STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2025AP000387-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

T.R.T.,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

1. What is the appellate standard of review when reviewing a circuit court's decision on whether a criminal defendant is likely to be restored to competency?

   The circuit court did not address this issue.

   The Court of Appeals reviewed the circuit court's decision for clear error.

2. When a circuit court bases its competency determination on an expert's diagnosis, can it independently decide whether a defendant is likely to be restored to competency?

   The circuit court agreed with a doctor that T.R.T.'s diagnoses made him incompetent, but found T.R.T. was likely to be restored despite that doctor's opinion otherwise.

   The Court of Appeals found that there was support in the record for the circuit court's decision.

3. Does either party bear a burden of proof as to whether a defendant can be restored to competency?

   The circuit court noted that there did not appear to be a burden of proof on this issue.

   The Court of Appeals did not address this issue.

CRITERIA FOR REVIEW

Issues related to involuntarily medicating criminal defendants who are incompetent to stand trial have been increasingly litigated in Wisconsin over the last decade, providing the Court of Appeals and this Court opportunities to weigh in on issues that Wisconsin courts had not previously. *See, e.g. State v. Fitzgerald*, 2019 WI 69, 387 Wis. 2d 384, 929 N.W.2d 165; *State v. N.K.B.*, 2024 WI App 63, 414 Wis. 2d 218, 14 N.W. 3d 681 (petition for review granted).

This case presents issues that no court has previously addressed—a defendant's restorability.[1] Specifically, this case requires the Court to clarify: 1) the appellate standard of review, 2) whether a court can find a defendant restorable without supporting medical opinion, and 3) whether either party bears a burden of proof on the issue of restorability.

All of these issues are novel questions, as there are no Wisconsin cases addressing restorability. Wis. Stat. § 809.62(1r)(c)2. Moreover, these are questions of law that are likely to recur, given the uptick in competency litigation, and decisions from this Court regarding the evidentiary standards and standard of review will guide circuit and appellate courts alike. Wis. Stat. § 809.62(1r)(c)3. Finally, the circumstances under which the State can commit non-

[1] The petition uses the term "restorability" as shorthand for the ability of a defendant to be restored to competency.

dangerous individuals[2] for treatment purposes is a significant question of constitutional law,[3] as such this Court should guide circuit courts in determining the appropriate standards for finding an individual restorable. Wis. Stat. § 809.62(1r)(a).

STATEMENT OF THE FACTS AND CASE

T.R.T. was charged with multiple counts related to sexual abuse of a child, which allegedly occurred between September 2017 and September 2020, and one count of felony bail jumping. (R.2:1-3). During the proceedings, trial counsel raised the issue of T.R.T.'s competency to proceed in a letter to the circuit court. (R.78).

Two competency evaluations were completed. Dr. Dileep Borra was appointed by the court, (R.82; 84:1), while Dr. Steven Benson was retained by defense counsel. (R.86:1). The opinions given were opposite. Dr. Borra opined that T.R.T. was feigning

[2] Individuals who are not restorable can have their cases converted to a mental health commitment or placed under a guardianship and protective placement; however, individuals are still entitled to the full protections under those statutes, which includes the County proving they are dangerous/a risk to themselves or others. *See* Wis. Stat. § 941.14(6)(b) (noting only that a petition is filed as part of the conversion).

[3] *See Jackson v. Indiana*, 406 U.S. 715, 737 (1972) ("Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on [the states' power to commit persons found to be mentally ill] have not been more frequently litigated.").

impairment, due to repeatedly answering "I don't know" during the interview. (R.84:5). Dr. Benson's opinion was that T.R.T. has primary diagnoses of "Schizoaffective Disorder, Bipolar type and Major Neurocognitive Disorder, due to chronic inhalant abuse and traumatic brain injury," and that he was not competent and not likely to be restored. (R.86:18-19).

While the court agreed with and primarily relied on Dr. Benson's opinion to find T.R.T. incompetent, it found T.R.T. was likely to be restored to competency. That finding was based on purported inconsistencies in Dr. Benson's report and evidence in the record that the court felt suggested restorability.

Dr. Benson's Report and Testimony[4]

As part of his examination, Dr. Benson met with T.R.T. twice at the jail, administered numerous tests, consulted with trial counsel, interviewed jail staff, and reviewed numerous medical records as well as the criminal complaint and CCAP notes. (R.86:1-2). Dr. Benson also talked with T.R.T.'s wife and mother. (R.86:7).

In discussing T.R.T.'s history, Dr. Benson's report noted that T.R.T. failed second grade and was referred for special education classes. (R.86:4). T.R.T. was also involved in a motor vehicle accident that may

[4] Given the court's lack of reliance on or discussion of Dr. Borra's opinion, his report and testimony are largely omitted from this petition.

have caused a traumatic brain injury. (R.86:5). T.R.T. also reported abusing inhalants beginning at age 12, the frequency of which was confirmed by his mother and wife. (R.86:7). Additionally, per T.R.T.'s wife, he was determined to be disabled in 2017 or 2018 and received disability benefits. (R.86:4).

According to Dr. Benson, T.R.T.'s mental health records contained the following diagnoses:

> Schizoaffective Disorder, Bipolar type, with paranoid ideation; Cognitive Impairment in the Context of Emerging Schizophrenia; Post-Traumatic Stress Disorder; Major Depressive Disorder, recurrent; Unspecified Mood Disorder; Adjustment Disorder with mixed features; and Childhood Sexual Abuse.

(R.86:5). The report also notes a history of symptoms of a "schizophrenia spectrum disorder" and numerous medications were listed as having been prescribed to T.R.T. in the past. (R.86:5-6).

The report went on to describe a number of psychological tests that Dr. Benson administered to T.R.T. (R.86:7-14). Notably, on the Wechsler Adult Intelligence Scale-IV (WAIS-IV), T.R.T. was estimated to have an IQ of 53, putting him in the range of moderate intellectual disability. (R.86:9). Dr. Benson interpreted another test, the Wisconsin Card Sorting Test (WCST), to indicate that T.R.T. was unable to benefit from feedback, meaning "he *effectively lacks* the capacity to learn from experience or modify his behaviors in response to feedback from others or

situations." (R.86:13; *see also* 110:84-85) (emphasis in original).

Dr. Benson offered a number of diagnoses for T.R.T.:

> Schizoaffective Disorder, Bipolar type; Major Neurocognitive Disorder due to multiple causes (chronic inhalant abuse and traumatic brain injury); Intellectual Developmental Disorder, moderate; Post-Traumatic Stress Disorder, childhood onset; Inhalant Use Disorder, severe, in forced remission due to current incarceration; history of physical, psychological, and sexual abuse as a child; and history of child sexual abuse.

(R.86:14).

The report also discussed the Competency Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR)—a competency specific tool for defendants with intellectual disability. T.R.T. performed well below the average scores for adults with cognitive issues who were opined to be competent. (R.86:17-18).

In finding T.R.T. incompetent to stand trial, Dr. Benson's report notes:

> there is an empirical basis for the clinical signs of a schizoaffective disorder—hallucinations, delusions, disjointed speech, grossly disorganized behaviors, and the previously specified negative signs of schizophrenia—in addition to major

> cognitive and executive deficits that reliably and consistently result in impaired perceptions, reasoning, problem-solving, and the inability to benefit from life experience.

(R.86:19). In opining that T.R.T. was not likely to be restored to competency, the report states:

> These conditions have adversely affected the ability to learn and retain essential information, and to provide relevant details to his attorney during legal proceedings. This opinion recognizes the presence of significant neurocognitive deficits from inhalant abuse that are neither reversible nor amenable to treatment.

(R.86:19).

Regarding treatment, Dr. Benson noted that schizoaffective disorder can be treated effectively with antipsychotic medication, but T.R.T.'s "ability to benefit from treatment is extremely limited by virtue of his extremely inefficient intellectual functions." (R.110:76). According to Dr. Benson, the treatment record showed that T.R.T. had previously been prescribed antipsychotic medications but was inconsistently compliant or noncompliant with that treatment. (R.110:82-83). Dr. Benson also testified that the progression of major neurocognitive disorders can sometimes be slowed by treatment, but they cannot be reversed or improved with time. (R.110:79-80).

When asked directly if T.R.T. would benefit from medication, Dr. Benson said he would not and referred the court and parties to the references that accompanied his report regarding the "significant and pervasive and not remediable deficits of neurocognitive functioning in response to prolonged inhalant abuse." (R.110:93). On re-cross, Dr. Benson explained:

> [I]f it was schizoaffective disorder without the other disorders present, that that could be treated, but you can't look at this—this is not an all-or-none case. . . . This is not a black or white case. This is a case in which there are significant and severe and multiple mental disorders and it's the weight of those combined mental disorders that form the basis of my opinion that he—these are permanent, they cannot be treated, and that they are not in any way going to be restorable.

(R.110:95).

Testimony of Todd Evers

Todd Evers, a correctional sergeant at the Monroe County jail described certain jail procedures, including that inmates have access to a mental health professional, which they do not have to request. (R.102:58-59). Sgt. Evers testified that inmates can receive medications while in jail. (R.102:59).

In discussing T.R.T.'s presentation in the jail, Sgt. Evers testified there was no issue with T.R.T. eating his meals. (R.102:62). He stated that T.R.T.

"had a few minor violations" while in the jail, estimating no more than six to eight violations. (R.102:62). Sgt. Evers went on to describe T.R.T. presenting differently "the day of the evaluation" and when he has seen T.R.T. in court than when he is in the jail. (R.102:63-64).

Sgt. Evers noted that T.R.T. complained about a number of things in his cell being broken, and Sgt. Evers disagreed. (R.102:65-66). He also testified T.R.T. requested to be transferred to a cell without a camera. (R.102:66). He further described T.R.T. being able to maintain eye contact and hold a "normal conversation." (R.102:67-68). Sgt. Evers also described T.R.T. properly maintaining his cell and hygiene. (R.102:69-70).

Circuit Court Ruling

After the two-day evidentiary hearing and briefing by the parties, the circuit court held an oral ruling where it found T.R.T. not competent, but likely to regain. The circuit court found both doctors credible, (R.114:7; App.29), but gave more weight to Dr. Benson's testimony, (R.114:7; App.29), noting how it was more comprehensive. (R.114:10, 12; App.32, 34). The court stated that it was "relying primarily on [Dr. Benson's] opinion as it relates to competency." (R.114:16; App.38).

Despite relying on Dr. Benson's opinion to find T.R.T. not competent, the court diverged when it found that he could be restored to competency. In doing so, the court specifically noted Dr. Benson's opinion was:

> inconsistent with the other evidence in this case, including jail staff, nursing staff, the chronic mental health issues that the defendant has had which are treatable.

(R.114:16; App.38). The court went on to say:

> Doctor Benson's opinion is a little bit contradictory because he relies upon the mental health history and the schizophrenia and the PTSD when determining that he's not competent to proceed, but when it comes to restoration, he doesn't mention the potential impact of restorative treatment.

(R.114:17; App.39).

Ultimately, the court found T.R.T. was likely to be restored to competency in the appropriate timeframe. (R.114:17; App.39). The court committed T.R.T. to an inpatient facility for competency restoration. (R.114:17; App.39; 113; App.20-22).

T.R.T. appealed, and the Court of Appeals affirmed. The court applied a clearly erroneous standard of review, while deciding that restorability is a judicial determination, rather than a medical one. *State v. T.R.T.*, unpublished slip op. No. 2025AP387-CR, ¶¶25-27 (WI App. June 19, 2025); (App.14-15).

T.R.T. petitions for review.

ARGUMENT

I. The issue of restorability should be reviewed as a mixed question of fact and law.[5]

This Court has not specifically addressed the standard of review when assessing a circuit court's decision on restorability. Given the similarity to whether an individual is a proper subject for treatment in the Chapter 51 context, courts should review them under the same standard—one of a mixed question of law and fact. *See Waukesha Cnty. v. J.W.J.*, 2017 WI 57, ¶15, 375 Wis. 2d 542, 895 N.W.2d 783 (noting the standard of review was mixed when the only issue raised was whether the individual was a proper subject for treatment).

The parties agreed in the Court of Appeals that no cases address the standard of review related to restorability. App. Br. at 12-13; Resp. Br. at 12. The Court of Appeals suggested this Court's decision in *State v. Garfoot*[6] was instructive. *T.R.T.*, No. 2025AP387-CR, ¶22; (App.13). According to the court, "restorability was at issue in *Garfoot*, and the majority did not suggest that a standard other than clearly erroneous should apply to restorability." *Id.*, ¶23; (App.14).

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[5] Regardless of the standard of review this Court adopts, T.R.T. maintains that the circuit court's decision was clearly erroneous, and should be reversed under any standard of review. App. Br. at 15.

[6] 207 Wis. 2d 214, 223, 558 N.W.2d 626 (1997).

While technically true, the decision in *Garfoot* is focused almost exclusively on the question of competency. The opinion notes that, in addition to not being competent, the circuit court "determined that Garfoot would not likely regain his competence within the statutory time frame." *Garfoot*, 207 Wis. 2d at 220. Other than this reference, *Garfoot* never discussed the issue of restorability. When setting the standard of review, *Garfoot* only discussed competency determinations. *Id.* at 223-25.

Additionally, *Garfoot*'s reasoning is not compelling in the restorability context, given the circuit court's lack of expertise needed to determine an individual's likelihood of restoration. *Infra* at 17-21. *Garfoot* noted "[t]he trial court's superior ability to observe the defendant and the other evidence presented" including judging the credibility of witnesses. *Id.* at 223. Since judging the credibility of witnesses is always the province of the circuit court, that itself is not a compelling reason to adopt a clearly erroneous standard. The mixed standard already recognizes the circuit court's position to assess witnesses and defers to the court's factual findings. *J.W.J.*, 375 Wis. 2d 542, ¶15.

It is the court's superior position in observing a defendant and institutional knowledge regarding what it takes for a defendant to be competent that warrants a more deferential standard of review. *Garfoot*, 207 Wis. 2d at 224 (citing *Pickens v. State*, 96 Wis. 2d 549, 569, 292 N.W.2d 601 (1980)).

To the contrary, restorability is largely a medical determination (*i.e.* whether a particular defendant's condition can be rehabilitated) where the circuit court is in no better a position to apply facts to law than appellate courts. The Court of Appeals' position to the contrary is not supported by anything other than a bare assertion. *T.R.T.*, No. 2025AP387-CR, ¶30; (App.16-17). While the circuit court can judge the credibility of the doctors and put those findings on the record,[7] whether the evidence meets the legal standard is a question of law within the province of the appellate courts. *J.W.J.*, 375 Wis. 2d 542, ¶15.

Additionally, the standard of review regarding whether an individual is a proper subject for treatment should guide the standard of review on restorability. In order to commit a mentally ill individual the government must prove that the person is a "proper subject for treatment." Wis. Stat.

[7] If accepted for review, T.R.T. will argue that the Court of Appeals' statements that the circuit court was not relying on Dr. Benson's opinions are not supported by the record. *See, e.g. T.R.T.*, No. 2025AP387-CR, ¶12 ("the court did not necessarily reject the possibility that T.R.T. might be 'malingering or … falsely presenting his behavior for his own purposes.'); (App.9); ¶27 ("Although the court found that T.R.T. was not competent, it did not discount the possibility that T.R.T. might be exaggerating the effects that his various disorders had on his cognition and ability to understand, process, and remember information."); (App.15); ¶32 ("However, it did not necessarily credit Benson's diagnosis about the severity of the neurocognitive disorder, given what the court knew about T.R.T.'s ability to function in the jail setting."); (App.17).

§ 51.20(1)(a)1. An individual is a proper subject for treatment if the underlying condition can be controlled or improved (*i.e.* rehabilitated), rather than simply having their individual functioning maximized and maintained (*i.e.* managed). *See Fond du Lac Cnty. v. Helen E.F.*, 2012 WI 50, ¶¶35-36, 340 Wis. 2d 500, 814 N.W.2d 179.

Rehabilitation must, in part, "ameliorate impairments and facilitate an individual's capability to function." *Matter of Athans*, 107 Wis. 2d 331, 336, 320 N.W.2d 30 (1982). Restoring an individual to competency often involves treating symptoms of an individuals mental illness or providing education to those with cognitive issues that prevent them from participating in their defense or understanding the proceedings. Overcoming these limitations facilitates their capability to function in the role of the criminal defendant. As such, the restorability and proper subject for treatment standards are functionally the same.

Additionally, this Court has described the standard for evaluating whether an individual is a proper subject for treatment as a "fact-based test," and still reviews it as a mixed question of fact and law. *Helen E.F.*, 340 Wis. 2d 500, ¶36; *contra T.R.T.*, No. 2025AP387-CR, ¶25; (App.14).

Restoration in the criminal competency context requires improving, rather than simply controlling a defendant's condition, making the legal question substantially the same: are there facts sufficient to

support a legal conclusion that an individual's condition can be rehabilitated to the degree required by law. As such, the standard of review should be the same in both case types.

II. Circuit courts need supporting expert testimony to decide restorability when incompetency results from diagnosable conditions.

Circuit courts are not able to assess restorability of defendants with specific diagnoses without supporting medical opinion. Whether someone with diagnosed mental illness and neurocognitive disorders can be treated to competency is beyond the expertise or experience of the circuit court—requiring expert testimony supporting the court's decision. *See State v. Perkins*, 2004 WI App 213, ¶16, 277 Wis. 2d 243, 689 N.W.2d 684 ("expert testimony is *required* only if the issue to be decided by the jury is beyond the general knowledge and experience of the average juror") (emphasis in original). Decisions not supported by the record are clearly erroneous. *Royster-Clark, Inc. v. Olsen's Mill, Inc.*, 2006 WI 46, ¶11, 290 Wis. 2d 264, 714 N.W.2d 530.

The court relied on Dr. Benson's expert opinion regarding T.R.T.'s mental illnesses and major neurocognitive disorder to find him incompetent. When it did so, it was bound by his opinion as to T.R.T.'s prognosis, unless there was sufficient evidence to suggest another outcome.

The court relied on Dr. Benson's expertise and diagnoses to support its finding that T.R.T. lacked substantial mental capacity. (R.114:14-15; App.36-37). The court then disregarded the rest of the opinion and made a finding not supported by the record—that T.R.T. could be restored to competency.

This is not a scenario where the fact-finder could disregard portions of the expert opinion. In *State v. Owen*, this Court held that a jury could accept an expert's testimony that it was possible that a blow to a baby's chest could cause its death, and disregard the expert's inability to opine that the blow caused the death at issue. 202 Wis. 2d 620, 632-34, 551 N.W.2d 50 (Ct. App. 1996). Because the expert could not foreclose the possibility of the blow causing the death, the jury was not bound by her inability to decide. *Id.*

In *In re Commitment of Kienitz*, the Supreme Court noted that it was proper for the circuit court to rely on aspects of reports from different experts to form an opinion on the potential dangerousness of a Chapter 980 committee. 227 Wis. 2d 423, 438-39, 597 N.W.2d 712 (1999).

In both cases, there is a reason for the fact-finder to adopt certain portions of an expert's opinion, and not others. In *Owen*, the jury heard from an expert that the blow possibly caused the death, even if the expert could not say with certainty—they could accept that possibility in light of the evidence. In *Kienitz*, while one expert's statistical analysis did not suggest a "substantial probability" of dangerousness, the court

could rely on two other experts and the defendant's extensive history to make that finding.

T.R.T. can find no support for a finder of fact accepting an expert's opinion regarding diagnoses and rejecting their opinion on prognosis, as the circuit court did here. The Court of Appeals cited nothing in support of its finding that the circuit court could simply reject portions of Dr. Benson's opinion and make a finding of prognosis without any supporting authority. *T.R.T.*, No. 2025AP387-CR, ¶32; (App.17).

The court's reasoning for disregarding part of the opinion is also lacking. The court claimed that Dr. Benson "relies upon the mental health history and the schizophrenia and the PTSD when determining that he's not competent to proceed, but when it comes to restoration, he doesn't mention the potential impact of restorative treatment." (R.114:17; App.39). First, this mischaracterizes Dr. Benson's opinion, which was based on the confluence of both the mental illness and major neurocognitive disorder. (R.86:18-19). Dr. Benson agreed people could be treated for schizoaffective disorder and PTSD, but maintained that T.R.T. would not benefit, in terms of competency restoration, due to the medications not treating his major neurocognitive disorder. (R.110:76, 80).

The court's characterization of Dr. Benson's opinion was clearly erroneous. Rather than disregard the mental illnesses, Dr. Benson evaluated them in light of T.R.T.'s major neurocognitive disorder. Dr. Benson testified: "we can't divide things out in

terms of saying one's more important than the other, they're all important in combination with one another." (R.110:34). He also considered and rejected the ability for T.R.T. to be treated with medications. (R.110:93, 94-95).

Second, the court effectively cherry-picked one aspect of Dr. Benson's testimony to find that because schizoaffective disorder is normally treatable on its own, T.R.T. was likely to be restored if treated for his schizoaffective disorder. In doing so, the court failed to evaluate T.R.T.'s specific circumstances and make "an individualized, fact-specific decision." *Garfoot*, 207 Wis. 2d at 227. Instead, the court's finding was one based on a generic defendant with schizoaffective disorder and PTSD, who could be treated.

Ironically, the court did exactly what it accused Dr. Benson of—disregarding one of the conditions that it found made T.R.T. not competent. The court did not explain what about the treatable mental illnesses were impacting T.R.T.'s mental capacity, such that treatment for them would make him competent. Had the evidence suggested that T.R.T. was actively psychotic and delusional (*e.g.* not competent because he had paranoid delusions that interfered with his ability to discuss the facts with his attorney), then the court's findings may have been supported by the record. Notably, the court made no finding as to what made T.R.T. incompetent, (R.114:15; App.37), and found that it was due to both "mental health disorders as well as some intellectual functioning disability." (R.114:14-15; App.36-37); *infra* at 23.

Here, the things that prevented T.R.T.'s competency were his poor memory, (R.86:15), inability to explain or retain education regarding roles of legal terms, (R.86:15-16), and his overall cognitive impairment. (R.86:18-19). The court did not explain why it believed treatment would alleviate these concerns or point to anything in the record suggesting this. Thus, its decision was unsupported by the record. The Court of Appeals' opinion compounded the error by speculating about what the circuit court could have been relying on rather than discussing the record. *Supra* at 15 n.7.

Whether someone with diagnosed mental health issues is able to be treated to overcome the limitations interfering with their competency to stand trial is essentially a psychological/psychiatric determination. Factfinders cannot make decisions on restorability in these cases without expert support in the record. *Perkins*, 277 Wis. 2d 243, ¶16. Here, the circuit court could have asked Dr. Benson hypothetical questions regarding a less severe neurocognitive disorder to support the findings it did make.[8] What courts cannot do is make conclusions as though they are mental health professionals; there must be support in the record for their findings.

[8] The State could also have strategically posed such questions to Dr. Borra, instead of pursuing an all or nothing approach to T.R.T.'s competency.

III. Whether either party bears a burden of proof is unclear and may be determinative in this case.

While the burden of proof to prove competency is established by statute, Wis. Stat. § 971.14(4)(b), there is no assigned burden regarding restorability. Instead courts must find that a defendant is "likely to become competent," Wis. Stat. § 971.14(5)(a)1., or "that it is unlikely that the defendant will become competent." Wis. Stat. § 971.14(6)(a). T.R.T. is unaware of any statute or case defining "likely" in this context. However, "likely" is defined in Wis. Stat. § 980.01(1m) as "more likely than not." Additionally, "probable" has been defined similarly. *In re Commitment of Curiel*, 227 Wis. 2d 389, 405, 597 N.W.2d 697 (1999). Finally, "probable" is listed as a synonym to "likely" in the dictionary. *Likely*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/likely (last accessed July 18, 2025).

Here, the circuit court failed to make a finding regarding the cause of T.R.T.'s incompetency:

> I don't have to determine clinically what is causing his current functional limitations, whether it's the mental health or the history of neurocognitive impairments, but it's clear he is not currently able to assist in his defense.

(R.114:15; App.37). This finding made it impossible to determine whether T.R.T. was or was not likely to be restored.

While the court did not need to ascribe a medical diagnosis to determine whether an individual is incompetent, *State v. Byrge*, 2000 WI 101, ¶31, 237 Wis. 2d 197, 614 N.W.2d 477, given its reliance on the diagnoses provided by Dr. Benson, it could not find that restoration was "likely" if it was not going to identify the underlying cause of the incapacity.

No one disagreed with Dr. Benson's opinion and testimony that schizoaffective disorder and PTSD are treatable conditions, (R.110:76, 80), and that neurocognitive disorders are not. (R.110:79-80); *T.R.T.*, No. 2025AP387-CR, ¶9; (App.7-8). The question is whether T.R.T. can be restored to competency with all three.

By not explaining what made T.R.T. incompetent, the circuit court's finding leaves only one conclusion—it was just as likely that T.R.T. would remain incompetent as it was that he would be restored. *See State v. Magett*, 2014 WI 67, ¶¶47-49, 355 Wis. 2d 617, 850 N.W.2d 42 (when the theory of defense allowed two equally possible explanations and only one supported an NGI[9] finding, the defendant could not meet his burden to show he was NGI by the greater weight of the credible evidence). By not deciding the root of T.R.T.'s incapacity, the court could not find it was more likely than not that T.R.T. would regain competency.

[9] NGI is shorthand for "not guilty by reason of mental disease or defect."

If T.R.T.'s restorability was as likely as him not being restored, whether there is a burden of proof would determine the outcome of this case. *See id.* If the Court decides that the Legislature has chosen to not assign a burden, then guidance is necessary for circuit courts to know how to handle situations in which the evidence shows that the two scenarios are equally likely.

CONCLUSION

Restorability of a criminal defendant to competency is an issue where no cases are available to guide courts and practitioners. This case raises several issues in need of this Court's guidance.

The Court should accept review.

Dated this 21st day of July, 2025.

Respectfully submitted,

Electronically signed by Lucas Swank

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 4,611 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with 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 s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or 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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 21st day of July, 2025.

Signed:

Electronically signed by
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