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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2024AP2081

In the interest of J.A.V., a person under the age of 17:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

J.A.V.,

Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUE PRESENTED

1. Did the circuit court erroneously exercise its discretion when it waived Joshua¹ into adult court without considering the full length of supervision available to Joshua under the serious juvenile offender program?

The circuit court entered the waiver order.

The court of appeals answered no.

CRITERIA FOR REVIEW

The circuit court waived Joshua into adult court based on its belief that the juvenile court system could not provide a long enough term of supervision to provide treatment and protect the public. (62:163-64; App. 30-31). However, this decision rested in part on the court's erroneous belief that the serious juvenile offender program could only last for three years. (62:161, 164; App. 28, 31). Contrary to the circuit court's belief, disposition to this program actually requires a mandatory term of five years. Wis. Stat. § 938.355(4)(b).

In affirming the waiver order, the court of appeals did not dispute that the circuit court failed to consider the full length of time available in the serious

¹ A pseudonym for the respondent-appellant-petitioner, J.A.V.

juvenile offender program. Instead, the court of appeals held that Joshua forfeited his right to raise this issue because he did not correct testimony from a witness for the State who testified that the program could only last for three years. *State v. J.A.V.*, No. 2024AP2081, unpublished slip op., ¶¶15-17 (Wis. Ct. App. Apr. 23, 2025) (App. 8-9). According to the court of appeals, trial counsel's failure to correct this testimony was analogous to *State v. Benson*, 2012 WI App 101, 344 Wis. 2d 126, 822 N.W.2d 484, where the court held that a defendant forfeited an inaccurate information at sentencing claim by failing to object at sentencing.

Joshua's case is not analogous to *Benson*. In *Benson*, it was defense counsel who introduced inaccurate information by submitting a report detailing the presence of a prescription drug in the defendant's system at the time of his car crash. *Id.*, ¶5. Unlike *Benson*, the inaccurate information presented at Joshua's waiver hearing came in the form of testimony from a State's witness, not a report filed by defense counsel. (62:80). *J.A.V.*, No. 2024AP2081, ¶17 (App. 9). Moreover, as the court of appeals acknowledged, Joshua's counsel did nothing to "invite" the incorrect testimony. *Id.*, ¶19 (App. 10). Thus, while application of the forfeiture rule was appropriate in *Benson*, Joshua's case is readily distinguishable. Review is therefore warranted because the court of appeals' decision is in conflict with caselaw holding that "[t]he forfeiture rule should not be applied where its application would not further its purpose—the fair, efficient, and orderly administration of justice." *State*

v. Coffee, 2020 WI, ¶ 21, 389 Wis. 2d 627, 937 N.W.2d 579. *See* Wis. Stat. § 809.62(1r)(d). Review is further warranted because Joshua's case presents a real and significant question of law concerning whether the circuit court considered the adequacy and suitability of services available in the juvenile court system as required by Wis. Stat. § 938.18(5)(c).

STATEMENT OF FACTS

The State filed a delinquency petition along with a petition for waiver of jurisdiction on June 7, 2024. (3:1; 8:1). Joshua was charged with one count of first-degree sexual assault of a child and 15 counts of possession of child pornography by a person under the age of 18. (43:4-5).

Prior to the waiver hearing, Waukesha County Health and Human Services (HHS) social worker Greg Rewolinski filed a waiver report. (35:8). HHS recommended against waiver, concluding that Joshua's needs could be more appropriately addressed in the juvenile court system. (35:7-8). The report also noted that Joshua had not previously been involved in any juvenile services because he had no prior involvement in the juvenile court system. (35:4).

Additionally, Dr. Karyn Gust-Brey, a licensed psychologist, evaluated Joshua pursuant to a court

order and submitted a report. (33:10).² Dr. Gust-Brey diagnosed Joshua with major depressive disorder and generalized anxiety disorder, and noted that he had a history of trauma. (33:4, 7, 10). Dr. Gust-Brey opined that Joshua should remain in the juvenile court system based on his mental health diagnoses, his openness to treatment, and because he had not yet had access to services through the juvenile court system. (33:10).

The waiver hearing took place on October 1, 2024. At the outset of the hearing, trial counsel for Joshua stipulated that the case had prosecutive merit. (62:6).³ The State then called Detective Brian Fredericks of the Waukesha County Sheriff's Department as the first witness. (62:8).

Detective Fredericks testified that he interviewed Joshua in June 2024 in connection with a child pornography investigation. (62:16). According to the detective, Joshua admitted that he began looking at adult and child pornography when he was about 11 years old. (62:19). Detective Fredericks further

² Pursuant to Wis. Stat. 938.295 (1)(a), "upon a finding by the court that reasonable cause exists to warrant a physical, psychological, mental, or developmental examination or an alcohol and other drug abuse assessment ... the court may order a juvenile within its jurisdiction to be examined ... by a physician, psychiatrist, or licensed psychologist[.]"

³ Pursuant to Wis. Stat. § 938.18(4), a court presiding over a waiver petition must "determine whether the matter has prosecutive merit before proceeding[.]"

testified that he reviewed the child pornography materials obtained from Joshua's home pursuant to a search warrant, and that it was "among the worst" child pornography he had ever reviewed. (62:14, 27). He stated that some of the videos included "infants and toddlers being sexual assaulted by adults. They're seen struggling, crying and screaming to get away." (62:27).

Detective Fredericks testified that Joshua admitted to having sexual contact with a child on one occasion when Joshua was about 12 or 13 years old. (62:21-22). He told the detective that "a friend of his mother's had come over and had a son about four years old, [and] they were in [Joshua's] room." (62:21). Joshua showed the other child an adult pornography website while they were in his room, and the other child later placed his hand on Joshua's penis. (62:21-22). Detective Fredericks also testified that Joshua advised "he has in the past met with adult men" through online dating apps "for what he described to be consensual sexual contact." (62:24-25).

Detective Fredericks testified that another officer from his department spoke with Joshua's mother in 2022 in connection with an earlier child pornography investigation. (62:12). Joshua's mother reportedly told police that she disposed of a computer in her home after finding child pornography on it, and that she warned Joshua to not continue looking at child pornography. (62:12).

Gregory Rewolinski testified as the next witness. (62:34). Mr. Rewolinski testified that Joshua was placed at the Lad Lake Shelter following the filing of the juvenile delinquency petition, and that he was receiving offense-related treatment at Lad Lake. (62:64-65). Mr. Rewolinski said Joshua was reportedly “motivated and active in all therapy sessions and has been open to therapy. He’s doing very well.” (62:64-65). Additionally, he said Joshua “demonstrated great behavior [at Lad Lake]. He has not gotten involved with any other kids. He’s not gotten involved in any drama. He’s been helpful to staff. They’ve seen absolutely no safety concerns whatsoever.” (62:68).

Mr. Rewolinski testified that HHS supported retaining Joshua in juvenile court. (62:34-35). He said HHS’s recommendation was based in part on Joshua’s young age “and his brain development at this point to be able to be impacted by the appropriate treatment[.]” (62:71). He further testified that because Joshua was now receiving appropriate treatment, remaining in the juvenile court system would provide him with a higher level of services and would better protect against recidivism than if Joshua was waived into adult court. (62:71-72).

In regards to placement options available within the juvenile court system, Mr. Rewolinski testified that HHS recommended in-home placement with a number of restrictions, including electronic monitoring. (62:48). However, Mr. Rewolinski testified that an alternative option would be for the court to place Joshua in the serious juvenile offender program.

(62:80). Mr. Rewolinski had the following exchange with defense counsel regarding this option:

Defense counsel: Okay. Now while the Department is not recommending placing him in the serious juvenile offender program, this is a charge that does give the Court that option?

Mr. Rewolinski: Our juvenile court can order this youth or stay an order for SJO, which would be relative to, I believe, a three-year ability for the youth to remain in that program for three years for additional supervision ... which would put him at about the age of 18.

Defense counsel: And --

Mr. Rewolinski: -- which would put him at about the age of 18.

(62:80).

Dr. Gust-Brey testified as the final witness at the wavier hearing, and she joined HHS's recommendation to retain Joshua in juvenile court. (62:97-98). She testified that Joshua presented as open, honest, and cooperative during her evaluation of him. (62:85, 96-97). She also stated that he "endorses clinically significant depression and anxiety," and characterized him as a "very compliant individual. He does have lower self-esteem and had endorsed some suicidal ideation." (62:99). Dr. Gust-Brey testified that Joshua did not present as having low empathy for others, and that he recognized the harm caused to children depicted in the child pornography he had viewed. (62:99, 122). She also said Joshua showed an

interest in receiving treatment and demonstrated an ability to productively engage with treatment. (62:98-101).

Dr. Gust-Brey further testified that she evaluated Joshua's risk of reoffending using several risk assessments. (62:103-07). She stated that Joshua did not pose a high risk of reoffending, and that the risk assessments she administered supported retaining him in juvenile court. (62:107-08). Nonetheless, she said there is limited research into sex-offense-related risk factors for adolescents, and "you can only really look at their risk level at this point in time." (62:116). Dr. Gust-Brey also stated that the risk assessments she administered could not account for the type of pornography that Joshua had viewed. (62:118-19).

The circuit court subsequently heard arguments from the parties, found prosecutive merit based on the stipulation of the parties, and addressed the statutory wavier criteria in a decision rendered from the bench. As to the desirability of trial and disposition in one court, the court noted that this criterion did not apply because Joshua's case did not involve multiple parties. (62:148-49; App. 15-16).

The court said nothing about Joshua's prior record. (62:148-65; App. 15-32). The court did not address the evidence that Joshua had no prior record and no prior opportunity to receive court-ordered treatment through the juvenile court system. (62:148-65; App. 15-32).

Regarding Joshua's personality, the court noted that he appeared to be at a physically and mentally appropriate level of maturity for his age, and that he suffered from general anxiety disorder and major depressive disorder. (62:150; App. 17). The court stated that Joshua's pattern of living was concerning because a lack of parental supervision enabled him to begin viewing both adult and child pornography at a young age. (62:151; App. 18). The court further stated that while Joshua was in some ways "a typical teenager, going to school [and working] a part-time job," his pattern of living also included a history of sexual contact with adults. (62:151; App. 18).

In regards to the seriousness of the child pornography offenses, the court stated that it was "horrendous, what those toddler/child/infant victims are put through." (62:152; App. 19). The court also noted Detective Fredricks' testimony that the child pornography materials he reviewed were among the worst he had ever seen. (62:158; App. 25). The court said the sexual assault offense was aggravated based on the large age difference between Joshua and the victim as well as what the court characterized as the "premediated" nature of the offense. (62:156; App. 23).

Regarding the adequacy and suitability of services available within the juvenile court system, the court found HHS's recommendation for in-home placement concerning because it did not account for Joshua's admission that he "was leaving the home, having sexual encounters with other adult males." (62:159; App. 26). As to the alternative option of

placing Joshua in the serious juvenile offender program, the court stated the following:

The Court is familiar that there is a possibility of serious juvenile offender programming that would extend supervision out for a couple of extra years. Actually, I should make sure I have it correct. It's not -- well, I'll put it this way, because it's not completely critical to the findings, it's -- I would still have to look at if *it's three years from the time he turns 18 or three years from the time of disposition that that can go out for*. I believe it's three years from the time of disposition, but if I'm wrong on that, it would add essentially another year onto it if it's from the time he turns 18. But it's not dispositive for my determination here today.

(62:161; App. 28) (emphasis added).

The court stated that a long term of supervision was needed and that the juvenile court system could not provide Joshua with a long enough term of supervision. (62:163; App. 30). The court then granted the State's request for waiver based on the following:

So the Court is finding on really two parts here, one, that the seriousness of this type of offense is one that is contrary to the best interest of the public to be dealt with in juvenile court. Also further finding that *it's not in the best interest of the juvenile to only have a* -- yes, it is a significant time in the life of a juvenile, but as court officials, as people that deal with these types of issues, see these are not -- these are not 20-week programs, these are not one-year programs, these are not

even *three-year programs*. Sadly at times, these are lifetime programs. I hope that is not the case.

(62:164; App. 31) (emphasis added).

Joshua filed a petition for leave to appeal, and the court of appeals granted his petition. (54:1). On appeal, Joshua argued that the circuit court failed to consider the full range of options available in the juvenile court system by failing to consider the full length of time available in the serious juvenile offender program. Contrary to the circuit court's belief that the program could only last for three years, disposition to this program actually requires a mandatory term of five years. Wis. Stat. § 938.355(4)(b).

The court of appeals affirmed the waiver order. In doing so, the court of appeals did not dispute that the circuit court failed to consider the full length of time available in the serious juvenile offender program. Instead, the court held that Joshua forfeited his right to raise this issue for the following reasons:

While counsel's initial question to the social worker did not specifically invite him to mention any length of time related to the serious juvenile offender program, by adding 'And' during the exchange, counsel would have given the juvenile court the impression the social worker was correct in representing that supervision under the serious juvenile offender program was available for 'three years.' Counsel also then made no effort to correct the misinformation through either further testimony by the social worker or otherwise.

J.A.V., No. 2024AP2081, ¶19 (App. 10).

According to the court of appeals, the above facts made Joshua's case analogous to *Benson*, where the court held that a defendant forfeited an inaccurate information at sentencing claim by failing to object at sentencing. *J.A.V.*, No. 2024AP2081, ¶16. (App. 9) (citing *Benson*, 2012 WI App 101, ¶¶16-17). As a result, the court declined to address the merits of Joshua's argument regarding the serious juvenile offender program. *Id.*, ¶21. (App. 11)

ARGUMENT

I. The circuit court erroneously exercised its discretion when it waived jurisdiction over Joshua.

A. General legal principles.

The transfer of a juvenile into adult court is a "grave step." *D.H. v. State*, 76 Wis. 2d 286, 292, 251 N.W.2d 196, 200 (1977). Protections afforded to a child in juvenile court include: confidentiality of records (s. 938.396); hearings closed to the public (s. 938.299(1)(a)); a presumption of remaining in the family home (s. 938.355(2)(b)6.); right to periodic reviews of any out-of-home placement (s. 938.38(2)); limited exposure to incarceration (s. 938.34(3)(f), s. 938.34(4m)); limited restitution (s. 938.34(5)(a)); and a liberal right to petition for expungement (s. 938.355(4m)).

To divert a child away from these protections requires the court to make a “critically important decision.” *T.R.B. v. State*, 109 Wis. 2d 179, 198, 251 N.W.2d 196 (1977). Adult court exposes a child to severe punishment, public proceedings, and a criminal record. *Id.* The charges against Joshua include what would be a felony in adult court, so he also faces becoming a felon for life and forever losing his Second Amendment right. Even if adult charges are ultimately dismissed, a child’s name and charges appear on CCAP for public viewing. Dismissed charges are not removed from CCAP until two years after dismissal. In other words, waiver forever alters a child’s life regardless of the ultimate outcome.

To waive jurisdiction over a juvenile, the circuit court must determine on the record that it would be contrary to the best interests of the juvenile or the public to hear the case in juvenile court. Wis. Stat. § 938.18(6). It is the State’s burden to prove by clear and convincing evidence that waiver is warranted. *Id.*

The court *must* consider the following factors in making its waiver decision:

- (a) The personality of the juvenile, including whether the juvenile has a mental illness or developmental disability, the juvenile’s physical and mental maturity, and the juvenile’s pattern of living, prior treatment history and apparent potential for responding to future treatment.
- (am) The prior record of the juvenile, including whether the court has previously waived its jurisdiction over the juvenile, whether the

juvenile has been previously convicted following a waiver of the court's jurisdiction or has been previously been found delinquent, whether such delinquency involved the infliction of serious bodily injury, the juvenile's motives and attitudes, and the juvenile's prior offenses.

(b) The 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 or premeditated or willful manner.

(c) The 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 and the suitability of the juvenile for placement in the serious juvenile offender program under s. 938.538 or the adult intensive sanctions program under s. 301.048.

(d) The 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.

Wis. Stat. § 938.18(5).

B. The circuit court erroneously exercised its discretion because it failed to consider the full length of supervision available to Joshua under the serious juvenile offender program.

The serious juvenile offender program is designed to allow for longer-term supervision of juveniles adjudicated of serious offenses. Unlike most juvenile dispositional orders, which expire after only one year, disposition to the serious juvenile offender program requires a mandatory five-year term. Wis. Stat. § 938.355(4)(b); *see also State v. Terry T.*, 2002 WI App 81, ¶¶7-8, 251 Wis. 2d 462, 643 N.W.2d 175. Moreover, a child cannot receive early discharge from the program unless he or she has participated in the program for at least three years, and only if the Department of Corrections approves the early discharge. Wis. Stat. § 938.538(5).

Here, the circuit court concluded that the juvenile court system could not provide Joshua with a long enough term of supervision to adequately provide treatment and protect the public. (62:163-64; App. 30-31). But this conclusion rested in part on the court's erroneous belief that the serious juvenile offender program could only last for three years:

The Court is familiar that there is a possibility of serious juvenile offender programming that would extend supervision out for a couple of extra years. Actually, I should make sure I have it correct. It's not -- well, I'll put it this way, because it's not completely critical to the findings, it's -- I would

still have to look at if *it's three years from the time he turns 18 or three years from the time of disposition that that can go out for*. I believe it's three years from the time of disposition, but if I'm wrong on that, it would add essentially another year onto it if it's from the time he turns 18. But it's not dispositive for my determination here today.

(62:161; App. 28) (emphasis added).

Contrary to the circuit court's belief, the court had no ability to order placement in the serious juvenile offender program for only three years. *See* Wis. Stat. § 938.355(4)(b). Additionally, because Joshua was nearly 17 years old at the time of the waiver hearing, a five-year term in the program would have allowed him to remain in the juvenile court system until he was approximately 22 years old. The court therefore misstated both the length of time Joshua could remain in the serious juvenile offender program and his projected age upon completion of the program.

Additionally, the court linked its belief that the serious juvenile offender program could only last for three years to its determination that the juvenile court system could not offer a long enough period of supervision:

So the Court is finding on really two parts here, one, that the seriousness of this type of offense is one that is contrary to the best interest of the public to be dealt with in juvenile court. Also further finding that *it's not in the best interest of*

the juvenile to only have a -- yes, it is a significant time in the life of a juvenile, but as court officials, as people that deal with these types of issues, see these are not -- these are not 20-week programs, these are not one-year programs, these are not even three-year programs. Sadly at times, these are lifetime programs. I hope that is not the case.

(62:164; App. 31) (emphasis added).

The above statement indicates that the court believed three years was the maximum term of supervision and treatment available in the juvenile court system. But again, placing Joshua in the serious juvenile offender program would have actually provided him with the opportunity to remain in the juvenile court system for a substantially longer period of time. Because the court was unaware of and did not consider this possibility, the court erroneously exercised its discretion when it concluded that the juvenile court system could not provide Joshua with adequate services.

Similarly, in *State v. M.C.*, No. 2021AP301, unpublished slip op., ¶7 (WI App Aug. 11, 2021) (App. 37-38), a circuit court waived a child into adult court based on its belief that the juvenile court system could not provide a long enough term of supervision. But the court incorrectly believed that supervision through the juvenile court system would end when M.C. turned 18 years old, and the court entirely failed to consider the serious juvenile offender program, which would have allowed for supervision beyond M.C.'s 18th birthday. *See id.*, ¶¶6-8. (App. 36-38). As a result, the court of

appeals reversed and remanded so the circuit court could consider the full range of options available in the juvenile court system in order to make a proper waiver determination. *See id.*, ¶9. (App. 38-39)

As in *M.C.*, the circuit court here did not consider the full range of options available in the juvenile court system based on its incorrect belief regarding the length of supervision that was available. Consequently, the waiver order should be reversed because it rests on an erroneous exercise of discretion.

Finally, Joshua did not waive his right to challenge the circuit court's erroneous exercise of discretion. While the court of appeals cited *Benson* in support of its application of the forfeiture rule, in that case defense counsel introduced inaccurate information by submitting a report detailing the presence of a prescription drug in the defendant's system at the time of his car crash. 2012 WI App 101, ¶5. Unlike *Benson*, the inaccurate information presented at Joshua's waiver hearing came in the form of testimony from a State's witness, not a report filed by defense counsel. (62:80). *J.A.V.*, No. 2024AP2081, ¶17 (App. 9). Moreover, as the court of appeals acknowledged, Joshua's counsel did nothing to "invite" the incorrect testimony. *Id.*, ¶19 (App. 10). Joshua's case is therefore readily distinguishable from the issue presented in *Benson*, and Joshua did not waive his right to challenge the circuit court's erroneous exercise of discretion.

CONCLUSION

For the reasons stated above, Joshua asks this Court to grant review and reverse the order waiving him into adult court.

Dated this 23rd day of May, 2025.

Respectfully submitted,

Electronically signed by
David Malkus

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 4,137 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

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

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

Dated this 23rd day of May, 2025.

Signed:

Electronically signed by

David Malkus

DAVID MALKUS

Assistant State Public Defender