STATE OF WISCONSIN

WISCONSIN SUPREME COURT

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STATE OF WISCONSIN,

Respondent,

vs. Case No. 2007AP157-CRNM

MARCO TORRES,

Petitioner.

Petition for Review

Marco Torres
Petitioner, Pro Se

Green Bay Correctional Institution
P.O. Box 19033
Green Bay, WI 54307-9033

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I, Marco Torres, appellant, state on oath under penalty of perjury, have placed an enveloped addressed, Clerk of Court, Wisconsin Supreme Court, P.O. Box 1688, Madison, WI 53701-1688, with the proper postage affixed to allow for first class delivery via USPS, in the mail receptacle at the Green Bay Correctional Institution, 2833 Riverside Drive, Green Bay, WI 54307-9033 on this date of April 30, 2008. This institution does not maintain a separate mailing system for legal mail. The envelope contained the following item(s):

Petition for Review
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Certificate of Service

Dated this 30 day of April, 2008.

Marco Torres

Marco Torres
Appellant, Pro Se

Green Bay Correctional Institution
P.O. Box 19033
Green Bay, WI 54307-9033

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ISSUES PRESENTED FOR REVIEW

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1. Whether trial counsel, knowing his client was mentally challenged as documented by receipt of SSI payments, family member interviews, as well as his own observations was obligated to refute the State's findings in the competency hearing.

2. Whether appellate counsel was required to raise the issue of trial counsel failure to challenge the State's competency findings through a postconviction motion.

3. Whether trial counsel was required to introduced the defendant's mental limitations at the Miranda-Goodchild hearing, challenging the waiver of the Miranda warnings as not being knowingly waived.

4. Whether the trial court erred in not considering the defendant's limited mental abilities in its sentence.

CRITERIA FOR REVIEW

Special and important reasons are presented which justify Supreme Court review of this matter.

The failure of appellate counsel to preserve a constitutional issue during postconviction proceedings is reasonable to remand the issue(s) to the trial court in order to establish the record and allow the appellate court to properly review the issues presented.

The appellate court's reliance on an incomplete record fails in the preservation of the appellant's due process rights protected under the United States 14th Amendment and the right to effective assistance of counsel as protected under the 6th Amendment.

The aforementioned issues represent a real and significant question of federal and state constitutional laws as presented for review, specifically in the determination of a person's competency to stand trial, the review of the effectiveness of both trial and appellate counsel. An issue protected by both the State of Wisconsin and United States constitutions.

This petition meets the requirements for criteria for review pursuant to §809.62(1), being there exists a real question and violation of a protected constitutional right.

STATEMENT OF THE CASE

On November 1, 2004, a criminal complaint was filed charging Torres with first degree reckless homicide while armed in the October 26, 2004, shooting death of Eric Bryant (3). Torres was bound over for trial following a preliminary hearing on November 8, 2004, at which the state produced certified records of portions of the court files in Milwaukee County case Nos. 94CF001844 and 04CF005166 demonstrating that at the time of this offense Torres was a convicted felon and was also on bail for a felony offense (38:15-17).

Defense counsel advised the court on December 14, 2004, that there was reason to doubt his client's competency. (39:23) The court suspended the proceedings and ordered Torres to be evaluated for competency. (30:3,11) Dr. Smail evaluated Torres and authored a report finding him competent (12). When neither the defense nor the state challenged the report, the court found Torres competent to proceed and reinstated the proceedings (40:2-3).

On May 6, 2005, having previously provided the defense with notice that it intended to do so, the state amended the charges from first degree reckless homicide while armed to first degree intentional homicide while armed, bail jumping, and possession of a firearm by a felon. (43:3,13) Torres personally waived his right to a jury trial on the bail jumping and possession of a firearm by a felon charges (48:3-5) and proceeded to jury trial before the Honorable

Jeffrey A. Wagner on the charge of first degree intentional homicide while armed (48). The jury found Torres guilty of the less included offense of first degree reckless homicide while armed (23) and the court found him guilty of the remaining charges. (53:89)

The following sentences were imposed on March 30, 2006:

First degree reckless homicide while armed, 40 years, 35 years initial incarceration and 5 years extended supervision, concurrent to sentence being served;

Felony bail jumping, 3 years, 1 year initial incarceration and 2 years extended supervision, concurrent to count one; and

Possession of a firearm by a felon, 10 years, 5 years initial incarceration and 5 years extended supervision, consecutive to count one.

A No Merit Notice of Appeal was filed with the trial court on January 11, 2007 (35).

The appellate court granted Torres' in an order dated February 20, 2008, the ability to file a response to the No Merit Report filed by counsel, beyond the time allowed pursuant to Wis. Stat. § 809.62.

Torres, on March 10, 2008, filed a response to counsel's no merit report, requesting the review of two additional issues, those being the effectiveness of trial counsel during competency and suppression proceedings, neither of which were argued in the no merit report. Torres, requested both issues be remanded to the trial court for fact finding

proceedings required by appellate court rules. (see Cappon v. O'Day, 165 Wis. 486, 490-91, 162 N.W. 655 (1917)).

Appellate counsel notified the appellate court that it was not necessary to file a reply to Torres' response.

On April 4, 2008, without all issues preserved through postconviction proceedings the appellate court for the 4th district affirmed counsel's opinion of there being no merit.

On April 21, 2008, Torres filed a motion for reconsideration with the appellate court, which remains pending at the time of this petition.

Torres now petitions the Wisconsin Supreme Court for review pursuant to Wis. Stat. § 808.10.

STATEMENT OF FACTS

Torres, represented by trial counsel, requested a competency hearing due to serious concerns as to Torres' ability to assist in his defense, the record shows the following exchange between trial counsel and the court:

> Mr. Rosen: I met with my client last week I believe it was or the week before and attempted to discuss the case with him, and I found that his mind works in tangents. He doesn't seem to be able to focus. I wasn't able to communicate with him. He didn't comprehend what was going on. We were on different tracks. I immediately got concerned about competency. I spoke with the mother in court, Lisa Baldwin. She confirmed he's been on SSI for issues with inability to comprehend. I don't know if it's organic or what it is, but there may be some issues of medical retardation.
>
> ...he can't assist me at this point in time. I feel in his defense there may be something there. (39:2-3)

This was reiterated in a letter to the trial court from counsel. (See App. 100)

The court granted a competency review, after which he was found to be competent by the court. (40:3-4)

The issue, of competency was not addressed by the defense, the party who questioned the competency of his client, Torres. Trial counsel failed to bring forth its own review by its own clinician, and never challenged the State's findings. (40:23) Trial counsel relied on a discussion with Torres as a basis to accept the State's findings, the same person who trial counsel considered to be mentally retarded, who's mind works in tangents and simply does not comprehend. Without any treatment or medication provided, trial counsel determined that Torres was not able to determine whether to accept the State's findings, that he was in fact competent to assist in his own defense. (40:2-3)

The trial court, who was left with no other evidence other than the State's expert, found Torres competent.

The appellate court reasoned, since Torres, waived the right to present evidence and accept the State's findings at the competency proceeding, there is no reason to question the competency of Torres. This decision was based on an incomplete record, there exists the question of why counsel both recommended and accepted the State's findings without scrutiny, the rational for Torres' request for remand to the trial court for further fact finding.

Torres filed a motion to suppress his statements made to police alleging in part that after being read his Miranda rights he requested an attorney but that his request was ignored as the police continued to question him about his case. (19) A hearing on the motion was held before Judge Karen Christenson on June 16, 2005, at which time the following testimony was received. (46)

Detectives Timothy Duffy and Terrence Gordon interviewed Torres on October 28, 2004, in an interview room on the fourth floor of the CIB. (46:4-5,77) Duffy advised Torres of his constitutional rights from a Department of Justice handout. (46:5-5) Torres appeared to pay attention, stated he understood them, and was willing to talk about why he was arrested. (46:7-8) The officers then obtained pedigree information from Torres and his statement that he had not been drinking or using drugs and had no medical or mental health concerns that needed to be addressed. (46:8-9)

The officers interviewed Torres in a question-and-answer type format for a period of time. (46:9) Torres never asked to speak with an attorney or refused to answer any questions. (46:10) Toward the end of the interview Duffy reduced Torres' statement to writing and read it back verbatim while Torres followed along. (46:11) Torres made a couple of corrections and then, after being told he did not have to sign, signed at the bottom acknowledging it was correct. (46:12,14-15) Torres was cooperative and no threats or promises were made to induce him to make the statement.

(46:16-17,78)

Torres was interviewed again on October 29, 2004, by Detective Michael Sykes and Louis Johnson. (46:24-25) Sykes advised Torres of his rights and he again indicated he understood them and was willing to answer questions without a lawyer. (46:27-28) During the ensuring five to six hour interview regarding the death of Eric Bryant, Torres never expressed confusion and seemed oriented to the conversation. (46:28-30) Torres never refused to answer any questions, asked for an attorney or asked to terminate the interview. (46:30-31) At first Torres denied any direct knowledge of the homicide. However after the officers explained he had been identified from photos by witnesses, he stated he wanted to tell the truth about what happened. (46:33,42)

His statement was written out and read to him, after which Torres made a few corrections and then signed it. (46:31-33,35-36) The officers never made any threats or promises to him. (46:33) He was never told he could only use the telephone if he gave them specific information, however at the end of the interview he was permitted to make a phone call. (46:38,46-46) He did not ask to make a call earlier. (46:46)

Torres acknowledged being interviewed by officers on October 28 and 29, 2004. (46:49) He declared that after being advised of his rights on the 28th he asked to make a phone call for a lawyer and was told he could not until after he wrote a statement and told them what they wanted

to hear. (46:50-51,56) He said the officers told him if he gave a statement they would let him get a phone call. (46:51) Torres maintained he asked to make a call every time they asked him a question. (46:65-66)

On the second day, Torres said he asked to make a phone call as soon as he was being taken to the interview room. (46:52) He again asked to make a phone call to his sister after he was read his rights. He said he repeatedly asked to call his sister so she could call him a lawyer. (46:54-55,71).

Torres testified that during the first interview the officers were yelling and cussing at him and the Black officer pulled out a knife, got in his face while he played with it, and told him he better tell them what they wanted to hear. (46:58-62,67-70)

In a rebuttal Detective Gordon denied having a knife in his possesion while he interviewed Torres on the 28th and specifically denied threatening him with one. (46:79,82) He also testified Torres never asked for a phone call to contact his sister so she could call and attorney for him and maintained he and Duffy never raised their voices with him. (46:79-81)

Detective Johnson similarly testified that during the interview he and Sykes conducted with Torres he never requested an attorney or asked to call his sister so she could call a lawyer for him. (46:86) According to him, it was only at the end of the interview that Torres asked

to make a phone call so he could call his sister. (46:87) However he never said anything about a lawyer. (46:87)

At about 5:45 p.m. on October 26, 2004, officers were dispatched to a shooting in the area of 3100 block of N. Buffum Street. (49:23-24) Upon arrival they observed a large crowd around the porch at 3219 N. Buffum. Individuals reported someone had been shot and the officers observed a victim, identified, as Eric Bryant, lying face down on the porch. It was obvious he had been shot. (49:25)

Mr. Bryant was taken by ambulance to Froedtert Hospital where he was pronounced dead. (49:27-29) The cause of death was exsanguination caused by a gunshot wound to the back. (51:7) A bullet was recovered during unsuccessful surgical treatment at the hospital and turned over to police. (50:3;51:6)

Three witnesses identified Torres as the person who shot Bryant. Muriel Robinson, was in the process of moving into an apartment at 3157 N. Buffum and was just getting into a car with three friends when her attention was drawn to 3-5 people standing in the front yard of her new apartment building. (50:4-7) She recognized one as "Little John", whom she identified as Torres, someone she had seen numerous times before in the neighborhood and with whom she had a business relationship. (50:8-9,31-32,38) As the people were talking in a circle she saw one guy turn to run, and then saw sparks from a gun and the man get shot and fall. Little John was the person who fired the gun. (50:11-12,21).

The victim then got up and ran down the street while Torres ran towards Burleigh. As she and her friends drove away, she saw Torres enter a house on Holton. (50:12-14) When she returned to the area she saw where the victim came to lie, down the street, and gave her name and telephone to a uniformed officer to call her about what she had seen. (50:13-15) She later talked to detectives and identified a photograph of Torres. (15)

Keriyante Watson was walking with his cousin back from the store to his grandmother's house on Buffum when he saw a shooting happen. (50:39-41) He identified Torres as a person he knew as Marco and said he saw Marco the night of the shooting pull a gun and shoot at someone. (50:41-43,49) The man he was shooting at ran down the street and fell on the porch while Marco ran through some yards. (50:42-43) Keriyante went to his grandmother's house and was interviewed by police the next day. (50:43-44) He picked out a picture of Torres as the shooter. (50:44)

Keriyante's cousin, Terrance Fletcher, also witnessed the shooting as they were walking along the street. (50:52) Terrance identified Torres as someone he knew as Marco and said Marco was one of the people he saw in the group that night and the person he saw holding a gun and then shoot another guy. (50:53-56) The man who was shot ran down the street hollering and limping and then fell down on a porch calling "mamma". (50:56-57) Detectives interviewed him a day or two later. He told them what had happened,

that Marco was the shooter and picked out a picture of Marco. (50:57-58)

Torres was arrested on October 28, 2004, and interviewed by Detectives Michael Sykes and Louis Johnson on October 29, 2004, (51:8-10) He initially told them he was not present at the time of the shooting but then indicated he wanted to tell the truth about what happened. (51:14) Torres then gave them a statement in which he stated Eric Bryant had confronted him in the alley one night and robbed him of $200-300 in cash. After this robbery Torres purchased a black semi-automatic handgun as he didn't want to be robbed anymore. On the day of the shooting he saw Bryant talking to someone he knew. This was the first time he had seen Bryant since the robbery. When he asked Bryant why he had robbed him, Bryant began acting "big and bad" and Torres pulled the gun and swung it in his right hand from waist level, trying to hit Bryant in the head. However, Bryant turned away to avoid being hit and Torres heard and felt a discharge and realized he had shot Bryant in the back. He they ran and threw the gun into a garbage cart in an alley. (51:20-24)

Kim Fannini testified on behalf of Torres and stated on the evening of October 26, 2004, she was driving in an alley near Buffum when a man ran by with a gun in his hand and almost hit the corner of her car. (51:44-46) She described the man as about six feet tall with a slim build and having some facial hair, a little mustache or goatee.

He was wearing a black hooded sweatshirt, blue sweatshirt, blue jeans and white tennis shoes. (51:46-47) She did not know the person. (51:49) She knew from her son, who knows Torres, how he appears. (51:47) She also heard about the shooting from her son. (51:48-49).

At the request of the prosecutor the jury was instructed on the lesser included offenses of first and second degree reckless homicide while armed as well as on first degree intentional homicide while armed. (52:3-12) The jury found Torres guilty of first degree reckless homicide while armed. (23)

Following the return of the jury verdict the court found Torres guilty of the remaining charged offenses based upon the testimony heard at trial and the certified copies of the judgment of the conviction and bail bond admitted into evidence. (51:42-43;53:8-9)

On March 30, 2006, the court sentenced Torres as outlined above. The Honorable Judge Wagner began his sentencing comments by noting Torres had been convicted of the homicide offense and that there was a significant amount of evidence to support the verdict. (54:17) He went on to consider the seriousness of the offense as he commented it was a horrific offense as Torres sought out the victim while he was carrying a gun he knew should not have as he was a convicted felon and someone out on bail on a drug case, and then shot the victim in the back. (54:17) Judge Wagner stated he could not bring the victim back and that

the objectives of the sentence were to punish Torres, to deter Torres and others from carrying guns and shooting people and to protect the community. (54:18)

The court considered Torres' prior record, his failure to complete school, little work history, and involvement in drugs and guns for a significant period of his recent past. (54:19) The court also noted Torres' remorse, repentance, and cooperativeness, which the court found to be minimal. (54:20) Judge Wagner specifically stated he believed the sentences recommended by the presentence writer were inadequate given the risk Torres posed to the community, his prior history, and the violence of the offense, and believed it was obviously a prison case calling for a substantial period of incarceration was necessary. (54:19-20)

ARGUMENT

Whether trial counsel, knowing his client was mentally challenged as documented by receipt of SSI payments, family member interviews, as well as his own observations was obligated to refute the State's findings in the competency hearing.

Torres, for the sake of brevity, relies on the standards and meaning of effective assistance of counsel outlined in both Strickland v. Washington, 104 S.Ct. 2052 (1984), and State v. Pitsche, 369 N.W.2d 711, when discussing the deficient performance of both trial and appellate counsel

and the prejudices which resulted from same deficiencies.

Torres argues trial counsel was ineffective, in not pursuing trial counsel's own concerns in the matte of Torres' competency. Trial counsel's was not prepared to address the issue of competency, as evidenced by not hiring an expert witness to complete their own review of Torres, but relied solely on the State findings. When the State found Torres competent, trial counsel, had nothing to offer in the way of fact, i.e. expert testimony, SSI documents etc, any of which would have supported trial counsel's concerns that in fact Torres was incompetent to assist him with the defense.

Trial counsel enhanced the defense's deficits, through the recommendation to Torres'; again the person counsel believes is incompetent, to accept the State's findings as correct, and not defend the matter openly. It was through this recommendation, which the appellate court relies on in its decision to accept appellate counsel's no merit report. Torres, at age 18, being mentally challenged, accepts trial counsel's direction to accept the State findings as being logical course of action by a defendant.

The appellate court recognizes the fact there is no record on the matter as to what trial counsel recommended to Torres, nor why trial counsel failed to have a defense witness available to challenge the State findings. App. 200. The lone fact, that there existed no plan regardless of whether Torres did nor did not accept the State's

findings, gives credence to why Torres accept the State findings without argument. Trial counsel simply had no defense to present, no by virtue of there being no supporting facts for the defense, but the defense was not prepared.

The appellate court was unable to access trial counsel strategy or readiness in this matter since appellate counsel did not file a postconviction motion on the matter nor did the appellate court remand for fact finding.

Torres argues, counsel has the obligation to provide an argument and expert testimony of the concern counsel outlined in his request for a competency hearing request, more specifically, with the information readily available to him. This information would have provided defense counsel to make the adversarial testing process work. State v. Marty, 137 N.W. 2d at 361.

"The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. Kimmelman v. Morrison, 477 U.S. 365, 384 (1986) citing Strickland, 466 U.S. at 689. Is it reasonable for any trial counsel not to have had an expert witness report on the competency of his client prior to a competency hearing? Is it not prudent to have an argument challenging the competency of his clients with available evidence? The expectation to be prepared for a competency hearing is reasonable for any situation.

The only factor which may have effected trial counsel's

lack of preparation would have been his client's refusal to be found incompetent, or simply was direct by his client to drop the matter. The appellate court found this may have been the case, and as stated in State v. Wanta, 592 N.W.2d 645 (Ct. App. 1999), the defendant may assert competency has a fundamental liberty interest in avoiding commitment. Unfortunately, there is nothing on the record to reflect, Torres' desires in this matter, and to be assume such a possibility existed, in turn ending an appellant's appeal without a fact finding hearing to establish Torres' intent, clearly infringes on his right to due process and effective assistance of counsel.

To be clear, Torres, does not, has not, made any statement to any person including trial or appellate counsel that he wish to be found competent. Torres accepted the State's findings of competency due to trial counsel's recommendation along with having no prepared defense due to trial counsel's failure to procure expert testimony, SSI files etc.

To assert Torres waived his right to argue against the State's findings, leads to the questions of making such a waiver in a knowingly manner. Torres contends he did not, could not since trial counsel did not prepare an argument against the State's findings. In turn, the appellate court's reliance on his verbal acceptance of the State's findings of competency should be deemed insufficient to determine the violation of Torres' due process and right

to effective assistance of counsel claims.

Whether appellate counsel was required to raise the issue of trial counsel failure to challenge the State's competency findings through a postconviction motion.

The appellate court referred to the failure of the appellate counsel to file a postconviction motions on the two issues; failure of trial counsel to argue against the State's findings of competency, and to challenge the statements of Torres, since Torres could not knowingly waive his Miranda rights due to mental illness. With no postconviction motion filed, the appellate court was without a record on the matter.

To compound the issue, the appellate court did not remand the matter to the trial court and released appellate counsel from her duties, ending Torres' rights to appeal.

As a general rule the appellate court will not hear an issue for the first time. "The reason is plain, If the question had been raised below, the situation might have been met by the opposite party by way of amendment or of additional proof. In such circumstances, therefore, for the appellate court to take up and decide on an incomplete record questions raised before it for the first time would in many instances at least, result in great injustice, and for that reason appellate courts ordinarily decline to review questions raised for the first time in the appellate court." Cappon v. O'Day, 162 N.W. 655 (1917)).

It can be argued, the no merit report review distinguishes it self from appellate proceedings, the manner in which the appellate court reviews issues should not be viewed differently. If an issue requires fact finding to be determined the matter should be remanded, yet in this case, the matter was not remanded but merely "rationalized" by the court.

These two issues, which were not presented to the trial court for review or fact finding, which exist no record or fact to assist the court in their review, were decided by nothing more than assumptions. These two issues, to to allow for due process, required the appellate court to remand to the trial court for fact finding and the establishment of the record.

Whether trial counsel was required to introduce the defendant's mental limitations at the Miranda-Goodchild hearing, challenging the waiver of the Miranda warnings as not being knowingly waived.

The trial counsel challenged the statements made to police during interrogation by Torres, based on two primary arguments. The first being, Torres requested counsel, in turn the interrogation should have ended. The second argument was the police coerced and threatened Torres, verbally and with a knife. The trial court determined the police detectives version was more reliable and allowed the statement to be utilized by the prosecution.

The question raised is whether trial counsel was obligated to raise the issue of mental illness when

challenging the admission of Torres statement. Obviously, it can be argued it was a strategic maneuver, which is permitted. Strickland, 466 U.S. at 688.

The question of voluntariness of a defendant's statement to police involves the application of constitutional principles to historical facts. State v. Hoppe, 2003 WI 43 ¶ 34. While an appellate court gives deference to a circuit court's findings regarding the factual circumstances regarding the statements, the application of the constitutional principles to those facts is subject to de novo independent appellate review. Id; State v. Hindsley, 2000 WI App. 130, ¶37. Unfortunately, the trial court had not made a ruling as to the effect of Torres' mental illness had on the waiver of his Miranda rights.

The question of whether Torres mental illness plays a significant role in determining the voluntariness of a statement made by a defendant.

At a suppression hearing, the State has the burden of proving the voluntariness of a statement by a preponderance of the evidence. State v. Rewolinski, 464 N.W.2d 401, 207 (1990) When the State seeks to admit statements made during custodial questioning, it must make two separate showings: (1) that the suspect was informed of his Miranda rights, and understood them and knowingly waived such; (2) that the statement was voluntary. State v. Hindsley, 2000 WI App. 130, ¶21. Although the trial court ruled on the statement made by Torres, the issue of

mental illness and its effects on his ability to waive his Miranda rights was not determined.

Trial counsel failed to address this issue at the suppression hearing. The fact, trial counsel questioned Torres' competency, required trial counsel to review any impact these mental challenges posed to Torres in waiving his Miranda, rights. At a minium, an assessment by a mental health professional of the circumstances in which Torres waived his Miranda rights and the effect his mental illness may have had on his decision to waive those rights. When determining voluntariness, courts examine the totality of the circumstances surrounding the defendant's statement, weighing the defendant's personal characteristics and mental state against pressures that the police imposed upon the defendant to induce responses to the questioning. State v. Albrech, 401 N.W.2d 776 (1994), citing State v. Clappes, 401 N.W. 2d 759, 766 (1987). The personal characteristics and the mental state of Torres at the time of questioning is in question, which Torres submits trial counsel must have challenged at the time of the suppression hearing but was not.

The impact of Torres' mental state has direct impact on the ability to waive his right to waive his Miranda rights. If Torres' mental state was so deficient to allow for him to make a decision to waive his constitutionally protected right without knowing the nature of the right he was surrendering.

The appellate court reasoned in its decision, counsel had no basis to argue at the suppression hearing that Torres' mental state rendered an otherwise valid Miranda waiver unknowing. App. 200 The appellate court utilized the same explanation as to why trial counsel was not obligated to provide an argument against the State's findings in the competency hearing. Yet, Torres challenges that argument, demonstrating that level of competency at the time of interrogation can in fact be different than at a later time in court proceedings.

To be specific, the level of competence required to "knowingly" waive a constitutional right is, as it should be higher than that of assisting counsel with a defense, the difference is further heightened by the impact of decisions in each situation. For example, during legal proceedings, counsel is available to assist the defendant, which requires a certain level of competency, while during interrogation, the defendant is alone, in turn can only depend upon him or herself requiring a vastly higher level of competency to make a knowing decision such as the one required of all defendants, to waive their Miranda rights or not.

Whether the trial court erred in not considering the defendant's limited mental abilities in its sentence.

Torres, agrees with the standard for review of a sentence as outlines in State v Gallion, 2004 WI 42 ¶¶39-47, 678 N.W.2d 197, yet Torres believes his mental illness

is to be considered as part of the sentence since it has ramification on both his character and educational background. The court did not mention his mental health challenges and as provided by the record. Trial counsel never discussed the matter in his sentence ramification, and since Torres did not have access to the PSI for the purpose of this appeal, it can only be assumed it was not discussed therein.

There is no argument that the court must outline the rational for his sentence and the sentencing factors. The issue here is the lack of consideration in providing such a sentence without bringing any weight to the challenges Torres faced with the mental challenges. Further, there is no doubt his mental health issues played a role in the crimes convicted. The State findings on Torres' competency clearly provides a picture of a young man who lacks problems solving skills, holds incoherent thought processes, and is challenged with various other deficits which provide a window of explanation into why this crime was committed.

Judge Wagner, clearly placed a great deal of weight on Torres' flagrant violation of the law while on bail for another crime, yet, the court is unwilling to review possible reasons for such law breaking.

More importantly, is Judge Wagner's emphasis and weight given to the lack of remorse by Torres, it is inconceivable that you can make demands of and have expectations of a person who is incapable of offering what you seek. In this

case, Torres, is being punished for the lack of display of remorse, a feeling which is foreign to Torres not because he chooses not to have such a feeling but because he does not have such feelings to display due to his mental health issues.

It is difficult to speculate why the court did not consider the mental health history of Torres, yet, several assumption appear to be worth bringing to light. As discussed infra, the judge who heard the competency hearing was the Honorable Karen Christenson, this hearing provided an important perspective on the deficits of Torres' mental health, albeit he was found to be competent, the court was able to learn a great deal as to Torres' abilities and thinking. The Honorable Jeffery Wagner, did not participate in any discussions surrounding Torres' mental health concerns throughout the proceedings, in turn, Judge Wagner would have had to seek out the record produced in the State findings of competency to have such insight. There is no statement that he had done so.

The second possibility is trial counsel failed to argue the impact of Torres' mental health issues on the crime as well as the sentencing factors. Trial counsel was obligated to make the court aware of the issues which may have impacted the crime, he did not.

It is clear the mental health issues of a defendant plays a major role in the sentencing of the defendant. All the courts, including the United States Supreme court

have determined the mental health of a person in the commission of a crime is a valid factor in sentencing the defendant.

The four issues presented herein, clearly require the attention of this court to protect Torres' constitutional right to due process and effective assistance of counsel. It is not enough to merely "side step" issues if the record does not illuminate the facts surrounding the issue, the record must be built allowing the appellate court and any other court to thoroughly review the issue(s) presented before it.

CONCLUSION

Marco Torres, petitioner, respectfully requests this court grant review on the issue(s) presented within. These issues, as outlined, clearly demonstrate a violation of Torres' constitutional rights to effective assistance of both trial and appellate counsel as well as due process. Torres strongly believes, the manner in which the review of his appeal has been greatly deminshished to nothing more than a cursory glimpse of the record without the need to explore the absence of information or establishment of the record surrounding the issues presented.

Although the Court of Appeals, acknowledges such a fact, it fails to consider the potential information developed by the fact finding process which would allow them to clearly affirm or remand the trial court's decision. Yet, as it stands today, the dismissal of Torres' appellate rights based on an incomplete record, fails to grant Torres his right to due process.

Therefore, it is requested this court grant review, or at a minimum remand the matter to the appellate court for further action.

Dated this 30th day of April, 2008

Marco Torres

Marco Torres
Petitioner, Pro Se

Green Bay Correctional Institution
P.O. Box 19033
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CERTIFICATION

Marco Torres, petitioner, pro se certifies the attached petition for review with the Wisconsin Supreme Court, meets the established rules pursuant to §809.62, as to length, typeset, content, and filing.

Dated this 30th day of April, 2008

Marco Torres

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