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SUPREME COURT

State of Wisconsin

Supreme Court

Case No. 2021AP2174

In the interest of B.S.S., a person under the age of 18:

State of Wisconsin,

Petitioner—Respondent,

v.

Manitowoc County
Case No. 2018JV62

B.S.S.,

Juvenile—Appellant—Petitioner

On Review of the Decision of the Wisconsin Court of Appeals, District II, and from the Circuit Court of Manitowoc County, the Hon. Mark Rohrer, Presiding

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Petition for Review

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Statement of Issues

(1) Did the circuit court prejudge B.S.S.'s motion to stay sex offender registration when it denied her request for expert funding because "the court is going to order her to register" no matter what the expert said?

The circuit court and the court of appeals both said no.

(2) Did the court demonstrate further bias against B.S.S., or otherwise fail to use a rational process to reach a reasonable conclusion, when at postdisposition it

> Dismissed her expert witness as incredible;
>
> Refused to consider B.S.S.'s risk to the public of sexual re-offense, ostensibly because B.S.S. could not take actuarial assessments designed exclusively for men; and
>
> Said it would require her to register as a sex offender even if it believed there was no need to protect the public from her?

The circuit court and the court of appeals both said no.

(3) Did the circuit court correctly interpret the juvenile registry statute when it found it could order B.S.S. to register as a sex offender without any reasoning about her risk to the public of sexual re-offense?

The circuit court and the court of appeals both said yes.

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Reasons for Granting Review

This case shows how apparent neutrality concerning factual, sex-based differences between men and women inadvertently privileges males, treats women like defective men, and leads to unreasonable outcomes for women and girls.

B.S.S. is a young woman who was adjudicated delinquent for sex offenses she committed against a younger housemate when she was between the ages of twelve and fifteen. (R. 6, App. 65). The uncontroverted evidence in the record is that "be a woman" is an extraordinarily simple and reliable way to demonstrate a low risk of sexual re-offense. Female sex offenders re-offend sexually at a rate of around 1.5% over 6 years. (R. 120:13, App. 88). When the circuit court was deciding whether registration would protect the public from B.S.S., the fact of her womanhood should have redounded firmly to her benefit.

Instead, the circuit court dismissed the above information as incredible (R. 157:8, App. 59) and elected to treat B.S.S. as an aberrant man, whose risk of sexual re-offense, it said, was entirely unpredictable simply because she is not eligible to take the risk assessments used for men. (R. 157:6, App. 57).

Recognizing that sex-based differences between men and women are real, and finding that these differences can and sometimes must serve as relevant facts in judicial determinations, is alone a "special and important" reason for review.

Second, the court of appeals decided it was not prejudgment, or even the appearance of prejudgment, for the circuit court to say five times, before a motion had been filed and before any evidence was presented or argued, that it was going to order B.S.S. to register as a sex offender no matter what her risk was and no matter what her requested expert said. (Opinion ¶¶ 29-30, App 17-18). The court of appeals reasoned that, by requesting funding to support a future motion for a stay, B.S.S. invited, and even forced, the court to prejudge the matter. (Opinion ¶29, App. 17). This decision:

- Conflicts with controlling court of appeals decisions stating that judicial bias is a due process violation and cannot be found to be harmless;

- Conflicts with controlling court of appeals decisions concerning how judges should decide expert funding requests;

- Unconstitutionally turns requests for county funding of defense experts into surprise waivers of the right to an unbiased tribunal; and

- Develops and advances arguments the State never made and to which B.S.S. has had no opportunity to respond until now.

Finally, the court should take this case to clarify the proper interpretation of Wis. Stat. § 938.34(15m)(c)(5). This is the statute that says, in determining whether it is in the interest of public protection to make a juvenile register as a sex offender, the court may consider a non-exhaustive set of criteria including "the probability that the juvenile will commit other violations in the future." The plain meaning of "violations," as used throughout Chapter 938, is violations of the criminal code of any kind.

The circuit court and the court of appeals, instead of taking this plain meaning, take (5) to mean "risk of future *sexual* re-offense." Reducing the risk of sexual re-offense to just one optional consideration among many allowed the court to place B.S.S. on the registry even if, to quote the court, B.S.S. were "low risk, not going to reoffend, public not in danger." (R. 74:17, App. 35).

But the clear, and sole, purpose of juvenile sex offender registration is public protection. *State v. C.G.*, 2022 WI 60, ¶33, 403 Wis. 2d 299, 976 N.W. 2d 318. The court's responsibility to exercise discretion, and only order registration "where the particular facts of the case and concerns for public safety dictate it" is a safeguard that

protects juvenile registration from functioning as a potentially unconstitutional punishment. *Id.*, citing *State v. Hezzie R.*, 219 Wis.2d 848, 881, 580 N.W.2d 660 (1998).

This interpretation of the statute impermissibly inserts words into the statute to give it a certain meaning. *DOC v. Schwarz,* 2005 WI 34, ¶20, 279 Wis. 2d 223, 693 N.W.2d 703. This court should not allow such an interpretation to stand, even to be used only for its persuasive value.

Statement of the Case

I. The State files a tardy delinquency petition against B.S.S. and offers her a consent decree; B.S.S. declines the offer while legally incompetent; B.S.S. undergoes remediation and admits to felony charges.

B.S.S. was a victim of continuous childhood sexual assault who in turn, between the ages of twelve and fifteen, victimized her younger housemate. (R. 120:11, App. 86). The State initially overlooked B.S.S.'s delinquency referral. (R. 5, App. 64). Later, it told the court it had filed its petition with the goal of securing a consent decree on the felony sexual assault charge. (R. 21, App. 69). Success on the consent decree would have resulted in dismissal of the felony with prejudice and could therefore have spared B.S.S. sex offender registration. Wis. Stat. § 938.32(4).

For reasons that are not clear in the record, B.S.S. declined the consent decree, and the State declared its offer withdrawn. (R. 79:4). Five weeks later, B.S.S. was found incompetent by Dr. Deborah Collins, who specifically cited her "poor grasp of the plea-bargaining process despite a number of tutorials offered to her." (R. 42:6). By the time B.S.S. finished competency remediation, in March of 2019 (R. 113:4), the State had changed its goal—instead of a consent decree, it now wanted a felony adjudication, and fifteen years of sex offender registry to go with it. As such, B.S.S. entered a no-contest plea on June 4, 2019 to third-degree sexual assault under Wis. Stat. § 940.225(3) and exposing genitals under § 948.10(b)(1). (R. 69).

II. On June 14, 2019, the circuit court denies B.S.S.'s requests for a sex offender risk assessment by Dr. Dawn Pflugradt because it says it will order B.S.S. to register as a sex offender no matter what the risk assessment says.

After the plea, B.S.S.'s county-appointed trial counsel, John Bilka, requested that the court order a sex offender risk assessment by "a highly qualified expert," supplying Dr. Dawn Pflugradt's resume for the court's *in camera* review. (R. 68:2, App. 75).

The court denied the request for funding because:

- It assumed that the evaluation would only discuss B.S.S.'s risk of re-offending sexually and would have no relevance to any other factor under Wis. Stat. § 938.34(15m)(c). (R. 74:16-17, App. 34).

- It stated that "likeliness to re-offend" is "but one factor" the court may consider. (R. 74:10-11, App. 28-29).

- It stated five[1] different times that it was going to order B.S.S. to register and that no additional information from a defense expert would alter that decision. (R. 74:13, App. 31; R. 74:14, App. 32; R. 74:15, App. 33; R. 74:18, App. 36).

Trial counsel immediately told the court that it seemed to be prejudging B.S.S.'s disposition. (R. 74:19, App. 37). A chambers conference was held. (R. 74:20). The court ordered the Manitowoc Department of Human Services to have someone—not Dr. Pflugradt—do a "psycho-sexual" evaluation of B.S.S. (R. 74:21).

Manitowoc County hired a local substance abuse counselor and marriage and family therapist to evaluate B.S.S. (R. 88:10-11). That counselor, a Ms. Lepak-Jostsons, wrote that, "There is no actuarial instrument for juvenile females to predict recidivism. Therefore, it's this evaluators [sic] opinion that [B.S.S., her name spelled incorrectly] is at high risk fo [sic] commit another sexual assault or other criminal activity." (R. 85:5).

Mr. Bilka observed that this counselor claimed no training in evaluating females for risk of sexual re-offense and renewed his request for a defense expert, pointing out that Ms. Lepak-Jostsons had obtained a social history for B.S.S. but nothing more. (R. 86, App. 80-81). Mr. Bilka also filed a motion arguing that B.S.S. was entitled to a

[1] In the court of appeals, B.S.S. alleged four instances. Counsel found another while composing this petition.

different judge because the court appeared to have prejudged B.S.S.'s disposition contrary to *State v. Gudgeon*, 2006 WI App 143, ¶10, ¶12, ¶26, ¶30, 720 N.W.2d 114 (2006). (R. 81; App. 78). The court denied both motions.

III. On August 21, 2019, the circuit court orders B.S.S. to register as a sex offender.

The dispositional hearing was held on August 21, 2019. The court ordered B.S.S. to register as a sex offender. (R. 115:58, App. 51).

It said it did not and could not consider B.S.S.'s risk of sexual re-offense: "I don't know if there's really anything out there for this court to be guided as far as an actuarial study that says recidivism for juvenile sex offenders, what the recidivism rate is. I don't really see anything that I have to rely on. So the Court would not find that factor being able to be considered by this Court, because I don't know." (R. 115:57, App. 50).

It did not at this time repeat its line of reasoning from June 14, that it would have ordered her to register even if it received reliable information that B.S.S. was "low risk, not going to reoffend, public not in danger." (R. 74:17, App. 35).

The court emphasized the seriousness of the offense and what Ms. Lepak-Jostsons characterized as B.S.S.'s "lack of empathy" given her own extensive history as a victim of sexual abuse. (R. 115:53). The court stated that there would be "some public protection" in ordering B.S.S. to register but did not elaborate. (R. 115:58, App. 51).

IV. B.S.S. files a postdisposition motion to stay sex offender registration; State Public Defender grants funding for Dr. Pflugradt.

B.S.S. filed a timely notice of intent to appeal on August 23, 2019. It took almost a year, until June 15, 2020, for the State Public Defender to find appellate counsel for her. (R. 109). Upon obtaining counsel, B.S.S. applied for and was immediately granted State Public Defender

funding to hire Dr. Pflugradt. Dr. Pflugradt filed a detailed report (R. 120:8-17, App. 83-92), several supplemental reports addressing the court's specific concerns (R. 120:18-20, App. 93-95; R. 148:3, App. 173), and testified for over an hour at a hearing on B.S.S.'s postdisposition motion to stay sex offender registration (R. 140:3-72, App. 96-166).

V. Summary of Dr. Pflugradt's report and testimony.

In its factual statement, the court of appeals summarizes Dr. Pflugradt's 6,000-word report and seventy-one pages of in-court testimony in 111 words. (Opinion at ¶22, App. 14). The complete report and testimony are in the appendix and B.S.S. urges this court to review them in their entirety.

By way of a basic supplement to the court of appeals' statement of facts, B.S.S. offers the following:

Qualifications. The court of appeals does not mention Dr. Pflugradt's qualifications. (Opinion at ¶22, App. 14). She is the chief psychologist with Assessments Specialists with the Wisconsin Department of Corrections. (R. 140:6, App. 99). She stated that she is usually court appointed and testifies for either the prosecution or the defense depending on the results of her evaluations. (R. 140:9, App. 102).

She is also a leading world expert in female sex offender risk assessment (R. 140:9, App. 102), having personally helped develop the methodology that most states currently use for female sex offenders. (R. 140:56, App. 149; R. 140:8, App. 101).

Methodology. The court of appeals writes that Dr. Pflugradt found B.S.S. to be low risk to reoffend because she is like most other female sex offenders. (Opinion at ¶24, App. 15). It does not describe Dr. Pflugradt's methodology or its widespread acceptance and accuracy. (Id.)

Dr. Pflugradt wrote that women re-offend sexually at a rate of less than 2% over 6.5 years and that there are not any actuarial studies

for women because there are not enough re-offending women to study. (R. 120:13, App. 88).

Dr. Pflugradt testified that her method therefore systematically attempts to identify anything that causes a woman to be an outlier from other female sex offenders, specifically whether she caused bodily harm to her victim or is aroused by violence (R. 120:16, App. 91; R. 140:50, App. 143), whether she articulates disordered beliefs about sexuality (R. 120:15, App. 90; R. 140:39, App. 132), whether she is cognitively disabled (R. 120:15, App. 90; R. 140:55, App. 148), whether she shows signs of psychopathy (R. 140:15), whether she has significant substance abuse issues, especially with opioids (R. 140:52, App. 145), and whether she did not stop offending after being detected (R. 140:20, 40; App. 113, 133).

Dr. Pflugradt testified that she has personally evaluated 407 women for risk of sexual re-offense, found 100 of them to be a moderate risk to reoffend (R. 140:52; App. 145), found 2 to be high risk (R. 140:50-51, 143-144), and has never known a woman she labeled low-risk go on to reoffend sexually. (R. 140:11, App. 104).

She also testified that none of these concerning characteristics applies to B.S.S. and that B.S.S. was therefore a very low risk of sexual re-offense. (R. 120:19-20, App. 94-95; R. 140:10-23, App. 103-116).

Self-Reporting The court of appeals wrote that "Dr. Pflugradt admitted that much of B.S.S.'s information came from self-reporting[.]" (Opinion at ¶22).

Dr. Pflugradt testified that during their interview B.S.S. answered questions related to her sexual history and drug use, both of which Dr. Pflugradt corroborated using three professional evaluations from 2018 and 2019 and additional recorded observations of B.S.S. during her time at a youth treatment center. (R. 120:8-9, App. 83; R. 140:16, App. 109). She stated that this was an especially comprehensive amount of information for a first-time offender. (R. 140:44-45, App. 137-138). In fact, Dr. Pflugradt testified that, prior to B.S.S.'s evaluation, she was provided with a large box full of records documenting B.S.S.'s

treatment and social history and was able to select what she needed. (R. 140:58-59, App. 151-152).

Age difference. The court of appeals noted that Dr Pflugradt "did not view the age difference or the relationship as risk factors." (Opinion at ¶22, App. 14). It did not include Dr. Pflugradt's reasons for this.

Dr. Pflugradt said the age gap between B.S.S. and her victim did not objectively elevate B.S.S.'s risk of sexual re-offense. (R. 140:12, App. 105). For men, a large age gap between offender and victim creates a risk of sexual re-offense, but not for women. (R. 140:39, 48, App. 132, 141; R. 120:15,[2] App. 90).

Moreover, the familiar relationship between B.S.S. and her victim tended to lower her risk. Victimization of someone less well-known to B.S.S. would have suggested a higher risk. (R. 120:93-94, App. 93-94; R. 140:13, App. 106).

Empathy. Dr. Pflugradt addressed the court's concern about what Ms. Lepak-Jostsons called B.S.S.'s lack of empathy, stating that any lack of empathy shown by B.S.S. did not increase her risk. (R. 120:19, App. 94). However, B.S.S. appeared to Dr. Pflugradt to be growing appropriately in empathy along with maturity over time. (R. 140:17, App. 110).

VI. The court tells the parties it has never had to decide whether to place a woman on the registry; entertains B.S.S.'s statutory construction argument; offers the State the opportunity to obtain a competing expert, which it declines.

After Dr. Pflugradt testified, the parties engaged in a lengthy discussion of the posture of the case and how to proceed. (R. 140:62-72, App. 155-165). The court said:

[2] "For males, their physiological sexual arousal actually reflects their sexual preferences, whereas women's arousal patters are more fluid and tend not to demonstrate specificity."

"This is a very complicated issue. This isn't something that judges deal with on a daily basis. This is quite rare. I can count on one finger how many times I've dealt with it, that includes being a DA." (R. 140:66, App. 159).

B.S.S. responded that the court's specific earlier error, which Dr. Pflugradt's new evidence pointed out, was to believe that because there was no actuarial instrument to determine women's risk, that risk was not knowable. (R. 140:67, App. 160).

The court said: "That's correct that there's no actuarial tool that's out there."

Counsel for B.S.S. responded, "But that doesn't mean that risk is unknowable."

The court responded, "Correct." (Id.)

The State claimed that B.S.S. was inappropriately calling the juvenile sex offender registration statute illegal. (R. 140:68, App. 161). B.S.S. clarified,

"I'm not going to argue that the statute is illegal. I'm going to argue that the preeminent concern of the statute and its entire purpose is public protection, therefore in the absence of a finding that someone is a significant risk of re-offending, it would be an improper exercise of judicial discretion to decline to stay."

"That's not calling the statute illegal, this isn't an applied constitutional argument. It's simply an argument about the thrust of the statute and the way judicial consideration should work." (R. 140:68-69, App. 161).

During this discussion, the court offered three separate times to adjourn the hearing so the State could obtain a competing expert to give further testimony. (R. 140:66, 67, 70; App 159, 160, 163).

The State later wrote that, "The State did not provide the Court with another expert opinion because the State does not believe that the Court made the wrong ruling in the first place and that the information that Dr. Pflugradt provides is not relevant as the Court did not previously find risk." (R. 141:5, App. 170).

VII. The court decides that Dr. Pflugradt is not credible and that her testimony does not change anything about its original decision.

The court ordered briefing (R. 140:71; App. 164), asked to review a transcript,[3] and took six months before deciding Dr. Pflugradt was not credible and that her opinion would not alter its original judgment in any way. (R. 157, App. 53-59).

Dr. Pflugradt was not credible, said the court, because her written report included information self-reported by B.S.S. and because Dr. Pflugradt had not reviewed the police reports. (R. 157:6-8, App. 57-59). The next day, B.S.S. provided a letter to the court from Dr. Pflugradt stating that she had reviewed the police reports upon learning of the decision, that they did not contain additional information, and they would not change anything about her recommendation. (R. 148:3, App. 173). The circuit court declined to alter its decision. (R. 155, App. 62).

Next, the court observed that Dr. Pflugradt confirmed that there is no actuarial risk assessment for women as there is for males, which is the information it relied on in its original decision and had not turned out to be incorrect. (R. 157:7-8, App. 59-60).

Finally, the court included something of a back-up decision, adopting its judgment back on the June 14, 2019 funding request: it stated that even if it believed Dr. Pflugradt were credible and agreed

[3] The court requested a copy of the transcripts at the September 17, 2021 decision hearing it had previously scheduled. (R. 164:6). The transcript was filed on October 12, 2021 and the parties re-filed their trial briefs to contain citations to the transcript. (R. 164:7). The court quoted from the transcript in its decision. (R. 157:6, App. 57).

that B.S.S. was a low risk of sexual re-offense it would still order B.S.S. to register based on other factors. (R. 157:8, App. 59).

VI. The court of appeals rules against B.S.S.

B.S.S. appealed. The court of appeals found that the circuit court did not prejudge B.S.S. It ignored the statutory construction basis for her challenge to the court's exercise of discretion and held that the court weighed all the factors appropriately. (Opinion at ¶25, App. 15).

B.S.S. now petitions for review.

Argument

I. The court of appeals independently developed a harmlessness test for prejudgment that contradicts published case law.

Comments indicating a circuit court has prejudged a defendant's sentence can give rise to objective bias. *State v. Marcotte*, 2020 WI App 28, ¶20, 392 Wis. 2d 183, 943 N.W.2d 911. The test is whether an ordinary, reasonable person would "discern a great risk that the trial court in this case had already made up its mind" to impose a certain disposition long before the dispositional hearing took place. *Id.*, (quoting *State v. Gudgeon*, 2006 WI App 143, ¶26, 295 Wis. 2d 189, 720 N.W.2d 114). Apparent judicial bias is a structural error that can never be found to be harmless. *State v. Carprue*, 2004 WI 111, ¶¶55, 59, 274 Wis. 2d 166, 771 N.W.2d 385.

Here, the court stated five separate times, while denying B.S.S. funding for Dr. Pflugradt's evaluation, that it was going to require her to register as a sex offender:

- "It's almost as if this young person, this juvenile, befriended this young boy and took advantage of him. *Again, under that factor, another reason why she would register*." (R. 74:13, App. 31).

- "Even without that, again, based on as I go through these factors and the seriousness of the offense, *the Court is going to require her to register.*" (Id).

- "Even if, best case scenario, this Court would receive a report from Mr. Bilka's expert saying that there's a substantial or significant likelihood that she would not reoffend in the future, even in spite of that, *the Court when analyzing these factors and the seriousness of the offense, would require her to register as a sex offender.*" (R. 74:14, App. 32).

- "One last time, I said even if I would receive such a report, which would be the best-case scenario for her, *I would still require her to register.*" (R. 74:15, App. 33).

- "I said, even if I received such a report, best case scenario, *it would not basically change my mind of whether or not I'd require her to register*." (R. 74:18, App. 36).

Any reasonable person, upon hearing all of this, would believe there was a "great risk" that the court had already decided that it was going to order B.S.S. to register as a sex offender.

The court of appeals attempts to rehabilitate the judge's comments by contextualizing them. The court made these comments while it was denying funding for an expert witness, which, the court of appeals says, "was necessarily intertwined with its ultimate analysis of the factors it would be required to consider in addressing a future motion to stay." (Opinion at ¶29, App. 17). The court's analysis "led it to conclude that because it would not grant a stay as to the sex-offender-registration requirement, it was unnecessary to grant the funding request." (Opinion at ¶30, App. 18).

But the court of appeals did not explain how determining that it "would not grant a stay," before a stay motion was even filed, is anything other than a prejudgment of the stay motion.

The court of appeals appears to be unaware that there is already case law describing how circuit courts ought to decide funding requests from indigents. *State ex rel Dresser, v. Circuit Court for Racine County, Branch I*, 163 Wis.2d 622, 641 fn12, 472 N.W.2d 532, 540 (Wis. App. 1991).[4] The court should find whether the expert's information would objectively relate to a judgment that could at least partially contribute to the case's outcome. *Id*. This is the same criteria the State Public Defender uses when deciding whether to fund defense experts. *Id*. Nothing about *Dresser* permits the court to deny funding if the court already knows, because of its own privileged access to its own discretion, that it will not consider anything any expert says.

Additionally, if this decision is correct, then an indigent person with appointed counsel must waive her right to an independent tribunal if she wishes to request county funding for an expert. In other words, indigents for whom the State Public Defender is unable to find counsel would be forced to purchase needed expert testimony at the cost of the due process right to a neutral tribunal. *State v. Goodson*, 2009 WI App. 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385.[5] Such a waiver could never be free and voluntary.

The court of appeals consigns all the recent case law favorable to B.S.S. to a footnote. (Opinion at ¶30 fn9, App. 18). It justifies this by saying the circuit court had all the information it needed at the time of the prejudgment and that, at any rate, the prejudgment gave B.S.S. the benefit of the doubt by assuming her risk would be low. (Id). These are both arguments suggesting that the prejudgment was harmless. But, again, it is very clear in controlling case law that prejudgment is not subject to harmlessness analysis. *State v. Carprue*, 2004 WI 111, ¶¶55, 59.

[4] Mr. Bilka properly cited *Dresser* in his request for funding. B.S.S. considered raising an appellate claim concerning the circuit court's failure to follow *Dresser*, but since the court agreed to hear from Dr. Pflugradt on a postdisposition revision motion, B.S.S. could not identify a remedy.

[5] As the court of appeals quotes in ¶27 of its decision, "The right to an impartial judge is fundamental to our notion of due process."

In short, the court of appeals does not attempt to explain how even a fair, well-informed prejudgment is anything other than a prejudgment.

Finally, it is worth noting that this decision is entirely the legal work of the court of appeals. This petition is B.S.S.'s first chance to respond to it. (State's Response Brief, App. 175-182). She anticipated this problem and argued that the State had waived the issue multiple times (Reply Brief 3), an argument the court of appeals did not acknowledge.

II. The circuit court's postdisposition finding that Dr. Pflugradt was incredible was so objectively unreasonable as to demonstrate further bias against B.S.S.

To read the portions of the court of appeals' decision discussing Dr. Pflugradt's testimony and the circuit court's treatment of it is to get the impression that this was a case in which two equally matched psychologists reasonably disagreed as to whether B.S.S.'s risk was low or high (Opinion at ¶42, App. 24) and that B.S.S.'s preferred psychologist expressed the arbitrary and rather silly opinion that since most women are low risk it is fair to think B.S.S. is low risk too. (Opinion at ¶22, App. 22). The court of appeals makes it seem that the court reasonably decided the two experts cancelled each other out because in the end, they both agreed there was no reliable way to assess risk in women. (Opinion at ¶34, App. 20).

That is not what happened. The experts were in no way equally matched; Ms. Lepak-Jostsons was not even an expert, and their differing judgments about risk were in no way comparable. (R. 140:22, App. 115). That women are at an extremely low risk of sexual re-offense is a fact, not Dr. Pflugradt's subjective opinion. (R. 120:13, App. 88). And far from "agreeing" that there is no reliable way to predict sexual re-offense in women, Dr. Pflugradt testified at great length about the extraordinarily accurate methodology she had personally developed with other leading experts on the issue and had applied to B.S.S. (R. 140:34-35, 56, App. 127-128, 149).

The court of appeals notes that Mr. Bilka objected to the court's use of Ms. Lepak-Jostsons's report. (Opinion at ¶11, App. 9). It leaves out the reason for this. Ms. Lepak-Jostsons's curriculum vitae indicated no training in female sex offender risk assessment (R. 88). On top of that, she botched many simple biographical details about B.S.S. (R. 115:36-37).

Dr. Pflugradt, by contrast, is a true world expert in risk assessments for women, employed by Wisconsin's own Department of Corrections to conduct risk assessments as a neutral evaluator, and the author of a widely accepted method used for women in most states. (R. 140:6, App. 14). Dr. Pflugradt informed the court for the first time, three years after B.S.S. was charged, that the base level of re-offense for female sex offenders like B.S.S. is less than 2%. (R. 120:20, App. 95). She also explained that she finds around 25% of the women she evaluates to be moderately likely to re-offend, far more than the 2% who statistically will go on to re-offend (R. 140:52, App. 145), and that to her knowledge this method has never identified as low risk a woman who went on to re-offend. (R. 140:11, App. 104). And she told the court that B.S.S. showed absolutely no signs of being one of those very few female sex offenders who will sexually re-offend. (R. 140:10, App. 103).

The court questioned Dr. Pflugradt at length (R. 140:46-58, App. 139-151), ordered briefing (R. 140:71, App. 164), and then ordered a written transcript. In the end, after six months of additional consideration, it decided to stand by the reasoning in its original, August 2019 dispositional order. (R. 157, App. 53-59).

To do this, it had to find a way to get around Dr. Pflugradt. The best it came up with were Dr. Pflugradt's decision not to ask for the police reports—which later turned out to have made no difference—and concerns that the low-risk finding turned on "self-reporting" (R. 157:6-8, App. 57-59), which was also incorrect. Dr. Pflugradt included B.S.S.'s statements about herself in her written report, but her testimony showed that the only actual risk factor that partially relied on B.S.S.'s self-reporting was substance abuse, which was corroborated elsewhere. (R. 140:60, App. 153).

The court then emphasized that, because Dr. Pflugradt confirmed that there is no actuarial risk assessment for women as there is for men, nothing about its original decision was wrong or called for alteration. (R. 157:7-8, App. 59-60). In fact, even if it believed B.S.S. were a low risk of sexual re-offense, it would still order her to register. (R. 157:8, App. 59).

The court of appeals goes even further than the circuit court did. The circuit court merely noted that it had always been correct to say there is no actuarial tool for women. But, at the postdisposition hearing, it conceded that the lack of an actuarial tool did not mean that there was no way to determine a woman's risk. (R. 140:67, App. 160). The court of appeals elevates this to "everyone agreed there is no reliable instrument to determine B.S.S.'s risk." (Opinion at ¶34, App. 20). But that is not what Dr. Pflugradt said (R. 140:34-35, App. 127-128) and is not what the circuit court said she said.

Absolutely nothing in the record establishes that "actuarial" equals "more accurate than what Dr. Pflugradt does." It even seems that Dr. Pflugradt's method might be more accurate, or at least more conservative, than the actuarial risk assessments for men. Dr. Pflugradt testified she has been wrong about men's risk, presumably with the benefit of those actuarial assessments. She has never been wrong about a woman. (R. 140:11, App. 104).

Meanwhile, "she didn't read the police reports" and "there was some self-reporting about drug use" are extraordinarily weak bases to dismiss as "not credible" an extremely qualified expert witness who works for the Department of Corrections and whose evidence the State did not bother to try to refute. It certainly leaves a reasonable outside observer to fairly wonder whether loyalty to the court's prejudgment back in June of 2019 influenced the outcome here.

That sort of question, which leaves onlookers wondering whether the court could hold the balance "nice, clear, and true," is the reason that apparent judicial prejudgment is contrary to due process. *State v. Herrmann*, 2015 WI 84, ¶31, citing *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 (1927).

In short, B.S.S. has shown the great risk of actual bias due to prejudgment more amply than any of the many recent cases to successfully raise this issue. She is, at the very least, entitled to a new hearing in front of a different judge.

III. The circuit court's decision that it need not consider risk at all and would order B.S.S. to register even if she posed no risk to the public is a straightforward misinterpretation of the governing legal text.

Wis. Stat. § 938.34(15m)(c) says:

> In determining under par. (am) 1. whether it would be in the interest of public protection to have the juvenile report under § 301.45, the court may consider any of the following:
>
> 1. The ages, at the time of the violation, of the juvenile and the victim of the violation.
>
> 2. The relationship between the juvenile and the victim of the violation.
>
> 3. Whether the violation resulted in bodily harm, as defined in § 939.22(4), to the victim.
>
> 4. Whether the victim suffered from a mental illness or mental deficiency that rendered him or her temporarily or permanently incapable of understanding or evaluating the consequences of his or her actions.
>
> 5. The probability that the juvenile will commit other violations in the future.
>
> 7. Any other factor that the court determines may be relevant to the particular case.

B.S.S.'s argument is that the circuit court inserted meaning into (5) contrary to rules of statutory construction. The court took

"probability that the juvenile will commit other violations in the future" to mean "risk of sexual re-offense." This is the wrong interpretation. "Probability that the juvenile will commit other violations" refers to other violations of the criminal code.

The court of appeals either misunderstood B.S.S.'s argument or chose not to address it. It writes that B.S.S. "believes that a circuit court cannot deny a motion to stay sex offender registration unless the court finds the juvenile has an elevated risk of re-offending because, absent an elevated risk, having B.S.S. on the registry does not protect the public." (Opinion at ¶36). This is correct, but she does not believe it just because it is convenient for her. She believes it because that is what the statute says.

A word is presumed to bear the same meaning throughout a text. *Donaldson v. Board of Commissioners of Rock-Koshkonong Lake District*, 2003 WI App 26, ¶13, 260 Wis. 2d 238, 659 N.W.2d 66.[6] "Violations" refers to many types of violations of the criminal and civil codes throughout Chapter 938.[7] The circuit court and the court of appeals both insert the word "sexual" into (5) to limit it to, "the probability that the juvenile will commit other *sexual* violations in the future." But courts should not read words into a text to give the text a certain meaning. *DOC v. Schwarz*, 2005 WI 34, ¶20, 279 Wis. 2d 223, 693 N.W.2d 703.

"The violation" is also used in § 938.34(15m)(c), subsections (1), (2), and (3), to refer to the specific violation that exposed the juvenile to registration, which will of course be sexual in nature. But the context of the statute favors the plain reading of "other violations" of any kind for subsection (5). While the statute does not require courts to rely on expert testimony, the enumerated factors—age difference between victim and offender, type of relationship between victim and offender, whether there was bodily harm, whether the victim was mentally disabled, and risk of committing other general violations of various

[6] See also Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 145 (2012).

[7] Chapter 938 uses the term "violation" 321 times to refer to many types of lawbreaking.

types—name factors that, according to Dr. Pflugradt, are commonly used to determine risk of sexual re-offense, particularly for men.[8] These factors therefore serve as a rough guide to help judges make the determination of risk on their own if necessary.

Furthermore, a statute should be interpreted in a way that avoids placing its constitutionality in doubt. The juvenile sex offender statute has survived constitutional challenges because it is not a punishment. *State v. C.G.*, 2022 WI 60, ¶33, 403 Wis. 2d 299, 976 N.W. 2d 318., citing *State v. Hezzie R.*, 219 Wis.2d 848, 881, 580 N.W.2d 660 (1998). But the statutory interpretation the circuit court and court of appeals endorse here, that risk to the public is just an optional consideration, frees courts to use the registry for other purposes, such as punishment. B.S.S.'s argument—that whatever factors the court relies on, a proper exercise of discretion must articulate a nexus between those factors and the need to protect the public—is consistent with case law stating that sex offender registration for juveniles is solely for public protection. *State v. Jeremy P.*, 2005 WI App 13, ¶13, 278 Wis. 2d 366, 692 N.W.2d 311.

The court of appeals suggests that B.S.S. is somehow arguing that the court should be bound to accept her preferred expert. (Opinion at ¶42, App. 42). This is a straw man. Counties elect judges to reflect the values and attitudes of those communities and to give a local flavor to the way that the law is applied in different places. Judges are free to be critical of experts like Dr. Pflugradt and of social science generally, perhaps favoring their own experience and common sense. The court was free to have a nagging, inchoate sense that B.S.S.'s risk of sexual re-offense was elevated, no matter how low-risk most women are.

But to demonstrate a reasonable exercise of discretion, it needed to connect the relevant facts to the law—to articulate *why* it thought B.S.S. posed the kind of risk to the public that would be mitigated by the registry. It did not do that. It only said, from the very beginning,

[8] General criminal recidivism can interrelate with risk of sexual recidivism. For example, Dr. Pflugradt said "[w]hat we know is that even though the women are at a low risk to sexually re-offend, they're at a higher risk to re-offend generally, so general criminal recidivism." (R. 140:51, App. 144).

that her risk to the public of sexual re-offense need not be discussed. That is contrary to the statute.

Conclusion

Although this case involves the interpretation of case law and statutory construction, the problem at its core is this: The judge approached B.S.S. assuming, based on his experience with male sex offenders, that he already knew everything he needed to know. Later, upon learning just how much female sex offenders differ from males, the judge called the task of determining risk of sexual re-offense for women "very complicated." (R. 140:66, App. 159). But women only seem complicated when apparently neutral laws are construed to take maleness as normal.

This does not mean that the juvenile registry statute is unconstitutional (although it could certainly do with some legislative fine-tuning). It does mean that, for any woman subject to Wis. Stat. § 938.34(15m)(c), her biological sex is a relevant factor that a rational court should take into consideration. It also means that, absent some other legislative action, only judicial discretion protects women subject to this statute from being treated as men—or protects the female public from men attempting to escape the registry by claiming to be women.

The concurrence in *State v. C.G.* noted that "unknown legal repercussions" could arise from insinuating that "someone who identifies as a female is in fact a female, under the law or otherwise." 2022 WI 60, ¶100. C.G. appears to have been evaluated for risk of sexual re-offense as a male. *Id.* at ¶42. A future challenge to discretionary sex offender registration, objecting to a court's application of male risk assessment tools to a transgender woman, seems inevitable. This case will allow the court to clearly establish that biological sex is real.

For the above reasons, the petition for review should be granted.

Dated this 7th day of November, 2022.

Respectfully submitted,

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Certification

I hereby certify that this petition conforms to the rules contained in § 809.19(8)(b) and (c) and § 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 6,515 words.

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, which complies with the requirements of § 809.19(12) and § 809.62(4)(b). I further certify that the electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

I hereby certify that filed with this petition, either as a separate document or as part of this brief, is an appendix that complies with § 809.62(2)(f) and that contains at minimum: (1) the decision and opinion of the court of appeals; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 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 court's reasoning regarding those issues.

I further certify that portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 7th day of November, 2022.

Signed:

Atty. Kimberley Bayer