

**FILED**

MAY 25 2016

STATE OF WISCONSIN  
SUPREME COURTCLERK OF SUPREME COURT  
OF WISCONSINSTATE OF WISCONSIN,  
Plaintiff,

v.

Appeal No. 13AP2732 CRNM

ANDREW J. MEINHOLZ,  
Defendant.

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SUPPLEMENTAL STATEMENT

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Pursuant to this Court's Order dated December 2, 2015, the Dane County Circuit Court, Branch 13, Honorable Julie Genovese presiding, has determined that the Defendant is not competent to exercise his right to file a statement in support of a petition for review complying with the requirements of §§ 809.62(2) and (4). This update is being submitted pursuant to this Court's December 2, 2015 Order as well. Undersigned counsel respectfully suggests that this Court order the time for filing a Petition for Review tolled while the Defendant is incompetent, which would permit the Defendant to petition this Court for review should he ever attain competency, and preserve his right to seek other relief. A brief recap of the posture of this case and the reasons for counsel's suggestion follows. Undersigned counsel would welcome further briefing of this issue if this Court so instructs.

Andrew was found guilty of misdemeanor theft, felony kidnapping, second degree sexual assault, human trafficking, 2 counts of first degree sexual assault, and 7 counts of misdemeanor bail jumping. The circuit court imposed a sentence

of 20 years initial confinement and 45 years of extended supervision with an additional 25 years of probation. Andrew was found guilty as a result of his no contest pleas, and found culpable after an NGI bench trial.

Andrew was initially found incompetent to stand trial. After a period of commitment, he was restored to competency. After being restored to competency, the circuit court accepted his pleas of no contest as to the facts, and over several hearings the court heard evidence as to his NGI defense. The court found that he did appreciate the wrongfulness of his conduct and could have conformed his conduct to the law. The court sentenced him.

Undersigned counsel was appointed by the State Public Defender to represent Andrew on appeal. Counsel submitted a No-Merit Report. The Defendant did not submit a response to the No Merit Report.<sup>1</sup> The No-Merit Report was subsequently accepted by the Court of Appeals. The Court of Appeals also relieved counsel of further representation. Under Wis. Stat. § 809.32(3), counsel was still statutorily obligated to inform Andrew of his right to appeal the Court of Appeals' decision on his No-Merit Report by petitioning this Court for review. When counsel endeavored to inform Andrew of his right to petition this

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<sup>1</sup> As counsel has already informed this Court in a previous supplemental statement, counsel had consulted with the Defendant before submitting a No-Merit Report. Undersigned counsel had provided the Defendant with a copy of the No-Merit Report by mail with a letter informing him of his right to respond and to a copy of his file for those purposes. The Defendant did not reply. Counsel did not have verbal communication with the Defendant between the time the Defendant had instructed him to submit a No-Merit Report and the time counsel endeavored to inform the Defendant of the Court of Appeals' decision and the Defendant's right to petition this Court for review. It is therefore possible that the Defendant may not have been competent at the time the Defendant received a copy of the No-Merit Report, and may not have been competent to submit a response to it.

Court, counsel was given reason to doubt Andrew's competency. Counsel moved the Court of Appeals for a ruling on Andrew's competency. The Court of Appeals forwarded that motion to this Court which, after requiring a supplemental statement, appointed undersigned counsel to represent Andrew<sup>2</sup> and remanded the matter to the circuit court for a determination of whether Andrew was competent to petition this Court for review.

The circuit court has made a determination that the Defendant is not competent to petition this Court for review. The circuit court made that determination based on the report of Greg Schoenecker, M.D., who was appointed to examine Andrew for the purpose of deciding his competency.<sup>3</sup> After discussion, the circuit court refrained from ordering further action.<sup>4</sup>

In light of the circuit court's determination that Andrew is incompetent at this stage of proceedings, there are limited options available. The options have been outlined in *State v. Debra A.E.*, 188 Wis.2d 111, 523 N.W.2d 727 (1994):

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<sup>2</sup> It should be noted that the Defendant "fired" counsel during a private conversation at the Dane County Jail after the circuit court had ordered him evaluated for competency. Counsel informed the circuit court of this event at the hearing on the Defendant's competency but, as counsel had been appointed by this Court and the examiner's report had already been produced, the circuit court took no action concerning the Defendant's desire to fire counsel.

<sup>3</sup> The examiner opined that the Defendant could be treated to competency so as to be able assist counsel in representation. But if Andrew were competent, he would not be entitled to representation: He would have to petition this Court on his own. *See* Wis. Stat. § 809.32(3). Nonetheless, if the examiner opined that Andrew would be incompetent even with the assistance of counsel, it follows that he would be incompetent without the assistance of counsel. Counsel confirmed as much with the evaluator after reading the report, and represented the same to the circuit court.

<sup>4</sup> There was some discussion as to the extent that the circuit court was to act in this matter: Undersigned counsel urged that because this Court retained jurisdiction, that the circuit court ought only to make a finding on the Defendant's competency and leave the remedy to this Court.

This Court could order the appointment of a guardian to perform the functions required of the Defendant; this Court could simply note that the Defendant is not currently competent, and allow him to pursue an appeal in the future.<sup>5</sup>

Ordering the appointment of a guardian would likely be fruitless. As revealed by the record, Andrew does have a good potential guardian in the person of his adoptive mother. However, while she may be able to perform the function of deciding whether to petition this Court for review of the Court of Appeals no-merit decision, she would be ill-equipped to fulfill the duties required by §§ 809.62(2) and (4). Alternatively, appointment of another attorney would either have the same result as undersigned counsel's appointment (a determination that the case has no merit), or—if the attorney is in disagreement with both undersigned counsel and the Court of Appeals—at best be a third opinion on whether the case has arguable merit. It would have little utility because the Defendant would still be incompetent, and if he ever attains competence would likely present different issues or the same issues differently, and ought to have the opportunity to do so.

Finally, this court can just take notice of the Defendant's incompetency, order that the time for filing a petition is tolled while the Defendant is incompetent, and consider a petition should he ever attain competency. Doing so may require an order of this court, lest it lose jurisdiction to consider a future

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<sup>5</sup> Perhaps because of their affinity for competency-to-stand-trial determinations, the examiner suggested and the circuit court discussed whether the Defendant could be treated to competency. However, such an order would have no basis in law at this stage of the proceedings.

petition. See *First Wis. Nat'l Bank v. Nicholaou*, 87 Wis. 2d 360, 362, 274 N.W.2d 704, 705 (1979). This Court seemed to opine in *Debra A.E.* that an appeal under Wis. Stat. § 974.06 would be sufficient should a defendant attain competency after the time for a direct appeal has ended.<sup>6</sup> Undersigned counsel respectfully submits that if this Court does not preserve the Defendant's right to this final step in a *direct* appeal, important collateral rights will be lost as well.

For example, a Defendant's opportunity to pursue federal habeas relief will be lost soon after his opportunity for direct appeal ends. The Anti-Terrorism and Effective Death Penalty Act (AEDPA) imposes a one-year statute of limitations running from the date on which a judgment becomes final by the conclusion of direct review or the expiration of the time for seeking such review. 28 U.S.C. § 2244(d)(1). *Debra A.E.* was decided in 1994, before the stringent rules of AEDPA were effected in 1996. The 7th Circuit made clear in *Graham v. Borgen*, 483 F. 3d 475 (7th Cir. 2007) that appeals under Wis. Stat. § 974.06 are not "direct appeals," and the one-year limitation is not tolled by them. In fact, under *Graham*, the time for filing a habeas petition may well run before an appeal is ever filed. While incompetency may provide grounds for equitable tolling in such a case (*See Davis*

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<sup>6</sup> "The defendants argue that because an incompetent defendant, upon regaining competency, is limited to sec. 974.06 and habeas corpus relief, such a defendant may lose the right to litigate on direct appeal under sec. 809.30 nonconstitutional issues which could not be raised because of incompetency. We understand the defendants' concern. However, defendants have not been able to identify a nonconstitutional issue that cannot be raised on direct appeal due to a defendant's incompetency. Absent even a hypothetical to illustrate this contention, this court cannot decide what steps, if any, would be necessary to protect such a defendant's right to appeal on nonconstitutional grounds." *State v. Debra A. E.*, 188 Wis. 2d 111, 136, 523 N.W.2d 727, 736 (1994).

*v. Humphreys*, 747 F.3d 497(7th Cir. 2014)), as this Court noted in *Debra A.E.*, retrospectively determining a defendant's competency can prove difficult: Presumably this would be true for federal courts as well as state courts.

This Supplemental Statement is being provided pursuant to this Court's December 2, 2015 Order. Also pursuant to that Order, the circuit court determined that Andrew is not competent to exercise his right to file a statement in support of a petition for review complying with the requirements of §§ 809.62(2) and (4). Undersigned counsel respectfully suggests that this Court order that the time for filing a Petition for Review to this Court is tolled due to the Defendant's incompetency. Undersigned counsel welcomes further briefing if this Court would find it useful.

Dated: May 25, 2016.

Respectfully submitted,



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