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identified by Wissing immediately after the accident. Thus, the trial court was not incorrect in finding that the cervical spine condition was caused by the January 2007 accident, as there was credible evidence supporting this factual determination. We recognize that Walgreen introduced expert opinion to contradict Wissing's expert's opinion, but our task is not to choose between competing and conflicting expert testimony. See *Swanson v. Park Place Automotive*, 267 Neb. 133, 672 N.W.2d 405 (2003) (where record presents nothing more than conflicting medical testimony, appellate court will not substitute its judgment for that of compensation court).

CONCLUSION

Accepting the findings of fact made by the trial court judge, as they are not clearly wrong, we determine that the court did not err in finding that the latent and progressive exception applied in this instance to toll the statute of limitations, and therefore, Walgreen was liable for past and future medical expenses for the treatment of Wissing's cervical spine and right shoulder. Further, the trial court did not err in determining that the cervical spine condition was caused by the accident, a factual determination supported by the evidence.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JAMES GRIFFIN, APPELLANT.
823 N.W.2d 471

Filed November 27, 2012. Nos. A-11-1084, A-11-1085.

1. **Mental Competency.** Concerning the issue of competency of the defendant, it is the trial court's responsibility to assess and make a determination concerning competency when the issue is brought to the court's attention.
2. **Mental Competency: Attorney and Client.** Attorneys have a duty, when a question of a client's competency arises, to ensure that the client is competent or to bring to the attention of the court that there is a question of the client's competency.
3. **Mental Competency: Convictions: Sentences: Due Process.** Issues of competency of criminal defendants to be convicted and sentenced implicate fundamental and long-established due process principles.

4. **Mental Competency: Convictions: Due Process.** The conviction of an accused person while he or she is legally incompetent violates the constitutional guarantee of substantive due process.
5. **Mental Competency: Trial: Waiver.** A criminal defendant's assertions of competency cannot be dispositive because it is contradictory to argue that a defendant may be incompetent and yet knowingly or intelligently waive his or her right to have the court determine his or her capacity to stand trial.
6. **Mental Competency.** If facts are brought to the attention of the court which raise doubts about the competency of the defendant, the question of competency should be determined at that time.
7. **Mental Competency: Convictions: Due Process.** A conviction of a mentally incompetent accused is a violation of substantive due process.
8. **Mental Competency: Trial: Due Process.** Due process requires that a hearing be held whenever there is evidence that raises a sufficient doubt about the mental competency of an accused to stand trial.
9. **Mental Competency: Sentences: Attorney and Client.** Counsel's suggestion to a court that a defendant be evaluated, counsel's numerous suggestions to the court that counsel's interactions with the defendant suggested a competency or mental illness problem, and the defendant's statement to the court are sufficient to at least create a doubt about the defendant's competence to be sentenced.
10. **Mental Competency: Due Process: Notice.** When competency becomes an issue, due process requires that a defendant be afforded notice a hearing will be held and that the defendant receive a full, fair, and adequate hearing.
11. **Mental Competency: Sentences.** Included within the direction for a new sentencing hearing should be the question whether the defendant is competent to be sentenced at the time of that proceeding.

Appeal from the District Court for Douglas County: W. RUSSELL BOWIE III, Judge. Sentences vacated, and cases remanded for further proceedings.

Michael J. Wilson, of Schaefer Shapiro, L.L.P., for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

IRWIN, PIRTLE, and RIEDMANN, Judges.

IRWIN, Judge.

I. INTRODUCTION

James Griffin appeals an order of the district court for Douglas County, Nebraska, denying his application for post-conviction relief without conducting an evidentiary hearing in these two consolidated cases. We find that the record

demonstrates that a reasonable doubt concerning Griffin's competency to be sentenced was raised to the trial court at the time of Griffin's sentencing and that the trial court failed to comport with due process in addressing the matter. As such, we vacate Griffin's sentences and remand for further proceedings.

II. BACKGROUND

In 2005, Griffin was charged in separate dockets with burglary and first degree sexual assault. The two charges were consolidated at trial and remain consolidated in our discussion. Griffin entered pleas of no contest to the two charges and was ultimately sentenced to 5 to 10 years' imprisonment on the burglary conviction and 25 to 40 years' imprisonment on the first degree sexual assault conviction, to be served consecutively.

Prior to entry of pleas, Griffin's counsel had scheduled a competency evaluation, but Griffin refused to attend. At the time of his plea, Griffin represented to the court that he did not want to be evaluated and that his mind was clear. At the time of sentencing, Griffin's counsel expressed a concern about Griffin's competency and suggested the court consider having Griffin evaluated prior to sentencing. Griffin's counsel indicated that he had observed a number of behaviors and statements by Griffin suggesting that he "proceeds in and out of reality" and that the presentence investigation report appeared to be based on an assumption that Griffin had been evaluated, even though he had not been evaluated. The court denied the request and proceeded to sentence Griffin.

Griffin filed direct appeals from the convictions and sentences, in cases Nos. A-05-1245 and A-05-1246, and asserted on appeal that the district court had abused its discretion in imposing excessive sentences. Griffin was represented by the same counsel on appeal as at trial. This court summarily affirmed Griffin's convictions and sentences.

On June 6, 2011, Griffin filed motions for postconviction relief in both cases. Griffin asserted that he had received ineffective assistance of trial counsel. Griffin alleged that his trial counsel had been ineffective in a variety of particulars,

including by failing to ensure that Griffin was fully evaluated as to his mental competency to enter pleas in the two cases. Griffin made factual assertions that he had not attended the first mental evaluation scheduled by counsel, but that he had intended to attend a second evaluation, that another inmate had instead attended the second evaluation, and that counsel did not do anything when Griffin informed counsel what had happened. Griffin also alleged that he suffered from paranoid schizophrenia, was treated by prescription medication, was being housed in the mental health unit at the correctional facility, and had been untreated at the time of his offenses and pleas. Griffin alleged that there was a reasonable probability he would have been found incompetent to enter pleas and that his pleas were involuntary.

Griffin requested an evidentiary hearing on his postconviction requests. The State sought dismissal of the postconviction requests without an evidentiary hearing.

On November 29, 2011, the district court entered an order denying the requests for postconviction relief and denying the requests for an evidentiary hearing. In addition to finding no merit to Griffin's other claims of ineffective assistance of counsel, the court found that Griffin's claims concerning his mental competency did not merit an evidentiary hearing. In that regard, the court noted that Griffin had informed the court at the time of his pleas that he had never been treated for a mental illness and did not then suffer from a mental or emotional disability, that Griffin had indicated he did not want to be evaluated and was thinking clearly, and that he never sought to withdraw his pleas. The court held that it had "reviewed the entire record in this matter, and being fully advised, [found] that the records and files affirmatively show that [Griffin] is entitled to no relief on [his] allegations."

These appeals followed.

III. ASSIGNMENT OF ERROR

Griffin's sole assignment of error is that the district court erred in dismissing his requests for postconviction relief without granting an evidentiary hearing concerning Griffin's claims about his competency to enter pleas and be sentenced.

IV. ANALYSIS

Griffin argues that the district court erred in denying him postconviction relief without an evidentiary hearing because he raised sufficient allegations to demonstrate that the trial court had been made aware of facts which raised doubts about his competency and the trial court failed to sufficiently determine the question of his competency. We agree.

1. *State v. Johnson*

[1] We agree with Griffin that the procedural context of the present case is similar to that discussed in this court's decision in *State v. Johnson*, 4 Neb. App. 776, 551 N.W.2d 742 (1996), concerning the issue of competency of the defendant and the trial court's responsibility to assess and make a determination concerning competency when the issue is brought to the court's attention. In that case, Darrell Johnson appealed from the district court's denial of postconviction relief after holding an evidentiary hearing. Johnson had been convicted upon a plea to a charge of incest. In his postconviction pleading, Johnson raised issues related to the effectiveness of his trial counsel concerning counsel's advice and conduct related to questions about Johnson's competency at the time of the plea and sentencing.

In *State v. Johnson*, the evidence demonstrated that Johnson and his counsel had discussed his competency several times before the entry of his plea, but that Johnson had not wanted to raise the issue to the trial court. Nonetheless, a doctor did perform an evaluation which included a determination concerning Johnson's competency. The doctor authored a written report prior to the plea hearing, in which report the doctor diagnosed Johnson as suffering from posttraumatic stress disorder and dissociative disorder, with paranoia. The doctor's report also included descriptions of some of Johnson's symptoms and actions that had led the doctor to his conclusions. The doctor specifically questioned Johnson's ability to confer coherently and raised questions about Johnson's ability to assist in his own defense. The doctor opined that Johnson was not competent to stand trial.

At the plea hearing, the court questioned Johnson about the issue of his competency. The court asked Johnson if he felt he was competent to stand trial and enter a plea, and Johnson answered affirmatively. Johnson then made statements admitting that "'Darrell Johnson'" had committed the offense, acknowledging that he was "'Darrell Johnson,'" but indicating that he "'wasn't [t]here'" and did not have independent recollection of the events taking place. *State v. Johnson*, 4 Neb. App. at 780, 551 N.W.2d at 747. The court found him competent, accepted his plea, and convicted him.

At Johnson's initial sentencing hearing, his counsel requested a diagnostic evaluation prior to sentencing. His counsel noted that there were additional concerns about Johnson's mental or psychiatric problems raised in the presentence investigation report. The court granted the request and ordered an evaluation. That evaluation resulted in a report indicating that Johnson was "'confused and potentially dangerous.'" *Id.* at 781, 551 N.W.2d at 748. At the subsequent sentencing hearing, the court received the report and also heard testimony from Johnson. In his testimony, Johnson made what we described as "a lengthy, obviously disjointed, and mostly nonsensical statement" concerning former military service and prisoner status, despite there being no record he had actually been in the military. *Id.*

Despite the medical reports questioning Johnson's competency, his own testimony suggesting breaks with reality, and his counsel's expressed concerns about Johnson's competency, the court proceeded to sentence Johnson. Johnson did not file a direct appeal, but brought a postconviction action. At the conclusion of an evidentiary hearing where all of the foregoing was presented and discussed, the court denied postconviction relief.

[2] On appeal, we recognized that Johnson's postconviction claim was that his trial counsel had been ineffective in failing to properly advise him concerning the "'defense'" that he was not competent to stand trial. *State v. Johnson*, 4 Neb. App. 776, 783, 551 N.W.2d 742, 749 (1996). We noted that attorneys do have a duty, when a question of a client's competency arises,

to ensure that the client is competent or to bring to the attention of the court that there is a question of the client's competency. See *State v. Johnson, supra*. We concluded that because Johnson's trial counsel had sought and obtained evaluations of Johnson and had brought to the court's attention the issue of Johnson's competency, the record failed to demonstrate that counsel had been ineffective. *Id*.

[3-5] Despite finding no merit to the ineffective assistance of counsel issue raised by Johnson, we also recognized that issues of competency of criminal defendants to be convicted and sentenced implicate fundamental and long-established due process principles. See *id*. The conviction of an accused person while he or she is legally incompetent violates the constitutional guarantee of substantive due process. *Id*. See, also, *Pate v. Robinson*, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). Moreover, a criminal defendant's assertions of competency cannot be dispositive because "'[i]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial.'" *State v. Johnson*, 4 Neb. App. at 786-87, 551 N.W.2d at 750, quoting *Pate v. Robinson, supra*.

[6-8] We noted that if facts are brought to the attention of the court which raise doubts about the competency of the defendant, the question of competency should be determined at that time. See *State v. Johnson, supra*. We recognized that two fundamental constitutional principles are implicated in such a situation. The first is that a conviction of a mentally incompetent accused is a violation of substantive due process, and the second is that due process requires that a hearing be held whenever there is evidence that raises a sufficient doubt about the mental competency of an accused to stand trial. *Id*.

On the facts of *State v. Johnson*, we concluded that the trial court's admission of the psychiatrist's report, the questioning of Johnson and his counsel, and the court's observations of Johnson in court at the time of Johnson's plea constituted a competency hearing. We concluded, however, that the hearing did not comport with fundamental due process because Johnson had not received advance notice that the issue would

be heard and because the court's reliance on Johnson's own representations of competency was not sufficient to overcome the uncontroverted psychiatric report. *Id*. We also noted that the additional information made available to the trial court at the time of sentencing further strongly suggested that Johnson was not competent. *Id*. We concluded that at the time of sentencing, the trial court had before it evidence which compelled a conclusion that there was reasonable doubt about Johnson's competency sufficient to require another competency hearing. *State v. Johnson*, 4 Neb. App. 776, 551 N.W.2d 742 (1996).

We noted that if the threshold level of doubt concerning the competency of a criminal defendant is reached at any time while criminal proceedings are pending, the matter of competency must be settled before further steps are taken. *Id*. Thus, the issue of competency was raised to the trial court and required resolution both at the time of Johnson's plea and at the time of Johnson's sentencing. See *id*.

We also specifically recognized that the issue of competency is not one that can be considered waived or procedurally barred by a defendant's failure to raise the issue on direct appeal. *Id*. We specifically concluded that postconviction relief was not precluded on the basis of a defendant's failure to have raised the issue in a direct appeal. *Id*. Thus, although we did not find merit to Johnson's assertion of ineffective assistance of counsel, we did find plain error in the trial court's failure to comport with due process in properly resolving the issue of competency when the issue was presented to the court. We found that the district court erred in denying postconviction relief. *Id*.

2. *State v. Dunkin*

We note that the Nebraska Supreme Court recently addressed another case wherein a defendant sought postconviction relief by alleging, in part, that his counsel had been ineffective for failing to request a mental health or competency examination to determine whether he understood the effect of plea proceedings. See *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012). In *State v. Dunkin*, there was nothing in the record

from Robert J. Dunkin's plea hearing to reflect that he was incompetent; there was no indication to raise a sufficient doubt about his competency to trigger the need for a competency hearing. Moreover, in seeking postconviction relief, Dunkin argued that a competency hearing "'would have seemed prudent, *even though nothing may have come of it*.'" *Id.* at 47, 807 N.W.2d at 757. The Supreme Court concluded that Dunkin failed to establish ineffective assistance of counsel, and the court did not analyze the case or record as posing any due process issues.

Despite the State's assertion to the contrary, we do not find *State v. Dunkin* instructive to our analysis in the present case. As noted, the Supreme Court did not suggest that any due process concerns were even raised, and the court's analysis suggests that the record of Dunkin's plea contained no evidence to suggest that there was any reason for the court to have doubted his competency at the time of his plea.

3. Present Case

In the present case, we conclude that the record demonstrates that there was not sufficient reasonable doubt raised to the trial court to raise a question about Griffin's competency to enter pleas. However, there was sufficient reasonable doubt raised to the trial court to raise a question about Griffin's competency at the time of sentencing. We also conclude that the record demonstrates the trial court failed to comport with due process in resolving the competency issue at the time of sentencing and that Griffin's sentences must be vacated and the matter remanded for a new sentencing hearing.

There are a number of similarities between the present case and *State v. Johnson*, 4 Neb. App. 776, 551 N.W.2d 742 (1996), concerning the issue of competency and the trial court's being alerted to a question about the defendant's competency. First, we note that Griffin, like Johnson, has couched his assertions in the postconviction proceeding as being matters of ineffective assistance of counsel. Like *State v. Johnson*, it appears that counsel was not ineffective because counsel did seek to determine competency and did bring the matter to the attention of the trial court. Nonetheless, just as the manner in which

Johnson raised the competency issue did not preclude our finding of plain error and determination that Johnson was entitled to relief, the manner in which Griffin has raised the issue here does not resolve the question of whether his competency and the trial court's consideration of it entitle him to postconviction relief.

Next, we note that Griffin's counsel, like Johnson's counsel, brought to the court's attention that there was a potential issue concerning his client's competency, both at the time of the pleas and at the time of sentencing. Prior to the entry of Griffin's pleas, his counsel requested and received a court order to have Griffin evaluated. At the plea hearing, the court engaged in a colloquy with Griffin about his failure to attend the scheduled evaluation. Then, at the time of sentencing, Griffin's counsel indicated to the court that Griffin had engaged in behaviors and comments suggesting incompetency, indicated to the court that counsel's position was that Griffin suffered a mental illness and was not grounded in reality, and referred to specific incidents of behavior. Griffin's counsel suggested to the court that an evaluation of Griffin's competency was warranted.

As such, the district court was correct in concluding that the record does not demonstrate that Griffin's counsel was ineffective. As we noted in *State v. Johnson*, however, that determination is not dispositive. The issues concerning competency at the time of the pleas and sentencing implicate due process concerns, and if the record demonstrates that those due process concerns were not satisfied, there may be plain error entitling Griffin to postconviction relief.

Unlike *State v. Johnson*, however, we conclude that the record in the present case does not demonstrate the same level of clear incompetency at both the time of the pleas and sentencing. Where the trial court in *State v. Johnson* was presented with sufficient evidence to demand a hearing and determination of competency consistent with due process both at the time of the plea and at sentencing, the trial court in the present case was presented with differing indications of doubt about competency at each stage.

(a) Griffin's Pleas

We first conclude that the record does not demonstrate that the trial court was presented with sufficient evidence to create doubt about Griffin's competency to enter his pleas. At the time of his pleas, although a competency hearing had been requested, there was not otherwise sufficient indication on the record that the trial court should have had a doubt about Griffin's competency.

In *State v. Johnson*, 4 Neb. App. 776, 551 N.W.2d 742 (1996), Johnson had been evaluated by a psychiatrist prior to entry of his plea and the psychiatrist had authored a report concluding that Johnson was not competent. At the time of the plea, the trial court did conduct a hearing of sorts on Johnson's competency to enter his plea, by receiving psychiatric reports, questioning Johnson and his counsel, and making observations of Johnson. Johnson's answers to questions at the time of the plea indicated that while he acknowledged that "'Darrell Johnson'" had committed the offense and that he was, in fact, Darrell Johnson, he also represented to the court that he was not present when "'Darrell Johnson'" committed the offense and that he had no independent recollection of the offense. *Id.* at 780, 551 N.W.2d at 747. The results of the uncontroverted psychiatric report, as well as Johnson's own responses to court questions, were sufficient to raise doubts as to his competency, which triggered the due process requirements that Johnson receive notice and a full, fair, and adequate hearing on competency.

In the present case, the court was advised by Griffin that he had never been treated for a mental illness and did not then suffer from a mental or emotional disability. Griffin represented that he knew a request for an evaluation had been filed, but that he did not want to participate in such an evaluation. There was no other testimony, evidence, or other indication to the trial court that there was a reasonable question about Griffin's competency. Thus, unlike in *State v. Johnson* where the record demonstrated that the trial court failed to comport with due process at the time of Johnson's plea, the record in the present case does not demonstrate that the trial court

was presented with sufficient indicia to create a doubt about Griffin's competency at the time of his pleas.

(b) Griffin's Sentencing

We conclude that the record in the present case does contain sufficient indication that the trial court was presented with information sufficient to raise a doubt about Griffin's competency at the time of sentencing. Similarly to *State v. Johnson, supra*, the record in the present case demonstrates that the trial court failed to comport with due process in resolving the competency issue at the time of sentencing.

In *State v. Johnson*, the trial court also conducted a hearing of sorts on Johnson's competency to be sentenced. When Johnson's counsel requested another evaluation of his competency prior to sentencing, the trial court granted the motion, ordered a diagnostic evaluation, and continued the sentencing. The trial court was notified of a variety of information in the presentence investigation report suggesting psychiatric and mental problems. The diagnostic evaluation resulted in an evaluation report in which the evaluator concluded that Johnson was confused and potentially dangerous. In addition, at the subsequent sentencing hearing, Johnson presented what we characterized as "a lengthy, obviously disjointed, and mostly nonsensical statement" concerning service in the military, "being sent to Vietnam to search for POW's," and hypnotism. *State v. Johnson*, 4 Neb. App. 776, 781, 551 N.W.2d 742, 748 (1996). We concluded that this information was sufficient to create a doubt in the trial court concerning Johnson's competency and to trigger due process rights to notice and a full, fair, and adequate hearing.

The present case is similar, even if the evidence was not as overwhelming concerning the defendant's competency. At the time of Griffin's sentencing, his counsel raised concerns about competency and again requested an evaluation, but the court denied the request and never again mentioned Griffin's competency. Counsel indicated concerns about information in the presentence investigation report and personal observations that caused counsel "to believe [Griffin] proceed[ed] in and out of reality." Counsel indicated that Griffin had never been

evaluated for mental illness and indicated that it was counsel's position that Griffin did suffer from mental illness. Counsel indicated that Griffin's comments "are often not grounded in reality."

Counsel provided the court with examples of what counsel believed were irrational behaviors. Counsel recounted one specific incident where, in dealing with Griffin on an unrelated matter, Griffin "would get so irrational and insistent that [counsel] had to actually throw [Griffin] out of [counsel's] office at one time." Counsel also noted that Griffin had been removed from drug court "because of the way he was interacting with people at the drug court" and because "[t]hey felt uncomfortable around him." Counsel pointed to Griffin's responses to questioning in preparation of the presentence investigation report as confirming his view that Griffin was mentally ill.

Griffin also provided a statement in his own behalf. Griffin's statement was as follows:

> I can just say that I feel that the crimes that I committed concerning my neglecting the law and going about my own manner and how I lived in life. You know, we can come to a point where when we do come to jail we do talk to people and one another a lot more than we do in the house, and it feels a lot more comfortable. You know what I mean? Because you just can't talk to a total stranger that you never slept with. You know what I mean? You're riding a bike and on the bus stop, you know, things of that nature. But when we come to jail, we get together, kind of, sometimes, and the brothers sit down and play spades.
>
> It feels kind of good because you know what's going on with the next person beside you instead of just sitting by a total stranger at the bus stop. So we get along kind of good in jail. You know what I mean? But it's a different story in the house. People kind of, you know, come toward each other sometimes, you know. You don't go through that type of ordeal when you're in jail because it's like we're all brothers. You know what I mean? And we're trying — just trying to survive the whole thing.

> What we're here for, we still don't know. But life is good as we know it, and I respect it.

[9] The record of Griffin's sentencing certainly does not contain information as clearly suggesting a lack of competency as the evidence in the record at the time of sentencing in *State v. Johnson*. Nonetheless, we conclude that counsel's suggestion to the court that Griffin be evaluated, counsel's numerous suggestions to the court that counsel's interactions with Griffin suggested a competency or mental illness problem, and Griffin's statement to the court were sufficient to at least create a doubt about Griffin's competence to be sentenced.

[10] As we held in *State v. Johnson*, 4 Neb. App. 776, 787, 551 N.W.2d 742, 751 (1996), "[i]f facts are brought to the attention of the court which raise doubts as to the sanity of the defendant, the question of competency should be determined at that time." When competency becomes an issue, due process requires that the defendant be afforded notice a hearing will be held and that the defendant receive a full, fair, and adequate hearing. See *id*.

In the present case, the trial court at sentencing simply denied the request for Griffin to be evaluated and did not take any further action concerning Griffin's competency. The court did not provide any notice that the issue would be resolved, did not order or receive any evaluations, and did not even make a finding concerning Griffin's competency to be sentenced. The record in the present case demonstrates that because there was sufficient indication to raise adequate doubt about Griffin's competency, Griffin was denied due process when the court failed to provide notice and a full, fair, and adequate hearing.

(c) Resolution

In *State v. Johnson, supra*, we concluded that Johnson's due process rights were violated at the entry of his plea, as well as at the time of sentencing. We concluded that, consistent with Neb. Rev. Stat. § 29-3001 (Reissue 2008), the appropriate remedy was to reverse Johnson's conviction and remand for a new trial.

[11] In the present case, we conclude that Griffin's due process rights were not violated at the time of his pleas because there was not sufficient indication at that time to raise a sufficient doubt about his competency to trigger the trial court's obligation to provide notice and a hearing. We conclude, however, that there was a sufficient indication to trigger that obligation at the time of Griffin's sentencing. As such, we vacate Griffin's sentences and remand the matter to the district court with directions to conduct a new sentencing hearing. Included within the direction for a new sentencing hearing should be the question whether Griffin is competent to be sentenced at the time of that proceeding. See *State v. Johnson, supra*.

V. CONCLUSION

We find that the district court erred in denying postconviction relief. The record demonstrates that there was sufficient indication to create a sufficient doubt about Griffin's competency at the time of his sentencing and that the trial court failed to comport with due process in resolving the competency issue. We vacate the sentences and remand the matter for a new sentencing hearing consistent with this opinion.

SENTENCES VACATED, AND CASES REMANDED FOR FURTHER PROCEEDINGS.