompetency on the defendant, finding it constitutionally adequate to guard against the criminal trial of an incompetent defendant in violation of due process. *Id.* at 453.

Several years later, the Supreme Court again addressed the constitutionality of state legislation placing the burden of proof on the defendant in competency proceedings. *Cooper v. Oklahoma*, 517 U.S. 348, 367-68, 116 S.Ct. 1372 (1996). In that case, Oklahoma law presumed a criminal defendant competent to proceed to trial unless the

defendant proved their incompetence by clear and convincing evidence. *Id.* at 350. The court applied the standard set forth in *Patterson* and *Medina*, but concluded that Oklahoma's statute was not adequate to protect the due process rights of defendants whose competency was in question, because "The deep roots and fundamental character of the defendant's right not to stand trial when it is more likely than not that he lacks the capacity to understand the nature of the proceedings against him or to communicate effectively with counsel mandate constitutional protection." *Id.* at 367-68.

Here, an interpretation of section 971.14 that does not afford a potentially incompetent defendant an expert evaluation sufficient to produce an opinion on competency to a reasonable degree of professional certainty does not provide sufficient protection against the due process violation of being tried while incompetent. Both the United States and Wisconsin Supreme Courts have recognized the importance of the competency evaluation and expert opinion testimony to a fair competency determination. *See Garfoot*, 207 Wis. 2d at 227 ("determination of competence is an individualized, fact-specific decision. It is for this reason that expert testimony regarding a particular defendant's mental capabilities is necessary."); *Haskins*, 62 Wis. 2d at 266 ("Our statute…clearly recognizes the legislature's belief that psychiatric testimony is highly relevant.")

In *Pate*, the Supreme Court held that due process is violated where a trial court does not order an adequate hearing on competency in the face of evidence suggesting the defendant is incompetent. 383 U.S. at 388. There, the

state courts had found that the evidence of the defendant's incompetency was insufficient to require a hearing on the issue "in light of the mental alertness and understanding displayed in [the defendant's] colloquies with the trial judge." *Id.* at 385. In finding that the failure to conduct a competency hearing deprived the defendant of a fair trial, the court specifically noted the inability of the defendant to "introduce expert testimony on the question of his [competency]." *Id.* at 385 n.7.[5] Likewise, in *Medina*, the court noted that due process was adequately protected where the defendant was afforded a competency hearing at which "psychiatric evidence is brought to bear on the question of the defendant's mental condition." 505 U.S. at 451.

Just as the importance of an expert evaluation and opinion evidence is demonstrated in precedent, so is the need for such expert testimony to be to a reasonable degree of professional certainty so as to allow the evidence to be admissible. *McGarrity*, 104 Wis. 2d at 429; *Pucci*, 51 Wis. 2d at 519-20; *Casimere*, 28 Wis. 2d at 445. For if the expert opinion is inadmissible, the defendant may either be placed in the same position as have never received that opinion, or may be subject to the court deciding competency on evidence insufficient to meet professional standards. Either situation raises due process concerns.

Interpreting section 971.14 so as to not afford a defendant whose competency is in question admissible

[5] While the original language in this footnote is "insanity," the decision explains that "present sanity" was the relevant language in state law to discuss mental competence. *Pate*, 383 U.S. at 384 n.6.

expert evidence on the question would violate fundamental fairness. *Medina*, 505 U.S. at 448. As in *Cooper*, a weighing of the risks and interests involved demonstrate this fundamental unfairness:

> For the defendant, the consequences of an erroneous determination of competence are dire. Because he lacks the ability to communicate effectively with counsel, he may be unable to exercise other rights deemed essential to a fair trial. … The importance of these rights and decisions demonstrates that an erroneous determination of competence threatens a fundamental component of our criminal justice system – the basic fairness of the trial itself.
>
> By comparison to the defendant's interest, the injury to the State of the opposite error – a conclusion that the defendant is incompetent when he is in fact malingering – is modest. To be sure, such an error imposes an expense on the state treasury and frustrates the State's interest in the prompt disposition of criminal charges. But the error is subject to correction in a subsequent proceeding and the State may detain the incompetent defendant for the reasonable period of time necessary to determine where there is a substantial probability that he will attain competence in the foreseeable future.

Cooper, 517 U.S. at 364-365 (internal quotes and citations omitted). Here, risk to the State is even less serious because the issue not that Mr. White should have been found incompetent, but simply that he should have been afforded additional evaluation, potentially on an inpatient basis, to

produce an expert opinion on competency to a reasonable degree of professional certainty.

On the other hand, the facts of this case demonstrate with particularity that the risk of error in competency proceedings for a defendant, "are dire." *Cooper*, 517 U.S. at 264. The court's decisions to proceed with the hearing, and ultimately to find Mr. White competent to proceed, are particularly problematic here because Mr. White was unrepresented by counsel. After finding Mr. White competent, the court went on to find that, based on his behavior, Mr. White forfeited both his right to counsel and his right to appear at trial. Mr. White's decisions to waive or forfeit his right to an attorney and right to appear at trial must also be evaluated in light of the competency question and may in fact demonstrate his lack of competence. *Riggins v. Nevada*, 504 U.S. 127, 140, 112 S.Ct. 1810 (1992) ("defendant's waiver of the right to be tried while competent would cast doubt on his exercise or waiver of all subsequent rights and privileges through the whole course of the trial").

This Court should grant review to determine whether the failure to afford a potentially incompetent defendant an admissible expert opinion on competency does not adequately protect the due process right to not be tried while incompetent.

CONCLUSION

For the reasons presented herein, this Court should grant review of this case.

Dated this 5th day of December, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 7,377 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, including the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

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

Dated this 5th day of December, 2022.

Signed:

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