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STATE OF WISCONSIN
IN SUPREME COURT

APPELLATE CASE NO. 2015AP002328-CR
WAUKESHA COUNTY CASE NO. 2013CF001206

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SHAUN M. SANDERS,

Defendant-Appellant-Petitioner.

ON REVIEW OF AN OPINION OF THE COURT OF APPEALS, DISTRICT II, AFFIRMING A JUDGMENT OF THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE LEE S. DREYFUS, JR., PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

By: Craig M. Kuhary
State Bar No. 1013040
Attorney for Defendant-Appellant

Walden& Schuster, S.C.
707 W. Moreland Blvd.; Suite 9
Waukesha, WI 53188
T. (262)547-5517 F. (262)547-7517

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ISSUE PRESENTED

I. CAN THE STATE PROSECUTE SANDERS AS AN ADULT FOR OFFENSES ALLEGEDLY OCCURRING BEFORE HIS TENTH BIRTHDAY?

The Trial Court Answered: **Yes.**

Without referencing a specific case by name, the court held that the age of the defendant at the time of charging, absent prosecutorial delay, gave adult criminal court jurisdiction to adjudicate what otherwise would have been CHIPS era conduct**. (58:5-9).**

The Court of Appeals Answered: **Yes.**

The Court of Appeals specifically relied upon this Court's decision in ***State v. Annala,*** 168 Wis.2d 453, 484 N.W.2d 138 (1992) and the court of appeals decision in ***D.V. v. State,*** 100 Wis.2d 363, 302 N.W.2d 64 (Ct. App. 1981) to permit the prosecution of CHIPS era conduct in adult criminal court without any restriction.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this court has indicated that oral argument and publication are appropriate.

STATEMENT OF THE CASE AND FACTS

Sanders was charged in Waukesha County Case No. 13-CF-1206 with four offenses stemming from allegations he had sexual contact with his younger sister[1], H.A.S. (1:1-4). The charging section of the complaint

[1] Sanders was approximately two years older than H.A.S.

alleged two charging periods covering a period of nine years. *Id.* The first charging period encompassed one count of repeated sexual assault of the same child, contrary to Wis. Stat. §948.025, alleging that at least three assaults occurred between the time period of "September 26, 2003 and September 25, 2008." *Id.* The remainder of the counts alleged offenses occurring during the second charging period between "September 26, 2008, and September 25, 2012." *Id.* Specifically, Sanders was charged with an additional count of repeated sexual assault of a child (Count Two of the Information), contrary to §948.025, Wis. Stats; Incest with a Child (Count Three of the Information), contrary to §948.06(1), Wis. Stats., and Child Enticement (Count Four of the Information), contrary to §948.07, Wis. Stats. *Id.*

As probable cause for the charges, the complaint alleged that then sixteen-year-old H.A.S. reported to police in February of 2013 that Sanders "touched her sexually when she was seven or eight years old and Sanders would have been nine years old." *Id.* H.A.S. alleged that Sanders would "touch her breasts with his hand." *Id.* H.A.S. indicated that Sanders also asked for "peeks," which she interpreted as a request by Sanders to lift up

her shirt so he could see her breasts, but she indicated there initially was no touching. *Id.*

The complaint also stated H.A.S. indicated she was expected to go into Sanders' room "every night" to expose her breasts at 11:00 p.m. H.A.S. stated that she was to remove her clothes and lay naked so Sanders "could touch her breasts and suck on her nipples." *Id.*

H.A.S. also alleged that eventually she began to perform oral sex on Sanders, and that between the ages of twelve and fifteen she performed oral sex on Sanders "at least twelve times." *Id.* She recalled one specific time where Sanders encouraged her to "keep his penis in her mouth so he could ejaculate in it and on her breasts." *Id.* H.A.S. indicated during these instances Sanders would ejaculate on her body or on his clothing. *Id.*

Sanders was later arrested. He was approximately eighteen years old at the time. *Id.* Sanders was subsequently questioned by a detective from the Menomonee Falls Police Department, Jay Weber. Sanders was interrogated by Detective Weber for a period of three and one half hours. (52:17). During that time, Sanders made several inculpatory statements regarding the allegations made by H.A.S. (52:16-17).

Prior to trial, trial counsel filed a motion to suppress Sanders' statement to Detective Weber. (5:1). At the conclusion of a hearing on the motion, the court initially suppressed Sander's entire statement because of the coercive nature of the interrogation. (52: 22). However, the court later allowed a portion of Sanders' statement to Detective Weber into evidence because it occurred during the initial questioning, at a time before the court believed the interrogation became coercive. (52: 22-24).

The portion of Sanders' statement the court allowed into evidence concerned his admission to Officer Weber that, ten years prior, he had engaged in "peeks" with H.A.S. for a period of one month. (54: 171). This conduct allegedly would have occurred when Sanders was under ten years old. *Id.*

This case ultimately proceeded to a jury trial. (54; 55) H.A.S. testified without objection that Sanders began touching her breasts when he was as young as eight to nine years old, a full year *younger* than what was originally alleged in the complaint. (54: 123-26). H.A.S. testified that the touching later progressed to oral sex and ended in approximately December of 2012, when she would have been approximately sixteen years old. (54:126). A boyfriend of H.A.S. at the time overheard Sanders ask H.A.S.

for "peeks" during an internet chat session, and she later confided in him about the alleged abuse. (54:150). It was eventually reported to a teacher at Menomonee Falls High School, who then in turn contacted the police. (54:166).

After the state rested its case, trial counsel brought a motion to dismiss count one based upon the fact that the state had failed to prove Sanders could form the necessary intent to commit the assaults because of his young age at the time. (55:23). Citing ***In the Interest of Stephen T.***, 250 Wis.2d 26, 643 N.W.2d 151 (2001), the defense argued that the state had not presented any evidence that Sanders had the intent to become sexually aroused or gratified even if the conduct did occur. *Id.* The state commented that "it [was] a little late in the game" to raise the issue of Sanders' age as it related to the charging period in count one. (55:25). The State further argued that this issue should have been addressed in a pre-trial motion. *Id*.

The trial court acknowledged that the issue of evidence having already been received of Sanders being under the age of ten at the time the alleged assaults began was a "jurisdictional issue… (which) this court does have authority to address at any point in time." (55: 88). However, the court

was unsure of how to appropriately remedy this jurisdictional dilemma at that point in the trail. *Id*.

The state originally offered to amend the charging period in count one of the information to commence on May 31, 2004, so it would correspond with Sanders' tenth birthday, tacitly conceding that it could not prosecute Sanders for acts allegedly committed prior to that date. (55:91). The court ultimately rejected this proposal largely because the state had already closed its case by the time the issue was finally raised by defense counsel. (55:94).

Instead, the court took the unusual step of taking its own motion for mistrial under advisement pending the outcome of the verdict on count one. (55:95). The defense did not object.

Sanders took the stand in his own defense. (55:72-83). While he acknowledged that he had engaged in a game of "peeks" with H.A.S. when he was approximately eight years old, which resulted in H.A.S. exposing her breasts to him, he denied having any sexual contact with his sister. (55:76).

Sanders was later acquitted of the charge of repeated sexual assault of a child in count one and the court never revisited the jurisdictional issue.

(55:141). Sanders was convicted of all remaining charges in counts two through four. (55:142).

Sanders subsequently filed a post-conviction motion alleging, among other things, that his trial counsel offered ineffective assistance of counsel for failing to object to the jurisdictional issue concerning the defendant's age at the time of the offenses on count one prior to trial. (38: 1-68). Sanders further argued that this error prejudiced Sanders defense on the remaining counts. *Id*. A hearing pursuant to ***State v. Machner***, 92 Wis.2d 797, 285 N.W.2d 905 (1979), was held and further briefing was ordered by the court. (57:38).

When the jurisdictional issue was raised by Sanders in his post-conviction motion, the state took a different tack and argued that this Court's holding in ***State v. Annala***, *supra.*, provided a legal basis for charging Sanders for offenses that allegedly occurred before his tenth birthday. (43:2). As a result, the state did not believe that trial counsel was ineffective for failing to raise the issue prior to trial. *Id.* The trial court ultimately issued an oral decision on October 1, 2015, denying Sanders' post-conviction motion in its entirety. (58:10-15; 46:1).

Sanders then appealed the circuit court's decision denying his post-conviction motion. In a decision dated March 15, 2017, the Court of Appeals affirmed the decision of the circuit court. The court first found that it had subject matter jurisdiction over Sanders for offenses allegedly committed before his tenth birthday and considered the issue a "nonstarter." Slip op. at ¶12. The court of appeals further found that the trial court had competency to exercise its subject matter jurisdiction and that trial counsel did not perform deficiently in failing to raise the competency issue prior to trial. *Id.* at ¶¶14, 29.

The court, also relying heavily on this Court's holding in ***State v. Annala***, 168 Wis.2d 453, 484 N.W.2d 138 (1992) and ***D.V. v. State***, 100 Wis.2d 363, 302 N.W.2d 64 (Ct. App. 1981) ultimately concluded that Wisconsin has no minimum age for criminal responsibility. *Id.* at ¶26. Thus, Sanders' trial counsel was not ineffective for failing to raise the issue prior to trial. *Id.* at ¶29.

The concurring opinion, while joining in the majority's application of ***D.V.*** to the facts of this case, cautioned that "at some stage a child does not have the capacity to commit a crime" and "[i]mprisonment of an adult for conduct the person engaged when they were between the ages of one

and nine years old strikes me as akin to punishing a puppy two days after the puppy had an accident in the house-the child/puppy has no idea why they were just struck and all they have learned is a fear of their master." ***Id.*** at ¶45.

Sanders then filed a petition with this Court to review the court of appeals decision, which this Court granted on June 12, 2017.

STANDARD OF REVIEW

The question of whether Sanders can be prosecuted as an adult for offenses allegedly committed before his tenth birthday is one involving statutory interpretation which this court reviews *de novo. See,* ***State v. List***, 2004 WI App. 230, ¶3, 277 Wis.2d 836, 691 N.W.2d 366. The application of a statute to undisputed facts also presents a question of law for a *de novo* review. *See,* ***State v. White***, 177 Wis.2d 121, 124, 501 N.W.2d 463 (Ct. App. 1993).

With regard to claims of ineffective assistance of counsel, to be successful, a defendant must show counsel's performance was deficient and the deficiency prejudiced him. See ***State v. Erickson***, 227 Wis.2d 758, 768, 596. Whether counsel's performance was deficient or prejudicial is a question of law which this court reviews

de novo. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis.2d 721, 703 N.W.2d 694.

ARGUMENT

I. WISCONSIN HAS A MINIMUM AGE OF CRIMINAL RESPONSIBILITY OF TEN YEARS AND SANDERS CANNOT BE CRIMINALLY PROSECUTED AS AN ADULT FOR OFFENSES WHICH PREDATE THE AGE OF ORIGINAL JUVENILE COURT JURISDICTION.

A. An Overview of Wisconsin's Juvenile Justice Code.

At issue in this case are four statutes, Wis. Stat. §938.12(1); Wis. Stat. §938.13(12); Wis. Stat. §938.18 and Wis. Stat. §938.183. This Court, in ***State v. Kleser***, 2010 WI 88, 328 Wis.2d 42, 786 N.W.2d 144 provided an extensive history behind the legislature's revision of the Juvenile Justice Code beginning in the 1990's that relate to the above statutes. As a result, it is not necessary to repeat it here. *See* ***Kleser*** at ¶¶40-52.

Wis. Stat. §938.12(1) sets a jurisdictional demarcation point at age ten or older for any juvenile who is alleged to be delinquent. The word "delinquent" is defined in Wis. Stat. §938.02(3m). It provides in pertinent part:

> **938.02 Definitions.**
>
> (3m) "Delinquent" means a juvenile who is 10

> years of age or older who has violated any state or federal criminal law, except as provided in 938.17, 938.18 and 938.183...

Wis. Stat. §938.02(10m) goes on to define "juvenile" as a person under the age of seventeen for a person who is being investigated or prosecuted for a violation of state or federal criminal law.

Wis. Stat. §938.13(12) sets a jurisdictional demarcation point for persons under the age of ten thusly:

> **938.13 Jurisdiction over juveniles alleged to be in need of protection or services.**
>
> Except as provided in s. 938.028(3), the court has exclusive jurisdiction over a juvenile alleged to be in need of protection or services which can be ordered by the court if any of the following conditions apply:
>
> (12) DELINQUENT ACT BEFORE AGE 10. The juvenile is under 10 years of age and has committed a delinquent act.

Wis. Stat. §938.13(12) allows juveniles under the age of ten who commit what otherwise would have been a delinquent act to be subject to a non-criminal CHIPS proceeding; civil in nature with a focus on providing treatment and services to the child. *See* ***State v. Thomas J.W.***, 213 Wis. 2d 264, 266, 272-74, 570 N.W.2d 586 (Ct. App. 1997). Delinquency proceedings, on the other hand, have a different and broader purpose as

summarized by this court in ***State v. Hezzie R.,***:

> The JJSC also recommended that the express legislative intent and purpose codified in the JJC should incorporate and promote the goals of balancing rehabilitation, accountability, and protection of the public. *See id.* at 10. The JJSC suggested, and the legislature and the governor ultimately agreed, that such matters as the protection of citizens and holding juveniles accountable for their acts be added to the express purposes of the statute. *See id.; see also Wis. Stat. § 938.01*. The JJSC also suggested, and again the legislature and the governor agreed, that the express intent of the legislature in the JJC should include provisions assuring that a child is provided a fair hearing, enforcing the constitutional rights of the juvenile, allowing for an individual assessment of each juvenile's needs, developing a child's ability to live as a productive and responsible member of the community, diverting juveniles from the JJC through early intervention if possible, and responding to a child's needs for care and treatment in accordance with his or her best interests. *See JJSC Report* at 10; *Wis. Stat. § 938.01*.

219 Wis. 2d 848, 871,580 N.W.2d 660 (1998).

Although treatment and services to the child remain a core component, other goals begin to emerge such as "protection of citizens" "rehabilitation," and "holding juveniles account for their acts." *Id.* at 872. The above conceptual goals begin, for the first time, to incorporate adult Criminal Code principles as well.

Wis. Stats. §938.18 provides for waiver of jurisdiction for criminal proceedings for juveniles fourteen years or older for certain enumerated offenses provided specific criteria can be met. *See Wis. Stat. §938.18(5)*. It also provides for waiver for all violations of state or federal criminal law on or after the juvenile's fifteenth birthday as long as the same criteria can be

met. *See Wis. Stat. §938.18(1)(c).*

Finally, Wis. Stats. §938.183 allows for original adult court jurisdiction for certain enumerated offenses that have been alleged to occur on or after a juvenile's tenth birthday. The majority of the triggering offenses for the statute are various forms of homicide, including felony murder. *See Wis. Stat. §938.183(1)(a)-(c).* It does allow for a transfer of jurisdiction back to juvenile court under certain limited circumstances. *See Wis. Stat. §938.18(1m)(c).*

Thus, the youngest age a child can be prosecuted in adult court for a criminal offense in Wisconsin is ten, provided the offense is essentially homicide related. *See Wis. Stat. §938.183(1)(am).* Again, the bulk of the changes to the above statutes occurred in the 1990's in a legislative response to reduce juvenile crime while providing greater personal accountability for juveniles both in punishment and rehabilitation while offering greater protection for the community. *See* ***Kleser*** at ¶¶40-42.

At that same time, the nation as a whole began to adopt tougher penalties in the juvenile justice system in an effort to combat the concept of a child as a "super-predator," leading to great increases in the number of school-based arrests and delinquency cases. *See* Kimberly P. Jordan, *Kids*

are Different: Using Supreme Court Jurisprudence About Child Development to Close the Juvenile Court Doors to Minor Offenders, 14 N. Ky. L. Rev. 193-195 (2014)(The number of juvenile delinquency cases peaked in 1997 at 1,878,505 according to the National Center for Juvenile Justice FN 53). Legislators in other states also reacted to the fear of the juvenile super predator making it easier for youths to be tried as adults. *Id*.

The tide began to turn, however, in the late 1990's as crime rates continued to drop and new research began to debunk the notion of the super-predator theory. *Id*. This prompted initiatives to re-examine some of the changes that had occurred in the juvenile court model earlier in the decade. *Id*.

Currently, states have re-examined their approach to serious juvenile offenders. *Id*. Several emerging trends have developed, including expanding juvenile court jurisdiction to older teens, allowing juveniles to stay out of adult jails and prisons, and the reduction of pathways for children into adult court, as well as reducing sentences for children tried as adults. *Id*.

This shift in thinking was partly due to the U.S. Supreme Court, who in several recent opinions, have commented on the distinct differences

between the brain development of juveniles and adults, in the context of determining the appropriateness of certain penalties imposed on juveniles who are convicted and sentenced in adult criminal court. *Id*. In ***Miller v. Alabama***, 567 U.S. 460 (2012), as an example, the Court summarized recent caselaw on the issue thusly:

> To start with the first set of cases: *Roper* and *Graham* establish that [8] children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, "they are less deserving of the most severe punishments." [citing ***Graham v. Florida***, 560 U.S. 48 at 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825]. Those cases relied on three significant gaps between juveniles and adults. First, children have a " 'lack of maturity and an underdeveloped sense of responsibility,' " leading to recklessness, impulsivity, and heedless risk-taking. [citing ***Roper vs. Simmons***, 543 U.S. 551 at 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1]. Second, children "are more vulnerable . . . to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. *Ibid.* And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]." *Id.*, at 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1.
>
> Our decisions rested not only on common sense--on what "any parent knows"--but on science and social science as well. *Id.*, at 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1. In ***Roper***, we cited studies showing that " '[o]nly a relatively small proportion of adolescents' " who engage in illegal activity " 'develop entrenched patterns of problem behavior.' *Id.*, at 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (quoting Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003)). And in ***Graham***, we noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"--for example, in "parts of the brain involved in behavior control." 560 U.S., at 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825. We reasoned that those findings--of transient rashness, proclivity for risk, and inability to assess consequences--both lessened a child's "moral culpability" and enhanced the prospect that, as the years go by and neurological development

> occurs, his " 'deficiencies will be reformed.' *Ibid.*,___, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (quoting ***Roper***, 543 U.S., at 570, 125 S. Ct. 1183, 161 L. Ed. 2d 1).
>
> ***Roper*** and ***Graham*** emphasized that [9] the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because " '[t]he heart of the retribution rationale' " relates to an offender's blameworthiness, " 'the case for retribution is not as strong with a minor as with an adult.' ***Graham***, 560 U.S., at 71, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (quoting ***Tison* v. *Arizona***, 481 U.S. 137, 149, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987); ***Roper***, 543 U.S., at 571, 125 S. Ct. 1183, 161 L. Ed. 2d 1). Nor can deterrence do the work in this context, because " 'the same characteristics that render juveniles less culpable than adults' "--their immaturity, recklessness, and impetuosity--make them less likely to consider potential punishment. ***Graham***, 560 U.S., at 72, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (quoting ***Roper***, 543 U.S., at 571, 125 S. Ct. 1183, 161 L. Ed. 2d 1). Similarly, incapacitation could not support the life-without-parole sentence in ***Graham***: Deciding that a "juvenile offender forever will be a danger to society" would require "mak[ing] a judgment that [he] is incorrigible"--but " 'incorrigibility is inconsistent with youth.' 560 U.S., at 72-73, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (quoting ***Workman* v. *Commonwealth***, 429 S.W.2d 374, 378 (Ky. App. 1968)). And for the same reason, rehabilitation could not justify that sentence. Life without parole "forswears altogether the rehabilitative ideal." ***Graham***, 560 U.S., at 74, 130 S. Ct. 2011, 176 L. Ed. 2d 825. It reflects "an irrevocable judgment about [an offender's] value and place in society," at odds with a child's capacity for change. *Ibid.*

See ***Miller*** at 471-473.

This has all led to a noticeable shift in how Wisconsin ranks within the United States in terms of holding children accountable in adult court for a crime committed when the offender was a juvenile at the time. For example, in a 2009 study on the minimum age of criminal responsibility around the world, Wisconsin was listed as having one of the higher minimum ages of criminal responsibility in the United States. See Don

Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective*, (2009) p. 219-220. *See also Minimum Ages of Criminal Responsibility in the Americas/CRIN* www.crin.org (last visited July 21, 2017). However, in a more recent study from 2015, of the twenty five other states that did have a minimum transfer age specified in the statutes, Wisconsin was now listed along with Vermont as having the *lowest* transfer age at ten. *See* 2015 Statistical Briefing Book, *Juveniles Tried as Adults*, U.S. Department of Justice Programs, Office of Juvenile Justice and Delinquency Prevention (See Appendix)**.**

The majority of the remaining states (fourteen) with minimum transfer ages for juveniles to criminal court set fourteen as the minimum age, thus reflecting a national trend towards higher minimum transfer ages. *Id*.

The same study also listed a total of twenty-five states that had at least one provision for transferring juveniles to the criminal court for which no minimum age is specified, down from thirty-three states approximately six years earlier. *Id.* However, it must be noted that the majority of the state's that currently have no minimum mandatory age for discretionary adult court transfer all require the court to consider various relevant factors,

such as the sophistication and maturity of child, *before* transferring jurisdiction to the adult penal system. *See* 10A OK Stat § 10A-2-2-403 (2014). Furthermore, unlike the scenario that played out in this case, the child is entitled to a full due process hearing on the merits of the transfer and a right to an appeal an adverse ruling *before* a trial can be had in the case. *Id.*

Therefore, the court of appeals decision in this case, which effectively opens the door for adult criminal court prosecution for offenses dating back to infancy, has Wisconsin heading in the exact opposite direction from the rest of the country and in direct opposition to the findings noted in several significant studies on child development which have all been cited with approval by the U.S. Supreme Court in ***Miller***, et. al. Even worse, the court has not provided any framework for determining whether there should be a limit for adult prosecution of childhood offenses in certain cases based the capacity and/or maturity of the child at the time. At this point, *any* childhood sex offense can be prosecuted in adult criminal court provided the forty-five year statute of limitations has not run under Wis. Stat. 939.74(2)(c) and absent a valid claim of prosecutorial delay.

B. The Court of Appeals has Overextended *Annala* to Include Acts that Fall Outside of Wisconsin's Juvenile Justice and Adult Criminal Codes.

During the post-conviction proceedings in this case and in the court of appeals, the State relied primarily on this Court's holding in ***State v. Annala***, 168 Wis. 2d 453, 484 N.W. 2d 138 (1982), to support its prosecution of Sanders in adult court for offenses allegedly committed during a time when he would have originally been subject to a non-delinquency CHIPS proceeding (i.e. pre-age-ten conduct). Sanders maintained throughout the lower court proceedings that ***Annala*** could not be used for this broad purpose.

Annala was charged with molesting a young child at a time when he would have been fifteen years old, but he was twenty years old by the time it was reported to the authorities. *Id.* at 458. The sole issue before this court in ***Annala*** was whether juvenile court still had jurisdiction to hear the case since the crime was allegedly committed while Annala was a juvenile. This court ultimately held that it is the age of the defendant at the time of *charging* that controls which court will have jurisdiction to hear the case, subject to any claims by the defense that the State intentionally delayed the prosecution in order to charge the defendant as an adult. *Id. See also* ***State***

v. Becker, 74 Wis. 2d 675, 247 N.W. 2d 495 (1976).

Significantly, at the time the Annala was charged, juvenile court jurisdiction for a delinquency (i.e. a violation of state or federal criminal law) began at age twelve. This Court was not asked to consider the broader issue raised in this case of whether the adult court would retain jurisdiction to hear an offense occurring *before* Annala's twelfth birthday, during a time period the legislature originally envisioned a non-punitive CHIPS based outcome.

Sanders has already conceded that absent a claim under ***Becker***, *Supra*., for intentional prosecutorial delay, which is not being raised in this case, the State could arguably prosecute an adult in criminal court for state crimes occurring on or *after* the age of original juvenile court jurisdiction based on this Court's holding in ***Annala***. All of the other reported decisions are similar to ***Annala*** in that they relate to *post*-CHIPS juvenile court era conduct that was later reported and charged after the defendant had already become an adult. *See* ***State ex rel. Koopman v. County Court***, 38 Wis. 2d 492, 157 N.W. 2d 492, 157 N.W. 2d 623 (1968); *See also* ***State v. LeQue***, 150 Wis.2d 256, 442 N.W. 2d 494 (Ct. App. 1989).

The court of appeals ultimately relied upon ***D.V. v. State***, *Supra*, to

support its holding that Sanders could be prosecuted as an adult for what would have been CHIPS era conduct if prosecuted at the time. Unlike the cases cited above, ***D.V.*** *did* involve conduct that occurred before the age of original juvenile court jurisdiction (twelve years of age at the time).

D.V. allegedly committed a robbery several weeks before his twelfth birthday. The State filed a delinquency petition approximately twenty-seven days later, at a time when D.V. would have just turned twelve by one week. *Id.* at 364. The court of appeals in ***D.V.*** held that the prosecution could proceed under the juvenile justice code and that the twenty-seven day delay in charging was neither intentional nor negligent for juvenile court practices at the time, thus satisfying ***Becker***. *Id.* at 371.

Based on the holding in ***D.V.***, the court of appeals held Sanders had essentially no legal basis to challenge the criminal prosecution for his conduct that allegedly occurred before the age of original juvenile court jurisdiction. *See* ***Sanders***, at ¶24-28. As a result, the court concluded that Sanders' trial counsel could not have rendered prejudicially deficient performance for failing to challenge Sanders' CHIPS era conduct prior to trial. *Id.* at ¶29.

Completely missing in the court of appeals' decision in this case,

however, was the actual *analysis* used by the court in ***D.V.*** to arrive at its conclusion that D.V.'s CHIPS era conduct *could* be prosecuted in juvenile court. Critical to the court's decision was a direct comparison between Children's Code (Chapter 48 at the time) and CHIPS (§48.13(12) at the time). *See* ***D.V.***, 100 Wis. 2d at 369. The court in ***D.V.*** found and listed twenty three similarities between the two codes. *Id.* at 369-370. In contrast, the court then went on to note there were only six differences between the two codes. *Id.* at 370. The court in ***D.V.*** ultimately concluded the differences in the two proceedings were "minimal" and did not "constitute the kind of 'substantial differences' that implicate the equal protection and due process procedural protections of an evidentiary hearing" with respect to the twenty-seven day delay in charging D.V. under the Children's Code. *Id.* at 371.

Sanders has highlighted the jurisdictional division points created by the legislature and the ages where profound differences begin to occur in the CHIPS code, the Juvenile Code and the pathways to the Criminal Justice Code through juvenile court. It goes without saying that unlike the numerous comparisons the court in ***D.V.*** made between the CHIPS Code and the Juvenile Code, there are few, if any,that can be made between the

CHIPS Code and the Criminal Justice Code. There are even more substantial differences between the CHIPS code and the Criminal Justice Code when it relates to child sex crimes (chiefly up to forty years of imprisonment and mandatory sex offender registration for the offense in this case, as an example). Had the court of appeals applied the same analysis that was used in ***D.V.***, it is doubtful they would have reached the conclusion they did.

Sanders still maintains this court should attempt to harmonize the three statutory layers (CHIPS, Juvenile Justice Code and Criminal Justice Code) and employ a similar analysis to avoid conflict if at all possible. *See* ***State v. Ray***, 166 Wis. 2d 855, 873, 481 N.W.2d 288 (Ct. App. 1992); *See also* ***Edelman v. State***, 62 Wis. 2d 613, 215 N.W. 2d 386 (1974). The legislature intended to address pre-age-ten conduct under a civil CHIPS proceeding without *any* exception, regardless of the seriousness of the alleged offense (contrast this with the Juvenile Code which has multiple jurisdiction points based on age and the seriousness of the offense). As previously stated, the clear purpose of the legislature in creating a CHIPS proceeding in the first place is to provide treatment and services to the child, *not* punishment. *See* ***State v. Thomas J.W.,*** *Supra*.

As argued in Sanders' original petition, if the reasoning in ***Annala***, or the court of appeals' interpretation of ***D.V.*** used in this case, is applied to pre-age-ten conduct, jurisdiction or competency can be treated like fruit, which can ripen on the tree until it is ready for picking at a later date. In other words, had Sanders been charged at the time he allegedly committed the earliest offense in this case (seven to eight years of age), he would have been the subject of a non-criminal civil CHIPS proceeding and presumably provided with treatment and services. However, solely due to the passage of time triggered by the reporting of an offense and the filing of a complaint, the State can now prosecute him for a criminal offense carrying up to forty years of imprisonment and mandatory sex offender registration now that he has "ripened" into an adult.

It is illogical to punish a fully formed adult for an act he allegedly committed long before he was so. The statutory schemes referenced above must be harmonized to avoid this absurd result. *See* ***Johnston v. Masters,*** 2013 WI 43, 347 Wis.2d 238, 830 N.W.2d 637**.** Again, Sanders believes that the jurisdictional demarcation point should be ten years of age, the earliest age a juvenile can face the consequences of both the juvenile and/or adult criminal justice system. This is also consistent with the emerging

trends reflected in the more recent opinions of the U.S. Supreme Court (*Miller, Roper and Graham*) which highlight the differences between the brain of a child versus a fully formed adult.

Even if this Court disagrees, it must decide when and how this issue will be addressed in future prosecutions. Juveniles accused of certain enumerated offenses at age fourteen or any offense after age fifteen under Wis. Stat. §938.18 are at least entitled to a due process hearing to determine the appropriateness of the transfer to Adult Court waiver as long as specific criteria can be met. Similarly, even juveniles who are charged with crimes serious enough to warrant original adult court jurisdiction in Wis. Stat. §938.183 are entitled to a "reverse waiver hearing" before the jurisdictional decision is final. All of the jurisdictional decisions are determined *prior* to trial and *before* a jury hears any evidence, unlike the scenario in this case.

As stated above, even those states that have no mandatory minimum age for a discretionary transfer of a child to adult court have mandatory guidelines which must be considered by the court before the transfer can be made, such as the sophistication and maturity of the child and his/her capability to distinguish right from wrong for example. *See* 10A OK Stat § 10A-2-2-403 (2014).

Unlike the above statutory schemes, which provide clear guidance from the legislature on the ages and/or offenses that invoke jurisdiction and transfer, there is absolutely zero guidance on how to treat the special category of criminal prosecution like the one in this case. There is no "retro-crime" provision within the Criminal Justice Code. This special category of criminal prosecution was created strictly by judicial precedent, chiefly this Court's holdings in ***Koopman***, ***Annala***, and the court of appeals decision in ***D.V.*** *Supra*.

For this reason, Sanders maintains that the court does not have competency to adjudicate cases of this nature (pre-age-ten conduct resurrected into crimes after adulthood). In ***State v. Schroeder***, 224 Wis. 2d 706, 593 N.W. 2d 76 (1999), this Court held that competency refers to the "lesser power" of a court, as conferred by the *legislature***,** to adjudicate the *specific* case before it. *See* ***Schroeder***, 224 Wis. 2d at ¶16.

The legislature, in the creation of the juvenile and adult justice codes, has not conferred *either* system with *specific statutory authority* to adjudicate violations of state or federal criminal laws that pre-date an individual's tenth birthday as a criminal offense or "retro-crime." Therefore, because of the absence of a specific statutory mandate, the

circuit court loses competency to proceed.

This court has also held that a circuit court has subject matter jurisdiction to consider and determine *any* type of action (with one possible exception which will be addressed further below). *See* ***In re B.J.N.***, 162 Wis. 2d 635, 645, 469 N.W.2d 845, 848 (1991). However, when a statutory mandate is not met, like the minimum age of prosecution in this state that failure alone does not deprive the circuit court of its subject matter jurisdiction. *See* ***In re B.J.N.***, 162 Wis. 2d at 656. Instead, the court is deprived of its competency to *exercise* its subject matter jurisdiction. As a result, Sanders has maintained that he is more accurately challenging the circuit court's competency to exercise its subject matter jurisdiction over this special category of "retro-crime."

As it stands, the court of appeals has basically given the State *carte blanche* to prosecute individuals who have allegedly committed offenses dating back to infancy as long as the statute of limitations has not run and absent any claim of intentional or negligent delay. Even worse, the court has not established any meaningful guidelines for determining under what circumstances a crime from one's childhood can be prosecuted after that person has become an adult.

C. TRIAL COUNSEL COMMITTED PREJUDICIALLY DEFICIENT PERFORMANCE DUE TO HIS FAILURE TO CHALLENGE COUNT ONE OF THE INFORMATION ON JURISDICTIONAL GROUNDS PRIOR TO TRIAL.

The majority of the ineffective assistance claims raised in this brief hinge on the question of whether the state can prosecute Sanders as an adult for offenses that occurred before he was ten years of age. The answer to this question affects the outcome of the ineffective assistance claims in the following areas: 1) Failure to file a pretrial motion to dismiss or amend count one of the criminal complaint; 2) Failure to request an Order in Limine prohibiting the state from introducing evidence of conduct before Sanders' tenth birthday; 3) Failure to object to the testimony of the alleged victim that Sanders had sexual contact with her prior to his tenth birthday or request an Order in Limine prohibiting the same and 4) Failure to request a limiting instruction to cure any unfair prejudice that resulted from the introduction of this evidence.

As previously stated, the charging period in count one alleged that Sanders committed at least three acts of sexual contact with H.A.S. "between September 26, 2003, and September 25, 2008." (1:1-4). Sanders, who was born on May 31, 1994, would have been as young as nine years old at the time the offenses allegedly occurred. Thus, the defense was put

on notice from the very outset of the proceedings that the state was attempting to prosecute Sanders' for various offenses prior to his tenth birthday.

The problem with trial counsel's approach to this issue was that he mis-framed it as a burden of proof issue (*See* ***In the Interest of Stephen T***, 2002 WI App 3, 250 Wis.2d 26) as opposed to one involving the court's competency to exercise its subject matter jurisdiction. It was not until the trial court correctly framed the issue as one involving its jurisdiction to try Sanders for a portion of the charging period alleged in count one that the gravity of the error became apparent.

At the ***Machner*** hearing, trial counsel testified that he did not believe a pretrial motion "would do any good" because the evidence would have come in as other acts evidence anyways, or the court would have amended the complaint to change the charging period to conform to the law. (57:15).

Sanders maintains that the error had a domino like effect and prejudiced the defense in several respects. First, had trial counsel brought a motion to dismiss or strike that portion of the complaint that pre-dated Sanders' tenth birthday *prior* to trial, as opposed to the close of the state's

case, the unsuppressed portion of Sanders statement to detective Weber, which concerned acts *prior* to his tenth birthday, would not have been admissible and trial counsel would have had the basis to request an order *in limine* prohibiting the introduction of this proffered evidence.

The testimony of detective Weber was prejudicial because the state was able to establish that Sanders admittedly engaged in "peeks" with H.A.S. (54:171). The state was further able to introduce evidence through detective Weber that Sanders admitted the word "peeks" had sexual overtones with his sister. (54:171-72). This is especially significant because it arguably corroborated H.A.S.' testimony that the use of the word "peeks" was the equivalent of a code word used by Sanders to initiate sexual contact with her during the charging periods alleged in counts two through four.

Moreover, the admission of Sanders' statement through Detective Weber basically forced Sanders to take the stand and explain the earlier contact with his sister from when he was under the age of ten. Sanders may not have felt compelled to take the stand and testify if this evidence had been properly excluded on jurisdictional grounds in the first place.

Furthermore, had trial counsel properly framed the issue as one involving the court's jurisdiction to try Sanders' for a portion of the acts

alleged in count one, the defense would have had the basis to request an order *in limine* prohibiting H.A.S. from testifying about any acts that may have occurred prior to Sanders' tenth birthday.

As it was, the jury heard evidence through H.A.S. that Sanders allegedly began to touch H.A.S. sexually when he was as young as eight or nine years old:

STATE: If you can recall, how old were you— About how old were you the first time that ["peeks"] occurred?

H.A.S.: Six or seven.

...

STATE: What do you remember about what took place back when you were six or seven with the word "peek?"

H.A.S.: All I know is that eventually, it just became something that I did.

STATE: Did the peeks always involve touching?

H.A.S.: Yes.

(54: 123-24).

Again, this was a full year younger than what was originally alleged in the complaint. Trial counsel admitted at the ***Machner*** hearing that his defense of Sanders was largely rooted in credibility, that is, H.A.S. was simply not a credible witness. (57:20, 35-36). Trial counsel conceded that

the above evidence hurt Sanders' defense because it made H.A.S. more believable than it would have had the evidence not been introduced (57:35-37).

The fact that Sanders was ultimately acquitted of count one does not lessen the gravity of trial counsel's error. The standard of ineffective assistance of counsel is not an outcome determinative standard. (38:2); *See also* ***State v. Pitsch***, 124 Wis2d, 628, 633, 369, N.W.2d711, 714 (1985). The improper admission of the evidence of conduct pre-dating Sanders' tenth birthday on count one materially impacted his defense on the remaining counts.

The evidence concerning Sanders contact with H.A.S. prior to his tenth birthday would not have been admissible other-acts evidence under Sec. 904.04(2), Wis. Stats. Other-acts evidence is not admissible "to prove the character of a person in order to show that the person acted in conformity therewith" or to show that the defendant has a propensity to commit crimes. See ***State v. Sullivan***, 216 Wis2d 768, 772, 576 N.W.2d 30(1998). Other acts evidence introduced for a different purpose is admissible so long as the evidence is relevant to a permissible purpose and

its probative value is not substantially outweighed by the danger of unfair prejudice. *Id.*

Here, the State would have offered the acts that allegedly occurred prior to Sanders' tenth birthday in order to show that Sanders is a bad person with a propensity to sexually assault children. The only useful purpose of introducing this conduct would be to show that Sanders also assaulted H.A.S. after his tenth birthday in conformity with his criminal character and propensity to sexually assault children.

If the State's other-acts evidence is relevant to show more than the defendant's criminal character or propensity to sexually assault children (and it should not), its probative value is substantially outweighed by the danger of unfair prejudice. *See Sec. 904.03, Wis. Stats*. Evidence that the defendant committed repeated acts of incest against his sister is likely to arouse the jury's sense of horror and provoke its instincts to punish. The error is magnified here because Sanders was not able to ask for a limiting instruction to cure the unfair prejudice that resulted from the introduction of this evidence because trial counsel did not properly frame the issue in the first place. Furthermore, even if he had, it is still doubtful that it would have made a difference.

Jurisdictional/competency issues aside, the relevancy of a child's age at the time of the alleged assaults has been addressed in the context of "other acts" evidence used to show the motive or intent of that same person to assault a victim at a later point in time. Specifically, in ***State v. McGowan***, 2006 WI App 80, ¶17, 291 Wis.2d 212, 715 N.W. 631, the state introduced evidence of an earlier assault allegedly committed by McGowan when he would have been ten years old, to provide evidence of motive or intent to assault a different female cousin eight years later.

The court in ***McGowan*** found the testimony of the earlier assault was improperly admitted. The court reasoned, "Because of the considerable changes in character that most individuals experience between childhood and adulthood, behavior that occurred when the defendant was a minor is much less probative than behavior that occurred while the defendant was an adult." *Id.*, ¶20 (quoting ***State v. Barreau***, 2002, WI App. 198, ¶38, 257 Wis.2d 203, 651 N.W.2d 12).

Ordinarily, the court must give great deference to counsel's "strategic choices made after thorough investigation of law and facts relevant to plausible options." ***Strickland v. Washington***, 466 U.S. 688 (1984). However, "[s]trategic choices made after less than complete

investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." ***Strickland***, 466 U.S. at 690.

In this case, present counsel cannot envision a scenario where it would have made strategic sense to wait until the close of the State's case to challenge the jurisdiction of the court over acts allegedly committed by Sanders before his tenth birthday. Again, there was a very real danger this evidence would make the jury more likely to believe Sanders' later alleged sexual contact with H.A.S. in the second charging period was more probable than not, (i.e. propensity evidence). The only reasonable conclusion that can be drawn from this is that trial counsel either was not aware of the law as it relates to the court's jurisdiction in the matter and/or he did not adequately investigate the facts of this case until it was too late to correct it. Either way, trial counsel's performance was the result of oversight, rather than reasoned defense strategy and the deficiency prong has thus been met. *See* ***State v. Moffett***, 147 Wis.2d 343, 433 N.W.2d 572, 576 (1989).

Alternatively, Sanders asks this court to find the admission of this evidence (acts prior to Sanders tenth birthday) plain error, thereby requiring

a new trial in the interest of justice. See ***State v Sonnenburg***, 117 Wis. 2d 159, 177, 344 N.W. 2d 95 (1984).

CONCLUSION

For the reasons stated above, Sanders respectfully requests that this court reverse the decision of the Court of Appeals which affirmed the decision of the trial court and remand the matter for a new trial in the interests of justice.

Respectfully submitted this 26th day of July, 2017.

WALDEN & SCHUSTER, S.C.
Attorney for Defendant-Appellant

Electronically signed by Craig M. Kuhary
_____
Craig M. Kuhary (SBN: 1013040)

707 W. Moreland Blvd. Suite 9
Waukesha, Wisconsin 53188
T. (262) 547-5517
F: (262) 547-7517

CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional serif font. The brief contains 7,799 words.

Electronically signed by Craig M. Kuhary
Craig M. Kuhary
Attorney for Defendant-Appellate

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 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 certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 26th day of July, 2017.

Electronically signed by Craig M. Kuhary
Craig M. Kuhary
Attorney for Defendant-Appellate