STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,
Plaintiff-Respondent,

v. Appeal No. 2024-AP-189

C.T.P.-B., Chippewa County
Circuit Court

Defendant-Appellant. Case No. 2022-CF-265

ON APPEAL FROM A NONFINAL ORDER OF THE CIRCUIT COURT FOR CHIPPEWA COUNTY, THE HONORABLE STEVEN H. GIBBS PRESIDING

DEFENDANT-APPELLANT'S BRIEF

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STATEMENT OF THE ISSUE PRESENTED

1. Did C.T.P.-B. meet his burden of proof at the reverse waiver hearing to establish that jurisdiction should be transferred to juvenile court?

Circuit Court's answer: No.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Wis. Stat. (Rule) 809.22. Appellant's arguments clearly are substantial and do not fall within that class of frivolous or near frivolous arguments concerning which oral argument may be denied under Rule 809.22(2)(a).

Publication is appropriate in this case, as the decision will clarify the proper considerations and analysis to be undertaken by a circuit court under this statute.

STATEMENT OF FACTS

Victim, a 10-year-old female, was reported missing on April 24, 2022. Officers began searching for her and found her bike near a wooded area east of Leinie's Lodge in Chippewa Falls. (R. 1). The next morning, on April 25, 2022, officers were notified that her body had been found by a person who knew her and was out looking for her. (R. 1). Victim was deceased and had injuries described by investigators as consistent with blunt force trauma to her head. She was naked from the waist down. (R. 1). A forensic autopsy concluded that there were injuries and biological

evidence consistent with sexual assault. (R. 59, p. 2). C.T.P.-B.'s DNA was found on swabs taken from the victim's mouth, anus, and left buttock. (R. 58, p. 3-4). The forensic autopsy also found manual strangulation, blunt force trauma, and sharp force injury. (R. 59, p. 1-2).

Officers interviewed C.T.P.-B., who was 14 years old at the time, on April 26, 2022. He told officers that he was with Victim on April 24. They were on a trail and he asked her if she wanted to go exploring off the trail. They walked into the woods, up the hill. C.T.P.-B. punched Victim in the stomach, which knocked her down. He then hit her in the head with a large stick three times. As she laid on her back, he straddled her and strangled her until he believed that she was deceased. Then he removed her pants and tried to have sex with her. He became scared, stopped attempting to have sex with Victim, and then left the area. He went home, showered, and put his clothes in the laundry. When he heard she was missing, he decided that he needed to hide her body better, so he returned to her body, moved her by a few feet, and covered her with leaves. (R. 1).

C.T.P.-B. was evaluated by Dr. Steven Benson and Dr. Michael Caldwell. Both doctors diagnosed C.T.P.-B. with multiple, verified psychological disorders. C.T.P.-B. has no juvenile court history. C.T.P.-B. called five witnesses to discuss the treatment options that exist in each

system. Casey Gerber and Alicia Weix testified about the juvenile system, specifically the Serious Juvenile Offender ("SJO") program. Kristi Zubke, Alisha Kraus, and Dr. Marlena Larson testified about the adult system, specifically the classification process, the available primary programs in the adult institutions, and the ability of the Psychological Services Unit ("PSU") to treat C.T.P.-B. in a manner consistent with his needs. C.T.P.-B. called Dr. Benson and Dr. Caldwell to discuss his diagnoses, treatment needs, and his scores on psychological testing, and Dr. James Garbarino to discuss issues of developmental psychology.

Dr. Caldwell testified that in this case, reverse waiver is appropriate. (R. 81, p. 80, lines 13-21). Dr. Garbarino testified that, based on C.T.P.-B.'s history, characteristics, and psychological diagnoses, reverse waiver would not depreciate the seriousness of the offense. (R. 82, p. 39, line 16, to p. 40, line 16).

CASE HISTORY

C.T.P.-B. was charged with First-Degree Intentional Homicide, First-Degree Sexual Assault, and First-Degree Child Sexual Assault, by a criminal complaint filed on April 27, 2022. (R. 1). He waived his preliminary hearing on September 1, 2022. In advance of the Reverse Waiver hearings, the parties stipulated that portions of the autopsy report

and State Crime Lab's DNA report would be admitted into evidence without witness testimony. (R. 57, R. 58, R. 59).

The Circuit Court held evidentiary hearings on the issue of reverse waiver on August 7, 8, and 9, 2023. C.T.P.-B. presented testimony from Dr. Caldwell, a former staff psychologist at and the co-founder of the Mendota Juvenile Treatment Center, Dr. Benson, a clinical psychologist, and Dr. Garbarino, a developmental psychologist. Each of these witnesses provided information bearing on all three of the Reverse Waiver factors.

Dr. Caldwell diagnosed C.T.P.-B. with Autism Spectrum Disorder and unspecified anxiety disorder and testified that his clinical needs supported transfer to Juvenile Court. Dr. Benson diagnosed C.T.P.-B. with Autism Spectrum Disorder and persistent depressive disorder. He testified that C.T.P.-B.'s treatment needs cannot be met in the adult system. Dr. Garbarino testified that C.T.P.-B.'s offense is characteristic of an adolescent crisis and that supervision until age 25 would be sufficient to address and overcome the adolescent crisis and would not depreciate the seriousness of the offense. C.T.P.-B. also presented testimony from staff at Northwest Regional Juvenile Detention Center, Department of Corrections, and Division of Juvenile Corrections. The State did not call any witnesses.

After the evidentiary hearings, the parties submitted written briefs. The Circuit Court denied C.T.P.-B.'s Petition for Reverse Waiver to juvenile court by written decision on January 22, 2024. (R. 92). This Court granted C.T.P.-B.'s Petition for Leave to Appeal that non-final order. (R. 101).

ARGUMENT

The Circuit Court erred when it denied C.T.P.-B.'s Petition for Reverse Waiver. The Circuit Court correctly found that he could not receive adequate treatment in the criminal justice system and that retaining jurisdiction in adult court is not necessary to deter him or other juveniles, but the Circuit Court erred in finding that transferring jurisdiction would depreciate the seriousness of the offense. The uncontroverted evidence presented by C.T.P.-B. clearly establishes that reverse waiver would not depreciate the seriousness of the offense. This Court should find that C.T.P.-B. met his burden, reverse the Circuit Court, and order that C.T.P.-B. be reverse waived into the juvenile court system.

I. STANDARD OF REVIEW.

"A decision to retain or transfer jurisdiction in a reverse waiver situation is a discretionary decision for the trial court." *State v. Dominic E.W.*, 218 Wis. 2d 52, 56, 579 N.W.2d 282, 284 (Ct. App. 1998) (citing *State v.*

Verhagen, 198 Wis. 2d 177, 191, 542 N.W.2d 189, 193 (Ct. App. 1995)). Such a decision should be affirmed on appeal only "if the circuit court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *State v. Kleser*, 2010 WI 88, ¶ 37, 328 Wis. 2d 42, 60, 786 N.W.2d 144, 152-53 (citing *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175, 184 (1982)).

II. THE CIRCUIT COURT MISAPPLIED THE EVIDENCE TO THE SECOND FACTOR.

The Circuit Court did not reach a reasonable conclusion, having failed to use a demonstrated rational process to examine the relevant facts and apply a proper standard of law. "Juveniles whose cases are charged originally in courts of criminal jurisdiction have a statutory right to a reverse waiver hearing after the criminal court finds probable cause." *State v. Kleser*, 2010 WI 88, ¶ 19, 328 Wis. 2d 42, 53, 786 N.W.2d 144, 149. The juvenile bears the burden of proof to demonstrate that jurisdiction should be transferred from "adult court" to juvenile court. *State v. Verhagen*, 198 Wis. 2d 177, 190, 542 N.W.2d 189, 193 (Ct. App. 1995). The three elements that a juvenile must prove by a preponderance of the evidence are:

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

> (b) That transferring jurisdiction to [juvenile court] would not depreciate the seriousness of the offense.
>
> (c) That retaining jurisdiction is not necessary to deter the juvenile or other juveniles from committing the [alleged offense].

Wis. Stat. § 970.032(2).

Implicit in these factors is the Legislature's determination that the proper focus for the Circuit Court is a Utilitarian theory of punishment, whereby punishment is forward-looking and serves the purpose of minimizing future harm, rather than a Retributive theory of punishment, whereby punishment is backward-looking and serves the purpose of making a person suffer because they caused harm. The first and third factors focus on the juvenile's prospective rehabilitation because they specifically address issues of treatment and behavioral change. The second factor also embraces utilitarian theory because the Court must consider not only the facts of the offense, but the specific circumstances of the juvenile's situation.

Preponderance of the evidence means proof by the "greater weight of the credible evidence, to a reasonable certainty." WIS-JI-CIVIL 200. Reasonable certainty is defined as meaning that the decisionmaker is "persuaded based upon a rational consideration of the evidence." *Id*. While it must be more than a guess, a chance is not a guess. A guess is speculative. A chance is a reasoned opportunity based on the actual data.

That juveniles charged in criminal court with first-degree intentional homicide are statutorily eligible for reverse waiver means that there will be juveniles so charged for whom reverse waiver is appropriate. *See State v. Dominic E.W.*, 218 Wis. 2d at 60. As demonstrated by the uncontroverted testimony, C.T.P.-B. is one of those juveniles.

A. The Circuit Court Acknowledged That C.T.P.-B. Met His Burden on the First and Third Factors.

The first element of the analysis is "[t]hat, if convicted, the juvenile could not receive adequate treatment in the criminal justice system." Wis. Stat. § 970.032(2)(a). The third element of the analysis is "[t]hat retaining jurisdiction is not necessary to deter the juvenile or other juveniles from committing the [alleged offense]. Wis. Stat. § 970.302(2)(c). The Circuit Court correctly found that C.T.P.-B. met his burden of proof on both of these factors.

For the first factor, the testimony heavily addressed C.T.P.-B.'s Autism Spectrum Disorder ("ASD") diagnosis, about which both Dr. Benson and Dr. Caldwell agreed (R. 74, R. 78). ASD impairs a person's ability to engage in reciprocal social communications and social reasoning, to understand others' perspectives, to perceive others' obvious mental states, and to understand others' emotions. It typically involves a restricted range of interests and high levels of stress when even minor changes in

their environment occur. (R. 81, pp. 51-53, 56-57). For C.T.P.-B., treatment of his ASD requires intensive one-on-one therapy that is not available in the adult prison system. (R. 81, pp. 71-73, 74, 189-90; R. 82, pp. 102-03). Both of the examining physicians testified that C.T.P.-B. needs, at a minimum, weekly treatment sessions. (R. 81, pp. 75, 153). Dr. Marlena Larson, the Psychology Director for the Department of Corrections' Division of Adult Institutions, testified that the adult institutions are not able to accommodate this level of treatment services over the long term. (R. 82, p. 103). The Circuit Court found that based on the testimony of the witnesses and the concession of the State, C.T.P.-B. cannot receive adequate treatment in the criminal justice system. (R. 92, p. 17). Implicit in this finding by the Circuit Court is the finding that the uncontroverted testimony of these expert witnesses was credible.

For the third factor, Dr. Benson and Dr. Caldwell testified that retaining jurisdiction in adult court is not necessary to provide specific deterrence for C.T.P.-B. Dr. Caldwell testified that adult court prosecution actually increases the risk of reoffending in the future. (R. 81, p. 69). Dr. Benson testified that providing insight as a form of specific deterrence does not work for children with ASD because they do not understand. (R. 81, p. 203). With regard to general deterrence, Dr. Caldwell testified that

there is no scientific basis to conclude that prosecuting a specific juvenile in adult court accomplishes a goal of general deterrence for other juveniles. (R. 81, pp. 69-70). Dr. Garbarino testified that much of violent crime committed by juveniles happens in a state of emotional arousal and, therefore, any potential deterrence from the length of punishment that they may receive is overwhelmed by the immediacy of their emotional state. (R. 82, pp. 35-36). The Circuit Court found that, based on the testimony and legal argument, C.T.P.-B. met his burden to prove that retaining jurisdiction in adult court is not necessary to deter him or other juveniles from committing the offenses alleged in this case. (R. 92, p. 21). Again, implicit in this finding by the Circuit Court is the finding that the uncontroverted testimony of these expert witnesses was credible.

The Circuit Court correctly applied the Utilitarian theory of punishment on these factors. According to the theory of Utilitarianism, the purpose of laws is to maximize the net happiness of society. Utilitarians believe that all laws should be used to minimize as much as possible all painful and unpleasant events. To a Utilitarian, both crime and punishment are unpleasant and therefore, undesirable. Therefore, Utilitarians believe that the infliction of pain in the form of punishment is only justified if it is expected to result in a net reduction of pain (crime) that would otherwise

occur. That is, according to a Utilitarian, punishment is justified only if it results in a net amount of less pain than no punishment. At the core of Utilitarians' theory is the premise that "punishment" (causing pain) should only be imposed if it minimizes society's future pain. The critical question for a Utilitarian is "will punishment of the wrongdoer make the world a better place?" Thus, in the context of sentencing the imposition of pain (punishment) should not occur until the government has proven that the punishment will improve behavior and reduce pain; if there is no evidence that the punishment improves behavior and reduces pain, then it should not be imposed.

Under a Utilitarian philosophy of justice, criminals are punished with an eye towards the future. Perhaps the main purpose in punishing criminal acts is to give both the offender and the public "the message" that the crime is dangerous and will not be tolerated. According to a Utilitarian's theory of justice, the purpose of criminal sentences is to motivate people – both the particular person who committed the crime and people in general – to not engage in that type of behavior so that they avoid having to be punished. Per the Utilitarian theory of justice, the only level of punishment that is appropriate is that which will motivate the offender to change their

behavior. If the punishment will not change behavior, then it is not appropriate.

In this case, putting C.T.P.-B. in adult prison for life is not necessary. It will not motivate change or cause change. It is only punishment for the sake of punishment, which is not what the law permits for juveniles.

There is no evidence that imposing this harsh outcome upon C.T.P.-B. will in any way deter others. We may hope, or wish that it does, but in reality, it will not change others' behavior. While the theory of general deterrence is a legally permissible argument, it is a poor and unpersuasive argument since there is no evidence to support the theory that harsh sentences deter others from committing the same act. Again, rationality requires more of all of us than following unsupported and mistaken intuitions simply because it is what has been done in the past.

Even if there were evidence that general deterrence works, there is a strong moral argument that we should not use C.T.P.-B.'s case as a means of shaping other people's behavior. According to contemporary moral philosophy, many consider it wrong and immoral to make an example out of one person by using that person as a means to an entirely separate end. German Philosopher Immanuel Kant most famously expressed this in

his second Categorical Imperative of moral philosophy: "the rational being, is by its nature an end and thus as an end in itself, must serve in every maxim as the condition restricting all merely relative and arbitrary ends." Kant, *Foundations*, p. 436. Kant's principle dictates that we "[a]ct with reference to every rational being (whether yourself or another) so that it [that person] is an end in itself in your maxim"; According to Kant, every rational being is "the basis of all maxims of action" and "must be treated never as a mere means but as the supreme limiting condition in the use of all means, i.e., as an end in and of themselves." In short, according to Kant and the tenets of moral philosophy transferring C.T.P.-B. to the Juvenile system is appropriate.

By way of analogy, most everyone would agree that it is immoral and wrong for a doctor to cause unnecessary pain to one patient in the hopes that by causing the one patient more pain it would save other future patients from pain. Doctors never treat patients as a means to another's end; doctors only treat each of their patients as an end in and of themselves. Doctors are taught in school the Latin phrase *Primum non nocere* which means "first, do no harm." Another way to state it is that given an existing problem, it may be better not to do something, or even do nothing, then to risk causing more harm than good. We should act the

same in the law as doctors act when practicing medicine: First, do no unnecessary harm. Second, treat each individual as an end in and of themselves so as to prevent human beings from merely using another person as a means for another's end. Any attempt to justify causing one person pain in order to potentially minimize the pain of others is a very slippery slope which courts should avoid. For courts to do otherwise and treat people as a means to another's end risks the loss of our Court's moral authority.

B. Transferring Jurisdiction to Juvenile Court Does Not Depreciate the Seriousness of the Offense for a Fourteen-Year-Old Child with Autism Spectrum Disorder.

The second element of the analysis is "[t]hat transferring jurisdiction to [juvenile court] would not depreciate the seriousness of the offense." § 970.032(2)(b). C.T.P.-B. met his burden of proof to establish this fact by a preponderance of the evidence.

i. The Case Law on Reverse Waiver is Clear that Reverse Waiver is Available Even if the Charged Offense is Serious.

The Circuit Court's duty is to determine not whether the specific facts of the offense are serious, but instead whether transferring the case to juvenile court would depreciate the seriousness of the offense.

"If the reverse waiver statute required the criminal court to retain jurisdiction in all situations involving [an offense], the legislature would not have provided the juvenile the opportunity to prove that the juvenile would not receive adequate treatment, that transfer would not depreciate the seriousness of the offense and that retaining jurisdiction would not be necessary to deter the juvenile or other children from committing further" offenses. *State v. Dominic E.W.*, 218 Wis. 2d at 59. In *Dominic E.W.*, the defendant "was charged as an adult with battery to a correctional officer" after he "punched a staff member in the nose." *Id*. at 54-55. The State appealed the Circuit Court's grant of reverse waiver, arguing, *inter alia*, "that this court will frustrate the purpose of the statute – to protect those who work in, visit or are confined in a secured correctional facility – by affirming the reverse waiver order." *Id*. at 59.

The Supreme Court rejected the State's interpretation of this requirement, finding that it "would render these considerations superfluous, a result to be avoided." *Id*. (citing *State v. Koopmans*, 210 Wis. 2d 671, 679, 563 N.W.2d 528, 532 (1997)). That juveniles charged in criminal court with first-degree intentional homicide are statutorily eligible for reverse waiver means that there will be juveniles so charged for whom

reverse waiver is appropriate. *See id*. at 60. C.T.P.-B. is clearly such an individual, given the ASD diagnosis discussed above.

Juveniles are not miniature adults. Settled science indicates that the brain does not fully develop until, on average, age 25.[1] Brain development does not occur uniformly in all parts of the brain; the parts of the brain that control higher cognitive functions such as judgment, planning, and impulse control are the last to develop.[2]

> Sound judgment requires both cognitive and psychosocial skills, but the former mature earlier than the latter. Studies of general cognitive capability show an increase from pre-adolescence until about age 16, when gains begin to plateau. By contrast, social and emotional maturity continue to develop throughout adolescence. Thus, older adolescents (aged 16-17) often have logical reasoning skills that approximate those of adults, but nonetheless lack the adult capacities to exercise self-restraint, to weigh risk and reward appropriately, and to envision the future that are just as critical to mature judgment, especially in emotionally charged settings. Younger adolescents are thus doubly disadvantaged, because they typically lack not only those social and emotional skills but basic cognitive capabilities as well.[3]

Because the brain is not fully developed, adolescents "rely on

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[1] Mariam Arain et al, *Maturation of the adolescent brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 451 (2013).

[2] *Id*.

[3] Brief for the American Psychological Ass'n, et al. as Amicus Curiae Supporting Petitioners, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9646 and 10-9647) at 14 (internal citations omitted). *See also* Praveen Kambam & Christopher Thompson, *The Development of Decision-Making Capacities in Children and Adolescents: Psychological and Neurological Perspectives and Their Implications for Juvenile Defendants*, 27 BEHAV. SCI. & THE L. 173, 187-88 (2009); Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, The Future of Children, Fall 2008, at 15, 21-22.

the emotional part of the brain when making decisions."[4] Further,

> An offender's age has no bearing on the harm caused – children and adults can cause the same injuries. But proportionality requires consideration of an offender's culpability, and immaturity reduces youths' blameworthiness. Youths' inability to fully appreciate wrongfulness or control themselves lessens, but does not excuse, responsibility for causing harms. They may have the minimum capacity to be criminally liable – ability to distinguish right from wrong – but deserve less punishment.[5]

ii. As a Matter of Law, Juveniles Are Not Miniature Adults.

The realities of adolescent brain development are reflected in case law as well. Multiple United States Supreme Court cases have examined the science and acknowledge that our society's treatment of children and adolescents must be informed by developmental issues. In *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982), the Court stated that "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and psychological damage." In determining culpability, the "background and mental and emotional development of a youthful defendant" must be "duly considered." *Id*. Decades later, after examining scientific evidence of adolescent brain

[4] Peterson Tavil, *Mandatory Transfer of Juveniles to Adult Court: A Deviation from the Purpose of the Juvenile Justice System and a Violation of their Eighth Amendment Rights*, 52 REVISTA JURÍDICA U.I.P.R. 377, 405 (2017).

[5] Barry C. Feld, *Competence and Culpability: Delinquents in Juvenile Courts, Youths in Criminal Courts*, 102 U. MINN. L. REV. 473, 554-55 (2017). *See also* Heilbrun, K. DeMatteo, D, King, C, & Filone, S. (2017). Evaluating Juvenile Transfer and Disposition. New York: Routledge. Chapter 7.

development, the Court decided *Roper v. Simmons*, 543 U.S. 551 (2005), the first of three cases that scrutinize the role that age plays in the criminal justice system. The Court determined that as a matter of law "juvenile offenders cannot with reliability be classified among the worst offenders." *Id*. at 569. This is because a "'lack of maturity and an underdeveloped sense of responsibility are found in youth more often than adults,'" because "juveniles are more vulnerable or susceptible to negative influences and outside pressures," and because "the character of a juvenile is not as well formed as that of an adult." *Id*. at 569-70. The Court continued on, stating that based on their own "vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment" and that "from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult." *Id*. at 570.

In *Morse v. Frederick*, 551 U.S. 393, 398, 408 (2007), the Court upheld a high school student's suspension for displaying a banner reading "BONG HiTS 4 JESUS" at a school event because that message could have influenced children to believe smoking marijuana is acceptable and that "students are more likely to use drugs when the norms in school appear to

tolerate such behavior." In *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009), the Court explained that the federal government could impose penalties for broadcasting indecent language because "programming replete with one-word indecent expletives will tend to produce children who use (at least) one-word expletives." The Court's reasoning was that "children mimic the behavior they observe – or at least the behavior that is presented to them as normal and appropriate." *Id*. At base level, these two cases hold that children and adolescents are vulnerable to outside pressures and therefore deserve protection based on that vulnerability.

The Court continued its examination of the science of adolescent brain development in *Graham v. Florida*, 560 U.S. 48, 68 (2010), reiterating its conclusion from *Roper* that there are "fundamental differences between juvenile and adult minds" that render juveniles less morally blameworthy and more capable of rehabilitation than adults. The Court reaffirmed the principles it laid out in *Roper* because "[n]o recent data provide reason to reconsider the Court's observations … about the nature of juveniles." *Id*. The Court again elaborated on this issue in *Miller v. Alabama*, 567 U.S. 460, 473 (2012), stating that "[n]one of what [*Graham*] said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific." "Immaturity, impetuosity, and failure

to appreciate risks and consequences" are "hallmark features" of a juvenile's age and are transient. *Id*. at 477.

Wisconsin also recognizes differences between juveniles and adults in its case law. *See State v. Jerrell C.J.*, 2005 WI 105, ¶ 26, 283 Wis. 2d 145, 699 N.W.2d 110. Unfortunately for this Court, however, there are not any cases in Wisconsin that were found by C.T.P.-B. that give guidance for the issues in this case. The Wisconsin cases issued post-*Roper* that consider issues of brain science do not shed light on the issue of whether it depreciates the seriousness of the offense to transfer jurisdiction to Juvenile Court. In *State v. Ninham*, 2011 WI 33, 333 Wis. 2d 335, 797 N.W.2d 451, Ninham raised a categorical constitutional challenge to sentencing 14-year-olds to life imprisonment without parole and, in the alternative, requested sentencing modification, arguing that the brain science discussed in *Roper* and *Graham* is a new factor frustrating the purpose of his sentence. ¶ 3. Similarly, in *State v. Barbeau*, 2016 WI App 51, 370 Wis. 2d 736, 883 N.W.2d 520, Barbeau also raised a categorical constitutional challenge to the sentencing scheme for Class A felonies. He argued that it is unconstitutional to require a mandatory minimum twenty years' confinement for children before they can be eligible for release to extended supervision. *Id*. at ¶ 23.

Importantly, neither *Ninham* nor *Barbeau* address the Reverse Waiver factors because the cases did not address that question. Thus, these cases do not give relevant assistance for addressing the issue here which is whether, based on the specifics of this case and this individual juvenile, it depreciates the seriousness of the offense to transfer jurisdiction of C.T.P.-B.'s case to Juvenile Court.

However, what is important about *Ninham* and *Barbeau* is that each Court explicitly recognizes and adopts the Supreme Court's logic regarding culpability of juvenile offenders. In *Ninham*, the Supreme Court stated that "[w]e do not disagree that, typically, juvenile offenders are less culpable than adult offenders and are therefore generally less deserving of the most severe punishments. Furthermore, we do not dispute Ninham's argument that, on average, the younger the juvenile offender, the more his or her culpability diminishes." 333 Wis. 2d 335, ¶ 74 (internal citations omitted). The Court of Appeals in *Barbeau*, stated that the "analysis of differences between juveniles and adults set forth in *Roper* and *Graham* (and further discussed in *Miller*), is equally applicable here [in reference to *Ninham*]." 370 Wis. 2d 736, ¶ 42.

iii. Retaining C.T.P.-B.'s Case in Adult Court Would Only Satisfy Retributive, Rather Than Rehabilitative Goals.

Theorists of criminal justice generally cite two main justifications for punishing people who commit crimes: Utilitarianism and Retribution. The idea of Utilitarianism and rejection of Retribution is implicit in the United States Supreme Court cases addressing the ideas of appropriate treatment of juveniles in the criminal justice system.

Retribution is the moral desire to make a person who has acted wrongfully suffer and thus pay for his mistakes. Retributivists believe that punishment is justified when it is deserved; it is deserved when the wrongdoer freely chooses to violate society's rules. To an uncompromising Retributivist, the wrongdoer should be punished whether or not it will result in a net reduction of crime. According to Retributivists, this act of punishment is required because of the moral desert of the wrongdoer.

The Theory of Retribution has its roots in many ancient texts and is common to most cultures throughout the world. Retribution's principal aphorism is "let the punishment fit the crime," which is more simply and commonly called "the eye for an eye" principle.[6]

[6] Noted moral authorities Jesus, Gandhi, and Dr. Martin Luther King, Jr., all opposed the "eye for an eye" philosophy of punishment:

Retribution is not about protecting society. The only arguable reason to send C.T.P.-B. to adult prison is to satisfy a need for retribution. However, the Criminal Justice system is about more than satisfying a need for retribution. When we have been wronged, as human beings we have a natural urge to strike back and make the offender suffer. When someone dies due to the criminal behavior, we feel we owe it to the family of the victim to avenge the death of their loved one. This is a natural human response based on our feelings of love for our family and our desire to protect them. However, the undeniable psychological fact that we all have retributive inclinations does not equate to an objective moral reality in which giving offenders their "just deserts" is required. In our contemporary culture, justice is much more complicated than the outdated concept of an "eye for an eye."

> Jesus of Nazareth: "You have heard that it was said, 'An eye for an eye and a tooth for a tooth.' But I say to you, Do not resist the one who is evil. But if anyone slaps you on the right cheek, turn to him the other also. And if anyone would sue you and take your tunic, let him have your cloak as well. And if anyone forces you to go one mile, go with him two miles."
>
> Mahatma Gandhi: "An-eye-for-an-eye-for-an-eye-for-an-eye … ends in making everybody blind."

Martin Luther King, Jr., later used his phrase in the context of racial violence: "The old law of an eye for an eye leaves everyone blind."

In fact, while retribution has Biblical roots, its antithesis is also from the Bible. When Jesus was asked whether a woman taken in adultery should be stoned to death in accordance with the Mosaic law, he responded simply, "he that is without sin among you, let him first cast a stone…" By his response, Jesus rejected the entire concept of retribution. All of us, both accusers and accused, are flawed human beings. Mercy, not retribution, is appropriate. Jesus changes the focus to restoration and healing because Jesus knew criminals were, in fact, like ourselves. They may have grave weaknesses and failings, but they are the weaknesses and failings of humanity. If we deny our human bond with people who have committed a crime, we implicitly deny our own capacity for evil and become guilty of hubris. Rather than deny our own humanity, we serve a better purpose if we instead deny our retributive impulses in favor of constructive approaches to sentencing. We should consider both the offender and the circumstances that produced the crime. If we deny our retributive impulses, we can help to create a less punitive, more flourishing culture in which we and those that follow us are less likely to face the temptations of retribution itself.[7]

[7] *See* Thomas Clark's essay "Against Retribution" in *Human Nature Review*, 2003 Volume 3:466-467 (11.17.2003).

In this case, everyone agrees that C.T.P.-B. should be punished. The question is both *how* and *how much* should we punish him. By placing C.T.P.-B. in Juvenile Court, he will receive the punishment he deserves, while also receiving the help he needs. This outcome will not depreciate the seriousness of the offense.

iv. It Does Not Depreciate the Seriousness of the Offense to Transfer C.T.P.-B.'s Case to Juvenile Court.

The existence of a juvenile justice system conforms to the settled science in the field of brain development. Additionally, the existence of the SJO program, and its applicability in cases like C.T.P.-B.'s, shows that the Legislature recognizes that although juveniles may do bad things, there are circumstances in which they should nevertheless be treated as juveniles rather than adults.

The research discussed above assumes juveniles without cognitive issues that impact normal functioning. C.T.P.-B., by virtue of his ASD, is not similarly situated. If juveniles under the age of 16, without ASD, are doubly disadvantaged compared to adults, then C.T.P.-B. is triply disadvantaged as a result of his ASD.

It is undisputed that, if C.T.P.-B.'s petition for reverse waiver is granted, he would be subject to the juvenile corrections system until age 25 in the SJO program:

> If the participant has been adjudicated delinquent for committing an act that would be a Class A felony if committed by an adult, placement in a Type 1 juvenile correctional facility or a secured residential care center for children and youth until the participant reaches 25 years of age, unless the participant is released sooner, subject to a mandatory minimum period of confinement of not less than one year.

Wis. Stat. 938.538(3)(a)1m.

The uncontroverted testimony from Drs. Benson, Caldwell, and Garbarino shows that reverse waiver would not depreciate the seriousness of the offense. All of the doctors who testified reviewed the Criminal Complaint setting out the facts of the offense; their opinions were offered with an understanding of the circumstances of Victim's death. The throughline of their testimony was that an understanding of who C.T.P.-B. is, rather than focusing only on what he did, is important when determining whether reverse waiver is appropriate in this case. Their testimony made it clear that although C.T.P.-B. has done a bad thing, it is better for society that his case be handled in Juvenile Court.

It is undisputed that C.T.P.-B. has ASD. It is also undisputed that ASD has certain effects on functioning. Drs. Benson and Caldwell testified that C.T.P.-B. had a diminished capacity to understand the consequences of his actions because of his ASD. (R. 81, pp. 84, 180-81). This is on top of the already diminished capacity that the Supreme Court has recognized exists for juveniles without any cognitive functioning disorders. They also

testified that C.T.P.-B.'s chronological age and developmental age diverge significantly due to his ASD, with Dr. Caldwell opining that his social functioning is in the range of prekindergarten to kindergarten and Dr. Benson opining that his emotional maturity is in the range of 4 to 6 years old. (R. 81, pp. 124, 167).

Dr. Benson's report and testimony addressed the influence of compulsive use of internet pornography and its interaction with C.T.P.-B.'s ASD. Specifically, he testified that for C.T.P.-B., there were two reasons for his compulsive use of pornography: the adherence to routine and fixation on doing particular things that comes from his ASD and the release of dopamine that is expected when viewing and masturbating to pornography. (R. 81, pp. 173-174). Those cognitive functions reinforced each other, preventing C.T.P.-B. from having the capacity to exercise judgement prior to or during the alleged offense. (R. 81, p. 181-82). As noted in the report, C.T.P.-B. was "especially vulnerable to pornography addiction as a consequence of obsessive compulsive tendencies, perseverative behavior, and social isolation." (R. 74, p. 19). This opinion is supported by research stating that "[m]uch of the deviant or sexual offending behavior exhibited among those with ASD is often a

manifestation of their ASD symptoms, and not malice."[8] Additionally, for people with ASD, "[a] curiosity and confusion regarding sexuality can lead to the desire for more information and the development of a solitary and clandestine special interest in pornography," which is exactly what Dr. Benson described in his report and testimony.[9]

Our society recognizes the harmful effects of pornography on juveniles, so much so that it is a felony to expose a child to visual representations of nudity, sexually explicit conduct, sexual excitement, or sadomasochistic abuse that predominantly appeals to prurient interest and lacks serious literary, artistic, political, scientific, or educational value. *See* Wis. Stat. § 948.11. Use of pornography stimulates the same areas of the brain as use of drugs and alcohol. (R. 74, p. 19). Settled science tells us that "children – adolescents in particular – are rapidly forming cognitive associations based on their experiences and environmental influences; therefore, they are quite vulnerable to cognitive changes that can affect their assumptions, attitudes, and behaviors."[10]

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[8] M.C. Mogavero, *Autism, Sexual Offending, and the Criminal Justice System*, J. INTELLECTUAL DISABILITIES & OFFENDING BEHAV. 116-126 (2016).
[9] TONY ATWOOD, THE COMPLETE GUIDE TO ASPERGER'S SYNDROME 336 (Jessica Kingsley ed., 2007).
[10] Deana Pollard Sacks, *Children's Developmental Vulnerability and the Roberts Court's Child-Protective Jurisprudence: An Emerging Trend?*, 40 STETSON L. REV. 777, 783 (2011).

Further, it is undisputed that C.T.P.-B.'s offense is one characteristic of an adolescent crisis rather than one indicative of ongoing involvement in antisocial behavior or one indicative of psychopathy. (R. 82, pp. 13-15). For juveniles who commit homicide offenses as part of an adolescent crisis, it is likely that they are able to be safe in the community by age 21. (R. 76, p. 11). C.T.P.-B.'s risk for future violence is directly related to management of his ASD. (R. 74, p. 18). As described above, C.T.P.-B. needs intensive, one-on-one treatment that is not available in the adult prison system. Importantly, Dr. Benson testified that treating C.T.P.-B. in a group setting would amount to malpractice, because of his ASD. (R. 81, p. 188-89).

In his circumstances, which the statutory scheme demands that the court consider, it would not depreciate the seriousness of the offense to grant C.T.P.-B.'s reverse waiver petition. Transferring jurisdiction to Juvenile Court is a decision that would address the seriousness of the offense in a way that retaining jurisdiction in adult court would not by ensuring that C.T.P.-B. will receive treatment that will enable him to manage his ASD and reduce his already low risk of future violence. It would also acknowledge his doubly reduced culpability compared to an adult who commits first-degree intentional homicide due to his age and cognitive limitations.

C. The Circuit Court's Application of the Law to the Evidence is Inconsistent Because the Testimony on All Factors Overlaps.

C.T.P.-B. called ten witnesses at the reverse waiver hearing. None of the witnesses were found incredible by the Circuit Court. The State did not impeach any of the witnesses. None of the witnesses' factual testimony or opinions changed when subjected to cross-examination by the State. However, the Circuit Court, without explanation or basis, essentially disregarded the testimony that it clearly found credible for the first and/or third factors when determining the second factor. This is problematic because the testimony on all three of the statutory factors overlaps, particularly for Drs. Benson, Caldwell, and Garbarino. The doctors' conclusions related to C.T.P.-B.'s future safety in the community are dependent on the diagnoses made by Drs. Benson and Caldwell as well as on the availability of treatment in each system. The questions in all three factors require analysis of who C.T.P.-B. is as a whole person, not as a list of offenses that he is charged with. It is inherently inconsistent for the Circuit Court to accept the testimony on some, but not all, of the factors in the reverse waiver statute.

D. The Circuit Court Did Not Use a Demonstrated Rational Process to Examine and Apply the Facts.

The Circuit Court failed to explain the reasoning for its decision that C.T.P.-B. failed to meet his burden on the second factor. The totality of the court's analysis on this factor consists of two paragraphs out of a 22-page written decision. Specifically, the Circuit Court stated the following:

> The actions of the defendant were violent and egregious in nature. The defendant carried out his plan to rape and murder a ten-year-old young girl, viciously and with brutality. This crime was clearly premeditated by the Defendant.
>
> This court is not swayed by the Defense arguments that the ***Gallion*** factors prove that the reverse wavier would not depreciate the seriousness of the offense. The court disagrees that a possible ten year confinement in the juvenile system, registering as a sex offender and that the Defendant would be vulnerable to the adult system would be punishment enough for the Defendant.

Decision and Order on Reverse Waiver (R. 92).

In making its ruling on the second factor, the Circuit Court made minor, conclusory findings of fact, but completely failed to apply those facts to the law. The Circuit Court found that the offenses alleged in this case were serious; however, that is not the analysis demanded by the reverse waiver statute. Nowhere in the Circuit Court's decision is an explanation of how or why reverse waiver would depreciate the seriousness of the offense. There is only a statement that the court "is not swayed by the Defense arguments." *Id*. There is no explanation of why the SJO program is insufficient in this case, even in light of C.T.P.-B.'s

argument that the intensive treatment available in the SJO program would embrace, rather than depreciate, the seriousness of the offense. The uncontroverted evidence was that C.T.P.-B.'s circumstances were such that his offense is reflective of an adolescent crisis and that he is likely to be safe in the community by age 21. (R. 82, p. 16; R. 76, p. 11). As noted above, C.T.P.-B. would be subject to the SJO program until age 25, which was one reason for Dr. Garbarino's conclusion that reverse waiver would not depreciate the seriousness of the offense. Moreover, the Circuit Court failed to justify and explain its obvious rejection of the law as set forth by the United States Supreme Court regarding treatment of juvenile offenders. Thus, the Circuit Court's decision that C.T.P-B. did not meet his burden on the second factor fails to explain why its finding was in direct opposition to the evidence presented at the hearing, and therefore, is an abuse of discretion.

E. The Circuit Court Did Not Apply a Proper Standard of Law.

Finally, the Circuit Court failed to apply a proper standard of law. The Circuit Court held, at the State's urging, that it is the "'unusual situation' where the juvenile is able prove that transfer of jurisdiction to juvenile court is appropriate," citing *Verhagen,* 198 Wis. 2d at 188. This is an inaccurate statement of the law.

Verhagen is the first case in which the Court of Appeals substantively addressed a reverse waiver determination. *Verhagen* is a case primarily about which party bears the burden of proof in the reverse waiver context. The "unusual situation" language quoted by the Circuit Court comes from the five-factor test that the Court of Appeals applied to determine that the burden of proof is on the juvenile and refers not to whether reverse waivers are favored or disfavored generally, but to the doctrine of judicial estimate of probabilities and the fact that the statute read, at the time, that the criminal court "shall" retain jurisdiction unless the court finds that all of the three factors are satisfied. *Id*. at 188-89. The Court of Appeals never stated that it is the "unusual situation" where the juvenile is able to meet his burden of proof.

CONCLUSION

The Circuit Court erred when it held that C.T.P.-B. did not meet his burden to prove by a preponderance of the evidence that reverse waiver was appropriate. The uncontroverted evidence presented by C.T.P.-B. clearly establishes that C.T.P.-B. could not possibly receive appropriate treatment in the adult criminal justice system, that reverse waiver would not depreciate the seriousness of the offense committed by C.T.P.-B., and that retaining jurisdiction is not necessary to deter C.T.P.-B. or any other

juveniles from committing the offense. This Court should find that C.T.P.-B. met his burden, reverse the Circuit Court, and order that C.T.P.-B.'s case be reverse waived into the juvenile court system.

Dated this 3rd day of April, 2024, in Eau Claire, Wisconsin.

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 6,989 words.

CERTIFICATION OF APPENDIX

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

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

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 first names and last initials 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.

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