STATE OF WISCONSIN

SUPREME COURT

Case No. 2024AP000032

In the interest of M.P., a person under the age of 17:

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

M.P.,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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INTRODUCTION

At a hearing on a petition to waive juvenile court jurisdiction, the juvenile court must determine whether the case has "prosecutive merit." Wis. Stat. § 938.18(4). If it does, the court must then consider the factors enumerated at § 938.18(5)—things like the child's "prior record" and his "potential for responding to future treatment." Finally, the court must decide, based on the evidence presented on the sub. (5) criteria, whether the State has proven by clear and convincing evidence "that it is contrary to the best interests of the juvenile or of the public to hear the case" in juvenile court. § 938.18(6). If it concludes that the State has met its burden, it "shall" waive jurisdiction. *Id.*

The plain language of the waiver-hearing statute thus appears to establish a straightforward process: the State has a burden, and if it meets it, the juvenile court must order waiver. But case law sees things differently, consistently treating waiver decisions as discretionary. *See, e.g.*, *State v. Kleser*, 2010 WI 88, ¶83, 328 Wis. 2d 42, 786 N.W.2d 144. This treatment is in tension with the statutory text and significantly constrains appellate review, as appellate courts afford great deference to discretionary determinations but none at all to circuit courts' legal conclusions. *See Martindale v. Ripp*, 2001 WI 113, ¶29, 246 Wis. 2d 67, 629 N.W.2d 698; *State v. Jankowski*, 173 Wis. 2d 522, 525, 496 N.W.2d 215 (Ct. App. 1992).

Outside the waiver hearing context, meanwhile, circuit courts are often required to rule a certain way based on whether a party has met its burden of proof. A court in a termination of parental rights case, for

example, "shall find the parent unfit" if the petitioner proves grounds for termination by clear and convincing evidence. Wis. Stat. § 48.424; *Sheboygan County HHS v. Julie A.B.*, 2002 WI 95, ¶26, 255 Wis. 2d 170, 648 N.W.2d 402. It has no discretion to do otherwise. A court hearing a motion to suppress evidence and considering whether there was probable cause for arrest similarly lacks discretion: if the State's evidence establishes probable cause, it must deny suppression. *Cf. Mapp v. Ohio*, 367 U.S. 643, 655 (1961). Finally, in these contexts and countless others, an appellate court will uphold the circuit court's findings of fact unless clearly erroneous but will grant no deference to its legal conclusions regarding what those facts do or don't establish. *See, e.g.*, *State v. Sykes*, 2005 WI 48, ¶12, 279 Wis. 2d 742, 695 N.W.2d 277.

What makes the juvenile waiver-hearing statute so different? Here, the court of appeals afforded deference to the circuit court's decision—which it deemed discretionary—waiving M.P. into adult court. *State v. M.P.*, No. 2024AP32, unpublished slip op., ¶13 (Wis. Ct. App. June 26, 2024) (App 9-10). It affirmed that decision despite an underdeveloped record and even though, by the circuit court's own admission, almost all the sub. (5) criteria weighed against waiver. *See id.*, ¶25 (App. 16).

ISSUE PRESENTED

1. Is a juvenile court's determination of whether the State met its § 938.18(6) burden—thereby mandating waiver—discretionary or legal?

   Neither lower court addressed this issue.

2. Did the circuit court err in concluding that the State sufficiently proved it would be contrary to M.P.'s best interests and the best interests of the public to keep this case in juvenile court?

The circuit court granted waiver. The court of appeals affirmed.

CRITERIA FOR REVIEW

As noted above, § 938.18 establishes the State's clear-and-convincing burden of proof, delineates the factual issues the State's proof must address, and requires the circuit court to grant waiver if the State meets its burden. It is unclear, in this statutory scheme, where discretion comes in—and yet the case law uniformly treats waiver decisions as discretionary. *See, e.g.*, *Kleser*, 328 Wis. 2d 42, ¶83.

The Court can tackle this tension here. By granting review, the Court can address what may be a longstanding wrong turn in the interpretation of a critical juvenile statute—one that puts dozens of children into Wisconsin's adult criminal legal system each year.[1] Wis. Stat. § 809.62(1r)(c)2.-3., (e). More specifically, it can clarify the plain meaning of § 938.18, ensure courts adhere to it moving forward, and, if it agrees the statute grants no discretion as to waiver petitions, make appellate review of waiver decisions more meaningful. *See id.*

[1] KIDS COUNT Data Center, The Annie E. Casey Foundation," Children Waived into Adult Court 2022 and Later in Wisconsin" (last updated April 2024), https://datacenter.aecf.org/data/tables/3485-children-waived-into-adult-court-2022-and-later#detailed/.

STATEMENT OF THE CASE AND FACTS

M.P. is a 16-year-old boy from Green Bay who hasn't lived with his parents for some time. (*See* 4:1). His mother is homeless. (4:1). His father struggled to be his primary caregiver and ultimately decided that Green Bay was too full of negative influences for M.P. to stick around. (42:26-27; App. 45-46).

When M.P. first left his dad's home, he moved in with his former stepmother in Wausau. (42:26-27; App. 45-46). Later, after briefly returning to Green Bay for reasons the record leaves a mystery, M.P. moved in with his paternal grandmother in Neenah. (42:27; App. 46). He was living with his grandma in Neenah when the incident underlying this case took place.

Shortly before midnight on November 26, 2023, M.P. got into a fistfight with another teenage boy, Austin.[2] (4:3; 42:10-11; App. 29-30). Why the two fought is a bit unclear; it had to do with Sasha[3] (Austin's ex-girlfriend and M.P.'s friend), who was "having issues with" with Austin's new girlfriend. (42:9; App. 28).

After some back-and-forth on social media, Sasha, M.P., and several of their friends—one of whom had a gun—drove to Austin's home. (42:7, 13; App. 26, 32). Austin came outside, and he and M.P. fought. (42:10-11, 19; App. 29-30, 38). Eventually, M.P. asked the friend who'd brought a gun to load it. (42:19-20; App. 38-39). She did so, then gave the gun to M.P.. (42:20; App. 39).

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[2] This is a pseudonym. *See* Wis. Stat. § 809.19(1)(g).

[3] This, too, is a pseudonym. *See id.*

As Austin ran back towards his house, M.P. fired. (42:14; App. 33). No one was hit.

Police responded to the scene following reports of gunshots and a fight. (4:3) They interviewed onlookers from the neighborhood, as well as the youth involved in the incident. (4:3-8). Based on their investigation, M.P. was taken into custody and the State filed a delinquency petition charging him with four counts: first-degree recklessly endangering safety, endangering safety by reckless use of a firearm, possession of a dangerous weapon by a person under 18, and pointing a firearm at another. (4:3).

The same day the State filed a delinquency petition, it also petitioned the circuit court to waive M.P. into adult court. (7). A supervisor at the Calumet County Department of Health and Human Services submitted a report supporting the waiver petition. (8). The report briefly described the charges at issue, as well as the facts underlying prior delinquency petitions filed against M.P. (all in Brown County). (8:1-2). It provided almost no insight into M.P.'s social history, physical or mental health, educational background, or treatment needs. Instead, the report noted that the Department was "waiting on information" from Brown County and from the high school M.P. had most recently attended. (8:2-3).

The Department never supplemented its partial report, and the circuit court never ordered the Department to submit a more comprehensive report under § 938.18(2m).

The waiver hearing took place on December 21, 2023—about a month after M.P.'s fight with Austin. (42; App. 20-96). The State called two witnesses: Sergeant

Chad Riddle, who talked about his follow-up investigation into the fight, and social worker Jason Halbach from the Brown County Health and Human Services Department, who'd worked with M.P. in Green Bay and who discussed some of M.P.'s recent successes and struggles. (42:5, 22; App. 24, 41).

Notably, the State did not call any witnesses from the agency that would determine M.P.'s treatment needs and offer appropriate services should he be subject to a dispositional order in Calumet County. Defense counsel, for his part, called no witnesses at all.

Finally, the circuit court called M.P.'s father to the witness stand itself. (42:55; App. 73). He talked about the difficulties he'd had with M.P. when the two lived together, and he explained that M.P. is eligible for membership in—and thus services from—the Oneida tribe. (42:55-56; App. 73-74).

Details regarding the testimony offered by the witnesses at M.P.'s waiver hearing are set forth, where relevant, below.

The circuit court granted the State's waiver petition. (42:76; App. 95). It voiced frustration with how little the juvenile justice system had offered M.P. in the past and how little it knew about certain important waiver factors. It also expressly held that most of the statutory criteria "suggest retention in the juvenile system would be appropriate." (42:76; App 95). But it concluded that the "seriousness of the offense" and the fact that M.P. was a year and a half away from turning 18—which it seemed to perceive as cutting it close—merited waiver. (42:76; App 95).

Thus, on December 22, 2023, the circuit court entered an order waiving juvenile court jurisdiction over M.P.. (33; App. 18-19).[4]

M.P. filed an interlocutory appeal, and the court of appeals affirmed. *See M.P.*, No. 2024AP32, ¶25 (App. 3-17). It held that the circuit court reviewed the statutory factors, gave them the weight it deemed appropriate, and articulated its rationale for concluding that waiver was proper. *Id*. (App. 3-17). Accordingly, it concluded, the circuit court did not erroneously exercise its discretion. *Id.* (App. 3-17).

ARGUMENT

I. This Court should grant review, address the plain meaning of the statutory provisions governing juvenile waiver decisions, then clarify whether such decisions are discretionary—as case law has long treated them.

The plain language of the statute governing juvenile waiver decisions is in tension with reviewing courts' longstanding treatment of such decisions as discretionary. It appears no appellate court has meaningfully grappled with this inconsistency—or addressed the matter at all. M.P. asks this Court to take the issue on, not just because there is an apparent conflict between the text at issue and the case law applying it, but also because, as noted earlier, the current approach significantly

[4] There appear to be two identical copies of this order in the record. (*See* 33; 34; *see also* App. 18-19).

constrains appellate review of waiver decisions like the one at issue here.

The key provision is § 938.18(6):

> DECISION ON WAIVER. After considering the criteria under sub. (5), the court shall state its finding with respect to the criteria on the record, and, if the court determines on the record that there is clear and convincing evidence that it is contrary to the best interests of the juvenile or of the public to hear the case, the court shall enter an order waiving jurisdiction and referring the matter to the district attorney for appropriate proceedings in the court of criminal jurisdiction. After the order, the court of criminal jurisdiction has exclusive jurisdiction.

There are three critical components to this statutory text. First, it sets a burden of proof: the State must make its case for waiver by "clear and convincing evidence." § 938.18(6). Second, it clarifies what factual issues the State's evidence must address to meet that burden of proof: those enumerated in § 938.18(5). *Id.* Finally, it specifies what a juvenile court "shall" do if the State meets its burden: order waiver. *Id.*

It's unclear, given these three aspects of the governing statute, where discretion comes into play.

First, "[u]se of the word 'shall' creates a presumption that the statute is mandatory," and nothing in § 938.18(6) contradicts that presumption. *See Matlin v. City of Sheboygan*, 2001 WI App 179, ¶5, 247 Wis. 2d 270, 634 N.W.2d 115. It thus appears from the text that, when

a juvenile court concludes the State has met its burden, it has no choice but to order waiver (and vice versa).

The statute is also presumptively mandatory as to the juvenile court's decisionmaking process: it "shall base its decision" on the sub. (5) criteria. § 938.18(5). Importantly, the fact that a court may weigh one criterion more heavily than another in a particular case does not make the resulting waiver decision discretionary: determining the weight of the evidence is a core part of a circuit court's function at all sorts of evidentiary hearings, and such hearings often conclude with legal determinations. Consider, to give just a few examples, preliminary examinations,[5] *Miranda*/*Goodchild* hearings,[6] and TPR

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[5] Preliminary examinations are governed by Wis. Stat. § 970.03, which requires the circuit court to order bindover if the State proves "there is probable cause to believe that a felony has been committed." *State v. O'Brien*, 2014 WI 54, ¶19, 354 Wis. 2d 753, 850 N.W.2d 8. These hearings aren't mini-trials involving credibility determinations, but a circuit court must assess the plausibility of the State's story in order to make its probable cause determination. *State v. Dunn*, 121 Wis. 2d 389, 397, 359 N.W.2d 151 (1984). Once that determination has been made, the circuit court has no discretion as to which order to enter. *See* § 970.03(7)-(9).

[6] A *Miranda* hearing tackles the admissibility of statements made either without *Miranda* warnings or following an invalid waiver of the defendant's *Miranda* rights, while a *Goodchild* hearing tackles the voluntariness of a defendant's confession. *See generally State v. Jiles*, 2003 WI 66, ¶25, 262 Wis. 2d 457, 663 N.W.2d 798. In both scenarios, the State has the burden to prove, by a preponderance of the evidence, that the defendant's statements were admissible (i.e., that he received *Miranda* warnings, validly waived them, or voluntarily confessed). *Id.*, ¶26. A circuit court must admit the challenged statements if the State meets its burden of proof.

summary judgment hearings.[7] In each context, the circuit court presides over a hearing where one party bears a particular burden of proof; in each context, the circuit court must decide what weight to give the evidence presented; and in each context, the circuit court must ultimately reach a legal conclusion as to whether the burden-holder has done its job. After making that determination, the circuit has no discretion as to the order it subsequently enters.

In short, the statutory text does not convey that a juvenile court has discretion in determining whether the State has met its § 938.18(6) burden or whether waiver should follow. On the contrary, its plain meaning appears to indicate that a juvenile court's task at a waiver hearing is like a circuit court's task at most other evidentiary hearings: find the facts first, reach a legal conclusion second. And as this Court has stated time and again, "[i]f analyzing a statute's language in context 'yields a plain, clear statutory meaning, then there is no ambiguity'" and the inquiry ends. *State v. Lopez*, 2019 WI 101, ¶12, 389 Wis. 2d 156, 936 N.W.2d 125.

This Court should grant review to take up the novel legal question of whether the plain meaning of the juvenile waiver statute affords juvenile courts discretion

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[7] At a summary judgment hearing in the grounds phase of a TPR case, a petitioner must prove by clear and convincing evidence that "there is no genuine issue of material fact regarding the asserted grounds for unfitness ... [and thus] the moving party is entitled to judgment as a matter of law." *Steven V. v. Kelley H.*, 2004 WI 47, ¶53, 271 Wis. 2d 1, 678 N.W.2d 856. If the petitioner fails to meet that burden, summary judgment is unavailable. If it meets it, "[t]he judgment sought *shall* be rendered." Wis. Stat. § 802.08(2).

at waiver hearings, warranting deference on appeal, or whether—for the text-based reasons set forth above—such decisions are ultimately legal ones and may be reviewed de novo.

II. If this Court grants review and determines whether juvenile waiver decisions are discretionary, it should further consider whether the waiver decision underlying this petition was in error.

Should this Court grant review to resolve whether the plain language of § 938.18 grants juvenile courts deference at waiver hearings, it should further resolve the issue underlying M.P.'s appeal: whether the juvenile court's decision waiving him into adult court was (as an exercise of discretion or a legal conclusion) in error. And, for the reasons set forth below, it should answer that question "yes"—and reverse.

A. Introduction.

A core aim of the juvenile justice system is to equip youth "with competencies to live responsibly and productively" in the future. Wis. Stat. § 938.01(2). Undergirding that aim is an abiding trust in young people's capacity to grow out of delinquency if they're provided with individualized treatment and services. *See generally State v. Pablo R.*, 2000 WI App 242, ¶17, 239 Wis. 2d 479, 620 N.W.2d 423. The juvenile justice code reflects that trust, in part, by giving the juvenile court exclusive jurisdiction over most youth who break the law. *See* Wis. Stat. § 938.12. The juvenile justice system is better suited to accomplishing the legislature's goal of rehabilitating,

rather than punishing, young people who've committed delinquent acts. As Justice Kennedy put it in *Roper v. Simmons*, it is "the rare juvenile offender whose crime reflects irreparable corruption." 543 U.S. 551, 573 (2005).

Adult court, meanwhile, may do more harm than good. As the Justice Policy Institute has explained: "The adult justice system is poorly equipped to provide young people with appropriate schooling, job training, and mental and physical health treatment opportunities," all of which can support their transition away from "crime and delinquency."[8] What's more, adult criminal convictions carry a host of collateral consequences that juvenile adjudications do not; they can limit a young person's "ability to get a job, receive student loans, and live in certain kinds of housing"—each of which may be key to their successful transition to adulthood.[9]

Despite the wide-ranging drawbacks to subjecting youth to criminal penalties, there is a mechanism for transferring a child to adult court to enable just that. If, after reviewing the full array of relevant circumstances, a circuit court determines that keeping a child's case in juvenile court would be contrary to the best interests of the child or the public, then it "shall" waive juvenile court jurisdiction. § 938.18(6).

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[8] Justice Policy Institute, *Raising the Age*, 10 (March 7, 2017), justicepolicy.org/wp-content/uploads/2021/06/raisetheage.fullreport.pdf.

[9] *See id.*

Waiver decisions are "critically important" to the children who find themselves at the brink of receiving either treatment and services in the juvenile justice system or criminal penalties in the adult justice system. *See Kleser*, 328 Wis. 2d 42, ¶83. They are also significant to the public, whose investment in sound waiver decisions may stem from their status as community members seeking safe neighborhoods, taxpayers seeking governmental efficiency, concerned citizens interested in giving every child a fair shake, or victims seeking some form of recompense.

The importance of sound decisionmaking at waiver hearings undergirds appellate courts' recent commitment to carefully scrutinizing circuit courts' exercise of discretion in this realm. While a judge may weigh the statutory waiver criteria differently in different cases, there must be a reasonable factual basis—in the record—to support a judge's conclusion. As the Wisconsin Supreme Court recently held: "[W]e cannot stand by while decisions falling outside the bounds of reasonable action are executed .... [T]o sit back and allow the implementation of wholly unjustified orders would be as great a misuse of our judicial role as ... [to] overrid[e] discretionary decisions simply due to ... disagreement with those decisions." *State v. X.S.*, 2022 WI 49, ¶53, 402 Wis. 2d 481, 976 N.W.2d 425.

This case, like *X.S.*, features a "distinctly out of the ordinary" exercise of discretion: one that was erroneous. *See id.*, ¶55. There are two basic problems with the circuit court's decision.

First, the circuit court lacked the factual record necessary to support its waiver ruling. More specifically, because there were significant holes in the evidence the State offered to support its waiver petition, and because the facts it *did* present overwhelmingly weighed *against* waiver, the State did not meet its clear-and-convincing burden of proof. § 938.18(6).

Second, the circuit court unreasonably determined that the only two criteria it deemed supportive of waiver—M.P.'s age and the seriousness of his offense—somehow countered the rest of the record. This determination was unreasonable in part because a host of other statutory criteria demonstrate that M.P. belongs in juvenile court, as noted above. But more importantly, the circuit court cited no facts of record showing that M.P.'s age made adult court appropriate; since when is a 16-year-old too old for meaningful intervention? And, while M.P.'s offense was serious (those underlying waiver petitions generally are), viewing it in context shows it didn't outweigh the strong message sent by the record as a whole: both his own best interests and the public's will be best served by affording him individualized treatment and services in the juvenile justice system. The State did not prove otherwise.

Taking into account the full waiver hearing record, gaps and all, there was no reasonable factual basis to send M.P. to adult court in this case. The State did not meet its burden, and the circuit court erred in holding that it did.

B. The underdeveloped record at M.P.'s waiver hearing does not support his transfer to adult court. Quite the opposite. The circuit court's contrary conclusion was the sort of "unreasonable action" that, under *X.S.* and related cases, warrants reversal.

M.P.'s best interests and the best interests of the public align: both will be served by affording M.P. meaningful access to individualized treatment and services in the juvenile justice system, not by casting him into the web of criminal penalties imposed on adults. While the factual record at M.P.'s waiver hearing falls far short of providing a comprehensive look into his strengths, needs, and history—the State failed to present information critical to the circuit court's full consideration of its waiver petition—it gives enough insight to demonstrate that M.P. is far from a lost cause. In other words, he is not the "rare juvenile offender whose crime reflects irreparable corruption"; he is a young man who has broken the law and needs support, which the system has thus far failed to provide. *See Roper*, 543 U.S. at 573. "[W]e can use the capabilities of the juvenile system to turn [M.P.] around before it is too late"—and because we can, we should. *See Pablo R.*, 239 Wis. 2d 479, ¶17. That is "the 'leading idea'" of the juvenile justice system. *See id.*

1. M.P.'s personality, including his mental and developmental health, his physical and mental maturity, his pattern of living, his prior treatment history, and his potential for responding to future treatment.

The first factor the circuit court was required to consider at M.P.'s waiver hearing was his "personality." § 938.18(5)(a). Per statute, that includes "whether [M.P.] has a mental illness or developmental disability," his "physical and mental maturity," his "pattern of living," his "prior treatment history," and his "apparent potential for responding to future treatment." *Id.*

Halbach, M.P.'s social worker while he was under juvenile supervision in Brown County, testified that he "believe[d]" M.P. had been on medication for ADHD but was unaware of any other diagnosed mental illness or developmental disability. (42:32, 51; App. 51, 70). He said M.P. had not, to his knowledge, even been "screened for mental illness." (42:51; App. 70). And he didn't know whether M.P. had an IEP. (42:44; App. 63). Halbach's testimony on these points began a pattern: the State failed to establish the basic facts necessary for the circuit court to consider the statutorily mandated waiver criteria.

There was no testimony directly addressing M.P.'s physical or mental maturity, but Halbach noted that M.P. struggles with impulsivity—a hallmark of immaturity. (42:44; App. 63). On the other hand, Halbach testified to many indications of maturity: M.P. had held a job for a few months before he was taken into custody (42:53; App. 72), he'd accepted the treatment and services

offered to him in Green Bay (42:51; App. 70), and he "was attending school regularly and getting good grades" when he lived in Wausau (42:51; App. 70). Thus, as with many adolescents, M.P.'s record of mature and immature decisionmaking appears mixed.

As to M.P.'s pattern of living, there was scattered testimony about his placement over the preceding few years. It's clear M.P. used to live with his dad in Green Bay, but for how long and until when remain unclear. (42:52; App. 71). At some point M.P. moved in with his former stepmother in Wausau, but it's unclear precisely when, how long this living arrangement lasted, or why it ended. (42:26-27; App. 45-46). It appears M.P. returned to Green Bay after living in Wausau, though Halbach was unaware of the circumstances surrounding his return. (42:27; App. 46). Finally, the record establishes that M.P. had been living with his grandma in Neenah before he was taken into custody. (42:29; App. 48). In sum, while the State introduced facts showing that M.P. dealt with residential instability, it's unclear how persistent it was and only some of the reasons for his repeated relocation came out in Halbach's testimony.

Next, M.P.'s treatment history is extremely limited. While M.P.'s mother is a member of the Oneida tribe, and Halbach noted that Oneida Behavioral Health might offer useful services, there was no testimony suggesting anyone had sought to get those services for M.P.. (42:53, 56; App. 72, 75). And there was no testimony suggesting that M.P. received *any* treatment or services while living in Wausau or Neenah. As for his time in Green Bay, M.P. participated in Advocates for Healthy Transitional Living, a "mentoring program" with group

work. (42:25; App. 44). Halbach testified that M.P.'s level of involvement would ebb and flow, as he was deciding whether he "wanted to be a leader within the group or if he was a follower." (42:25; App. 44). Later, M.P. spent a brief time in Brown County Shelter Care and a bit longer on electronic monitoring, which he complied with. (42:28-29; App. 47-48). Finally, while Halbach didn't clarify the timing, he testified that Brown County had conducted "random drug screens" on M.P. but that M.P. had never "been afforded formal AODA programming." (42:44; App. 63).

Given how little treatment M.P. has received in the past, the circuit court didn't have much to refer to in assessing his amenability to future treatment. But Halbach confirmed that M.P. has never declined a treatment opportunity (42:51; App. 70), and he said M.P. independently sought out a mentor and has maintained that "valuable" relationship (42:46; App. 65). When asked whether M.P. could "reach a safe point" given treatment in the juvenile justice system, Halbach said he could, but that only M.P. could make the decision whether to follow through. (42:37-38; App. 56-57).

Thus, M.P. is a 16-year-old boy who's shown maturity in some respects (e.g., in school in Wausau and on electronic monitoring in Green Bay), immaturity in others (most notably in the offense underlying this case), has moved around a bit but has family support, has ADHD and an IEP but hasn't been assessed for mental illness, and—though he's been subject to two separate dispositional orders in Brown County—has received almost no rehabilitative services. The record gives every reason to

believe that M.P. can and will respond to appropriate treatment if the juvenile justice system provides it.

In its oral ruling, the circuit court did not explicitly address whether it believed M.P. would be amenable to treatment, but its findings otherwise align with the facts set forth above. The circuit court repeatedly expressed frustration with how little the juvenile justice system had offered M.P., opining that it "has just absolutely failed" him. (42:75; App. 94).

2. M.P.'s prior record, including whether he's been waived into adult court or convicted or adjudicated, whether he's inflicted "serious bodily injury," and what his "motives and attitudes" are.

The second factor the circuit court was tasked with considering at M.P.'s waiver hearing was his "prior record," including whether he'd been waived into adult court, whether he'd been convicted of a crime following a waiver into adult court, whether he'd been adjudicated delinquent, whether any prior conviction or adjudication "involved the infliction of serious bodily injury," what his "motives and attitudes" are, and what his prior offenses were. § 938.18(5)(am).

It's undisputed that M.P. has never been waived into adult court and has no criminal convictions. (*See* 42:51-52; App. 70-71). He has, however, been subject to two prior dispositional orders in delinquency cases, both in Brown County. (42:52; App. 71). The circuit court summarized the offenses underlying those orders as follows: "[T]he first was criminal damage to property and theft,

and then after he'd been on an order for that, for some reason he ended up on a [deferred prosecution agreement] for burglary and operating a motor vehicle without owner's consent." (42:70; App. 89). The upshot is that, when the incident underlying this case occurred, M.P. had already faced delinquency petitions and dispositional orders—but they involved property crimes, not violence.

As for M.P.'s motives and attitudes, the only relevant testimony comes from Halbach. Halbach described M.P. as a follower, saying "part of ... him following is impulsivity." (42:25; App. 44). He also spoke repeatedly about negative peer influences, which tend to lead to M.P.'s poor decisions. (*See, e.g.*, 42:35; App. 54). (The circuit court, for its part, expressed concern that M.P. would "find those individuals at the bottom of the barrel no matter where you place him." (42:74; App. 93).) In short, while Halbach expressed a generally favorable view of M.P.'s character ("I believe that he's capable of doing a lot of good things"), he saw room for growth in M.P.'s capacity to make good decisions even in the midst of peers making bad ones. (42:37; App. 56). The record supports Halbach's viewpoint.

3. The nature of M.P.'s offense, "including whether it was against persons or property" and whether it was violent or premeditated.

The third statutory waiver criteria is "[t]he type and seriousness of the offense, including whether it was against persons or property and the extent to which it

was committed in a violent, aggressive, premeditated or willful manner." § 938.18(5)(b).

The seriousness of the offense, the fact that it was violent, and its (at least partly) premeditated nature were among the circuit court's core concerns at M.P.'s waiver hearing. It referenced the investigating officer's testimony, saying he "described an extremely serious and dangerous situation." (42:69; App. 88). It noted that there were children in the home that M.P. shot a gun at, and that someone could have died. It added: "And ... it's clear that [M.P.] went to this location with the intent to be involved in some sort of a confrontation. There's no doubt about that." (42:69; App. 88).

Based on the facts in the delinquency petition and the investigating officer's testimony, the record shows M.P. intended to participate in a fight, that he did in fact fight with Austin, and that he fired a gun in the vicinity of a number of other people. He thus concedes that his offense was serious, violent, and premeditated.

> 4. The availability and suitability of treatment options for M.P. within the juvenile justice and mental health systems, as well as M.P.'s suitability for the serious juvenile offender or adult intensive sanctions programs.

The next factor for the circuit court to consider at M.P.'s waiver hearing was "[t]he adequacy and suitability of facilities, services and procedures available for treatment of the juvenile and protection of the public within the juvenile justice system, and, where applicable, the mental health system," as well as M.P.'s suitability

for "the serious juvenile offender program ... or the adult intensive sanctions program." § 938.18(5)(c).

M.P. is ineligible for the serious juvenile offender program (*see* Wis. Stat. § 938.34(4h)(a); 42:40; App. 59), and there was no testimony either way about the suitability or availability of the adult intensive sanctions program should M.P. be waived into adult court.

No one testified from the department that will be tasked with assessing M.P.'s treatment needs and providing appropriate services should he be subject to a dispositional order in this case. Consequently, no one testified about what that department can offer. What's more, at the time of the waiver hearing, it appears *no* department had comprehensively assessed M.P.'s treatment needs. Because he hasn't been screened for mental illness, a witness from the relevant department couldn't have addressed whether there were suitable mental health treatment options available—even if one had testified.

Thus, on this criterion, there were significant gaps in the State's evidence. But the circuit court nevertheless relied on it: along with the seriousness of M.P.'s offense, the circuit court cited his age as the only other factor supporting his transfer to adult court. It didn't specify *why* M.P.'s age matters, but Halbach discussed his age at length in answering questions about whether M.P. could receive the services he needs before aging out of the juvenile justice system. Presumably that was the circuit court's concern.

There are two basic problems with the circuit court's reliance on M.P.'s age: it didn't set forth its reasoning on the record, rendering its exercise of discretion inadequate, and it relied on M.P.'s age without the requisite factual basis to determine whether it supports waiver.

As noted above, an integral component of a valid exercise of discretion in the waiver context is a "carefully delineated," on-the-record "statement of the relevant facts or reasons motivating the [waiver] determination." *J.A.L. v. State*, 162 Wis. 2d 940, 961, 471 N.W.2d 493 (1991). Here, the circuit cited a fact—M.P.'s birthday—that was undoubtedly relevant to its waiver determination. But it failed to articulate why that fact supported waiver. There's nothing unusual about keeping a 16-year-old in juvenile court, and one year and eight months is a long time in the life of an adolescent. So why wasn't it enough here? The circuit court did not provide an explanation. It simply cited the undisputed fact of M.P.'s age and declared, in a conclusory manner, that it meant waiver was appropriate.

The circuit court's failure on this front was likely tied to the State's failure to present the relevant facts. The State offered no evidence regarding any resources M.P. will or will not have access to on account of his age. It offered no evidence that anyone has ever evaluated M.P.'s treatment needs, let alone evidence regarding the substance of those needs or whether they can be fulfilled before M.P. ages out of the juvenile justice system. And it offered no evidence about what services would be available to M.P., before he turns 18, from the department that would be tasked with offering them. Without

these basics in evidence, the circuit court's reliance on M.P.'s age wasn't just unexplained; it was without a reasonable factual basis in the waiver-hearing record.

Finally, scant and speculative though it was, it's worth reviewing the information Halbach *could* provide about the treatment M.P. might get through juvenile court and the length of time he'd need it.

Halbach testified that, if M.P. stayed in juvenile court, he would likely spend six-to-nine months at Lincoln Hills before returning to the community (to a group home or foster home) on electronic monitoring. (42:33; App. 52). At Lincoln Hills, Halbach said, M.P.'s education and "mental health needs would be addressed," and he'd receive individual and family therapy. (42:34; App. 53). He could continue receiving the same types of services once out. (42:34; App. 53).

As for the substance of M.P.'s treatment needs, Halbach said he believed M.P. would benefit from AODA programming, which he'd never received. (42:36, 45; App. 55, 64). He acknowledged that M.P.'s needs hadn't yet been assessed in realms as basic as his mental health.

The crucial issue at M.P.'s waiver hearing was whether M.P.'s remaining time in the juvenile justice system would be enough for his rehabilitation. On that question, Halbach said it "could be"; he wasn't sure whether additional supervision would be necessary. (42:35; App. 54). When the State repeated the question in a different way moments later, Halbach opined that there was enough time for M.P. to be rehabilitated before his 18th birthday if he put his mind to it:

> I believe that he's capable of doing a lot of good things, but it's totally up to what [M.P.] wants to do, and it's totally up to his decision making, so we can put any plan in place in regards to AODA. We can put a plan into place ... until his eighteenth birthday, but it really comes down to what is [M.P.] willing and wanting to do ....
>
> So to answer your question, yes, he's capable, but does he want to? I have no idea. And can it be completed in a year and a half? Sure....

(42:37-38; App. 56-57).

Not long after, the State repeated the question a third time, asking again whether there was enough time to address M.P.'s needs through juvenile court. This time Halbach contradicted himself and answered, "No." (42:40; App. 59).

The State then asked about residential treatment facilities like Rawhide and Homme Home, asking whether that kind of placement would "adequately address [M.P.'s] needs and community protection." (42:41; App. 60). Halbach said "[n]o." (42:41; App. 60). He then clarified that he believed M.P. would have a hard time getting into that kind of facility because of his charges—not that the facilities would be inadequate if he *were* admitted. (42:42; App. 61).

On cross, defense counsel asked whether M.P. could succeed "in a situation where he couldn't be influenced by the same group of people" that he'd gotten into trouble with time and again. (42:47; App. 66). Halbach said he could. (42:47; App. 66). He then agreed that placements like Rawhide "would ... remove [M.P.] from his negative influences in this area." (42:48; App. 67). Asked

again about whether these facilities might accept M.P., Halbach made clear that he didn't know: "It goes back to the screening process. They'll take all the information and determine if he's an appropriate candidate for their program." (42:48; *see also* 42:49; App. 67-68). Halbach then confirmed that, like Lincoln Hills, residential treatment facilities would provide M.P. with therapy, AODA treatment, educational programming, and work assistance, all while keeping him out of the community to protect the public. (42:48; App. 67).

Halbach didn't have the information necessary to speak intelligently about M.P.'s treatment needs, the timeline required to meet them, the availability of services in Calumet County, or whether a residential treatment facility would let M.P. in. He expressed some doubt about such facilities admitting M.P., some confidence in the suitability of a correctional placement, certainty that M.P. would benefit from AODA treatment, and tempered optimism about M.P.'s capacity to be rehabilitated by his 18th birthday. Halbach thus had limited insight into the crucial issues at play under § 938.18(5)(c), but the insight he offered did not support waiver.

M.P.'s treatment needs remain uncertain, and he hasn't received much in the way of services yet. But, if he's motivated, Halbach believes M.P. could be rehabilitated by his 18th birthday. The record supports his cautious optimism.

5. "The desirability of trial and disposition of the entire offense in one court" if other individuals involved in the offense face prosecution.

The final factor the circuit court was required to consider is "[t]he desirability of trial and disposition of the entire offense in one court if the juvenile was allegedly associated in the offense with persons who will be charged with a crime in the court of criminal jurisdiction." § 938.18(5)(d).

This factor doesn't apply here. The State told the circuit court that no other individual involved in the offense had been charged in either juvenile or adult court, but that the young woman who brought a gun to the scene had been "referred to juvenile authorities in Outagamie County." (42:62; App. 81). Nothing about that potential delinquency case suggests M.P. should be sent to adult court. The State did not try to argue otherwise.

* * * *

In sum, M.P.'s personality makes him a good candidate for juvenile court; nothing about M.P.'s prior record negates that fact; the nature of M.P.'s offense, taken on its own, weighs in favor of waiver; the record lacks the facts necessary to fully assess M.P.'s treatment options in the juvenile justice system, but strongly suggests he can be rehabilitated within it; and there is no separate prosecution in criminal court that might justify M.P.'s transfer there. The question thus becomes: was M.P.'s misconduct so egregious that, despite his rehabilitative potential and the State's failure to present evidence on

his treatment options in the juvenile justice system, adult criminal punishment is required?

While M.P.'s offense is serious, his case is a far cry from one like *X.S.*, in which the crime was "a mass and indiscriminate shooting at a place of public accommodation." 402 Wis. 2d 481, ¶43. The gravity of the offense here is not so extreme as to override the rest of the record, which, as the circuit court acknowledged, overwhelmingly supports M.P.'s retention in juvenile court. And indeed, the circuit court never said that the seriousness of M.P.'s offense could support his waiver into adult court on its own; it deemed waiver appropriate based on the seriousness of M.P.'s offense *and* his age. Taking M.P.'s age out of the equation (because there is no factual basis to conclude his age is a problem), neither the record regarding M.P.'s offense nor the circuit court's discussion thereof provides a reasonable, rational basis to deprive him or the public of meaningful juvenile justice system intervention.

On this point, recall the United States Supreme Court's observation in *Roper*: the fact that "juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.... [I]t would be misguided to equate the failings of a minor with those of an adult, *for a greater possibility exists that a minor's character deficiencies will be reformed*." 543 U.S. at 570 (emphasis added).

The State's burden at M.P.'s waiver hearing was to establish by clear and convincing evidence that allowing the case to remain in juvenile court would be contrary to

either his best interests or those of the public. The circuit court's task was to exercise discretion, reasonably and with its rationale articulated on the record, in determining whether that burden was met. Both fell short. Only one of the factors the circuit court was required to consider weighed in favor of waiver: the seriousness of M.P.'s offense. The others weighed *against* waiver, didn't apply, or weren't factually developed enough to permit an assessment one way or the other.

Taken as a whole, the record shows M.P. is a 16-year-old boy with plenty of strengths but a record of misbehavior, and with treatment needs the juvenile justice system has done almost nothing to address. He is precisely the kind of child the juvenile justice system was designed to reform—struggling and in need of intervention, but with clear rehabilitative potential. Thus, should this Court grant review, it should reverse the lower courts' decisions waiving him into adult court.

CONCLUSION

M.P. respectfully requests that this Court grant review, clarify whether waiver decisions are discretionary given the plain language of § 938.18, and review waiver decision here.

Dated this 24th day of July, 2024.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 7,236 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written 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 24th day of July, 2024.

Signed:

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