STATE OF WISCONSIN

IN SUPREME COURT

No. 2020AP275-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DONALD L. WHITE,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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Plaintiff-Respondent State of Wisconsin opposes Defendant-Appellant-Petitioner Donald L. White's petition for review on the following grounds:

1. White must overcome two layers of forfeiture for this Court to even reach the issues presented in his petition. White faults the circuit court for finding him competent to stand trial without an expert opinion offered to a reasonable degree of professional certainty. (Pet. 9–11.) But he's the reason why the expert couldn't offer that type of opinion: the examination was "very unproductive" because he gave "outlandish" responses to questions and behaved in a "theatrical" behavior. *State v. White*, No. 2020AP275-CR, 2022 WL 16643242, ¶ 11 (Wis. Ct. App. Nov. 3, 2022) (not recommended for publication). White's "highly uncooperative" attitude forced the examiner to end the interview without completing the standardized tests designed to assess his competency. *Id.*; (R. 12:5.)

Notably, this wasn't the first time that White has refused to cooperate with a competency examination—he's done it three times before. (R. 12:2–3.) Nor was this the first instance where White appeared to be feigning mental illness for competency purposes: he's previously been diagnosed with malingering. (R. 12:2.) White has a history of being "gamey," faking self-harm on numerous occasions. (R. 12:3.) He also has a history of being uncooperative with psychiatry staff, either ignoring them or showing them hostility. (R. 12:3.)

And White's highly uncooperative attitude in this case hardly came as a surprise considering his conduct leading up to the competency examination. He'd been playing a "stubborn" game of stonewalling the court at hearings and was physically resisting coming to court, too. (R. 36:3–4; 37:2–13.) Given White's conduct, the court anticipated that he wouldn't cooperate with the competency examiner and told him what would happen if he didn't: his evaluation would be based on collateral sources of information. (R. 37:8, 13–14.)

The court told White that it would be "good" if he talked to the competency examiner. (R. 37:13.) If he didn't but later changed his mind, the court assured White, "I'll send that person back to talk to you." (R. 37:8.)

Yet, when it became clear that the circuit court was going to proceed with the competency determination despite the examiner's inability to offer an opinion to a reasonable degree of professional certainty, White didn't object. (R. 38:4.) Nor did he take the court up on its previous offer to send the examiner back to speak with him. (R. 37:8; 38:4; 39:4–12.) Nor did he exercise his statutory right to an examination from an expert of his choice. *See* Wis. Stat. § 971.14(2)(g). Quite the opposite, at the competency hearing, White doubled down on his defiance: "I refused to be interviewed because they don't know what they are talking about." (R. 39:17.)

Wisconsin courts have long held that "a specific, contemporaneous objection is required to preserve error." *State v. Delgado*, 2002 WI App 38, ¶ 12, 250 Wis. 2d 689, 641 N.W.2d 490; *accord In re Guardianship of Willa L.*, 2011 WI App 160, ¶ 26, 338 Wis. 2d 114, 808 N.W.2d 155 (stating that parties must raise "specific arguments in a timely fashion"). Further, defendants may forfeit rights—even constitutional ones—through conduct incompatible with the assertion of the right. *See State v. Anthony*, 2015 WI 20, ¶ 64, 361 Wis. 2d 116, 860 N.W.2d 10. Both aspects of forfeiture are on display in this case, and the State will argue as much if this Court grants White's petition.[1] There aren't good reasons to overlook

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[1] Despite recognizing that White didn't ask for another competency evaluation until the morning of trial, well *after* the competency proceedings ended, the court of appeals assumed without deciding that White adequately preserved his arguments by lodging a specific, contemporaneous objection. *State v. White*, No. 2020AP275-CR, 2022 WL 16643242, ¶ 23 n.7 (Wis. Ct. App. Nov. 3, 2022) (not recommended for publication). It didn't address the State's forfeiture-by-conduct argument. *See id.*

White's doubly forfeited arguments, either: he points to no other instances of courts determining trial competency without an examiner's opinion offered to a reasonable degree of professional certainty. (Pet. 9–11, 23–34.) The simple fact is that he's manufactured the issues raised in his petition through his manipulative and defiant conduct. White had every opportunity to obtain an examiner's opinion offered to a reasonable degree of professional certainty: he could have cooperated during his first examination, he could have asked to speak to the examiner again, or he could have asked for a new examination with an examiner of his choice. But he did none of those things, apparently because he didn't want the prosecution to proceed. Overlooking White's doubly forfeited arguments rewards his misconduct.

2. The issues raised in White's petition are based on the flawed premise that an expert opinion is inadmissible unless it's offered to a reasonable degree of professional certainty. (Pet. 7–8.)

It's true that an expert opinion is often "cast in terms of a 'reasonable degree of certainty' in the pertinent field or discipline." 7 Daniel D. Blinka, *Wisconsin Practice Series: Wisconsin Evidence* § 702.603, at 701 (4th ed. 2017). "There are, however, no magic words or other talismans that govern admissibility. The proponent need only show that the expert testimony otherwise comports with § 907.02." *Id.* (footnote omitted). "*Short of speculation*, the expert's degree of certainty runs to the testimony's weight." *Id.* at 702 (emphasis added). "Case law sometimes distinguishes between opinions predicated upon 'probabilities' versus 'possibilities.' *Admissibility does not turn on simple word choice.*" *Id.* (emphasis added). Professor Blinka continues, "[S]emantic quibbles should not cloak the real focus of the analysis: relevancy and helpfulness depends upon the reliability of the underlying theories and the techniques

predicated upon those theories, especially in [the] area of scientific evidence." *Id.*

So, White is wrong to argue that experts are required to "testify to a reasonable degree of professional certainty or probability, even where such a standard is not laid out within the relevant statute." (Pet. 23 n.2.) Wisconsin Stat. § 907.02 governs the admissibility of expert opinions, and there's no requirement there that the expert must use those magic words. *See In re Commitment of Jones*, 2018 WI 44, ¶ 29, 381 Wis. 2d 284, 911 N.W.2d 97 (discussing the "five determinations" a court must make before admitting expert testimony). Here again, the court of appeals assumed without deciding that the circuit court properly deemed the examiner's opinion inadmissible. *White*, 2022 WL 16643242, ¶ 33. But the State will argue as much if this Court grants White's petition, providing another obstacle for White to overcome for this Court to even reach the issues presented.

3. The court of appeals reached the correct result in an opinion that doesn't have precedential value. It properly rejected White's constitutional challenge to the relevant statute as undeveloped. *White*, 2022 WL 16643242, ¶ 34. As for White's statutory-interpretation argument, the court of appeals rightfully declined his invitation to read language into Wis. Stat. § 971.14(3)(c). As White concedes, the plain language of the statute doesn't require an expert opinion offered to a reasonable degree of professional certainty. *White*, 2022 WL 16643242, ¶ 37. Stated otherwise, the statute does not prevent the court from determining competency without such an opinion. And that makes sense considering that a competency determination is legal, *not* medical, and that the aims of a competency hearing are "modest." *State v. Byrge*, 2000 WI 101, ¶ 48, 237 Wis. 2d 197, 614 N.W.2d 477. As the court of appeals noted, this case is a great example of one where a court has "ample evidence to support a competency determination, regardless of the ultimate

conclusion reached by the examiner." *White*, 2022 WL 16643242, ¶ 42. At bottom, White's position offends numerous principles of statutory construction and was correctly rejected.

For the above reasons, this Court should deny White's petition.

Dated this 20th day of December 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rule) 809.19(8)(b) and 809.62(4) (2019–20) for a response produced with a proportional serif font. The length of this response is 1,296 words.

Dated this 20th day of December 2022.

John Blimling

For: KARA L. JANSON

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULE) 809.19(12) and 809.62(4)(b) (2019–20)

I hereby certify that:

I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rule) 809.19(12) and 809.62(4)(b) (2019–20).

I further certify that:

This electronic response is identical in content and format to the printed form of the response filed as of this date.

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

Dated this 20th day of December 2022.

John Blimling

For: KARA L. JANSON