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# Supreme Court of Wisconsin

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2020AP1746-CR

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State of Wisconsin,  
Plaintiff-Respondent

v.

Joseph M. Marks  
Defendant-Appellant-Petitioner0

Appeal from The Circuit Court of Barron County  
The Honorable James C. Babler, presiding

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Petition for Review

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### **Statement of Issues**

This case presents three issues relating to the interpretation of Wisconsin Statute §908.08. This statute governs the admission of audiovisual recordings of statements from children.

First: The legislature requires a recording to be accurate *and* free from excision, alteration and visual or audio distortion. May a court admit a recording where the original recording contains audio distortion, but the state excised this audio and replaced the audio with an accurate recording?

The Court of Appeals held courts may admit audiovisual statements which had been excised and altered as long as the resulting recording was accurate.

Second: The legislature requires the child to demonstrate the understanding false statements are punishable and the importance of telling the truth. If the child does not demonstrate they know the difference between a truth and a lie, can they understand the importance of telling the truth?

The Court of Appeals did not reach this question.

Third: The legislature requires the content and circumstances of the statement provide indicia of trustworthiness. The legislature did not establish how courts are to determine indicia of trustworthiness, and our caselaw has not directly addressed this. How are courts to determine when a statement is trustworthy?

The Court of Appeals rejected past precedent, and did not determine any criteria for determining if a statement is trustworthy.

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### **Reasons to Accept Review**

Crimes against children are amongst the most heinous crimes in our society. In 2020 the Wisconsin department of Children and Families substantiated a horrifying 4,426 claims of maltreatment. (App. 6). Shockingly, this represents a decline from previous years.

Forensic interviews are a key tool in assessing allegations of maltreatment and prosecuting those who abuse our children. These interviews are designed to gather factual information in both a legally defensible and developmentally appropriate manner. (App. 7). The Wisconsin Legislature enacted Wis. Stat. §908.08 to enable the admission of these interviews subject to stringent safeguards contained in §908.08(3).

These safeguards are critically important. The evidence in a forensic interview may be the most damning evidence in a case charging a crime against a child. This interview is conducted *ex parte*, is not subject to cross examination, and should be conducted in a manner which is safe and child friendly.<sup>1</sup> These interviews are far from the “crucible of cross-examination” the founding fathers envisioned. The safeguards work to ensure the probity of this evidence while still protecting the child.

This case presents an opportunity to interpret and evaluate three of the five procedural safeguards. The lower court’s ruling significantly alters the statutory language of Wis. Stat. §908.08(3)(b) by treating the conjunctive “and” as the disjunctive “or”. The lower court further rejected settled caselaw for

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<sup>1</sup> Forensic Interview Services – National Children’s Advocacy Center, Nationalcac.org (2022), <https://www.nationalcac.org/forensic-interview-services/> (last visited May 26, 2022).

determining the trustworthiness of a statement.<sup>2</sup> The lower court's decision usurps the legislatures role in writing law, and creates needless uncertainty in the exercise of a judge's discretion. The State's jurists, litigators, investigators, defendants, and most importantly, the State's children deserve clarity regarding this important law.

### **Statement of the Case**

Mr. Marks began to date E.F. in November of 2017. (R.113:123). Mr. Marks moved in with E.F. that month. (R.113:123). E.F. lived with her three children from a previous marriage. (R.113:124). At the time, R.F. was four years old. (R.113:124). E.F. and her husband A.F. had divorced previously; from November 2017 to January of 2018 the children spent every other weekend with their father, and his new wife S.F. (R.113:125). In January 2018, the children began to spend every other week with A.F. and S.F. (R.113:126).

In late November, Officer Greg Chafer was informed Mr. Marks was in violation of his sex offender registry requirements. (R.72:7-8). Mr. Marks was arrested, and subsequently released on bond. (R.100:9).

On March 19, 2018, S.F. called the police alleging R.F. had told her she saw Mr. Marks' genitals, and Mr. Marks had told her to touch herself. (R.113:249). S.F. and A.F. would subsequently receive full-custody of the children. S.F. was "especially upset"

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<sup>2</sup> While *State v. Sorenson* does not directly address Wis. Stat. §908.08(3)(d), it is used to evaluate audiovisual recordings of a child's statements under Wis. Stat. §908.08(7). *State v. Sorenson*, 43 Wis. 2d 226, 421 N.W.2d 77 (1988). While the language used is slightly different, (indicia of trustworthiness, circumstantial guarantees of trustworthiness) statutes dealing with the same subject matter should be interpreted harmoniously.

E.F. was not charged with any crimes. (R.100:4). R.F.'s pre-kindergarten teacher Holly Schramski also called the police as R.F. informed Schramski Mr. Marks had told her to pull down her pants and touch herself. (R.63). Ms. Schramski testified this conversation happened on March 20, 2018, but her written statement is dated April 18, 2018. (R.113:109; R. 63).

On March 22, 2018, R.F. was brought to the Cumberland Police Station where Officer Chafer and Martha Moyer conducted an interview of R.F. (R.113:165-166). On April 20, 2018, a criminal complaint was issued, charging Mr. Mark with first degree child sexual assault and exposing genitals in violation of Wis. Stat. §§948.02(1)(e) and 948.10(1) respectively.

On February 6, 2019, the circuit court held a hearing to determine if the forensic interview of four year old R.F. would be admitted. After hearing testimony on the State's alterations of the video to fix issues with the audio recording, the court viewed the forensic interview in its entirety. (R.108:26). Mr. Mark's attorney raised objections regarding the alterations to the video and R.F.'s ability to understand the differences between a truth and a lie, and the consequences for lying. The court found the video was free from alteration and video audio distortion. (R.108:32). The court also found R.F. demonstrated a "clear understanding of false statements and that they are punishable". (R.108:34). Lastly, the court found from the time, the content, and circumstances of the statement, there was indicia of trustworthiness. (R.108:34).

The case proceeded to trial on October 3, 2019. R.F. testified she did not remember the interview taking place, she did not remember telling Mr. Schramski anything about Mr. Marks, and she did not remember telling S.F. Mr. Marks had shown her

his genitals, or instructed her to pull down her pants. (R.113:240-245).

After three and a half hours of deliberations, the jury returned a verdict of guilty as to both counts. (R.115:87). The court sentenced Mr. Marks to twelve years of confinement and eight years of supervision in count one and 18 months confinement and two years supervision in count two to be served consecutively. (R.116:17).

Mr. Marks filed a timely notice of intent to pursue post-conviction relief on December 19, 2019. (R.80). A post-conviction motion alleging counsel was ineffective was filed on August 17, 2020. (R.88). Trial counsel had requested a respected psychologist review the interview of R.F. (R.88:4). Unfortunately, Dr. Jurek's report was not submitted until after the motion hearing regarding the admissibility of the forensic interview. Dr. Jurek's report concluded the interview failed to establish R.F. understood the difference between a truth and a lie, and the interview was littered with errors and irregularities which limit the trustworthiness of the interview. (R.88:29-30). Despite this, this circuit court denied Mr. Marks' motion for post-conviction relief stating a reasonable lawyer would not have brought a portion for reconsideration, the court would not have changed its ruling, and the child testified at trial and "gave information".<sup>3</sup> (R.117:18)

A timely notice of appeal was filed on October 12, 2020. (R.91). The Court of Appeals issued a published decision affirming the circuit court's ruling on April 27, 2022.

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<sup>3</sup> R.F.'s testimony is located at R.113:239-245. R.F. did not provide any information about the alleged conduct, and could not remember any of her alleged disclosures.

## Argument

- I. This case presents a question of statutory interpretation which has not been address by Wisconsin appellate courts. Correcting the lower court's flawed analytical methodology will serve to restore established canons of legal interpretation, aiding courts as they interpret statutes in any area of law.

The Wisconsin Legislature enacted Wis .Stat. §908.08 in 1985. This statute allowed for the admission of videotaped statement of children in court proceedings. The statute is largely self-explanatory and easily construed. In the 37 years since its introduction, this court has only been asked to interpret the language of the statute recently. *State v. Mercado*, 2021 WI 2 (Wis. 2021). Likewise, there are few opinions from the Court of Appeals which interpret the statute.<sup>4</sup>

This Court serves as the primary law defining and law declaring Court. *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (Wis. 1997). This case presents the opportunity to interpret three of the five factors governing the admission of a child's videotaped statement. An opportunity to resolve any ambiguities in a statute designed to protect the State's most vulnerable victims should not be passed on.

The published decision of the Court of Appeals is the first decision which interprets Wis. Stat. §908.08(3)(b) and Wis. Stat §908.08(3)(d). The court's decision reflects the neglect of established methods of interpretation. This neglect leads to a weakening of the democratic process and distorts our system of

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<sup>4</sup> There are numerous opinions which review the application of the statute. The vast majority of these opinions are unpublished.



checks and balances. Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Text*, xxvii (2012).

Wis. Stat. §908.08(3)(b) requires the “recording is accurate *and* free from excision, alteration and visual or audio distortion.” (Emphasis added). The Court of Appeals held an excision or alteration is permitted by statute as long so the alteration or excision enhances the accuracy of the recording. This interpretation effectively rewrites the statute, exchanging the legislature’s chosen conjunctive “and” with the disjunctive “or”, rendering the majority of the section a mere afterthought. The Court’s reasoning extracted the purpose from the statute, then eliminates the statute. This method of reasoning has been rejected by the United States Supreme Court. *See e.g., United States v. Gonzales-Lopez*, 458 U.S. 140, 145, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006); *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed. 2d 177 (The Confrontation Clause “commands, not that evidence be reliable, but that reliability be assessed in a particular manner”). This Court should join in this rejection and restore the primacy of a statute’s text in its interpretation.

When a child’s developmental level is inappropriate for the administration of an oath, Wis. Stat. §908.08(3)(c) requires a demonstration the child understands “false statements are punishable and the importance of telling the truth.” This provision serves to ensure the child attempts to tell the truth, just as an oath would. The legislature has not required the child actually demonstrate they know what “truth” is, or what a “lie” is. This could lead to an unjust result; a child enunciating the legislature’s chosen standard without any understanding of what is true and what is false. This court should resolve the question

of whether the legislature intended this anomalous result, or if the prerequisite of understanding the difference between truth and a lie is implicit in the statute.

Wis. Stat. §908.08(3)(d) requires the time, content and circumstances of the statement provide “indicia of its trustworthiness”. The legislature did not delineate how courts are to determine if the recording bears signs of trustworthiness. This Court has provided guidance when a child’s recorded statement is admitted under Wis. Stat. §908.08(7); courts are to apply the five factor *Sorenson* test. *State v. Sorenson*, 143 Wis. 2d 226, 245-46, 421 N.W.2d 77 (1988); *State v. Mercado*, ¶¶54-56.

In declining to “rigidly apply or rely on the facts of other cases” the Court of Appeals not only violated the presumptions of consistent usage and the canon of *in pari materia*, it appears to jettison *stare decisis* as well. The Court of Appeal’s holding leaves the lower courts with no guidance for determining whether indicia of trustworthiness exist. The Court of Appeals decision threatens to turn “indicia of trustworthiness” into the unreliable and unworkable test of *Roberts v. Ohio*. *Roberts v. Ohio*, 448 U.S. 56, 100 S. Ct. 2531, 65 L.Ed. 2d 597 (1980). This Court should reverse the lower court, firmly declare the *Sorenson* factors to guide throughout Wis. Stat. §908.08, and refute this unequal treatment of similarly situated litigants.

These issues obviously involve significant error correcting. Error correcting is not the primary purpose of this Court. However, the Court of Appeal’s errors stem from a fundamental misunderstanding of *how to interpret law*. If these errors are not corrected, the development and declaration of the law will be stunted. This Court necessarily accepts a small percentage of

cases; cementing the canons of interpretation in our caselaw will guide the lower courts as they grapple with difficult legal questions. Correcting the fundamental errors in the lower court's reasoning to ensure the legal system regains the mooring it has lost and restore judicial fidelity to statutory texts. Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Text*, xxvii (2012). The error correction in this case will benefit the development of law in any case where legal interpretation is necessary.

II. This case presents a purely legal question in a fact pattern which is likely to reoccur.

The Wisconsin Department of Child Protective Services conducted 20,960 initial assessment investigations in 2020. (App. 6). Many result in forensic interviews, but the exact number of forensic interviews conducted in the State is not readily available. Unfortunately, recorded forensic interviews of children are a modern necessity.

Despite the best efforts of all of those involved in protecting our children, technological errors happen. Wisconsin deserves guidance as to the admissibility of these recordings. If the legislature means what it said, and interviews must be accurate *and* free from excision, alteration and distortion, our child advocate services should know so they can make arrangements to adopt redundant systems, or lobby the legislature to alter the statutes.

Children will be interviewed who will be unable to swear an oath or give an affirmation to tell the truth. Child advocates need to understand whether they need to determine if the child understands the difference between a truth and a lie, so they can adjust their interview procedures accordingly.

Questions about the veracity of a child's statement will continue to permeate our systems. CPS is diligent in investigating the majority of referrals it receives, but substantiates a small fraction. The indicators of trustworthiness are not just useful for the criminal justice system, they are useful for all stakeholders investigating every claim of maltreatment.

Child abuse is horrific and systemic. It is a blight on our society. We need clear guidance from this Court as we seek to protect our children and prosecute offenders. Ignoring the

ambiguities and inconsistencies created by the lower court's decision will only harm our children. They deserve certainty which can only be provided by this Court

**Conclusion**

Mr. Marks respectfully requests this Court Grant review in this case.

Dated: Thursday, May 26, 2022

Respectfully submitted,



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**CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (8)**

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this petition is 2,551 words.

Signed: Steven Roy

Signature 

**CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (2)**

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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Signed Steven Roy

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#### CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (13)

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Signed Steven Roy

Signature

