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SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2021AP2174

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

B.S.S.,

Juvenile-Appellant-Petitioner.

**RESPONSE BRIEF AND SUPPLEMENTAL
APPENDIX IN OPPOSITION TO
PETITION FOR REVIEW**

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The State opposes B.S.S.' petition for review. The court of appeals applied the correct principles of law and standards of review when it affirmed the circuit court. *See State of Wisconsin v. B.S.S.* (Wis. Ct. App. Dist. II, October 12, 2022).¹ The petition does not meet the criteria enumerated in Wis. Stat. § (Rule) 809.62(1r). Thus, B.S.S. has not shown any "special and important reasons" warranting review by this Court. *See* Wis. Stat. § (Rule) 809.62(1r).

**THIS COURT SHOULD DENY THE PETITION FOR
REVIEW BECAUSE IT DOES NOT SATISFY THE
CRITERIA IN WIS. STAT. § 809.62(1R).**

This Court should decline B.S.S.' petition. In 2019, B.S.S. pled no-contest to third-degree sexual assault and exposing genitals to a child. (R. 62.) B.S.S. repeatedly sexually assaulted N.R. from the time the victim was four years old, up until he was eight. (R. 6.)

Prior to disposition, B.S.S. filed a motion to adjourn the disposition date so she could "obtain a sex offender psychosexual evaluation." (R. 68.) The State objected to the motion, and the circuit court held a hearing on it. (R. 74.) The court ultimately denied the motion and set the case for a dispositional hearing. (R. 74.) A week before the dispositional hearing, B.S.S. filed two new motions, a motion to stay her sex offender reporting requirements, and a motion for recusal. (R. 81–82.) At the hearing, the court denied both motions.

¹ The Wisconsin Court of Appeals decision in this case is attached to this brief as a Supplemental Appendix.

In January of 2021, B.S.S. filed a post-disposition motion seeking to modify the dispositional order and a stay of the registry requirements. (R. 120.) In her motion, B.S.S. presented a post-disposition psychosexual evaluation conducted by Dr. Dawn M. Pflugradt. (R. 120.) The circuit court held a hearing and Dr. Pflugradt testified. (R. 140.) The circuit court ultimately denied B.S.S.' motion to modify the dispositional order. (R. 157.)

B.S.S. appealed, arguing that the circuit court evidenced actual bias by revealing that he had prejudged the decision to require B.S.S. to register as a sex offender, and that the court erroneously exercised its discretion in making that decision. In a thorough and detailed decision, the Wisconsin Court of Appeals affirmed, explaining that B.S.S. had not shown bias or an erroneous exercise of discretion. (Supp. App. at 3–28.)

B.S.S. now seeks this Court's review. But while B.S.S.' petition attempts to manufacture an error, it does not identify a valid basis for review. The court of appeals decision in this case applies well-settled law and applies it correctly.

B.S.S.' arguments for review predominately relate to comments the circuit court made at the hearing on B.S.S.' motion to adjourn the disposition date so she could "obtain a sex offender psychosexual evaluation." (R. 68, 74.) At that hearing, B.S.S. was asking the court to delay disposition and pay for her to get an expert evaluation done. (R. 74.) The court aptly explained that if B.S.S. wanted to stay the sex offender registry requirements, she had to file a motion asking for that. (R. 74:5–15.) The court went on to explain that, even if B.S.S. were able to obtain an evaluation finding that she had a low risk of re-offense, that is only one factor the court needs to consider when deciding whether to stay the requirements. (R. 74:10–11.) And the court explained that, given the seriousness of the crime, a low risk of re-offending would not out-weigh the need to protect the public in this case. (R. 74:11.)

B.S.S. argues that the court's comments at that hearing show prejudgment. The Wisconsin Court of Appeals disagreed, noting that, given the context of the discussion, the court's comments do not demonstrate prejudgment. (Supp. App. 19.) Instead, the trial court's comments were related to whether B.S.S. was entitled to a publicly funded expert.

In her petition for review, B.S.S. tries to reframe this issue so as to manufacture a basis for review. But review is not warranted.

First, B.S.S. argues that the court of appeals "independently developed a harmlessness test for prejudgment that contradicts published case law." (Pet. 16.) But B.S.S. is wrong. The court of appeals correctly identified the law regarding objective bias. (Supp. App. 18.) And the court correctly concluded that the circuit court's comments do not demonstrate prejudgment. (Supp. App. 19.) The court of appeals did not apply any type of harmless error test.

Next, B.S.S. challenges the circuit court's credibility determination as to Dr. Pflugrad. (Pet. 19.) But this challenge does not warrant supreme court review. The court of appeals applied the correct law, correctly analyzed this challenge, and determined that the circuit court did not erroneously exercise its discretion. (Supp. App. 25.) And while B.S.S. might wish her expert was deemed more credible, it does not render it a valid basis for review. This Court's primary function is that of law defining and law development, not error correcting. *Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶ 47, 326 Wis. 2d 729, 786 N.W.2d 78.

In an attempt at gaining review, B.S.S.' petition also alludes to new arguments that were not raised below. For example, B.S.S. references gender-based inequalities in risk assessment. (Pet. at 5.) But B.S.S. did not raise that issue below, so it is forfeited on appeal and not a proper basis for review. See *Loren Imhoff Homebuilder, Inc. v. Taylor*, 2022 WI 12, ¶ 14, 400 Wis. 2d 611, 970 N.W.2d 831.

Finally, the court of appeals' decision creates no conflict or need for this Court to clarify law. See Wis. Stat. § (Rule) 809.62(1r)(c). B.S.S.' petition does not demonstrate a need for this court to consider establishing, implementing, or changing a policy within its authority. Wis. Stat. § (Rule) 809.62(1r)(b). Similarly, B.S.S.' petition does not demonstrate a need to reexamine current law. Wis. Stat. § (Rule) 809.62(1r)(e). For the same reasons, B.S.S.' petition presents no significant question of state or federal constitutional law. See Wis. Stat. § (Rule) 809.62(1r)(a).

In sum, B.S.S.' petition lacks a special or important reason for this Court to review the court of appeals' decision. Because the court of appeals' decision does not conflict with controlling precedent, this Court should deny the petition. The court of appeals applied clearly established law to the facts and arrived at the correct result.

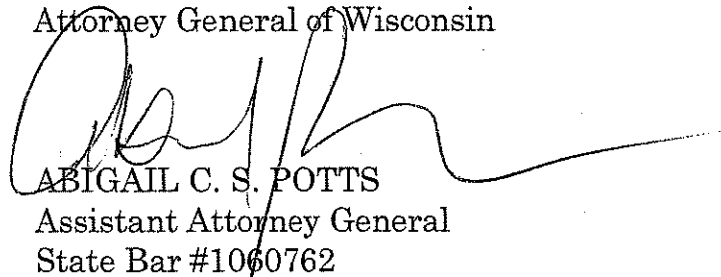
CONCLUSION

This Court should deny B.S.S.' petition for review.

Dated this 13th day of December 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin



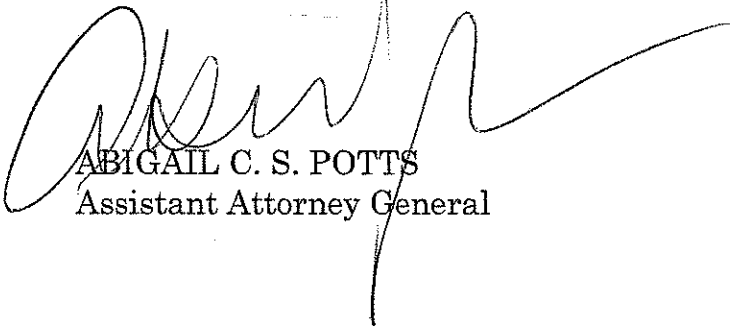
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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 1061 words.



ABIGAIL C. S. POTTS
Assistant Attorney General

**CERTIFICATE OF COMPLIANCE WITH
WIS. STAT. §§ (RULES) 809.19(12) and 809.62(4)(b)
(2019-20)**

I hereby certify that:

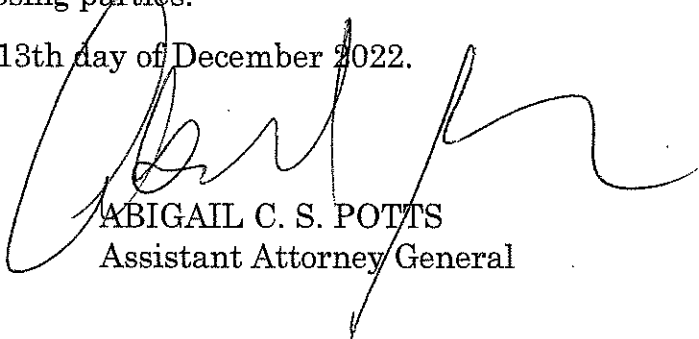
I have submitted an electronic copy of this petition or response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic petition or response 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 petition or response filed with the court and served on all opposing parties.

Dated this 13th day of December 2022.



ABIGAIL C. S. POTTS
Assistant Attorney General

