FILED
08-22-2024
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP218-CR

In the interest of Jayden Adams, a person under the age of 17:

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAYDEN ADAMS,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

1. Was Jayden entitled to discovery before his preliminary hearing in order to protect his right to challenge the criminal court's original jurisdiction?

   The circuit court answered no.

   The court of appeals answered no.

2. Did the circuit court erroneously exercise its discretion when it denied Jayden's motion to transfer jurisdiction to juvenile court?

   The circuit court denied the motion to transfer jurisdiction to juvenile court.

   The court of appeals answered no.

CRITERIA FOR REVIEW

In *State v. Kleser*, 2010 WI 28, ¶ 65, 328 Wis. 2d 42, 786 N.W.2d 144, this Court recognized that due to the unique nature of preliminary hearings held in connection with motions to transfer jurisdiction to juvenile court, juveniles must be entitled to "latitude in attacking the specific offense charged if a successful attack would alter the crime charged or negate the exclusive original jurisdiction of the criminal court." Until the court of appeals' decision in the instant case, however, neither this Court nor the court of appeals

had provided further guidance on the scope of this latitude.

In a decision recommended for publication, the court of appeals held that juveniles are entitled to any evidence the State intends to introduce at preliminary hearings held under Wis. Stat. § 970.032. *State v. Adams*, Case No. 2023AP218-CR, ¶ 37 (Wis. Ct. App. July 23, 2024). (App. 20). The court further held that additional materials may be discoverable if a juvenile establishes a "particularized need" for it. *Id.* Nonetheless, the court concluded that Jayden was not entitled to any of the discovery he requested because the State did not introduce the discovery materials he requested, and because he did not show a particularized need for it. *Id.*

The court of appeals' decision is flawed in two key respects. First, while it purportedly recognizes a right to discovery in preliminary hearings held under Wis. Stat. § 970.032, the decision actually enables the State to avoid providing any discovery whatsoever. This is because at Jayden's preliminary hearing, as in many preliminary hearings, the State called only a single witness whose testimony largely consisted of reciting what he had read in the criminal complaint. Hearsay was not admissible in preliminary hearings when *Kleser* was decided, so juveniles could at least challenge probable cause through cross-examination of firsthand witnesses. But where the State is allowed to both withhold discovery and rely on hearsay—as it did in Jayden's case—juveniles have no ability to meaningfully challenge probable cause and no right to

latitude beyond what adult defendants have in preliminary hearings held under Wis. Stat. § 970.03.

Moreover, while the court of appeals held that "additional" materials may be discoverable where a juvenile shows a particularized need for it, this right is no less hollow than granting a juvenile the right to any evidence the State intends to introduce at a preliminary hearing. Simply put, it is impossible for the defense to know of all potential challenges to probable cause that may exist in withheld police reports, other reports, and recorded witness statements without having access to these materials. This is particularly so in cases such as Jayden's because a 13-year-old has only a limited ability to provide pertinent factual information to his counsel as compared with adult defendants.

Based on the above, review is warranted because the court of appeals' decision is in tension with this Court's decision in *Kleser*. *See* Wis. Stat. § 809.62(1r)(d). Review is further warranted because a decision by this Court would help develop, clarify and harmonize the law on a question of law that will have statewide impact. *See* Wis. Stat. § 809.62(1r)(c)2. Additionally, if this Court grants review to address the discovery issue, it should also review whether the circuit court erred in denying Jayden's motion to transfer jurisdiction because this issue presents a real and significant question of law concerning Wis. Stat. § 970.032(2).

STATEMENT OF FACTS

A complaint was filed charging Jayden, then 13 years old, with six felony counts. Jayden was charged with one count of each of the following: first-degree reckless homicide as a party to a crime, taking a vehicle without owner's consent by use of force or threat as a party to a crime, hit and run resulting in death, knowingly operating a motor vehicle without a valid license resulting in death, unauthorized use of personal identifying information, and attempting to flee or elude an officer. (5:1-2). Jayden was subject to original criminal court jurisdiction based on the first-degree reckless homicide charge. *See* Wis. Stat. § 938.183(1)(am).

By counsel, Jayden filed a motion demanding that the State provide discovery prior to the preliminary hearing. (8:1). The motion cited *Kleser*, noted that the defense had only received a copy of the complaint and a limited number of police reports, and averred that the following discovery was outstanding:

> [P]olice reports, body worn camera and squad camera audio-visual recordings, surveillance video, photographs, audio-visual recordings of statements made by witnesses, alleged co-actors, and the child defendant, and Milwaukee County Medical Examiner reports.

(8:2).

Following briefing and oral arguments, the circuit court denied Jayden's motion in a decision

rendered from the bench.[1] The court noted that the State is not required to provide discovery prior to preliminary hearings conducted under Wis. Stat. § 970.03. (19:12-13; App. 24-25).[2] Additionally, the court stated the following in regards to *Kleser's* mandate for enhanced latitude in preliminary hearings held in connection with a motion to transfer jurisdiction under Wis. Stat. § 970.032:

> [P]aragraph 65 [says] the defendant must be given some latitude in attacking the specific offense charged if that successful attack would alter the crime charged or negate the exclusive original jurisdiction of the criminal court. This Court reads that as limited by the further statement in paragraph 69 of the *Kleser* Court that it appears to us the legislature did not intend the reverse waiver hearing to be a minitrial. So it's not to be a minitrial. It's modeled on a preliminary examination, but this Court has to give more latitude to the defense to be able to challenge the actual charges that are issued. The Court reads that as allowing questioning that would otherwise typically be objected to as discovery or getting into more credibility issues, that kind of thing, and the Court will give additional latitude to the defense pursuant to

[1] The Honorable Audrey Skwierawski presided over Jayden's motion for discovery and his preliminary hearing. The Honorable Laura Gramling Perez presided over the reverse waiver hearing.

[2] Wis. Stat. § 971.31(5)(b) states that "[i]n felony actions … motions under s. 971.23 … shall not be made at a preliminary examination and not until an information has been filed."

> *Kleser* to be able to attack the specific offense charged.

(19:14-15; App. 26-27). The court concluded that "there is no statutory or caselaw right at a preliminary examination for discovery to be turned over." (19:12; App. 24).[3]

Subsequently, police detective Ryan Cepican testified as the sole witness at the preliminary hearing. According to Detective Cepican, Wauwatosa police responded to a report of a pedestrian lying in a roadway who appeared to have been struck by a vehicle. (15:8). Detective Cepican testified that efforts to revive the pedestrian, Sunita Balogun-Olayiwola, were unsuccessful. (15:8). An autopsy indicated that the cause of death was multiple blunt force trauma consistent with being run over by a motor vehicle. (15:11).

Detective Cepican testified that police eventually arrested and interrogated Jayden and three other children in connection with the incident. Detective Cepican stated that he did not review much of Jayden's recorded interrogation, and indicated that he could not testify in regards to the contents of this interrogation. (17:19-20). Nonetheless, he testified that the other children reported to police that they had come to Wauwatosa in search of a car to steal. (16:23). He testified that the children reportedly attempted to

[3] The State advised that it would provide discovery to the defense after the preliminary hearing and before the reverse waiver hearing. (19:3).

steal a red Hyundai in a hotel parking lot, but walked away from the vehicle after being confronted by Ms. Balogun-Olayiwola. (16:24-26).

According to Detective Cepican, the children reported that Ms. Balogun-Olayiwola later approached the group in a dark Jeep SUV, and that she got out of the vehicle to confront them a second time. (16:32). One of the children, A.N.G., reported that Ms. Balogun-Olayiwola punched her, and that she retaliated by punching Ms. Balogun-Olayiwola. (16:33). A.N.G. further reported that Jayden got into the driver's seat of the SUV when A.N.G. told him to do so. (16:32-33). Ms. Balogun-Olayiwola reportedly then grabbed ahold of the driver's door and fell as Jayden put the SUV into motion, whereupon Jayden backed up the vehicle, striking her in the head. (16:32-33). Upon learning that Ms. Balogun-Olayiwola had died, the children reported that they fled the scene in the SUV. (16:39).

Detective Cepican testified that police also spoke with witnesses who lived in nearby apartments. (15:15, 20). He testified that one witness reported seeing a male sitting in the driver's seat of an SUV while three females argued outside of the vehicle. (15:16). This witness reported seeing the SUV back up, striking one of the females in a manner that appeared intentional, then drive forwards over her and back up over her again. (15:17-19). The witness reported that the other females got into the SUV, and the vehicle fled the scene. (15:20). Police learned that the SUV belonged to a friend of Ms. Balogun-Olayiwola's, and

that she was borrowing the SUV because her own vehicle was in repair. (15:10).

Detective Cepican testified that police later found the SUV in Milwaukee and attempted to conduct a traffic stop, but the vehicle successfully eluded police after a high-speed chase. (15:27-30). Police eventually relocated the SUV after it had been abandoned, and arrested Jayden and three other children near the vicinity of the vehicle. (16:7-11). Police found receipts in the SUV, and further investigation revealed that Jayden and two of the other children had used the deceased's credit card to purchase merchandise at Walmart. (16:13-20). Police also learned that Jayden did not have a driver's license when driving the SUV because he was only 13 years old. (16:39-40).

At the conclusion of Detective Cepican's testimony, the circuit court found that probable cause existed for first-degree reckless homicide. (17:57). The court stated that it also needed "to do the analysis on the remainder of the counts," and concluded that there was probable cause for these counts as well. (17:57-64).

A two-day reverse waiver hearing commenced on January 3, 2023. Dr. Antoinette Kavanaugh, a board-certified forensic psychologist, testified as the first witness for Jayden's defense. (59:9). Dr. Kavanaugh testified that she had met with Jayden to complete a forensic evaluation, and that she administered a series of tests to assist with the evaluation. (59:8, 22-24). She testified that Jayden

suffered from depression and anxiety, that he had a history of struggling with regulating his emotions, and that he needed treatment to address these issues. (59:33-34). Dr. Kavanaugh testified that Jayden particularly needed cognitive behavioral therapy in order to better regulate his emotions and reduce impulsivity. (59:43). She testified that he also needed to be evaluated for psychotropic medications to potentially treat his depression and anxiety. (59:43).

Dr. Kavanaugh testified that empirical studies find that children tried in the adult court system have higher recidivism rates than children in the juvenile court system. (59:61). She testified that higher rates of recidivism for children in the adult court system were likely tied to housing, employment, and health factors. (59:62). Dr. Kavanaugh further testified that children in the juvenile court system benefit from greater access to services, and that they benefit from being around peers of a similar age. (59:50). Dr. Kavanaugh testified that retaining criminal court jurisdiction was not necessary to deter Jayden or other children from committing crimes. (59:64-65).

Dr. Kavanaugh testified that she was unaware if the studies she had reviewed examined homicide cases specifically, and stated that higher recidivism rates could possibly reflect higher risk children being tried in the adult court system more often than lower risk children. (59:112, 118). She also testified that Jayden would likely remain at the Lincoln Hills juvenile correctional facility until he turned 18 even if he remained in the adult court system. (59:78). Dr.

Kavanaugh testified that she was unfamiliar with the Racine Youthful Offender Correctional Facility (RYOC). (59:94).

Alicia Kraus testified as the next witness for the defense. Ms. Kraus testified that she is the director of program services for the Department of Corrections. (59:140). She testified that there is limited access to treatment programs in adult prisons, that many inmates remain on lengthy waitlists for programs, and that inmates oftentimes do not receive access to programs until they approach their release dates. (59:155-57). As a result, Ms. Kraus testified that an inmate serving a lengthy sentence would likely not have access to programs during much of their sentence, with the sole exception of educational services. (59:157).

Ms. Kraus also testified in regards to RYOC. Ms. Kraus testified that RYOC is a medium-security prison primarily composed of inmates between the ages of 18 and 24. (59:151, 171). According to Ms. Kraus, it is "possible" for a child serving an adult sentence at Lincoln Hills to transfer to RYOC upon turning 18. (59:173-74). However, Ms. Kraus declined to offer any opinion on the likelihood that Jayden, or a similarly situated child, would transfer to RYOC upon turning 18. (59:173-74).

Sheila Corro testified as the next witness for the defense. Ms. Corro testified that she is the director of treatment programs for the Lincoln Hills juvenile correctional facility. (59:182). She testified that upon

entering Lincoln Hills, children undergo an observation and assessment period to identify their treatment needs. (59:183-89). According to Ms. Corro, Dialectical Behavioral Therapy (DBT) is the primary treatment program offered at Lincoln Hills. (59:197). Ms. Corro testified that DBT is a cognitive behavioral therapy program designed to help children better regulate their emotions and improve their decision-making skills. (59:198). She testified that children placed at Lincoln Hills begin DBT immediately, and that they continue with this treatment throughout their stay at the facility. (59:199).

According Ms. Corro, children placed at Lincoln Hills pursuant to juvenile delinquency orders typically spend eight to nine months in custody regardless of their offense. (59:216). She testified that upon release, children on juvenile orders continue to receive community-based supervision, and that children may return to Lincoln Hills if they violate their supervision rules. (59:211-12).

Ms. Corro testified that children placed at Lincoln Hills pursuant to adult court orders do not undergo an observation or assessment period at the facility to identity their treatment needs. (59:189). Nonetheless, Ms. Corro testified that these children still receive the same services at Lincoln Hills as compared with children under juvenile delinquency orders, including DBT. (59:213-14).

Timothy Kubiszewski testified as the next witness for the defense. Mr. Kubiszewski testified that

he is a field supervisor for the DOC's Division of Juvenile Corrections, and that this division monitors children released from Lincoln Hills to ensure that they follow their supervision rules and continue to receive treatment-based services. (85:6-7). He testified that the DOC does not supervise all children released from Lincoln Hills under juvenile orders, but that it is responsible for children released pursuant to the Serious Juvenile Offender (SJO) program. (85:9). Mr. Kubiszewski testified that upon release, children under SJO orders receive a continuation of DBT, educational support, mentoring, and intensive tracking through GPS monitoring. (85:11-31). He further testified that the DOC has discretion to return children to Lincoln Hills if they violate their supervision rules. (85:33).

Mr. Kubiszewski testified that children returned to Lincoln Hills for violating their supervision rules typically spend eight to nine months in custody. (85:36). He testified that children also typically spend eight to nine months in custody during their initial stay at Lincoln Hills regardless of their offense. (85:39-40). Mr. Kubiszewski testified that SJO orders can last for up to five years, and that the DOC has discretion to discharge children from SJO orders after three years. (85:42)

Melanie Fleischmann testified as the next witness for the defense. Ms. Fleischmann testified that she coordinates services for Wraparound Milwaukee. (85:67-68). She testified that the Wraparound program assists children upon their release from Lincoln Hills

by providing services to address their mental health needs. (85:68). Ms. Fleischmann testified that children are eligible for Wraparound services until they turn 19. (85:70).

Jayden's maternal aunt, Sharonda Stewart, testified as the final defense witness. (85:75-76). Ms. Stewart testified regarding Jayden's life before his arrest and her perception of his mindset during his time in secure detention. (85:80-89).

At the conclusion of testimony from defense witnesses, the State advised that it would not call any witnesses. (85:109).

The court then heard oral arguments from the parties, and denied Jayden's motion in a decision rendered from the bench. (52:3; App. 29). The court noted that the defense needed to prove by a preponderance of the evidence that reverse waiver was appropriate for each of the following reasons:

> That, if convicted, the juvenile could not receive adequate treatment in the criminal justice system.
>
> That transferring jurisdiction to the court assigned to exercise jurisdiction under chs. 48 and 938 would not depreciate the seriousness of the offense.
>
> That retaining jurisdiction is not necessary to deter the juvenile or other juveniles from committing the violation of which the juvenile is accused ….

Wis. Stat. § 970.032(2).

In regards to the first factor, the court stated that Jayden did not have any special treatment needs, and characterized his depression and anxiety as "situational." (52:4; App. 30). The court further stated that all of Jayden's treatment needs could be addressed at Lincoln Hills regardless of whether he was placed there under a juvenile order or an adult sentence, and that he could stay there longer if he received an adult sentence. (52:4-5; App. 30-31). Additionally, the court concluded that, upon turning 18, Jayden would "receive substantially the same services at the adult facility as are available at Lincoln Hills," and would not be negatively influenced by much older inmates. (52:5-6; App. 31-32). In support of these findings, the court stated the following:

> I think that *there is substantial evidence on the record that there is, at least, a very good chance that Jayden would be moved to RYOC* after his time at Lincoln Hills, and so would be in a facility that focuses on his -- people his age -- maturing youth -- and working with a staff that is certainly accustomed to, and perhaps, specifically trained to, work with a population that is approximately Jayden's age. It is certainly not guaranteed that Jayden would be placed at RYOC, but *the evidence before me indicates that there's a very good chance of it*.

(52:6-7; App. 32-33) (emphasis added).

Regarding the second factor, the court stated that Jayden had not proven that reverse waiver would

not depreciate the seriousness of the offense. (52:15; App. 41). The court noted the serious nature of the allegations, and stated that "this offense created significant trauma in our community." (52:10; App. 36). The court further stated that the incident must have been traumatic for witnesses and the victim's family, and elaborated as follows:

> Certainly, the victim's family has been very present throughout these proceedings, and I know throughout the proceedings involving the other youth who were involved in the incident. And it is very clear to me -- I mean, it goes without saying that this was an extraordinary incident, an incredibly tragic incident for the victim herself, but it's very clear to me that this has created very great ongoing trauma and tragedy for the victim's family.

(52:10-11; App. 36-37).

Additionally, the court stated that Jayden needed to be held accountable for the allegations. (52:14; App. 40). The court recited testimony that Jayden would likely remain at Lincoln Hills for less than a year under a juvenile order, and stated that it did not know whether "a period of nine months in custody -- even after [more than a year in custody] pre-trial -- would, in fact, not depreciate the seriousness of this offense." (52:15; App. 41).

In regards to the third factor, the court noted that Jayden might remain in Lincoln Hills for only nine months under a juvenile order, and stated "I don't believe that Jayden has established that retaining

jurisdiction in the adult court is not necessary to deter him from committing other serious offenses." (52:16; App. 42). However, the court did not address the statutory criteria of whether retaining jurisdiction was necessary to deter Jayden "from committing the violation of which [he] is accused[.]" *See* Wis. Stat. § 970.032(2)(c). Regarding general deterrence, the court stated that "perhaps" retaining criminal court jurisdiction was not necessary to deter other children. (52:17; App. 43). Nonetheless, the court concluded that the first two statutory factors weighed in favor of retaining jurisdiction. (52:17; App. 43).

The circuit court entered a written order denying Jayden's reverse waiver motion on January 23, 2023. (49:1; App. 44). By counsel, Jayden filed a petition for leave to appeal based on (1) the circuit court's denial of his motion for discovery prior to the preliminary hearing; and (2) the court's denial of his reverse waiver motion.[4] The court of appeals granted Jayden's petition, but subsequently affirmed the circuit court's decision on both grounds. *Adams*, Case No. 2023AP218-CR, ¶ 3. (App. 4-5).

Regarding the circuit court's denial of the discovery motion, the court of appeals stated the following:

[4] The petition's statement of issues also referenced a circuit court order compelling Jayden to undergo a forensic examination with a psychologist retained by the State. Jayden does not raise this issue on appeal.

> Given *Kleser's* interpretation of the statutory scheme and the fact that Wis. Stat. § 970.032(1) preliminary examinations uniquely test the exclusive original jurisdiction of the adult criminal court over the juvenile defendant … we conclude that defendants are entitled to evidence that the State intends to introduce at the § 970.032(1) preliminary examination to establish probable cause of the alleged jurisdictional offense… Moreover, we conclude that circumstances may be such that other materials exclusively in the possession of the State may be discoverable by the defendant prior to a § 970.032(1) preliminary examination, provided he or she establishes a particularized need for the materials requested by showing that they are likely to be relevant to negate one of the elements of the charged jurisdictional offense.

Id., ¶ 22 (App. 13).

Notwithstanding the above, the court concluded that Jayden was not entitled to any of the discovery he requested on the grounds that the State did not introduce the discovery materials he requested, and because he did not show a particularized need for it. *Id.*, ¶ 37. (App. 20). Additionally, in affirming the denial of Jayden's reverse waiver motion, the court of appeals concluded that the circuit court did not erroneously exercise its discretion. *Id.*, ¶ 36. (App. 19).

ARGUMENT

I. Jayden was entitled to discovery before his preliminary hearing in order to protect his right to challenge the criminal court's original jurisdiction.

Pursuant to Wis. Stat. § 938.183(1)(am), criminal courts have exclusive original jurisdiction over a juvenile charged with first-degree reckless homicide if the offense occurred on or after the juvenile's 10th birthday. A juvenile subject to original criminal court jurisdiction has the right to a preliminary hearing under Wis. Stat. § 970.032(1). A hearing under this statute, however, differs from an ordinary preliminary hearing in which the purpose is merely to decide if there is probable cause that "a felony" has been committed. Wis. Stat. § 970.03(1).

In contrast with ordinary preliminary hearings, a preliminary hearing held in connection with a motion to transfer jurisdiction to juvenile court requires the circuit court to decide if probable cause exists for "the violation" that subjects the juvenile to original criminal court jurisdiction. Wis. Stat. § 970.032(1). Thus, as this Court observed in *Kleser*, a preliminary hearing under this statute protects the juvenile not only from "hasty, improvident, or malicious prosecution," but also serves "the more important purpose" of assuring the criminal court's original jurisdiction. 2010 WI 88, ¶ 57. In recognition of this key distinction, the Court issued the following mandate in *Kleser*:

> [B]ecause the preliminary examination under Wis. Stat. § 970.032(1) is quite different from the preliminary examination under § 970.03, the defendant must be given some latitude in attacking the specific offense charged if a successful attack would alter the crime charged or negate the exclusive original jurisdiction of the criminal court.

Id., ¶ 65.

The Court held that this latitude includes "the right to attempt to negate [the] specific offense" and the right "to introduce evidence in an effort to get the charge reduced." *Id.*, ¶¶ 60-62. The Court noted that these rights are critical in first-degree reckless homicide cases in particular because a successful challenge to the utter-disregard-for-life element for this offense would result in dismissal of the criminal court's original jurisdiction. *See id.*, ¶ 64.

Based on the foregoing, Jayden was entitled to discovery prior to his preliminary hearing. Simply put, it was impossible for the defense to know of all potential challenges to probable cause without access to police reports, medical reports, and the recorded statements of witnesses, the alleged co-actors, and Jayden. Without this information, Jayden could not exercise his rights under *Kleser* to introduce evidence and negate probable cause for the charge that made him subject to the criminal court's original jurisdiction. Moreover, it was uncontroverted in circuit court proceedings that this discovery was within the exclusive possession of the State prior to the

preliminary hearing, and that Jayden's trial counsel had no ability to obtain this discovery due to the State's decision to withhold it. (13:3; 18:12-23; 19:2-3). Jayden was only 13 years old at the time of his preliminary hearing, and thus had a limited ability to provide pertinent factual information to his counsel. (13:3).

Moreover, the State's withholding of discovery deprived Jayden of the opportunity for latitude in cross-examination. The State called Detective Cepican as its only witness at the preliminary hearing, and much of his testimony consisted of reciting what he had read in the criminal complaint. (15:17-22; 16:28-38). Thus, when defense counsel asked about Jayden's and two of the alleged co-actors' recorded police statements, Detective Cepican advised that he could not discuss the specifics of these statements because he had only reviewed "bits and pieces of them." (17:14, 19-20). In particular, Detective Cepican testified that, because he had not reviewed Jayden's statement, he could not confirm whether Jayden became emotionally distraught in the immediate aftermath of the victim's death. (17:19-20). As such, this gap in the evidence presented at the preliminary hearing underscores that the defense was in no position to introduce evidence and negate probable cause for the utter-disregard-for-life element of the offense without discovery.

Additionally, the State's withholding of discovery is not justified because hearsay is now admissible in preliminary hearings. Wis. Stat. § 970.038. Hearsay was not admissible when *Kleser* was

decided, so juveniles could at least challenge probable cause through cross-examination of firsthand witnesses. If the State is allowed to withhold discovery while also relying on hearsay, however, many preliminary hearings will look much like the one that occurred here, in which a single officer testifies and the defense cannot meaningfully challenge probable cause. Consequently, providing the defense with discovery is the only way to avoid rendering *Kleser's* mandate for latitude hollow.

In affirming the denial of Jayden's request for discovery, the court of appeals held that while juveniles are entitled to any evidence the State intends to introduce at preliminary hearings held under Wis. Stat. § 970.032, Jayden was not entitled to anything because the State did not introduce the discovery materials he requested. *Adams*, Case No. 2023AP218-CR, ¶ 37. (App. 20). While the court's decision purportedly recognizes a limited right to discovery in preliminary hearings held under Wis. Stat. § 970.032, the decision actually enables the State to avoid providing any discovery whatsoever. As noted above, at many preliminary the State calls only a single witness whose testimony largely consists of reciting the allegations in the criminal complaint. Thus, in this context, granting a juvenile the right to any evidence the State intends to introduce at a preliminary hearing is meaningless.

Furthermore, while the court of appeals held that "additional" materials may be discoverable where a juvenile shows a particularized need for it, this right

is no less hollow than granting a juvenile the right to any evidence the State intends to introduce at a preliminary hearing. As noted above, it is impossible for the defense to know of all potential challenges to probable cause that may exist in withheld police reports, other reports, and recorded witness statements without having access to these materials. This is particularly so in cases such as Jayden's because a 13-year-old has only a limited ability to provide pertinent factual information to his counsel as compared with adult defendants. Consequently, providing the defense with full discovery is the only way to avoid rendering *Kleser's* mandate for latitude hollow.

II. The circuit court erroneously exercised its discretion when it denied Jayden's reverse waiver motion.

A. General legal principles.

When a criminal court finds probable cause to believe that a juvenile has committed an offense that subjects the juvenile to the court's original jurisdiction, the court must determine whether to retain or transfer jurisdiction. Wis. Stat. § 970.032(2). The court is to retain jurisdiction unless the juvenile proves each of the following by a preponderance of the evidence:

> That, if convicted, the juvenile could not receive adequate treatment in the criminal justice system.

> That transferring jurisdiction to the court assigned to exercise jurisdiction under chs. 48 and 938 would not depreciate the seriousness of the offense.
>
> That retaining jurisdiction is not necessary to deter the juvenile or other juveniles from committing the violation of which the juvenile is accused ….

Id.

B. The circuit court erroneously exercised its discretion.

In regards to the first factor outlined above, the circuit court asserted that, upon turning 18, Jayden would "receive substantially the same services at the adult facility as are available at Lincoln Hills." (52:5; App. 31). The court further stated that Jayden would not be negatively influenced by much older inmates upon transferring to an adult prison. (52:6; App. 32). In support of both of these findings, the court stated the following:

> I think that *there is substantial evidence on the record that there is, at least, a very good chance that Jayden would be moved to RYOC* after his time at Lincoln Hills, and so would be in a facility that focuses on his -- people his age -- maturing youth -- and working with a staff that is certainly accustomed to, and perhaps, specifically trained to, work with a population that is approximately Jayden's age. It is certainly not guaranteed that Jayden would be placed at RYOC, but *the evidence*

> *before me indicates that there's a very good chance of it.*

(52:6-7; App. 32-33) (emphasis added).

Contrary to these assertions, there was no evidence presented at the reverse waiver hearing as to the likelihood that Jayden would transfer to RYOC upon turning 18. The director of program services for the DOC, Alicia Kraus, was the only witness to testify in regards to this issue, and she merely testified that it is "possible" for a child serving an adult sentence at Lincoln Hills to transfer to RYOC upon turning 18. (59:173-74). In fact, when the State asked Ms. Kraus about the likelihood that Jayden or a similarly situated child would transfer to RYOC upon turning 18, Ms. Kraus did not offer any opinion. (59:173-74).[5] Consequently, the circuit court erroneously exercised its discretion when it based its decision—in part—on a misstatement of the evidence concerning the first factor for reverse waiver.

In affirming the circuit court, the court of appeals did not identify any testimony from any witness indicating that Jayden, or a similarly situated child, would most likely transfer to RYOC upon turning 18. Instead, the court of appeals asserted that the circuit court appropriately exercised its discretion because there was generic testimony about RYOC at the reverse waiver hearing. *Adams*, Case No.

[5] When asked if it was "possible if not likely" that Jayden would eventually transfer to RYOC, Ms. Kraus testified "[i]t's *possible*, yes." (59:173-74) (emphasis added).

2023AP218-CR, ¶ 33. (App. 18-19). But generic testimony about RYOC does not support the circuit court's assertion that Jayden had "a very good chance" of transferring there. The circuit court therefore erroneously exercised its discretion when concluding that Jayden would "receive substantially the same services at *the* adult facility as are available at Lincoln Hills." (52:5; App. 31) (emphasis added).

The circuit court also erroneously exercised its discretion when evaluating the second factor outlined in Wis. Stat. § 970.032(2). Regarding depreciation of the seriousness of the offense, the court cited the presence of the victim's family in court proceedings, and indicated that their presence weighed in favor of retaining jurisdiction in criminal court. (52:10-11; App. 36-37). This assertion, however, does not rationally support the court's decision because it implies that a victim with no family is somehow less entitled to having a case prosecuted in adult court. Nothing in the text of Wis. Stat. § 970.032(2) endorses this reasoning as a relevant criterion on which to deny a reverse waiver motion. Moreover, the victim's family did not testify, did not take a position on Jayden's reverse waiver motion, and did not present any information upon which the court could base its decision. There was thus no basis for the court to infer that the presence of the victim's family supported retaining Jayden in criminal court.

The court of appeals discounted the above statement about the victim's family in affirming the circuit court by suggesting that it merely provided

context for the circuit court's broader findings. *Adams*, Case No. 2023AP218-CR, ¶ 35. (App. 19). However, the circuit court clearly linked the presence of the victim's family to the need to retain jurisdiction. (52:10-11; App. 36-37). This statement thus erroneously implied that a victim with no family is somehow less entitled to having a case prosecuted in adult court.

Finally, in regards to the third statutory factor, the circuit court stated that "perhaps" retaining criminal court jurisdiction was not necessary to deter other children. (52:17; App. 43). And while the court noted concerns about whether the juvenile court system would deter Jayden from committing "serious offenses," the court did not address the statutory criteria of whether retaining criminal court jurisdiction was necessary to deter Jayden from committing "the violation" of which he is accused. *See* Wis. Stat. § 970.032(2)(c). The court was also clear that its reverse waiver decision rested on the first two factors discussed above, and not on the need for deterrence. (52:17; App. 43). Accordingly, nothing in the court's remarks on deterrence cures the errors the court made in assessing the other statutory factors. To remedy these errors, this Court should remand for a new reverse waiver hearing.

CONCLUSION

For the reasons stated in Section I, Jayden asks this Court to grant review, reverse the decision of the court of appeals, and remand to the circuit court with instructions to vacate its reverse waiver order and hold a new preliminary hearing. For the reasons stated in Section II, Jayden asks this Court to grant review, reverse the decision of the court of appeals, and remand to the circuit court with instructions to vacate its reverse waiver order and hold a new reverse waiver hearing.

Dated this 22nd day of August, 2024.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 5,935 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition 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 rules 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 or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including 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 22nd day of August, 2024.

Signed:
Electronically signed by
David Malkus
DAVID MALKUS
Assistant State Public Defender