

**STATE OF WISCONSIN
COURT OF APPEALS
District II
Case #2012AP002103-CR
Lower Court Case: #10 CF 527
Related Lower Court Case: #10 JV 107**

RECEIVED

05-08-2013

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff/Respondent,

- v. -

CODY G. PHILLIPS,

Defendant/Appellant.

**ON APPEAL FROM DECISIONS AND ORDERS OF THE RACINE
COUNTY CIRCUIT COURT DATED SEPTEMBER 12, 2012 AND OCTOBER
10, 2012, THE HONORABLE ALLAN TORHORST PRESIDING**

BRIEF AND APPENDIX OF DEFENDANT/APPELLANT

Submitted by:

DEBORAH J. STAHL

Attorney for Defendant/Appellant

4684 Murphy Court
Middleton, WI 53562
(608) 852-8569
State Bar No.: 1011261

TABLE OF CONTENTS

<u>TABLE OF AUTHORITIES</u>	iii
<u>STATEMENT ON ORAL ARGUMENT AND PUBLICATION</u>	v
<u>STATEMENT OF THE ISSUES</u>	v
 <u>COMBINED STATEMENT OF THE CASE AND STATEMENT OF FACTS</u>	 1
 <u>ARGUMENT</u>	 10
<u>I. INTRODUCTION</u>	10
<u>II. THE TRIAL COURT LACKED AUTHORITY TO VACATE, AFFIRM OR MODIFY THE WAIVER ORDER ISSUED BY THE JUVENILE COURT</u>	11
<u>III. THE TRIAL COURT ERRED BY CONCLUDING THAT THE JUVENILE COURT COULD NOT FURTHER ACT</u>	13
<u>IV. THE TRIAL COURT ERRED AS A MATTER OF LAW BY TREATING THE WAIVER ORDER AS DIVISIBLE</u>	16
<u>A. The State Chose To File A Two-Count Petition Because It Was To Its Advantage To Do So</u>	17
<u>B. The Waiver Procedure Considers the Matter as a Whole, Not Each Count Separately</u>	18
<u>C. Allowing Separate Consideration Of Counts At A Waiver Hearing Violates Common Sense</u> ..	24

V.	<u>THE TRIAL COURT’S “AFFIRMANCE” OF THE WAIVER ON COUNT 2 SHOULD BE VACATED ON THE MERITS..</u>	27
VI.	<u>THE ERROR WAS FAR FROM HARMLESS.....</u>	33
VII.	<u>THIS COURT SHOULD REMAND TO JUVENILE COURT FOR FURTHER PROCEEDINGS.....</u>	39
	<u>CONCLUSION.</u>	40
	<u>CERTIFICATION.....</u>	42

APPENDIX

	APPENDIX CERTIFICATION.....	A-I
APPENDIX 1:	JUVENILE COURT DELINQUENCY PETITION.	A-1
APPENDIX 2:	JUVENILE COURT PETITION FOR WAIVER.....	A-2
APPENDIX 3:	JUVENILE COURT WAIVER ORDER.....	A-3
APPENDIX 4:	DECISION AND ORDER.....	A-5
APPENDIX 5:	DECISION AND ORDER DENYING MOTION FOR RECONSIDERATION.	A-6

TABLE OF AUTHORITIES

Wisconsin Cases

<i>In the Interest of P.A.K.</i> 119 Wis. 2d 871, 350 N.W.2d 677 (1984).	18
<i>In the Interest of T.M.J.</i> 110 Wis. 2d 7, 327 N.W.2d 198 (Ct. App. 1982).	35, 36
<i>In the Interest of T.R.B.</i> 109 Wis. 2d 179, 325 N.W.2d 329 (1982).	18, 19, 20
<i>In Interest of T.R.B.</i> 105 Wis. 2d 405, 313 N.W.2d 850 (Ct. App. 1981) <i>affirmed</i> 109 Wis. 2d 179, 325 N.W.2d 329 (1982).	20
<i>In the Interest of Vairin M.</i> 255 Wis. 2d 137, 157, 647 N.W.2d 208, 217 (2002).	12, 15
<i>State v. Aufderhaar</i> 283 Wis. 2d 336, 700 N.W.2d 4 (2005).	14, 15, 16
<i>State v. Clausen</i> 105 Wis.2d 231, 239, 313 N.W.2d 819, 823 (1982).	23, 24
<i>State v. Machner</i> 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).	8
<i>State v. Travis</i> (2013 WI 38, Case #2011AP685-Release date: May 2, 2013).	27, 28, 29
<i>State v. Woods</i> 173 Wis. 2d 129, 496 N.W.2d 144 (Ct. App. 1992).	26

Non-Wisconsin Cases

Kent v. United States

383 U.S. 541; 86 S. Ct. 1045, 1055; 16 L. Ed. 2d 84, (1966). 28

Wisconsin Statutory Provisions

Chapter 938.	21
§938.01(1).	43
§938.01(2)(d).	44
§938.01(2)(f).	44
§938.12.	12
§938.12(1).	42-43
§938.18	12
§938.18(1).	23
§938.18(1)(a).	2, 3, 21
§938.18(1)(b).	2, 3, 21
§938.18(1)©.	2, 3
§938.18(4).	8
§938.18(4)(a).	18, 19, 20, 22
§938.18(4)(b).	33
§938.18(4)©.	20
§938.18(5).	33
§938.18(5)(a).	33
§938.18(5)(am).	33
§938.18(5)(b).	30, 32, 33
§938.18(5)©.	33
§938.18(5)(d).	33
§938.18(6).	23
§938.355(1).	25
§948.02(1)©.	1
§948.02(2).	2
§970.03(10).	22
§970.035.	20, 21, 22

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument may be helpful. Publication is warranted as the case presents one of first impression.

STATEMENT OF THE ISSUES

The following issues are presented in this appeal:

Issue #1 Did the trial court have the authority to declare a juvenile court waiver order illegal, instead of remanding the matter to the juvenile court for such a determination?

Trial court answered “**Yes.**”
Defendant/Appellant disagrees.

Issue #2 Did the trial court have the authority to uphold a juvenile court waiver order when legitimate challenges to its validity were raised, instead of remanding the matter to the juvenile court for such a determination?

Trial court answered “**Yes.**”
Defendant/Appellant disagrees.

Issue #3 Did the trial court properly refuse to remand to juvenile court for further juvenile court proceedings because the juvenile court lacked jurisdiction to conduct such further proceedings upon remand?

Trial court answered “**Yes.**”
Defendant/Appellant disagrees.

Issue #4 Should the juvenile court have denied the waiver petition because one of the two counts was not waivable?

Neither the trial court nor the juvenile court addressed.
Defendant/Appellant supports a “Yes” answer.

Issue #5 Was the defect in the waiver proceedings harmless?

Neither the trial court nor the juvenile court addressed.
Defendant/Appellant supports a “No” answer.

Issue #6 What is the proper remedy for the defect in the waiver proceedings?

Neither the trial court nor the juvenile court addressed.
Defendant/Appellant proposes that the matter be remanded to the juvenile court where the defect occurred.

COMBINED STATEMENT OF THE CASE **AND STATEMENT OF FACTS**

This appeal largely presents a procedural challenge; thus, the facts are inextricably intertwined with the procedural history of the case. Accordingly, a combined Statement of the Case and Statement of Facts is warranted. The following paragraphs set forth the relevant procedural and factual history in this case:

1. On March 8, 2010, Defendant/Appellant Cody Phillips (hereafter referred to as “Cody”) was charged in a two count delinquency petition, Case No. 10 JV 107 in Racine County Juvenile Court [Appendix I].¹ The state simultaneously filed a petition for waiver of juvenile court jurisdiction [Appendix II].
2. With regard to the first count in the delinquency petition [Appendix I]:
 - a. Count 1 alleged a violation of §948.02(1)©, *Wis. Stats.* (first degree sexual assault of a child under age 16 by use or threat of force or violence), a

¹ As this Brief was being finalized, it was noted that several critical documents were not part of the appellate record, namely the juvenile court delinquency petition, the juvenile court waiver petition, and the juvenile court waiver order. Presumably, these were not included in the appellate record because they were only filed in the juvenile court case (Racine County Case #10 JV 107) rather than in the adult case which followed (Racine County Case #10 CF 527). The appellate record does contain the transcripts of the waiver hearing in the juvenile case. With the consent of AAG Sally Wellman, and in an effort to avoid the delay that would ensue with the filing of a motion to supplement the record and the filing of a supplemental return, the 3 documents are included in Appellant’s Appendix. If necessary, a formal motion to supplement the record will be submitted.

Class B felony.

- b. The charging portion of the petition alleged an offense date of either the fall of 2007 or 2008. Cody's birth date is February 18, 1994; thus, Cody would have been under 15 years of age even on the latest date that the offense was alleged to have occurred.
- c. The state utilized the mandatory waiver form to request waiver of Cody [Appendix II].² This form requires the state to check one of 3 boxes, with each box corresponding to one of the 3 statutory conditions for waiver.³ Here, the state asserted that Cody was age 15 or older when Count 1 was committed. (§938.18(1)(c), *Wis. Stats.* establishes age 15 or older as one of the statutory conditions on which waiver can be premised).

3. With regard to Count 2 in the delinquency petition [Appendix I]:

- a. The second count alleged a violation of §948.02(2), *Wis. Stats.* (second degree sexual assault of a child under 16 years of age), a Class C felony.
- b. The alleged date of offense was March 2, 2010, when Cody would have been two weeks past his 16th birthday.
- c. The offense alleged in Count 2 was unrelated to the offense alleged in Count 1, as the petition

² Form JD-1722, Petition for Waiver of Jurisdiction.

³ *See.*, §938.18(1)(a), (b) and © , *Wis. Stats.*

alleged a different victim, a different location, and an offense date that was years after Count 1 allegedly occurred.

- d. As it did for Count 1 (but here, correctly), the state asserted that Cody was subject to waiver because he was age 15 or older when the offense alleged in Count 2 was committed. [Appendix II]

- 4. Attorney Janice Pasaba was appointed to represent Cody [R:56]. She did not challenge the authority of the juvenile court to waive Cody even though it was clear that Cody could not have been 15 years of age or older in Count 1 – as the petition for waiver alleged. She stipulated to a finding of prosecutive merit at the beginning of the proceedings, raising no concern regarding Cody’s age at the time of the alleged offense in Count 1 [R:56;5-6]. Thus, the juvenile court conducted a waiver hearing unaware that the state had falsely alleged that Count 1 was committed after Cody became age 15.⁴
- 5. During the waiver hearing, the state argued in favor of waiver by vehemently emphasizing the seriousness of Count 1. It argued that the mere fact that there were *two* counts caused heightened concern regarding the dangerousness of the juvenile and the need for community protection. Additionally, because Count 1 was significantly more serious (not only was it first degree sexual assault instead of second degree sexual assault, it was the only count that alleged the use of a dangerous weapon and a threat to the victim’s life), the state emphasized Count 1 more than it did Count 2 to support waiver. Specific examples of the prosecutor’s argument include the following, with the bolded phrases pertaining to Count 1 only:

⁴ On Count 1, Cody did not meet the criteria for waiver as provided in §938.18(1) (a) or (b), as well as failing to meet the criterion named by the state, found in subsection (c).

*So in addition to the disparity in height and weight, **the use of a weapon and his words with his intent auger toward the seriousness of this offense but he doesn't learn from that incident.** A year later he goes on to victimize another girl.*⁵
[R:58;5-6]

*When we move on to the prong that the Court has to consider regarding the type and seriousness of offense, this crime was obviously against a person. But this is really the sticking point for the state, it wasn't just one victim that Cody has been charged with but two victims. And those victims both had offenses committed against them with the use of force. **The first victim Kelsey had a knife held at her throat⁶ and it's alleged that Cody indicated quote if you don't give me a blow job I'll kill you, close quote.*** [R:58;5]

6. Judge Marik agreed, adopting both arguments [R:58]: first, that the alleged facts supporting Count 1 contributed significantly to considerations of seriousness and dangerousness, and second, that waiver was justified because of the implication of more than one offense under the Court's consideration for waiver. The juvenile court emphasized the offenses in plural each time it considered the seriousness of Cody's conduct and the need for

⁵ The prosecutor argued that only 1 year separated the two offenses. But the allegations in the juvenile petition and subsequent complaint showed that the Count 1 offense occurred in 2007, two and half to three years earlier than the Count 2 offense.

⁶ Interestingly, nowhere in these entire proceedings (including the delinquency petition [Appendix I], the criminal complaint [R:1], the preliminary hearing transcript [R:41], the information [R:2], the pre-sentence investigation [R:13], or the sentencing transcript [R:48], was there ever an allegation that a knife was held to the victim's throat. It is a mystery where the prosecutor obtained this "fact," and a mystery why Cody's juvenile defense counsel failed to object.

public protection. The court particularly emphasized the allegations supporting Count 1 (bolding added) [R:58;32-33]:

*So the **offenses** are of a type and seriousness that are extremely, extremely aggravated. Based upon the allegations **they** were committed in a violent and aggressive manner involving the use of physical violence and restraint, **and the use of a weapon and threat of killing the victim. There's nothing here to suggest that they were spur of the moment. There's suggestions here that they were premeditated in that the first count is alleged to have been prepared for by his having a knife with him and encountering this young lady out in a public area when no one else was around.....** So that criteria [seriousness] is one that weighs extremely, extremely heavily in favor of waiver of jurisdiction and is entitled to significant weight.*

7. Finally, the juvenile court stated (bolding added) [R:58;43-44]:

*We have **two** extremely serious violent offenses alleged with a significant passage of time between them. Based on the nature of the **offenses, based on the number of offenses** and based upon the time parameters that we're talking about here it is the Court's belief that if in fact there is an adjudication of guilt on **these offenses** that there will be significant emphasis that will need to be placed on protection of the public and the community on a long term basis.*

8. The juvenile court waived Cody into adult court on April 14th, 2010. [Appendix 3]

9. On April 15, 2010, the very next day, a criminal complaint [R:1] was filed by the state in adult court. It alleged the same two counts. Count 1 (which never should have been waived) alleged that Cody faced a minimum mandatory 25 year prison sentence if convicted.
10. According to the post-conviction motion, Cody filed a notice of intent to seek relief from the juvenile court waiver order [R:30;7, ¶1]. However, his adult court counsel, Attorney Patrick Cafferty, also failed to notice that Cody was too young at the time of the offense alleged in Count 1 of the petition to have been waived into adult court, and advised the court on April 28, 2010 that Cody was abandoning his intent to seek interlocutory relief from the waiver order [R:30; 7 ¶4].
11. Instead of pursuing appellate relief from the waiver order, Attorney Cafferty proceeded to defend the adult criminal case. Following a preliminary hearing, Attorney Cafferty filed a motion to sever the two counts [R:6], but later withdrew it allegedly based on the state's position that if he pursued it, the state would refuse to negotiate any plea bargain that removed the 25 year minimum mandatory prison sentence on Count 1.⁷
12. Thereafter, with Cody desperate to avoid the 25 year minimum mandatory prison term tied to Count 1, a plea agreement was reached. The plea agreement that was placed on the record [R:46] and thereafter approved by the circuit court [R:46] was as follows:
 - a. Count 1 was amended from first to second degree

⁷ Since no hearing was held on Cody's claim of ineffective assistance of counsel, no evidentiary record of this discussion exists. However, this factual allegation was made in the post-conviction motion filed in March, 2012 [R30; 8 ¶9], resulting in the state's eventual concession.

sexual assault of a child (the same charge levied in Count 2, and thereby eliminating the minimum mandatory 25 year prison term.)

- b. Cody pled no contest to both Count 1 (as amended) and Count 2.

13. Following a contested sentencing hearing, Cody was sentenced to a combined prison term of 10 years, 6 years on Count 1 and 4 years consecutively on Count 2 [R:16]. He was also placed on extended supervision and required to register as a sex offender [R:16]

14. Appellate counsel was then appointed, a motion for post conviction relief was filed on March 19, 2012 [R:30] and supplemented on June 28, 2012 [R:31]. The motion alleged ineffective assistance by Cody's juvenile and his adult defense attorneys. Two major errors were alleged:

- a. First Cody asserted that his trial attorneys failed to notice and challenge the false jurisdictional allegation in the waiver petition providing that Cody was age 15 years or older at the time that the offense in Count 1 was allegedly committed (described *infra* and conceded by the state).
- b. Second, Cody asserted that he was not properly subject to the 25 year minimum mandatory prison sentence as stated in the adult criminal proceedings, because the mandatory term by statute applied to defendants age 18 and over at the time of the offense, and he was under age 18 at the time of the alleged offense. He stated that his entry into the plea agreement was based on the belief that the mandatory penalty applied to him, and on his goal of avoiding the mandatory prison

term, being advised of its imposition if he exercised his rights to a jury trial and did not prevail. Additionally, he stated he experienced a great deal of pressure as to the mandatory sentence hanging over his head. (Cody was just sixteen years old when he was trying to decide to accept a plea agreement, all to avoid a mandatory 25 year prison sentence that only applied to defendants who were 18 at the time of the offense). Therefore the plea agreement was invalid, and based upon inaccurate information.

15. Following several delays (none at Cody's initiative), and several days after the deadline established by the trial court for the state to respond with its legal position [R:52;8], the Racine County District Attorney's Office filed a three page memo with the trial court late in the day on August 27, 2012 [R:32]. The state agreed that Cody was improperly waived into adult court, noting, however, that this concession applied to Count 1 only. The state believed that Cody was properly waived on Count 2. The state conceded that the mandatory penalty provision from the adult proceedings was inapplicable to Cody, agreed that avoiding the penalty provision motivated Cody's entry into the plea agreement, and agreed that Cody should be able to withdraw his pleas on both counts.
16. As a result of the state's concessions, no *Machner*-type hearing (*State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979)) was conducted into the allegations of ineffective assistance of counsel. This was deemed unnecessary by the circuit court since relief was being granted regardless, via the parties' stipulation.
17. Finally, at the September 10th, 2012 hearing [R:53;8-10, 25] and again in writing on September 12, 2012, the circuit court set

aside the judgment of conviction and vacated the pleas and sentences on both counts. In a written Decision and Order [R:33; Appendix 5], the court's ruling was multifaceted:

- a. First, the circuit court held that the waiver on Count 1 was improper and ruled that "*the State will have to determine its next appropriate action as to Count 1.*" [R:33;3] Notably, the order did not remand the matter back to the juvenile court.
- b. The circuit court went on to hold that the waiver on Count 2 was and continued to be legal [R:33;4].
- c. The order stated that as to Count 2, if Cody had still been under 18 years of age, then the matter should be returned to the juvenile court for further proceedings because that was the point where the defect occurred. However, the circuit court ruled that since Cody had by now reached age 18, the juvenile court had no jurisdiction to do anything so Count 2 must remain in the adult court. [R:33;4]
- d. Cody requested reconsideration of various points of the order [R:34] but that request was denied [R:38; Appendix 6].

18. Cody promptly filed a petition for leave to appeal a non-final order [R:35], which this Court granted.

Further facts necessary to Cody's argument are set forth in the following sections of this Brief.

ARGUMENT

I. INTRODUCTION

Both sides agreed in the trial court proceedings that a serious error was committed in the juvenile court waiver proceeding. Waiver was sought and obtained on a delinquency petition that contained two charges, one allegation (Count 1) to have occurred when Cody was too young to be subject to waiver, with all parties operating under the false assertion that Count 1 was properly before the juvenile court for waiver. Both sides also agreed in the trial court proceedings that Cody's pleas to both counts in adult court were invalid because they were significantly influenced by the perceived threat of a mandatory minimum 25 year prison sentence upon conviction of Count 1. It was conceded that this mandatory minimum sentence was inapplicable to Cody due to his age; of course, it was also inapplicable because Cody's age at the time of the alleged offense precluded waiver.

The parties disagreed about what should happen in light of the defective waiver proceedings where the juvenile court considered a two-count delinquency petition that was not a proper petition for waiver consideration due to the fact that one count was not subject to waiver. Cody asked that the trial court remand jurisdiction to the juvenile court that issued the illegal waiver order so that the juvenile court could consider what relief was appropriate, while the state argued that the trial court should "affirm" the waiver on Count 2 and continue with the adult court proceedings, and allow the state to file the charge from Count 1 as a new criminal proceeding.

The trial court ruled that Cody's waiver on Count 1 was illegal [33:3].

The trial court further ruled that Count 2 was and continued to be legal [33:4]. Oddly, the trial court stated that if Cody was under age 18, the matter should be returned to the juvenile court because that is the point where the defect occurred. However, the trial court observed that since Cody was now over age 18, jurisdiction should remain in adult court (with regard to Count 2).

In the following sections, Cody will show that the trial court lacked authority to uphold, affirm, vacate or modify the waiver order. Further, Cody will show that the trial court erred in concluding that the juvenile court could not act due to his current age 18 status. Finally, Cody will show that he should be permitted to seek relief from the juvenile court due to the defective waiver proceedings. Generally speaking, the errors asserted are matters of law, which are reviewed *de novo* by the appellate courts.

II. THE ADULT COURT LACKED AUTHORITY TO VACATE, AFFIRM OR MODIFY THE WAIVER ORDER ISSUED BY THE JUVENILE COURT.

The juvenile court is co-equal with adult court. Both are presided over by circuit court judges. No statute authorizes one circuit court to overrule the other circuit court. An attempt by one judge to change another judge's order is improper, as it fails to recognize this co-equality of authority. Moreover, a risk is created that there will be two inconsistent, even contradictory, court orders in effect, each entitled to enforcement.

This general proposition has been expressly applied to juvenile waiver proceedings. In *In the Interest of Vairin M.*, 255 Wis. 2d 137, 157, 647

N.W.2d 208, 217 (2002), the Wisconsin Supreme Court discussed the adult criminal court's absolute lack of authority to modify a juvenile court ruling, stating:

*We note initially two means of review⁸ that are not applicable after the criminal court assumes exclusive jurisdiction. First, **the criminal court may not reconsider the juvenile court's decision to waive the juvenile into criminal court.** As Chief Justice Dixon stated in 1868, "The impropriety, I might say the utter absurdity, of applying to one court to restrain, modify or correct the orders or decrees of another court of co-ordinate jurisdiction, is also apparent. I think it is wholly inadmissible to do so." [Citations omitted, bolding added].*

When one court is granted exclusive jurisdiction over the subject matter (here, the Racine County Juvenile Court had exclusive jurisdiction over the issue of Cody's waiver pursuant to §938.12 and §938.18), it is even less acceptable that a court without such jurisdiction attempt to modify the order of the court with proper jurisdiction. An adult trial court has no jurisdiction over juvenile waiver proceedings, yet the trial court in Cody's case apparently believed that it was nonetheless proper to decide whether the waiver order was or was not valid in light of the legal defect established by Cody. Similarly, the trial court denied Cody's motion for reconsideration of its order, merely reiterating that Count 1 of the juvenile waiver order was invalid and that Count

⁸ The Court's discussion of the second means of review mentioned in this paragraph is inapplicable to Cody's case and is therefore omitted.

2 of the waiver order was valid. Neither the September 12, 2012 decision [R:33] nor the October 10, 2012 decision [R:38] provided any explanation for why the trial court believed that it had the right to pass muster on the waiver order, nor did the state present the trial court with any authority that would justify the trial court's review of the waiver order. However, it is clear that the trial judge was aware of the issue because it had been vigorously presented by Cody.⁹

In sum, the trial court erroneously reviewed the juvenile court order that waived Cody into adult court. Only the court that issued the order, or an appellate court, has such authority. The trial court's decision that Count 1 was improperly waived and that Count 2 was validly waived are both *ultra vires* and void.

III. THE TRIAL COURT ERRED BY CONCLUDING THAT THE JUVENILE COURT COULD NOT FURTHER ACT.

The apparent basis for the trial court's decision to deny Cody's request for remand to juvenile court and to instead keep the case in adult court is its belief that the juvenile court no longer had any power to act because Cody was over 18 years of age. This conclusion is simply wrong. In *State v. Aufderhaar*, 283 Wis. 2d 336, 700 N.W.2d 4 (2005), the Wisconsin Supreme

⁹ The defense challenged the trial court's authority to reconsider the waiver order on multiple occasions. At the hearing on September 10, 2012 [R:53] and again in the motion for reconsideration [R:34], Cody maintained that the trial court lacked authority to review the waiver order.

Court addressed a situation procedurally similar to ours: a juvenile was waived into adult court and then challenged a defect that occurred in the juvenile proceedings. The waiver was ineffective. The Wisconsin Supreme Court, after ordering the adult proceedings dismissed (because adult court jurisdiction depended upon a valid waiver from juvenile court) remanded the case back to the juvenile court, stating at 283 Wis.2d at 356 (700 N.W.2d at 15):

[B]ecause the juvenile proceeding commenced before Aufderhaar turned seventeen years old, the proceeding should be returned to the point at which the ... defect occurred.

In *Aufderhaar*, the juvenile was 15 years old when he was charged in juvenile court in 2001. The commencement of the charge in juvenile court conferred jurisdiction upon it. When the Wisconsin Supreme Court remanded the case back to juvenile court on July 7, 2005, Aufderhaar was almost 20 years old. Yet, remand to juvenile court *was* ordered by the Wisconsin Supreme Court. Obviously, the Wisconsin Supreme Court would *not* have remanded the case to a court that lacked jurisdiction to conduct any further proceedings. Juvenile court jurisdiction existed in *Aufderhaar* because Aufderhaar was a juvenile when “*the juvenile proceeding **commenced.***” [Bolding added.] Because the case was commenced in juvenile court and because the defect occurred during juvenile court proceedings, the proper remand was to juvenile court.

Cody’s circumstances are highly analogous to those in *Aufderhaar*:

- In both cases, the action commenced in juvenile

court with the filing of a delinquency petition;

- In both cases, the juvenile court waived its jurisdiction;
- In both cases, the adult criminal court assumed jurisdiction;
- In both cases, a defect occurred in the juvenile proceedings (in Cody's and in *Aufderhaar*, the defect was recognized at different stages of the respective proceedings; however, it is immaterial *when* the defect is recognized);
- In both cases, the juvenile was over the age of 18 at the time of remand.

The remand to juvenile court is available in Cody's case precisely as it was in *Aufderhaar*.

Aufderhaar's remand is consistent with the *Vairin* principle that one co-equal court cannot correct another co-equal court's errors, and is also consistent with the principle that juvenile court, not adult court, has exclusive jurisdiction over waiver proceedings. In Cody's case, Judge Torhorst clearly determined that there was a defect in the juvenile court proceedings, and seemed to believe that the case would properly be remanded to juvenile court had Cody still been a juvenile, writing: "[If Cody] *was now under age 18, the matter should be returned to the juvenile court at a point where the defect*

occurred.”¹⁰ [R:33;4] However, convinced that Cody’s age precluded any future juvenile court action, the judge added: “*Since [Cody] is over 18 at this time, it is appropriate his case in Count 2 remains in the adult court.*” [R:33;4]

In sum, the trial court believed that the juvenile court could not modify or reconsider its waiver order because Cody was over 18. Since this is exactly what was ordered in *Aufderhaar* by the Wisconsin Supreme Court for a defendant years older than Cody, the trial court’s view was erroneous as a matter of law. A trial court’s decision based on a misconstruction of law is an abuse of discretion and should be reversed.

IV. THE TRIAL COURT ERRED AS A MATTER OF LAW BY TREATING THE WAIVER ORDER AS DIVISIBLE.

The trial court ruled that the waiver on Count 1 was invalid and that the waiver on Count 2 was valid. In addition to lacking any authority to review the waiver order, the trial court erred in viewing and considering the waiver order as divisible between the two counts in the petition.

¹⁰ The trial court was rather inconsistent. First, it ruled that the waiver of Count 2 was valid, while later ruling that there was a defect in the juvenile proceedings that would justify a remand but for Cody’s age. Why the trial court thought that a remand was justified AND that the waiver on Count 2 was valid is unclear, but resolving the inconsistency is unnecessary since the trial judge lacked authority to validate or invalidate the waiver while having authority to remand to juvenile court.

**A. The State Chose To File A Two-Count
Petition Because It Was To Its
Advantage To Do So.**

The state filed a single, two-count delinquency petition. The state is in control of how it files petitions. The state is permitted to file charges in petitions that benefit its case. This was not a situation where the charges were related to a single course of conduct, where joinder was necessary. Rather, the filing of a single, two-count petition was a deliberate, strategic choice by the state, used to its advantage.¹¹ The two counts were emphasized repeatedly by the state as establishing a course of conduct and justifying waiver into adult court.

With the filing of the single, two-count delinquency petition, the state also filed a single petition for waiver, using the mandatory form. [Appendix II] The waiver petition alleged that Cody violated two statutes, both offenses allegedly after he had reached the age of 15 years. Again, this approach was to the state's advantage – it suggested a course of conduct and required the juvenile court to consider the seriousness of two offenses together in a single

¹¹ The state's response to the defense motion to sever the counts in the adult criminal proceedings supports the view of the state's strategy. Cody's adult criminal attorney sought severance of the two counts, as it would clearly be advantageous to the defense to have a court or jury consider the counts separately. The state sought the opposite. The state indicated it would end all plea negotiations if severance were pursued, revealing the state's motive of maintaining the same strategic advantage that had commenced with the filing of the two counts in one delinquency petition, which was to have the court at all times consider the two counts together.

hearing instead of each count being considered separately.

B. The Waiver Procedure Considers The Matter As A Whole, Not Each Count Separately.

When a waiver petition is filed, the juvenile court must first determine whether the delinquency petition has “prosecutive merit.” 938.18(4)(a), *Wis. Stats.*, provides:

The court shall determine whether the matter has prosecutive merit before proceeding to determine if it should waive jurisdiction. If the court determines that the matter does not have prosecutive merit, the court shall deny the petition for waiver.

“Prosecutive merit” involves two separate determinations. First, the juvenile court must find that there is authority for the waiver. (*In the Interest of P.A.K.*, 119 Wis. 2d 871, 350 N.W.2d 677 (1984). This can be based on the juvenile being age 15 at the time of the alleged offense, or being age 14 at the time of the offense if the offense is one of the offenses specified by statute, or if the juvenile is age 14 and the offense is alleged to be gang related. If the juvenile meets the offense/age requirement for waiver, the juvenile court then considers whether there is a sufficient showing within the petition itself that the juvenile probably committed the charged offense. *In the Interest of T.R.B.*, 109 Wis. 2d 179, 325 N.W.2d 329 (1982). The state may supplement the record regarding prosecutive merit but is not required to do so (and did not do so in Cody’s case). *Id.*

By express statutory command, if prosecutive merit is not found, waiver cannot be granted: *“If the court determines that the matter does not have prosecutive merit, the court **shall** deny the petition for waiver.”* §938.18(4)(a), *Wis. Stats.* [Bolding added.]

There is no reported case that addresses the present situation, namely a petition that contains one waivable and one non-waivable offense. There are two possibilities: either the juvenile court is permitted to waive the juvenile on the waivable offense and required to deny waiver on the non-waivable offense (interpreting the statute to mean that the court shall deny just a portion of the waiver petition for the part of the matter lacking prosecutive merit) or the juvenile court is permitted to waive the juvenile only when both charges have prosecutive merit, and where count one did not meet the statutory conditions to authorize waiver, then the court shall deny the petition for waiver – of the entire matter.

Cody contends that the juvenile court lacks the power to consider prosecutive merit separately for each count, for several reasons:

- First, §938.18(4)(a), *Wis. Stats.* (quoted above) refers to *“the matter”* rather than to *“the offenses.”* We know that the Legislature has the capability of expressing its intent that charges be considered separately. For example, in §970.03(10), *Wis. Stats.*, direction is giving to preliminary hearing judges: *“In multiple count complaints, the court shall order dismissed any count for which it finds there is no probable cause....”* No similar provision is found in waiver proceedings.

In *Interest of T.R.B.*, 105 Wis. 2d 405; 313 N.W.2d 850; (Ct. App. 1981) *affirmed*, *T.R.B.*, 109 Wis. 2d 179, 325 N.W.2d 329 (1982), the Court of Appeals used a comparison to the preliminary hearing statute exactly as Cody proposes here. It stated, at 105 Wis. 2d 411 (bolding added):

*The legislature had the power to allow the juvenile to waive his right to a waiver hearing as it did with preliminary hearings, but it did not choose to exercise it. **Since the legislature has demonstrated that it knows how to establish different provisions in a waiver proceeding when it desires**, the conclusion is that it did not intend to provide for waiver of the necessity to take some testimony in support of waiver.*¹²

-- Second, the language employed by the Legislature in §970.035, *Wis. Stats.* (captioned **Preliminary Examination: Juvenile Younger than 15 years old**)¹³, suggests that the court should

¹² The testimony requirement when a juvenile seeks waiver is no longer in effect, as it was when *T.R.B.* was issued. *See*, §938.18(4)(c), *Wis. Stats.* The *T.R.B.* court's reasoning that the legislature has the power to, and does establish specific procedures in waiver hearings when it deems it appropriate, is demonstrated in the subsequent enactment of §938.18(4)(c), no longer requiring testimony when it is the juvenile who seeks waiver. Thus, the legislature did exactly what *T.R.B.* indicated it could do - enact a statute with a provision that establishes a specific waiver procedure. This provides further support of Cody's argument that if the statute does *not* specifically provide that the court may consider the counts separately in determining prosecutive merit, then the legislature did not intend for the court to do so. Note: the *T.R.B.* case referred to in this footnote is the Court of Appeals decision, not the later Supreme Court decision.

¹³ 970.035 **Preliminary examination; juvenile younger than 15 years old.** Notwithstanding s. 970.03, if a preliminary examination under s. 970.03 is held

consider prosecutive merit as a whole, and reject the entire waiver petition when one count is inappropriate for waiver. Section 970.035 addresses the procedure at a preliminary hearing following waiver from juvenile court to adult court when waiver is based on the juvenile having been at age 14 at the time of certain specified offense(s). *See*, §938.18(1)(a) or (b), *Wis. Stats.* In such a situation, the court may bind over a for trial *only* if the court makes a specific finding that probable cause exists to believe that the juvenile probably committed one of the specified offenses that can be waived when committed between at age 14. The statute further provides that if the court cannot make such a finding, then *the juvenile* is discharged from the adult proceedings, and proceedings can be then be refiled under Chapter 938.

The statute does not direct the preliminary hearing court to discharge the juvenile on one count and not another. In fact, there is no ability under this statute for the preliminary hearing court to retain an over-age 15 count that has been filed along with an age-14 count in a petition. The statute requires the juvenile's discharge from adult court proceedings barring the required finding of the age 14 offense. This preliminary hearing statute therefore safeguards the juvenile from an improper waiver proceeding where an age-14 offense is improperly

regarding a juvenile who was waived under s. 938.18 for a violation which is alleged to have occurred prior to his or her 15th birthday, the court may bind the juvenile over for trial only if there is probable cause to believe that a crime under s. 940.03, 940.06, 940.225 (1) or (2), 940.305, 940.31 or 943.10 (2), 943.32 (2) or 961.41 (1) has been committed or that a crime that would constitute a felony under chs. 939 to 948 or 961 if committed by an adult has been committed at the request of or for the benefit of a criminal gang, as defined in s. 939.22 (9). If the court does not make any of those findings, the court shall order that the juvenile be discharged but proceedings may be brought regarding the juvenile under ch. 938.

charged. The remedy is not directed at counts, instead it is directed at *the juvenile*, requiring discharge of the juvenile from adult proceedings. Thus, this remedy prevents the waiver of the juvenile on any waiver petition that includes an age 14 offense improperly charged.

Both §970.03(10), *Wis. Stats.*, and §970.035, *Wis. Stats.*, are found in the same chapter. Both apply to preliminary hearings. As asserted above, the Legislature clearly a) knew how to explicitly authorize instructions for multi-count complaints that permit the court to waive some and dismiss or reduce others; b) did so for preliminary hearings, generally; and c) did *not* do so for preliminary hearings when waivers dependent on the juvenile's "age waivability" were involved. We can only conclude that the absence of the authority that was granted elsewhere was intentional.

In Cody's case, then, where one count was not waivable because Cody was too young for waiver at the time of the offense, §938.18(4)(a), *Wis. Stats.*, there should never have been a bindover in the criminal proceedings at all – but obviously, the preliminary hearing court did not make the required finding for under-15 juveniles because nobody raised the issue.

- Third, the relevant statute – §938.18(4), *Wis. Stats.* -- contains unambiguous direction to the juvenile court when prosecutive merit is not found: "*the court shall deny the petition for waiver.*" The statute does not give the juvenile court the authority to "*deny part of the petition for waiver*" or to "*deny the petition for waiver as to one count but not others.*" Instead, the command is to "*deny the petition for waiver.*"
- Fourth, §938.18(6), *Wis. Stats.*, provides that waiver can occur only when the juvenile court "*determines on the record that*

*there is clear and convincing evidence that it is contrary to the best interests of the juvenile or of the public to hear **the case**....”* [Bolding added.] Again, the reference is to “the case” rather than “the count.” Because the state opted, for its own strategic advantage, to bring two unrelated charges in a single petition – resulting in only one case (there was only one case number, only one right to substitute judges, only one hearing, etc.) – the state can hardly complain that both counts make up “the case.”

- Fifth, the petition for waiver asks the juvenile court to “*waive its jurisdiction under this chapter.*” §938.18(1), *Wis. Stats.* Jurisdiction over delinquents is codified in §938.12(1), *Wis. Stats.*: “*The court has exclusive jurisdiction ... over any juvenile 10 years of age or older who is alleged to be delinquent.*” Thus, the jurisdiction that is being waived (or not waived) is jurisdiction over the juvenile, not over the offense.¹⁴ It makes little sense to simultaneously retain and waive jurisdiction over the same juvenile. King Solomon only threatened to cleave the baby in half; here, there is only one juvenile appearing at the hearing to determine which court should exercise jurisdiction. Because the state chose to include a non-waivable offense when it sought waiver, it precluded waiver of juvenile court jurisdiction.
- Finally, if the waiver statutory language is deemed to be ambiguous, the ambiguity should be resolved in favor of Cody’s position. As stated in *State v. Clausen*, 105 Wis.2d 231, 239, 313 N.W.2d 819, 823 (1982), penal statutes must be strictly construed in favor of the defendant. While the juvenile code

¹⁴ Consistent with this interpretation, the mandatory petition for juvenile waiver form (JD 1722) includes the provision at ¶1: “*I request that the court waive **the juvenile** into adult court.*” [Bolding added.] Again, the waiver is of the juvenile, not the separate offenses.

generally is to be construed liberally to effect its objectives, §938.01(1), *Wis. Stats.*, one of its objectives is to provide due process to juveniles. §938.01(2)(d), *Wis. Stats.* Clearly, since waiver into adult court for purpose of prosecution is penal in nature, the waiver statute should be strictly, or narrowly, construed.

There is no reported case in Wisconsin where waiver has occurred on some, but not all, of the charged offenses in a single petition, nor is the undersigned aware of any local court decision that found waiver to be appropriate on some but not all of the charged offenses. If a “waive some, keep some” policy was adopted, waiver hearings would change dramatically, with attorneys on both sides arguing for “partial” waiver as a less-favored alternative to waiving all offenses (the prosecutor would argue “please waive the juvenile on both counts, but if you disagree, please waive him on one count”) or none (the defense counsel would argue “please decline to waive the juvenile on both counts, but if you disagree, please deny waiver on one count”).

C. Allowing Separate Consideration Of Counts At A Waiver Hearing Violates Common Sense.

Treating a waiver hearing on a multi-count petition as an indivisible matter is logical given the issues presented. If the state instead had filed a petition for waiver only on the second count and simultaneously filed a delinquency petition only on the first count (in a timely recognition that the first count could not be waived) - then the state would find itself in a position

arguing contrary goals, wherein the very seeking of delinquency adjudication undermines its waiver arguments, as well as the reverse. It must argue that waiver is needed because juvenile court services are insufficient, specifically addressing the issue that even the serious juvenile offender program is insufficient (as the defense would argue in the waiver proceeding that this program *does* provide adequate community protection, the state arguing it does not). The state would simultaneously assert in delinquency proceedings that a juvenile court adjudication should be vigorously pursued, that services are required and appropriately ordered with regard to the non-waivable count - exactly what it is asserting is not true in the waiver case. The state's waiver request on a waivable count is tantamount to a claim that disposition under the juvenile code is contraindicated. Yet, if it had filed Count 1 as a non-waivable delinquency it must argue *for* a juvenile disposition on the non-waivable count, such disposition that employs "*those means necessary to promote the objectives under s. 938.01,*" §938.355(1), *Wis. Stats.* Arguments from the waiver contest and the delinquency contest for the same juvenile would be in contradiction to each other. It must claim that the juvenile system is inadequate to address the juvenile's need for care and treatment and simultaneously argue that disposition on the non-waived offense is necessary, provides services, and is in keeping with intent of the juvenile code to "*respond to a juvenile offender's needs for care and treatment ... by allowing the court to utilize the most effective dispositional option.*" See: §938.01(2)(f), *Wis. Stats.*

If a juvenile is waived into adult court, he or she can be held in jail while the case is pending, and sentenced to prison upon conviction. Such a sentence cannot run consecutively to juvenile court supervision. *State v.*

Woods, 173 Wis. 2d 129, 496 N.W.2d 144 (Ct. App. 1992). Accordingly, the state's waiver request constitutes a conflict -- an attempt to preclude the juvenile court from imposing the very services and protections that the state would purport to seek by filing a petition for delinquency on a non-waivable offense. Allowing the state to combine such inconsistent goals into a single petition is unwise. It is highly improbable that the state would ever pursue such a course. Yet, the consideration of the counts separately in the current case, rather than consideration of them together, would be similar to the result from the illogical simultaneous presentation of such contradictory goals - one count being waived and the other count remaining in the juvenile court system. This outcome defies logic and would not occur if proper proceedings had been conducted.

In sum:

- The single delinquency petition that the state chose to file contained a non-waivable offense;
- Because the juvenile court must either grant or deny the waiver petition without parsing it into components, denial was mandated; and
- This Court should therefore remand to the juvenile court with instructions to deny the waiver petition (the state's options thereafter are for the state to ascertain).

V. **THE TRIAL COURT'S "AFFIRMANCE" OF THE
WAIVER ON COUNT 2 SHOULD BE VACATED ON
THE MERITS.**

The foregoing section advanced the argument that waiver was not permissible because the request for waiver related to a two count petition where one of the two offenses was non-waivable. The state will likely dispute this contention and argue that a juvenile court, faced with multiple counts, is free to waive its jurisdiction over the juvenile as to some counts and retain jurisdiction over the juvenile as to other counts. The state may rely on the adult court's holding that the waiver on Count 2 was valid or ask this Court to uphold that waiver, essentially by finding that the errors relating to Count 1 were harmless. A previous section established that the adult court has no authority to "uphold" or "affirm" a juvenile court waiver order. However, even if it did, its holding that the waiver on Count 2 was valid would still need to be reversed.

In a just released case, the Wisconsin Supreme Court, in *State v. Travis*, (2013 WI 38, Case No.: 2011AP685-Release date: May 2, 2013) confirmed that upon a showing of error, the state has to establish beyond a reasonable doubt that the error was harmless. *Travis*, ¶70 and ¶71. In the present case, the adult court's holding did not address the state's burden of proof, nor did the judge make any reference to the "beyond a reasonable doubt" standard. Thus, we cannot know what showing the judge believed needed to be made. The judge cited no basis for his conclusion, beyond stating that because Cody was over age 15 at the time of the allegation in Count 2, the waiver on Count 2 was valid. As a result, the adult court's finding was not appropriately made.

In *Travis*, the defendant was sentenced on a charge that was alleged to carry a minimum mandatory 5 year prison sentence, when (similar to Cody's

case in the adult proceedings) the statute actually carried no minimum mandatory sentence. The defendant asked for a new sentencing hearing, which the trial court denied because it deemed the error harmless given that the sentence actually imposed was greater than 5 years. The Wisconsin Supreme Court disagreed, stating (*Travis*, ¶17, footnotes omitted):

When a circuit court relies on inaccurate information, we are dealing “not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude.” A criminal sentence based upon materially untrue information, whether caused by carelessness or design, is inconsistent with due process of law and cannot stand.

Cody’s challenge is not to a sentencing hearing but to a juvenile waiver hearing. However, it is undisputed that juvenile waiver hearings are a critical stage in the proceedings and have great import, due to the consequences of waiver. See: *Kent v. United States*, 383 U.S. 541; 86 S. Ct. 1045, 1055; 16 L. Ed. 2d 84, (1966), where the United States Supreme Court held: “*It is clear beyond dispute that the waiver of jurisdiction is a ‘critically important’ action determining vitally important statutory rights of the juvenile.*” A waiver order denies the juvenile the protections of juvenile court, and exposes the juvenile to adult court criminal penalties and sanctions which are far more severe and long-lasting. Wisconsin courts routinely grant interlocutory appeals of waiver orders in recognition of the critical and serious nature of such orders. Inaccurate information provided to a court for its consideration in a waiver proceeding raises the same concerns as inaccurate information provided in a

sentencing hearing.

Travis next required that the defendant establish that the sentencing judge relied on the untrue information, stating (*Travis*, ¶28, footnotes omitted):

Whether the circuit court “actually relied” on the incorrect information at sentencing, according to the case law, turns on whether the circuit court gave “explicit attention” or “specific consideration” to the inaccurate information, so that the inaccurate information “formed part of the basis for the sentence.”

If the defendant demonstrates this, “the burden then shifts to the State to prove the error was harmless.” *Id.*, ¶49.

At Cody’s waiver hearing, Judge Malik assumed that Cody was subject to waiver on both Count 1 and Count 2. Of the two counts charged in the petition, Count 1 was the more serious. The maximum penalty for an adult upon conviction was 60 years in prison, with an alleged minimum mandatory 25 year prison sentence. Count 2 had a 40 year maximum penalty with no minimum sentence. Further, the facts in the petition that supported Count 1 alleged the use of a dangerous weapon and alleged a death threat against the victim. Of course, Count 2 was still a serious offense, but for an adult, the maximum penalty was 2/3rds that established for Count 1, with no minimum penalty required.

Every juvenile court considering whether to waive its jurisdiction must consider “[t]he type and seriousness of the offense....” §938.18(5)(b), *Wis.*

Stats. There should have been consideration of Count 2 under this criteria instead of two counts.¹⁵ Yet, Judge Malik gave “*explicit attention*” and “*specific consideration*” to Count 1 both as to the multiplicity of counts and to the underlying facts. Indeed, he was required under the law to consider both offenses because the state sought waiver on both counts. Judge Malik specifically referenced the existence of two offenses when considering the seriousness of the offense, a statutory factor, and he specifically discussed the characteristics of Count 1. As examples of his remarks (bolding added):

1. *[B]y statute the court is required to look to those things relating to the type and seriousness of the **offenses** of which the juvenile is accused. And there it is hard to exaggerate the gravity and the seriousness of **these offenses**.* [R:58;32]
2. *[T]he **incidents** are very serious and ... were committed in a violent and aggressive manner. So the **offenses** are of a type and seriousness that are extremely, extremely aggravated. Based upon the allegations **they** were committed in a violent and aggressive manner involving the use of physical violence and restraint, **and the use of a weapon and threat of killing the victim.**¹⁶ So that criteria is one **that weighs extremely, extremely heavily** in favor of waiver of jurisdiction and is entitled to significant weight.* [R:58;43]

¹⁵ Clearly had only count 2 been petitioned for waiver, the waiver hearing would have been fundamentally changed. One count being petitioned for waiver is less serious than two. It removes the pattern the state attempted to establish with the two-count petition; additionally it removes the more egregious count one.

¹⁶ The allegations of a weapon and of threats are related to Count 1 only.

3. *We are dealing with **multiple alleged offenses** separated by a relatively long period of time. From the fall of 2007 or 2008 even until March of 2010. We have **two extremely serious violent offenses** alleged with a significant passage of time between them. [R:58;43]*
4. *Based on the nature of the **offenses, based on the number of offenses** and based upon the time parameters that we're talking about here it is the Court's belief that if in fact there is an adjudication of guilt on **these offenses** that there will be significant emphasis that will need to be placed on protection of the public and the community on a long term basis.... [R:58;43-44]*
5. *At least two instances spanning over time, so this strongly suggest to the Court that the facilities and programs particularly the Serious Juvenile Offender programming... in the juvenile system is inadequate. [R:58; 44]*

The only count where use of a weapon and a threat to kill the victim was alleged was Count 1. Further discussion by the judge confirms the importance of Count 1 in the decision [R:58;42, bolding added]:

6. *I thought it interesting even Dr. Hagan in his testimony in response to a question from defense counsel stated that yes there is a wide range of behavior that is involved in sex offenses. That it can be something ranging all the way from experimentation and perhaps involvement with one's significant other while a minor all the way to a forced rape with a weapon. **And that there was a significant difference and I thought it somewhat ironic***

that maybe it was not ironic maybe it was intended by him when he emphasized the difference and referred to a forced rape with a weapon because that is essentially what we're dealing with in Count 1 accompanied by a threat to kill if the assault cannot take place.

*So again as Dr. Hagan has recognized when we're dealing with sexually based offenses there is a wide range of behavior that is involved and **here we are dealing with the extreme behavior being alleged.***

In other words, the juvenile court concluded from the expert's testimony that the behavior specific to Count 1 was hugely significant in determining the seriousness of the offenses. This determination was expressly tied to a waiver criterion and ended up being the pivotal determination in favor of waiver. The Court stated with respect to community protection [R:58;42, **bolding added**]:

*This factor becomes very, very significant in this particular case when it is considered in light and type of the seriousness of **the offenses** that are alleged here...*

Clearly, Judge Malik considered Count 1 in deciding to waive Cody. He considered both the specific seriousness of Count 1 and the multiplicity of offenses in applying §938.18(5)(b), *Wis. Stats.* This is far more of a showing than is required under *Travis* to shift to the state the burden of proving beyond a reasonable doubt that any error was harmless.

VI. THE ERROR WAS FAR FROM HARMLESS.

The state may argue that the error was harmless because the juvenile

judge would have been able to consider exactly the same evidence had only one count been presented for waiver. This argument assumes that evidence of the conduct underlying Count 1 would have been admissible at a waiver hearing considering only Count 2 for waiver.

Section 938.18(4)(b), *Wis. Stats.*, permits the court to hear testimony, to consider that testimony “*as well as other relevant evidence,*” and to then base its decision pursuant to the criteria under §938.18(5), *Wis. Stats.*. Information regarding Count 1 might be admissible under “other relevant evidence.” Or, admissibility might be justified under two of the five waiver criteria, codified as §938.18(5), *Wis. Stats.*

As to the five criteria, the first (§938.18(5)(a), *Wis. Stats.*) relates to the juvenile’s lifestyle, personality and similar attributes. An allegation that the juvenile committed an assault 3 years earlier might be admissible under this section, though it would be only one aspect of the evidence under this criterion. The second codified criterium (§938.18(5)(am), *Wis. Stats.*) is the juvenile’s record; here, the allegation was is but an allegation, there was no adjudication or conviction. The third criterium (§938.18(5)(b), *Wis. Stats.*) is the seriousness of “the offense,” which refers to the offense on which waiver is sought – Count 1 was, but should not have been considered, under this criterion. The fourth criterion (§938.18(5)(c), *Wis. Stats.*), permits consideration of the adequacy of juvenile services and treatment, and it is arguable that the facts underlying Count 1 had a bearing on Cody’s need for treatment. Finally, the fifth criterion (§938.18(5)(d), *Wis. Stats.*), is not relevant to Cody’s case as it pertains to situations with multiple co-defendants.

Whether deemed admissible under the “other evidence” provision, the “lifestyle” criterion, and/or the “treatment needs” criterion, the Count 1 circumstances would have been a part of an amalgamation of evidence about Cody’s overall life circumstances and treatment needs provided to the court for its consideration. Such evidence would be balanced with evidence about Cody’s functioning at home, at school, in the community, his family support structure, his prior police contacts or lack thereof, his lack of prior treatment, his amenability to treatment, and other considerations. In other words, information regarding the count one allegations becomes part of the mass of evidence provided to the court to be utilized for its consideration of the juvenile on the waiver offense.

In contrast, the charging and attempt to waive Cody on Count 1 causes Count 1 to be above the mass of evidence and stand out as a primary consideration, being front and center for the court’s waiver determination. All of the other evidence in the case serve to assist the court in its decision regarding the juvenile as to the offenses alleged. The charging and request to waive Cody on Count 1 provides elevated consideration of this incident: count one stands out above the rest of the mass of evidence, it *required* the juvenile court to consider its seriousness standing alone – as a separate and distinct waiver criterion. Put simply, that Count 1 had to be considered under a specific waiver criterion placed more weight on its seriousness than had it been part of Cody’s overall background. In this case, when Count 1 was part of the waiver petition, the impact of Count 1 on the juvenile court’s determination of seriousness was further heightened by the fact that it was the more serious of

the two offenses.

Inclusion of Count 1 in the waiver petition additionally required the court as a matter of law to consider the offenses together. It required the court as a matter of law to consider issues regarding protection of the community and need for supervision, and the adequacy of the juvenile facilities as those specifically pertained to the allegations of both Count 1 and Count 2 together. If the waiver had been only as to Count 2, the Court would have been required as a matter of law to make findings regarding these issues only as to Count 2.

In addition to the emphasis placed on Count 1 as a charged offense, other harm is found from its inclusion as a waivable offense. As discussed above, the state is entitled to rely on the facts set forth in the petition for purposes of prosecutive merit, and the presiding judge can then consider those facts as true for purposes of its waiver determination. The only attack that can be mounted against a finding of prosecutive merit is a challenge to the reliability of the petition. If the petition shows that the allegations are made by a citizen, the petition need only establish that the person making the allegations had a reasonable basis for observing that which is reported to have occurred. *See: In the Interest of T.M.J.*, 110 Wis. 2d 7, 327 N.W.2d 198 (Ct. App. 1982). Because Count 1 was before the juvenile court for consideration of waiver, the juvenile court was permitted to conclude that Cody committed both counts in the manner alleged in the petition ***including the use of a dangerous weapon in Count 1 and including the threat alleged to have been made at the time.*** Barring a showing that there were reckless or intentional misstatements in the petition, credibility issues, or conflicting evidence, Cody

was foreclosed from denying, explaining or otherwise contesting anything related to Count 1 because it was part of the waiver petition. Again, inclusion in the waiver petition elevated Count 1 for waiver, and protected it from attack. Cody could not challenge the credibility of the complainant or ask that the juvenile court base its waiver determination on an alternative view of what happened. Count 1 was to be believed when it was in the waiver petition.

In contrast, had Count 1 not improperly been part of the state's waiver request, but submitted as evidence in support of a waiver of another offense, the state would not have been entitled to have the allegations in the petition deemed true for purposes of the waiver hearing, nor would Cody have been precluded from challenging the accuracy of the facts in the petition. Instead, the state would have had to offer evidence of that offense and convince the court that it was relevant to the waiver determination.

Moreover, it is clear that Cody would have had the right to dispute the evidence with the assistance of discovery: as stated in *T.M.J.*, *supra*, at 11 (bolding added):

*Our holding does not mean that a juvenile should be denied access to all records prior to the waiver hearing. Section 48.293(2), Stats., allows inspection of social reports and records relating to the juvenile. While a juvenile is not allowed materials relating to the commission of the offense itself, **materials relating to the juvenile's personality and past history are discoverable.** The reason is that the court must consider these factors in deciding whether to order waiver, assuming*

prosecutive merit has been found. See sec. 48.18(5) (a), Stats. It is at this stage of the proceedings where the court makes final determinations of fact upon which the ultimate decision on waiver is based. It is adjudicatory in that it makes a final determination regarding the retention of jurisdiction in the juvenile court system, taking into account the best interests of the child and the public.

In other words, even if all of the circumstances alleged regarding Count 1 were *admissible* in a waiver hearing on Count 2 only, three radical differences would exist:

- When part of the waiver petition, the seriousness of Count 1 was given far greater emphasis because it was considered under the §938.18(5)(b), *Wis. Stats.* criterion rather than as part of the overall evidence of lifestyle and treatment needs or other relevant evidence in the case;
- When part of the waiver petition, the court found that count 1 had prosecutive merit, elevating its credibility to be deemed as true for consideration by the court, and protecting the charge from challenges. Had count one been submitted in support of waiver rather than as part of the waiver petition, the allegations regarding Count 1 would have been disputable; there would no finding of prosecutive merit, and no shield from an attack on the factual allegations in the petition about the alleged offense.; and
- When part of the waiver petition, Cody is not entitled to discovery. When part of a support for waiver but not in the waiver petition itself, Cody would have been entitled to discovery, assisting him in distinguishing and providing the court evidence in his defense to the waiver.

Should the state claim that the waiver hearing on Count 2 was fair once the waiver on Count 1 is set aside, the state is effectively claiming that it is immaterial whether a juvenile is or is not permitted discovery of the Count 1 facts, immaterial whether a juvenile is or is not permitted to actually challenge the Count 1 facts, and immaterial whether the juvenile judge's view of the seriousness of the offense(s) is premised on one offense (the less serious) or on two offenses (including the more serious, *non-waivable* count). Such an argument must fail.

As a result, *if* the juvenile court was entitled to make a separate waiver determination on Count 2 notwithstanding its lack of jurisdiction to waive Cody on Count 1, it has not done so in a manner that is fair and reliable. The waiver proceedings were substantially influenced by the juvenile judge's consideration of the Count 1 circumstances, with such circumstances having a heightened impact because Count 1 was a charged offense. Yet, while Count 1 was given greater statutory weight as a charged offense, the fact that it was charged in the petition precluded Cody from challenging the credibility of the witnesses, the reliability of the information, and otherwise attempting to refute or explain the circumstances. Bearing in mind that the cause of the defect was the prosecutor who alleged that Count 1 was waivable (the defense attorney and the judge both entirely missed the prosecutor's false allegation), therefore allowing the tainted waiver proceedings to stand would be manifestly unjust and unfair. The waiver order should be vacated as to both counts.

VI. THIS COURT SHOULD REMAND TO JUVENILE COURT FOR FURTHER PROCEEDINGS.

Jurisdiction over Cody is presently in adult court based on the waiver order. It is, undisputed that the adult court jurisdiction depends on the existence of a valid waiver order. If this Court agrees that the waiver on both counts must be vacated due to the defects in the juvenile court proceedings, adult court jurisdiction would thereby cease to exist. Accordingly, a remand to the adult court would be meaningless – it would not have jurisdiction to do anything. Instead, this Court should return the case to the juvenile court where the defect arose.

If this Court agrees with Cody's position in Section IV that the waiver petition had to be either granted or denied in its entirety, the remand should specifically direct the juvenile court to enter an order *dismissing* the waiver petition and to conduct such further proceedings as the juvenile court deems appropriate under existing law and the demonstrated facts. If this Court disagrees with Cody's position in Section IV and concludes that the waiver petition *could* have been granted as to Count 2 only, the remand should read differently. The remand should then direct the juvenile court to enter an order *dismissing* the waiver petition as to Count 1, should direct the juvenile court to *vacate* the waiver order on Count 2, and should direct the juvenile court to conduct such further proceedings as it deems appropriate under existing law and the demonstrated facts.

This Court should not attempt to determine the precise nature of the

further proceedings that should occur following remand, for several reasons. First, it remains to be seen what relief the state may request upon remand. Second, the juvenile court may need to consider the state's explanation for the false allegation that Cody was over 15 years of age at the time that Count 1 was allegedly committed (e.g. whether it was inadvertent, negligent, reckless, or intentional, whether the state's motives are relevant in this circumstance, and how that may be considered). If the juvenile court concluded that the prosecutor's motives were significant, a hearing could be conducted to make appropriate findings regarding this issue. Third, the juvenile court may need to consider additional evidence not in the current record, such as the juvenile's behavior since the invalid waiver occurred as well as evidence regarding the state's conduct in the proceedings. Fourth, the juvenile court has not exercised its discretion regarding the admissibility of evidence about Count 1, discussed extensively here, nor has that been presented in evidentiary form.

CONCLUSION

For the reasons set forth above, this Court should vacate the waiver order and remand to the juvenile court for further proceedings consistent with the decision of this Court.

Dated this 8th day of May, 2013.

Law Offices Of DEBORAH J. STAHL

By: _____

Deborah J. Stahl
Attorney for Jace H.
State Bar No.: 1011261

4684 Murphy Court
Middleton, WI 53562
(608) 852-8569

CERTIFICATION

I, Deborah J. Stahl, attorney for Defendant/Appellant, certify that this
Brief was produced using the following font in compliance with §809.19(8)(b):

☐ Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is _____ pages.

☐ Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 point and maximum of 60 characters per full line of body text. The length of the Combined Statement of the Case and Statement of Facts, Argument and Conclusion, including all footnotes, is 10,926 words.

Dated this 8th day of May, 2013.

Law Offices Of DEBORAH J. STAHL

By: _____

Deborah J. Stahl
Attorney for Jace H.
State Bar No.: 1011261

4684 Murphy Court
Middleton, WI 53562
(608) 852-8569

CERTIFICATION OF E-FILING

I, Deborah J. Stahl, attorney for Defendant/Appellant, certify that in compliance with Rule 809.19(12), I have submitted an electronic copy of this Brief which complies with the requirements of §809.19(12). I further certify that this Electronic Brief is identical in content and format to the printed form of the Brief filed as of this date.

A copy of this Certification has been served with the paper copies of this Brief filed with the Court and served on opposing counsel.

Dated this 8th day of May, 2013.

Law Offices Of DEBORAH J. STAHL

By: _____
Deborah J. Stahl
Attorney for Jace H.
State Bar No.: 1011261

4684 Murphy Court
Middleton, WI 53562
(608) 852-8569

STATE OF WISCONSIN v. CODY PHILLIPS

APPENDIX CERTIFICATION

I, Deborah J. Stahl, attorney for Defendant/Appellant, certify that filed with this Brief is an Appendix that complies with §809.19(2)(a) and that contains: (1) a table of contents; (2) the single unpublished decision cited. 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 first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the records have been so reproduced to preserve the confidentiality and with appropriate references to the record.

Dated this 8th day of May, 2013.

Law Offices Of DEBOAH J. STAHL

By:

Deborah J. Stahl
Attorney for Jace H.
State Bar No.: 1011261

4684 Murphy Court
Middleton, WI 53562
(608) 852-8569