STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2024AP002585-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NOAH Q. MANN-TATE,

Defendant-Appellant.

On Appeal from an Order Denying a Transfer of Jurisdiction to Juvenile Court, Entered in the Milwaukee County Circuit Court, the Honorable Jane Vinopal Carroll, Presiding

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BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Is the reverse waiver statute unconstitutional because the criteria do not require the court to consider juveniles' reduced culpability and potential for rehabilitation in making the reverse waiver determination?

The circuit court denied Noah's motion to dismiss the case based on the unconstitutionality of the reverse waiver statutes, Wis. Stat. §§ 938.183 and 970.032.

2. Did the circuit court erroneously exercise its discretion when it denied Noah's request for reverse waiver motion?

The circuit court denied Noah's request for reverse waiver.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The case is statutorily ineligible for publication. Wis. Stat. § 809.23(1)(b)4. Noah welcomes oral argument if this court would find it helpful.

STATEMENT OF THE CASE AND FACTS

On January 19, 2023, the state filed a criminal complaint alleging that Noah, then ten years old, committed first degree intentional homicide, contrary to Wis. Stat. § 940.01(1)(a). (25). According to the complaint, on November 21, 2022, police responded to a report of a shooting in a residence and found Noah's mother, Q.M.M., deceased. (25:1).

According to the complaint, police interviewed Noah, who said that his mother woke him up at 6:00 a.m. Noah told police that he went to his mother's bedroom and got her gun and then went down to the basement where she was grabbing some laundry. He originally described twirling the gun around on his finger and then it "accidentally went off." Noah then woke up his sister, who discovered their mother was deceased and called 911. (25:1). Police spoke with the medical examiner, who said that Q.M.M. died from a handgun shot at her at close range. (25:1). The bullet entered through her right eye, went through her brain, and exited out of the back side of her head. (25:1). After being interviewed, Noah was allowed to remain with family. (25:2).

Noah's family contacted the police department the next morning and two detectives returned to speak with them. (25:2). Noah's older sister told police that Noah had "rage issues" and acted out. (25:2). She said that about six months earlier, Noah filled a balloon with flammable liquid and set it on fire, causing their couch and carpet to burn. (25:2). Noah explained to his mother that his sisters told him to do it. (25:2). The detectives questioned Noah, who explained that he has five imaginary people who talk to him: two sisters, one old lady, one guy, and someone who is mean whom he does not like talking to. (25:2).

Noah's sister told police that Noah was seeing a therapist. (25:2). She reported seeing paperwork from the therapist "who gave him a concerning diagnosis." (25:2). She said that Q.M.M. put cameras in their home to watch Noah but that someone had unplugged

them. (25:2). Noah's sister also reported that Noah logged on to Q.M.M.'s Amazon account and ordered a virtual reality headset on November 22, 2022, after their mother's death. (25:2).

Detectives also interviewed other family members, one of whom described Noah as intelligent and manipulative. (25:2). Noah's maternal aunt, Q.M.M.'s sister S.R, said that when Noah was four years old he picked up his puppy and swung it around by the tail and that it whined and howled. (25:2). She told detectives that Q.M.M. got rid of the dog because she was afraid it might hurt Noah. (25:2). She said that Noah's school was sending home daily behavioral updates. (25:2). She told detectives that when Noah was eight years old, after an argument with his sister, he told her that he hoped the plane she was getting on would crash and that she would die. (25:2). She said Q.M.M. stopped telling family members about Noah's behaviors and that family members did not want to babysit Noah. She told police that she learned that Noah took his mother's credit cards and ordered things off the internet. (25:2).

The complaint states that S.R. told police that Noah did not cry after his mother's death and did not show remorse. (25:2). S.R. said that when she picked up Noah after his mother's death, she asked him where the house keys were. (25:2). Noah had them in his bedroom to hide them from his mother. (25:2). S.R. noticed that one of the keys was for Q.M.M.'s gun lock box. (25:2). She told detectives that Noah told her that he aimed the gun at his mother and that his mother asked why he had it and told him to put it down. (25:2). S.R. told detectives that Noah attacked her son "to the point that she had to pull Noah Mann-Tate off of her

child." (25:2). She drove Noah to her mother's home to meet with child service protection workers. (25:2). When Noah saw his grandmother crying he said he was sorry for killing his mother but S.R. said he did not show empathy or compassion. (25:2). Noah asked if a package had arrived from Amazon. (25:3).

According to the complaint, detectives gave Noah his *Miranda*[1] warnings and interviewed him. (25:3). Noah told police that he was not twirling the gun around when he shot his mother. (25:3). He told police he was mad that she woke him up half an hour early. Noah told police that he held the gun with two hands and that he closed his left eye. (25:3). His mother walked in front of him when he tried to shoot the wall to scare her. (25:3). He thought he shot her when she was about three feet away from him. (25:3). He put the gun in the living room closet and told his older sister that he thought their mother was dead. (25:3).

The complaint also alleged that Noah made untruthful statements to police. He told police he was not mad at his mother but then admitted he was mad that she woke him up early; he initially told police he pried open the gun safe but later admitted he got the keys the night before and hid them in his nightstand and got the gun from the gun safe the next morning when his mother woke him up early; he first said he asked his mother whether the gun was real but later admitted he did not say anything to his mother but that she walked toward him and told him to put the gun down; that when a cousin told him he could go to jail for a long time he tried to come up with different

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

stories and that he was nervous and did not know what to do when the bullet hit his mother so he tried to fake that he was innocent; and that he was not truthful when he said that his mother ordered the virtual reality headset because "people in his home do not like him ordering things from Amazon" and that his plan was to sneak it into the house and start playing it. (25:3-4).

On December 30, 2022, Noah filed an affidavit of Gina Scheik, a defense investigator who interviewed S.R., Noah's maternal aunt. (22). Per the affidavit, S.R. stated that there were two inaccurate statements in the criminal complaint. First, the complaint said that Noah got his mother's keys from his bedroom. S.R. stated that she asked Noah why he was playing with Q.M.M.'s keys the night before the incident and that he told her he hid the keys from his mother. She stated that she never saw Noah with his mother's keys. (22:1). The second error in the complaint was that it stated that Noah "attacked her 7-year-old son" and that she had to pull Noah off of him. S.R. stated that this was not true, and that her son reported that Noah kicked him and punched him, and that Noah bullied him, but that S.R. believed Noah was acting on behaviors he experienced from school, as he was bullied there. (22:2). She stated that it was not a physical attack and she did not need to pull Noah off her son. (22:2).

Based on the charge and Noah's age, the criminal court had original jurisdiction under Wis. Stat. § 938.183. Noah's attorneys requested a competency evaluation for Noah, and the court appointed Dr. Karyn Gust-Brey to evaluate him. (33). Dr. Gust-Brey submitted a report, and later an

updated report, to the court. (35; 42). Defense counsel retained an independent evaluator, Dr. Antoinette Kavanaugh, who also submitted a report. (38; 46). Dr. Gust-Brey found Noah competent to stand trial, while Dr. Kavanaugh found Noah not competent. (35; 42; 46). A contested competency hearing was held over two days. (20; 51, 49).

At the competency hearing, Dr. Gust-Brey testified that she was able to teach Noah about legal concepts he did not understand. (51:30-31, 33-34, 62-87, 92). She diagnosed Noah with oppositional defiant disorder. (51:35). She explained that Noah uses a "great deal of fantasy," and she considered whether that or Noah's young age affected his competency but determined it did not. (51:36). When asked about the oppositional defiant disorder, Dr. Gust-Brey explained that Noah was overall cooperative with her and that she based the diagnosis on past reports only. (51:95-96).

Dr. Kavanaugh testified that she reviewed Noah's records and Dr. Gust-Brey's report. (51:104-105). Specifically, she reviewed a neuropsychological report that was conducted because Noah had sustained a concussion after which his behavior had changed. (41:121). She noted that Noah had been working on regulating his emotions in therapy, and that Noah's therapist diagnosed him with adjustment disorder. (51:122-23).

Dr. Kavanaugh explained that while Noah had some understanding of some concepts, he did not adequately understand many of them. (51:144-156). Dr. Kavanaugh concluded that Noah was not competent to proceed because he had "fundamental

errors in knowledge" and an inability to display an appropriate understanding of the terms he used. (51:157). Following arguments from the parties, the court found that Noah was competent to proceed. (49:31-41).

A preliminary hearing was held on September 5, 2023. At the hearing, the state called Timothy Keller, a detective with the City of Milwaukee who was called to the scene of Q.M.M.'s death. (66:4-5). He testified that they were able to determine that Q.M.M. died from a gunshot to her head. (66:6). Detectives then interviewed Noah and Noah's sister at their home. (66:6). Noah first reported that he took his mother's gun, which he believed to be a confetti gun, from the lockbox and was twirling it on his finger when it accidentally fired. (66:7). Noah told detectives he opened the lockbox by slipping his fingers under the lid and pulled the trigger while upstairs, however, there was no indication that the gun had been fired upstairs. (66:8-9).

Keller testified that after one of Noah's family members contacted law enforcement, Noah was taken into custody and given *Miranda* warnings. Keller explained that "eventually we got to a point" where Noah indicated that he had an argument with his mother the night before because she did not let him order virtual reality goggles but that was not the reason the incident happened. (66:12-13). Keller testified that Noah told him that the next morning his mother woke him up early and he was upset. He took the gun downstairs to the basement where his mother was doing laundry. (66:14). Noah fired the gun to scare his mother. (66:14).

Based on this testimony, the court found there was probable cause to believe that Noah committed first degree intentional homicide. (66:61-64; App. 14-16).

The case proceeded to the reverse waiver hearing. Noah called Dr. Michael Caldwell, who testified that he is a part-time lecturer in the department of psychology at the University of Wisconsin-Madison and recently retired from the Mendota Juvenile Treatment Center (MJTC) as a senior staff psychologist. (73:31). Dr. Caldwell met with Noah, reviewed records, and conducted testing as part of his evaluation. (73:40-41). Dr. Caldwell noted that Noah had a history of migraine headaches, difficulty sleeping, and a concussion from 2021. (73:42). There was also concern that Noah might have attention deficit hyperactivity disorder. (73:46). Dr. Caldwell noted that Noah's mother had obtained a neuropsychological evaluation and therapy for him. (73:42). Noah began therapy, and the notes indicated that Noah did not have difficulties in his family. (73:47). School records indicated that, with the exception of the second half of third grade, Noah was "a delight" to have in school and that there were no behavioral issues. (73:48). Noah changed schools in fourth grade and his mother expressed concern about the level of violence there. (73:49).

Dr. Caldwell also reviewed the neuropsychological evaluation conducted in February 2022. (73:50). Dr. Caldwell testified that Noah's IQ skills were slightly lower than average. (73:51, 54, 73). He explained that he compared Noah's raw scores from the IQ test that had been done to the adult functional standard to provide the court with an

idea of how Noah was functioning compared to an average 17-year-old and determined that if a 17-year-old were functioning at Noah's level, their comparable IQ score would fall in the category of having an intellectual disability. (73:54). Dr. Caldwell explained that he provided this information because "in essence, we're applying the adult standards for prosecution, culpability, sentencing and so on, at least at this point." (73:55).

Dr. Caldwell also testified that the testing that had already been done showed some anomalies, which he believed could be caused by post-concussive issues. (73:58). Dr. Caldwell explained that Noah showed some distortion of reality, like reporting hallucinations and having animals in his room. (73:59). Dr. Caldwell's report also explained that Noah engaged in magical thinking as a way of coping. (60:16).

Dr. Caldwell reviewed Dr. Gust-Brey's competency evaluation and explained that he disagreed with her diagnosis. (73:61). He noted that Noah did not have issues with defiance of authority at school or in the detention facility, only with his mother. (73:61-62, 148-150). He noted that Noah seemed to go out of his way to comply with people in positions of authority and Noah was doing well in detention. (73:62-64).

Dr. Caldwell interviewed Noah and described him as very cooperative. (73:66-67). Dr. Caldwell explained that Noah was not always able to distinguish what actually happened from what he may have thought happened, which he attributed to Noah having possible difficulties with memory retrieval and a weak sense of reality. (73:67-68). Dr. Caldwell also

noted that Noah did not have an interest in violence, liked Minecraft and Garfield, and did not identify with violent subcultures, which meant that he would not need lengthy rehabilitation to correct attitudes that tend to propagate violence. (73:71-72).

Dr. Caldwell provided what he described as a "descriptive diagnosis," based on Noah's symptoms, of schizophreniform disorder. (73:80, 111). He described this as a cluster of symptoms involving a distorted sense of reality, including imaginary friends, hallucinations, delusions, and disordered reality in his thinking. (73:80-81). Dr. Caldwell explained that these symptoms could be caused by delayed maturation or could be an early sign of a serious mental health disorder, but that he believed it was more likely that it was a delayed developmental process and that it would dissipate as Noah got older. (73:82, 134, 154-55).

Dr. Caldwell testified he conducted the Risk Sophistication Treatment Inventory. (73:86). On the first scale, Noah scored as very low risk for violence. (73:87). On the second scale, Noah was in the second percentile for "sophistication maturity," meaning that 98 percent of children facing waiver were more mature or criminally sophisticated. (73:87). And on the third scale, Noah scored in the 74th percentile, meaning that he was more likely to respond positively to treatment and rehabilitation efforts than 74 percent of the comparison sample of 14- to 15-year-old youth. (73:87-88).

Regarding Noah's treatment needs, Dr. Caldwell testified that Noah should be evaluated for an IEP[2], continue with school, and receive treatment for reality distortions. (73:95, 139). Further, Noah would need regular ongoing counseling to deal with depression, which would be available in the juvenile system. (73:95-96). Dr. Caldwell explained that the treatment available in the adult system right now "is not very good." (73:97). When asked if Noah could be treated in the juvenile system, Dr. Caldwell testified that "I am very confident. His prognosis is really good." (73:99). Specifically, he noted that "[p]robably over the course of my experience, I can only think of a few -- a very small number, a handful of kids who had a similar or better prognosis than Noah. (73:99). He explained that he believed Noah could be fully rehabilitated in under ten years. (73:156-57).

Lynn Bade, a human services worker for Children's Youth and Family Services, also testified. (73:158). Ms. Bade testified that she was involved in Noah's case because Noah had no guardian when he first came to detention. (73:160-61). She reported that Noah was receiving positive recognition and good grades in detention. (73:162-63). Ms. Bade described the various services available if a youth is on a stayed serious juvenile offender program order, including potential placement options. (73:166-81).

The next day the court told the parties that it wanted victim impact information from the family to assist with its determination of whether reverse waiver would depreciate the seriousness of the offense. (74:3-4).

[2] IEP stands for Individualized Education Program.

Noah then called Dr. Steven Dykstra, a psychologist for Milwaukee County, who provided expert witness testimony regarding child brain development. (74:8). He described the concepts of neuroplasticity and myelination. (74:8-19). He explained that neuroplasticity means that brain development in childhood is not set in stone. (74:11). Dr. Dykstra also testified regarding available treatment in the juvenile system and in Milwaukee County. (74:39, 62-71). He described residential treatment centers and the treatment they provide. (74:39-46).

Regarding a diagnosis of schizophreniform disorder, Dr. Dykstra testified that it would be important for the treatment provider to be cognizant that the individual would be at a higher risk of exhibiting schizophrenia than someone in the general public. (74:57). Dr. Dykstra explained that he had seen children with this diagnosis do very well in residential treatment programs. (74:58). He explained that schizophrenia can be delayed through therapy and treatment and that the individual can receive treatment much sooner if the condition is already being addressed by a team of providers. (74:59-60). He, however, would make a different, but related diagnosis of attenuated psychosis syndrome for Noah. (74: 140-41).

With respect to the adult criminal system, Dr. Dykstra testified that the most appropriate available service for someone with Noah's diagnosis appeared to be cognitive behavioral therapy. (78:73-74). Dr. Dykstra testified that the Department of Corrections' website data indicated that there was a waitlist of over 10,000 individuals, the DOC

prioritized getting people ready for discharge and return to the community, and that people waited a "long, long, long, long time" for services. (74:74, 78).

Finally, Noah called his father, Levencia Tate, before resting his case. (74:169-181). However, after being prompted by the court at the next hearing, Noah filed a motion to reopen and adjourn his case while he waited for requested DOC records. (76; 122:4). The court granted the motion. (122:8-9, 59-60).

The reverse waiver hearing continued on April 29, 2024. The state called Dr. Gust-Brey, who testified about the competency evaluation she had conducted. (122:9-12). She affirmed her conclusion that Noah had oppositional defiant disorder and testified that she disagreed with Dr. Caldwell's diagnosis of persistent depressive disorder. (122:12-14). She believed Noah saying he had imaginary pets was likely based on his development, age, and imagination, and testified that she did not see value in Dr. Caldwell's method of comparing IQ results based on age. (122:20, 24-26).

Noah filed a motion to dismiss the case, challenging the constitutionality of the reverse waiver statutes. (80). The motion alleged that: (1) the reverse waiver factors in Wis. Stat. § 970.032(2) violate due process; (2) children have a constitutional right to be treated as children and tried differently than adults; (3) Wis. Stat. § 938.038's requirement that some 10-year-old children face prosecution in adult court violates children's right to equal protection; (4) the racially disparate impact on black children of original adult court jurisdiction violates due process; and (5) Wis. Stat. § 938.183(1)(m) violates the prohibition

against cruel and unusual punishment. The state filed a response arguing that the reverse waiver statutes have been found constitutional by Wisconsin appellate courts, and that the defense did not prove the statutes were unconstitutional beyond a reasonable doubt. (90). Noah filed a reply disputing the state's argument. (91).

The reverse waiver hearing continued on June 24, 2024. The defense called Christy Zubke. (88:14). Ms. Zubke testified that she is a classification sector chief with the DOC Bureau of Offender Classification and Movement. (88:15). Ms. Zubke testified that when individuals are admitted to a Division of Adult Institution, the DOC determines what classification level is appropriate based on their history and length of sentence. (88:16). All individuals with sentences of 30 years or more must spend at least three years in maximum custody, which might include time spent at Lincoln Hills School. (88:20, 27, 30). For adult-sentenced youth, she explained that the DOC works with Lincoln Hills to coordinate the transfer to adult prison. (88:22). Ms. Zubke testified that mental health services are available in adult prisons. (88:31).

Next, the defense called Casey Gerber, the director of the Office of Juvenile Offender Review in the Division of Juvenile Corrections at the DOC. (88:33). Ms. Gerber described the assessment process that Lincoln Hills conducts when youth arrive. (88:34-40). She also provided an overview of the available programming. (88:40-44). If Noah were in juvenile court, he would be in the Serious Juvenile Offender-A program, which would provide treatment and programming, including potential confinement, until Noah was 25 years old. (88:55). She explained that

children who are released continue to work with an agent who provides aftercare. (88:57).

On June 25, 2024, the defense called Alisha Kraus, the Office of Program Services Director for the Division of Adult Institutions at the DOC. (87:6). Ms. Kraus testified that once an individual's needs are assessed, they are placed on a waitlist. (87:10). She testified that the cognitive behavior programming waitlist had 10,419 individuals on it. (87:13). She explained that, in general, time to release is the consideration used to determine who will be prioritized for treatment. (87:12). Further, she testified that all individuals in the DOC's care are assessed for mental health needs and mental health services are available if requested. (87:15).

The final day of the reverse waiver hearing was held on October 8, 2024. (110). The defense called Zach Baumgart, the director of research and policy for the DOC. (110:4). Mr. Baumgart testified that he responded to an open records request submitted by defense counsel, but not all DOC data requested could be shared. (110:7-8).

Theodore Lentz, an assistant professor at the University of Wisconsin-Milwaukee in the Department of Criminal Justice and Criminology in the School of Social Welfare, also testified. (110:11). Dr. Lentz testified that the DOC data showed that access to programming in prison is low. (110:16). He noted that program completion is particularly low for individuals who are black, male, and enrolling in a program in a maximum security facility. (110:16). He noted that there were additional challenges for those who are adult-sentenced youth. (110:16). He explained

that a black male had an 18.75 percent completion rate for cognitive and anger management programming as compared to a 37 percent completion rate for a non-black individual. (110:37). There was a similar completion rate for an adult-sentenced youth, while for an adult, it was 31 percent. (110:38). He concluded, "So you can see that the characteristic of being black and being an adult-sentenced youth has really detrimental consequences on the likelihood of completing programming in the cognitive intervention or the anger management type programs." (110: 38).

The defense rested. (110:83). The court explained that it would consider family members' "impressions of the seriousness of the offense," but would not base its decision on anything "but the testimony received in court and the evidence and the law." (110:90-91). The parties made arguments regarding the constitutionality of the reverse waiver statute. (110:126-155).

On October 15, 2024, the circuit court issued a written decision denying Noah's constitutional motion. (101; App. 4-13). The court noted:

> This court is bound by Wisconsin precedent but recognizes the uphill battle faced by defendants seeking to prove the elements of §970.032(2), particularly with a young defendant and at this point in the proceedings. In addressing the seriousness of the offense, only preliminary hearing testimony has been heard, and the defendant is presumed innocent. He retains his right to challenge the admissibility of evidence against him, cross examine witnesses and to proffer a defense. Particularly in a homicide prosecution, there are often lesser included offenses involving intent v. recklessness. In addressing treatment in the adult system, again there are many unknown elements at this stage,

> the first of which is the treatment needs of the defendant. The younger the defendant, the more their treatment needs will change over time. A 10 to 12-year-old defendant has not even gone through puberty. Just like the conviction is unknown, the sentence is also unknown and will ultimately require the court to consider a variety of factors. If given an adult sentence, an offender remains in the custody of juvenile corrections until age 17; so the treatment in the adult system, in the case of a 10-year-old defendant, begins seven years into the future. Just as treatment needs are not static, treatment services available are not constant, either. There is no reason to assume that the treatment services available in the adult system today will be the same as the ones available when a juvenile defendant enters it at some future date. Finally, the third element that a juvenile must prove involves either specific or general deterrence. The effect of one case on general deterrence is simply impossible to know or measure but is likely negligible in almost all cases. The question of whether the juvenile will commit another homicide in the future is, again, complicated by their young age. They haven't lived long enough to establish a pattern of behavior, their brains and personalities are still in development, and their mental health is subject to change as well.

(101:10; App. 13).

On November 18, 2024, the circuit court issued an oral decision denying Noah's reverse waiver motion. (111; App. 18-36). Regarding the first factor, that Noah could not receive adequate treatment in the criminal justice system, the court noted that "the difficulty with proving that is first identifying what needs does this defendant have and what needs will he have when he enters the adult system. It's complicated even more by his age being ten years old." (111:3; App. 20). The court found that there was no diagnosis that would allow the court to determine what Noah's

needs are and that it was unknown whether Noah would need mental health treatment in the adult system. (111:9-10; App. 26-27). It concluded that, because Noah's needs were unknown, "the defendant has not proven that, if convicted, he could not receive adequate treatment in the criminal justice system." (111:12; App. 29).

With respect to the second factor, the court noted that "[t]his offense is first-degree intentional homicide. It is very aggravated." (111:15; App. 32). The court stated that it was required to make the determination of whether transferring jurisdiction would depreciate the seriousness of the offense based on preliminary hearing testimony, which indicated that there was preplanning, that Noah took the keys to the gun safe, went downstairs to confront his mother, and shot her at close range. (111:15-16; App. 32-33). The court also considered the impact on the victims, noting that the family supported Noah but did not agree on whether Noah should be in juvenile or adult court. (111:16; App. 33). The court concluded that it is an "extremely aggravated offense, and it has not been proven on this record that transfer to juvenile court would not depreciate the seriousness of the offense." (111:16-17; App. 33-34).

Finally, while considering the third factor of deterrence, the court explained that the state had conceded, and the court agreed, that there is nothing that one court does in one case that affects general deterrence. (111:17-18; App. 34-35).

The court found that the factor that was most compelling for the court was Noah's age. The court explained that it did not believe 10-year-old children

belong in the adult system, but that the court was required to consider the statutory factors. (111:18; App. 35). The court explained:

> What is extremely -- the factor in this case that is the most compelling for keeping this youth in the juvenile system is his age. He was ten years old at the time that he committed this offense. He is now twelve years old. And our feeling that if ten-year-olds do not belong in the adult system, and, as a juvenile court judge, that I would agree with that statement. But that's not my job. That is a legislative determination.
>
> The legislature has clearly indicated that ten-year-olds who are charged with first-degree intention [sic] homicide do belong in the adult system, unless those statutory factors are all proven by a preponderance of the evidence with the burden being on the defendant.
>
> So I am concluding that the defense has not met their burden in proving that Noah could not receive adequate treatment in the adult system, that transferring jurisdiction to the juvenile court would not depreciate the seriousness of the offense, and the motion to reverse waive him into the juvenile court is denied.

(111:18-19; App. 35-36).

A written order denying Noah's reverse waiver request was entered on December 4, 2024. (108; App. 3). Noah filed a petition to appeal a nonfinal order, which this court granted. (113, 117).

ARGUMENT

I. The reverse waiver statute is unconstitutional because the criteria do not require the court to consider juveniles' reduced culpability and potential for rehabilitation in making the reverse waiver determination.

A. Introduction to argument and standard of review.

Under Wis. Stat. § 938.183, the criminal court has exclusive original jurisdiction over juveniles who are alleged to have committed certain offenses, including first degree intentional homicide. Although the criminal court has exclusive original jurisdiction, Wis. Stat. § 970.032(2) allows a juvenile to seek transfer of his case to juvenile court though a "reverse waiver" procedure. First, the criminal court must find probable cause to believe that the juvenile has committed the violation that provided the court with original jurisdiction. Wis. Stat. § 970.032(1).

If it does, the criminal court must retain jurisdiction unless the juvenile proves each of the following three criteria by a preponderance of the evidence:

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

- That transferring jurisdiction to the juvenile court would not depreciate the seriousness of the offense.

> • That retaining jurisdiction is not necessary to deter the juvenile or other juveniles from committing the violation of which the juvenile is accused ….

Wis. Stat. § 970.032(2).

"A decision to retain or transfer jurisdiction in a reverse waiver situation is a discretionary decision for the [circuit] court." *State v. Dominic E.W.*, 218 Wis. 2d 52, 56, 575 N.W.2d 282 (Ct. App.1998). This court will affirm the court's discretionary decision 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 28, ¶37, 328 Wis. 2d 42, 786 N.W.2d 144.

Noah's constitutional argument focuses on a juvenile's right to due process at the reverse waiver hearing. It is well settled that legislatures can create statutorily-protected liberty interests that implicate due process protections. *Kent v. United States*, 383 U.S. 541, 86 S. Ct. 1045 (1966). For example, if the legislature provides a juvenile court with original, exclusive jurisdiction over a case, *Kent* requires a meaningful hearing before a juvenile may be waived to adult court. *Id.* at 557. Noah argues that in original adult court jurisdiction cases, because the legislature has created a statutorily protected interest in juvenile court through the reverse waiver process, due process mandates that a juvenile have a meaningful opportunity to prove that his case should be heard in juvenile court.

But the reverse waiver criteria no longer meet due process requirements. The U.S. Supreme Court has issued four decisions emphasizing the differences between adults in the criminal justice system and youth, and that justifications for some of the harshest penalties "collapse in light of 'the distinctive attributes of youth.'" *Montgomery v. Louisiana*, 577 U.S. 190, 208, 136 S.Ct. 718 (2016) (quoting *Miller v. Alabama,* 567 U.S. 481, 472, 132 S.Ct. 2455 (2012)). Because the reverse waiver statute does not require the court to consider the "distinctive attributes of youth," the statute no longer provides the required due process protection to children whose cases originate in the adult criminal system.

The constitutionality of a statute is a question of law that this court reviews *de novo*. *State v. Cole*, 2003 WI 112, ¶10, 264 Wis. 2d 520, 665 N.W.2d 328. Statutes are presumed constitutional, and a party challenging the constitutionality of a statute bears the "heavy burden" of proving beyond a reasonable doubt that it is unconstitutional. *Id.*, ¶11.

B. History of the original adult court jurisdiction and reverse waiver statutes and prior constitutional challenges.

The legislature first provided the adult court with jurisdiction over some children and created the "reverse waiver" procedure in 1993.[3] Under the new statutes, the criminal court was given exclusive original jurisdiction over any child with a previous adjudication who was alleged to have committed battery while placed in a secured juvenile facility or

[3] 1993 Wis. Act 98 created Wis. Stat. §§ 48.183 and 970.032.

who committed aggravated assault while placed in such a facility unless the court transferred jurisdiction to the children's court through the reverse waiver process.

Under the new reverse waiver procedure, once the court found probable cause to believe that the child committed one of those offenses, the court was required to retain jurisdiction unless the court found all of the following: (1) that, if convicted, the child would not receive adequate treatment in the criminal justice system; (2) that transferring jurisdiction to the court assigned to exercise jurisdiction under Chapter 48 would not depreciate the seriousness of the offense; and (3) that retaining jurisdiction was not necessary to deter the child or other children from committing battery, aggravated assault, or other similar offenses while placed in a secure correctional facility. Wis. Stat. § 970.032 (1993-94).

If the child remained in criminal court and was convicted of one of the adult jurisdiction offenses, the court was required to sentence the child to a presumptive minimum prison sentence unless the court determined that placing the child on probation or imposing a lesser sentence would not depreciate the seriousness of the offense or was not necessary for purposes of deterrence. Wis. Stat. § 939.635 (1993-94).[4]

The constitutionality of these statutes was challenged shortly after they were created, and this court first considered whether they violated equal

[4] Wis. Stat. § 939.635 was repealed by 2001 Wis. Act 109 and there is no longer a presumptive minimum prison sentence assault or battery in a secured juvenile facility.

protection or due process in *State v. Martin*, 191 Wis. 2d 646, 530 N.W.2d 420 (Ct. App. 1995). Martin argued that the statutes violated his "fundamental right" to a hearing with fair standards before he could be deprived of his liberty, and that by presumptively waiving children who were alleged to have committed battery, the legislature placed a burden on him that he could not meet. *Id.* at 653. Martin claimed that "basic fairness" required that he had a right to an "individual assessment" of his suitability for juvenile court. *Id.* Although Martin raised the issue as an equal protection violation, this court explained that "the correct question is whether the statutes under consideration violate the elaborate due process guarantees historically and traditionally protected against state interference." *Id.* at 655. The court concluded that juveniles do not have a substantive due process right to individualized treatment in the reverse waiver process or in sentencing because neither right was found in the Constitution. *Id.* at 655. The court did not consider whether the statute itself provided a liberty interest. This court also concluded that there was a rational basis for handling juveniles who commit battery while in a secured institution differently from those in the community or from those who commit other offenses and so the statutes did not violate equal protection. *Id.* at 659.

That same year, the Wisconsin Supreme Court rejected a child's claim that the statutes violated his due process and equal protection rights by revealing his identity to the public prior to the reverse waiver hearing. *State v. Hazen*, 198 Wis. 2d 554, 562-62, 543 N.W.2d 503 (1995). The court concluded that Hazen had no due process or equal protection right to have

his identity protected because the right to "reputational integrity" is not a constitutionally protected interest *Id.* at 506.

In 1995, the Juvenile Justice Study Committee ("Committee") was created to study the effectiveness of the Children's Code and state and county resources in providing "responses to delinquent behavior by children that promote public safety, accountability and rehabilitation."[5] In its report *Juvenile Justice: A Wisconsin Blueprint for Change ("Blueprint")*, the Committee recommended sweeping reforms, and in 1995, the legislature adopted the recommendations and removed the delinquency provisions from Chapter 48 and created Chapter 938, the Juvenile Justice Code, in part to address concerns about a perceived rise in serious juvenile crime.[6]

In explaining the need for a separate Juvenile Justice Code, the Committee stated that the term "children" was "misleading when it is applied to law violators who often are physically and mentally mature and who have demonstrated a willingness to engage in serious and even heinous acts."[7] It continued: "The words 'child' and 'children' are inappropriate when applied to such individuals."[8]

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[5] 1993 Wis. Act 377.

[6] *Juvenile Justice: A Wisconsin Blueprint for Change*. Report of the Juvenile Justice Study Committee 13. (January 1995). Available at https://files.eric.ed.gov/fulltext/ED384129.pdf. Chapter 938 was created by 1994 Wis. Act 77.

[7] *Blueprint* at 13.

[8] *Blueprint* at 9.

Among other changes, Chapter 938 lowered the age of delinquency to 10, and original adult court jurisdiction was expanded to include homicides or attempted homicides committed by children who were age 10 and over. *See* Wis. Stat. Ch. 938 (1995-96). The criteria regarding deterrence now required the court to determine whether retaining jurisdiction was not necessary to deter the child or other children from committing the offense for which the child was now under original adult court jurisdiction.[9] The legislature later changed the language of Wis. Stat. § 970.032(2) to place the burden on the child to prove the three criteria for transferring adult jurisdiction by a preponderance of the evidence, rather than having the court make findings regarding the three criteria.[10]

This court next considered whether the reverse waiver statute was unconstitutional in *State v. Armstead*, 220 Wis. 2d 626, 583 N.W.2d 444 (Ct. App. 1998). Armstead argued that the statute violated equal protection and the Eighth Amendment, but the court found that Armstead's claims were not ripe for review and declined to address them. Armstead also argued that the terms "adequate treatment" and "depreciate the seriousness of the offense" were unconstitutionally vague. *Id.* at 639. While the court acknowledged that "the standards are strict and therefore make it difficult for Armstead or other juveniles to prove that their case meets the criteria," it noted that "[s]trictness and vagueness are not

[9] 1995 Wis. Act 77.

[10] 1995 Wis. Act 352. *See also State v. Verhagen*, 198 Wis. 2d 177, 190, 542 N.W.2d 189 (Ct App. 1995) (holding that the burden is on the juvenile to prove the three criteria).

synonymous" and concluded that the statute was not unconstitutionally vague. *Id.* at 640.

Then, in *Armstrong v. Bertrand*, 336 F.3d 620 (2003), the Seventh Circuit concluded that Wis. Stat. §§ 938.183(2) and 938.18(5) do not create an impermissible irrebuttable presumption of an adult sentence even if a juvenile disposition might be available. *Id.* at 627. And in 2011, the Wisconsin Supreme Court concluded that sentencing a 14-year-old child to life in prison for committing intentional homicide was not categorically unconstitutional. *State v. Ninham*, 2011 WI 33, 333 Wis. 2d 335, 797 N.W.2d 451. While both of these cases addressed issues related to original adult court jurisdiction, neither of these cases specifically addressed the constitutionality of Wis. Stat. § 970.032(2).

Importantly, these challenges to the reverse waiver statute were considered before the U.S. Supreme Court handed down a series of landmark decisions that explain the constitutional significance of adolescent brain development on children's culpability and capacity for rehabilitation—characteristics fundamental to whether a juvenile's case should be heard in adult or juvenile court. Because the reverse waiver statute does not require the court to consider these characteristics, this court should conclude that the statute is unconstitutional.

C. The reverse waiver statute violates due process because it deprives juveniles of the meaningful hearing required by *Kent v. United States*.

Due process is a fundamental requirement in both criminal and juvenile courts. *In re Tawanna H.*,

223 Wis. 2d 572, 579, 590 N.W.2d 276 (Ct. App. 1998). An individual's substantive and procedural due process rights are rooted in the Fourteenth Amendment to the United States Constitution and Article I, Section 1 of the Wisconsin Constitution. *Kenosha County Dep't of Human Servs. v. Jodie W.*, 2006 WI 93, ¶39 & n. 17, 293 Wis. 2d 530, 716 N.W.2d 845. "[T]he concern of due process is fundamental fairness." *State ex rel. Lyons v. De Valk*, 47 Wis. 2d 200, 205, 177 N.W.2d 106 (1970). "'[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" *Gilbert v. Homar*, 520 U.S. 924, 930, 117 S.Ct. 1807 (1997) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593 (1972)).

It is well-established that once the right to be treated as a juvenile is provided by statute, due process demands that a court conduct a "meaningful review" prior waiving a child to adult court. *Kent,* 383 U.S. at 561-62. Specific to a waiver proceeding, due process requires an adversarial hearing, effective assistance of counsel, and a statement of reasons for the court's decision. *Kent* at 560-62. The court in *Kent* determined that a waiver decision requires the due process protection of meaningful review because it is a "critically important" proceeding determining "vitally important statutory rights of the juvenile." *Kent* at 556, 560. And although *Kent* did not dictate what exact criteria a court must consider in determining whether to waive juvenile jurisdiction, it suggested factors that many states, including Wisconsin, incorporated into their waiver statutes. *See* Wis. Stat. § 938.18(5). These factors include the juvenile's mental maturity and apparent potential for responding to future treatment. *See* Wis. Stat. § 938.18(5)(a).

Our supreme court has determined that the reverse waiver decision is likewise critically important. *State v. Kleser*, 2010 WI 88, ¶83, 328 Wis. 2d 42, 786 N.W.2d 144. The fact that a reverse waiver case originates in adult court does not mean that the juvenile should be deprived of the same due process rights required in juvenile court for a waiver hearing: although under Wis. Stat. § 938.183, the criminal court has exclusive original jurisdiction over a juvenile who falls under one of that statute's categories, under Wis. Stat. § 970.032(2), the legislature has created a pathway to juvenile court if the juvenile proves by a preponderance of the evidence the three reverse waiver criteria. Because the statute creates a constitutionally protected right for the juvenile to have his case heard in juvenile court, the due process protections identified by *Kent* must apply and the reverse waiver hearing "must measure up to the essentials of due process and fair treatment." *Kent* at 562.

The specific essentials for due process and fair treatment for a reverse waiver hearing have not been decided by the U.S. Supreme Court. But since the creation of the reverse waiver statute, the Court has issued four decisions—*Roper v. Simmons*,[11] *Graham*

[11] *Roper v. Simmons*, 543 U.S. 551, 570, 125 S. Ct. 1183 (2005) (imposing the death penalty on an individual for crimes committed before the age of 18 constitutes cruel and unusual punishment).

v. Florida,[12] *Miller v. Alabama*,[13] and *Montgomery v. Louisiana*,[14]—in which the Court has emphasized the fundamental differences between adult criminals and juvenile offenders and that these differences require greater protection and special treatment for children. The Juvenile Justice Committee's assertion that some 10-year-old children are "law violators who often are physically and mentally mature" can no longer justify the current reverse waiver criteria.[15]

Instead, in order to provide a meaningful review of whether reverse waiver is appropriate, the criteria must reflect the following:

> First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risktaking.
>
> Second, children are more vulnerable ... to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings.

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[12] *Graham v. Florida*, 560 U.S. 48, 70, 130 S. Ct. 2011 (2010)(sentences of life without the possibility of parole for youth convicted of crimes other than homicide constitutes cruel and unusual punishment).

[13] *Miller v. Alabama*, 567 U.S. 472, 132 S.Ct. 2455 (2012)(a sentence of mandatory life in prison without the possibility of parole for a homicide committed by a youth constitutes cruel and unusual punishment).

[14] *Montgomery v. Louisiana*, 577 U.S. 190, 211-213, 136 S.Ct. 718 (2016) (*Miller*'s prohibition on mandatory life without parole sentences for youth should be applied retroactively because it established a new substantive constitutional rule).

[15] *Blueprint* at 13.

> And third, children have a greater capacity for reform and rehabilitation than adults because their character and traits are not as "well formed," are "less fixed," and less likely to be "evidence of irretrievabl[e] deprav[ity]."

Miller, 567 U.S. at 471 (internal quotations and citations omitted; breaks added between sentences). These differences "render suspect any conclusion that a juvenile falls among the worst offenders." *Roper,* 543 U.S. at 570.

Although the four cases cited above address children subject to the harshest adult sentences, the Supreme Court has not limited the application of its "children are not little adults" analysis to sentencing cases. In *J.D.B. v. North Carolina*[16], the Court concluded that age is an important factor for purposes of a *Miranda* custody analysis and that children should not be held to the same standard as adults. *Id.* at 262. The Court noted that officers and judges "simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult." *Id.* at 279-80.

The Supreme Court's jurisprudence in this area has been driven by the science of adolescent brain development. Because children's characters are not well formed, and because children are more capable of change "a greater possibility exists that a minor's character deficiencies will be reformed." *Graham*, 130 S. Ct. at 2026 (citing *Roper*, 545 U.S. at 570). Contrary to the Juvenile Justice Committee's assertions, the terms "child" and "children" are, in fact,

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[16] *J.D.B. v. North Carolina*, 564 U.S. 261, 131 S. Ct. 2394 (2011).

appropriate when applied to youth who commit even the most heinous offenses.[17]

Without consideration of these characteristics of youth, children who may be more appropriate for the juvenile system remain in the adult system because the three reverse waiver criteria do require the court to consider information that is fundamental to determining whether a juvenile should remain in criminal court or be waived to juvenile court, including the juvenile's capacity for reform and rehabilitation. And although "juveniles can sometimes act with the same culpability as adults," it is only in "rare and unfortunate cases." *Graham*, 560 U.S. at 109 (Thomas, J. dissenting)(citations omitted). The current reverse waiver criteria violate due process because they do not provide a meaningful opportunity for a juvenile to prove that he is not one of the rare and unfortunate cases.

In particular, the criterion of whether waiver would depreciate the seriousness of the offense fails to consider how the unique characteristics of youth impact the seriousness of any given offense. The Supreme Court's decisions require us to acknowledge that a youth who commits an offense is less culpable than an adult who commits it. *See Graham,* 560 U.S. at 68. The fact that our legislature has created a means for a juvenile to have his case heard in juvenile court via the reverse waiver procedure is meaningless if we do not require the criminal court to consider that children's "lack of maturity and an underdeveloped sense of responsibility" leads them to poor decision-making—a concept so fundamental that the Supreme

[17] *Blueprint* at 9; *see Miller*, 567 U.S. at 471.

Court described it as something "every parent knows." *Id.* at 569 (internal citations omitted).

The reverse waiver statute takes the child's age into account—reverse waiver is obviously only available to a juvenile charged in adult court—but not the *impact of youthfulness* on the seriousness of the offense and whether the juvenile must be retained in adult court or waived to juvenile court. The criminal justice system is not designed or suited for children; this is why the juvenile justice system exists. Wis. Stat. § 938.01(2). Only in "rare and unfortunate" cases should a juvenile remain in criminal court, and the reverse waiver should reflect the Supreme Court's direction.

In *Miller*, the Court noted six characteristics that should be considered during sentencing in light of the differences between adults and children: (1) the youth's chronological age related to immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the juvenile's family and home environment that surrounds him; (3) the circumstances of the offense, including the extent of participation in the criminal conduct; (4) the impact of familiar and peer pressures; (5) the effect of the offender's youth on his ability to navigate the criminal justice process; and (6) the possibility of rehabilitation. *Miller*, 567 U.S. at 477-78. These factors mirror the factors used in a waiver hearing. *See* Wis. Stat. § 938.18(5). These are the factors that reflect the differences between adults and children and therefore ensure due process for a juvenile whose case is subject to original adult court jurisdiction.

Because the criteria in the reverse waiver statute does not include criteria that require the court to consider the reduced culpability of youth and the juvenile's prospects for rehabilitation, the statute is unconstitutional beyond a reasonable doubt.

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

The circuit court determined that Noah proved that retaining jurisdiction was not necessary for purposes of deterrence. (111:18; App. 35). The court explained that it was difficult to know whether retaining jurisdiction was necessary to prevent Noah from committing another homicide and that "the State has conceded, and the Court agrees, that there's nothing that one court does in one case that's going to affect general deterrence." (111:17-18; App. 34-35). Therefore, Noah addresses only the first and second reverse waiver criteria.

A. The court erroneously exercised its discretion in concluding that Noah did not prove by a preponderance of evidence that, if convicted, he could not receive adequate treatment in the criminal justice system.

The statute does not require a juvenile to prove that there is *no* treatment in the adult system to satisfy the first criterion. Rather, it "permits the circuit court to balance the treatment available in juvenile system with the treatment available in the adult system and *requires it to decide under the specific facts and circumstances of the case which treatment will better benefit the juvenile*." *Dominic E.W.*, 218 Wis. 2d at 56 (emphasis added). The circuit court

erroneously exercised its discretion because it failed to balance the treatment available to Noah in the adult and juvenile systems and decide which treatment would better benefit Noah. Even without comparing what is available in the two systems, Noah proved by a preponderance of the evidence that his treatment needs could not be met in the adult justice system.

The court acknowledged that the burden on Noah to prove that he could not receive adequate treatment in the adult system was complicated by the fact that Noah was only 10 years old.[18] (111:3; App. 20). The court reviewed Noah's behavioral history, the fact that he suffered a head injury, and that his family sought treatment for him. (111:3-5; App. 20-22). The court also noted that since being in detention, Noah had been evaluated by four doctors, three of whom testified and provided three different diagnoses. (111:5; App. 22). Between the different doctors, Noah was diagnosed with adjustment order with mixed disturbance of emotions and conduct, oppositional defiant disorder, schizophreniform disorder, and attenuated psychosis syndrome. (111:4-7, 11; App. 21-24, 28). Two doctors noted that Noah was also experiencing symptoms of depression, anxiety, and aggression. (111:5, 7; App. 22, 24).

The court noted that there was no diagnosis that clearly indicated what Noah's treatment needs were. (111:9; App. 26). The court noted that "that's one of the problems with this statute and with what the statute requires a defendant to prove." (111:10; App. 27). The court noted that Noah was only 12 years old, that he

[18] Noah was 10 at the time of the alleged offense and 12 at the time of the reverse waiver hearing.

had not yet gone through puberty, that his mental health diagnosis was unknown, and that it was also unknown whether Noah "even needs" mental health treatment. (111:10; App. 27). The court reiterated that "there is no clear treatment need that has been identified." (111:11; App. 28). The court said that although Noah's behavior in causing the death of his mother "make[s] us wonder about what his mental health treatment needs are," she concluded they were "unclear." (111:11; App. 28).

The court erred when it concluded that no treatment need had been identified and that Noah's treatment needs were unclear. (111:11; App. 28). On the contrary, in 2022, Noah began receiving therapy to help manage his emotions and behavior. (46:4). In addition, Dr. Caldwell explained that Noah's primary treatment needs "involve monitoring and treatment for his mental health issues." (60:23). Noah needed "treatment focused on assisting him to accept the death of his mother and to accept responsibility for his role in her death and the traumatic impact on the family." (60:23). Further, Noah needed "counseling services to help him develop additional coping strategies for dealing with his emotions constructively." (60:23).

Importantly, Dr. Caldwell noted that Noah's desire for approval presented risk to him if his main social contacts are "with older and more antisocial inmates." (60:24). Dr. Caldwell's report explained that Noah's initial placement, if there was one, would likely be in a juvenile facility until he turned 18. Dr. Caldwell further explained:

> if he is transferred to an adult prison at that point he would be in a setting where the required

> services are far more limited. In addition to staffing limitations, psychotherapeutic services in adult corrections would not typically be provided in the form that is required. Rather, mental health services typically have the goal of managing the behavior of the inmate. Also, in the adult corrections system, in order to employ treatment staff most efficiently, treatment is typically delayed until near the end of the inmate's sentence. This presents the likelihood that progress made in the juvenile facility will be lost during the gap in active services created by this approach to allocation of treatment resources. In addition, while Noah is unlikely to pose a behavior management problem, his mental disorder may make him a highly vulnerable youth that may be targeted by more antisocial individuals. The risk of serious harm to him would be much greater in the adult system than with a juvenile placement.

(60:24-25).

Dr. Caldwell's concern about the delay in treatment was echoed by other witnesses. DOC employee Alisha Kraus testified that that there were close to 11,000 people on the waitlist for the cognitive behavioral program and that time to release was the main consideration in taking individuals from the waitlist and offering them programming. (87:11-12). Dr. Dykstra testified that the DOC was prioritizing getting people ready for discharge and that the data suggested that people waited a "long, long, long, long time" for services. (74:78). And, as a black male, Noah was less likely to get into treatment than a white male. (110:37-38). This wait for services presented a likelihood that Noah would wait years in the adult criminal system before receiving any treatment at all.

By comparison, if Noah were in the juvenile system and adjudicated delinquent for first degree

intentional homicide, he would be in the Serious Juvenile Offender ("SJO-A") category. (88:54). Once Noah completed the programming at Lincoln Hills, he would step down to a less-restrictive placement and receive services in the community as needed. (88:50-57). This could include mental health services, which would be arranged for before release. (88:56-57). Dr. Dykstra also testified about residential treatment centers and the treatment they provide for youth in the juvenile justice system. (74:39-46). He explained that a child with a brain injury might need more general therapy and modifications to their school schedule. (74:53). Dr. Dykstra explained that he had seen children with a schizophreniform diagnosis do very well in residential treatment programs. (74:58). But in considering this option, the court noted that it was "very unlikely that [Noah] would receive a noncustodial disposition in the juvenile system, which would be necessary for him to receive residential treatment placement." (111:13; App. 30).

This was inaccurate. Casey Gerber with the DOC testified that if Noah were in the SJO-A program, he would serve a mandatory one-year minimum confinement at Lincoln Hills and that although it was possible a youth would stay confined until age 25, if the youth completed programming and services they might transition to a nonsecure placement. (88:56). Residential treatment is a nonsecure placement. So even if placed in the SJO-A program, Noah could still benefit from the treatment options outlined by Ms. Gerber and Dr. Dykstra.

The court also noted:

> The other problem with that first statutory requirement that the defendant is required to

> prove, that, if convicted, the juvenile could not receive adequate treatment in the criminal justice system, is that whether he is adjudicated in the juvenile system or he is convicted in the adult system, up until the age of 18, if he receives a custodial treatment, he will receive the exact same treatment. He will be held in the juvenile correctional system, and his treatment will be no different whether he's in adult court or juvenile court.

(111:11-12; App. 28-29). This court should share this concern. All juveniles who receive a custodial sentence in the criminal justice system are placed in a juvenile facility until they turn 18 years old.[19] For that reason, the younger the child is at the time of the reverse waiver hearing, the more difficult it is for him to prove that he cannot receive adequate treatment in the criminal justice system both because it is nearly identical to the treatment he would receive in the juvenile system and because he must anticipate what might be available once he turns 18, which is years away. In other words, it is more difficult for a 10-year-old to prove that he cannot have his treatment needs met in the adult system than it is for a 17-year-old to do so.

The court did consider what was available in the adult prison system and recognized that there would be a long wait before any services became available. (111:13; App. 30). The court noted that Dr. Lentz testified that essentially half the people leaving the adult system have not had the appropriate

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[19] *See* Wis. Stat. § 938.138(3). The statute allows the department of corrections to place 17-year-olds in state prisons, other than the Wisconsin Secure Program Facility. But DOC Classification Sector Chief Christy Zebke testified that youth remain at Lincoln Hills until their 18th birthday. (88:22).

intervention, "which tells us that services are limited in the adult system." (111:14; App. 31). The court also noted that there are mental health services available at the adult prisons, but that Noah's mental health needs could not be determined because the doctors who evaluated Noah "really cannot agree on what his treatment needs are." (111:14; App. 31). As explained above, Dr. Caldwell did inform the court what Noah's treatment needs were, and although the doctors disagreed on diagnoses, no doctor disagreed with the treatment needs identified by Dr. Caldwell. And no one disagreed, regardless of the diagnosis, that he'd be more readily able to receive proper treatment in the juvenile system as opposed to the adult prison system.

Moreover, although the court recognized that it would be "a long wait" before any services would be available in the adult system, the court failed to make the connection that this meant it would likely be years before Noah received *any* services at all. By no measure can sitting in prison for years without treatment be considered "adequate treatment in the adult system."

The court erroneously exercised its discretion both when it concluded that Noah's treatment needs were unknown and when it concluded that, no matter what Noah's future treatment needs were, they could be adequately addressed in the adult criminal justice system, because no evidence supported these conclusions.

B. The court erroneously exercised its discretion when it concluded that Noah did not prove by a preponderance of the evidence that transferring jurisdiction to the juvenile court would not depreciate the seriousness of the offense.

In considering this factor, the court noted that the offense was a first degree intentional homicide and explained the challenge of making the determination where the only information the court had regarding the offense was testimony from the preliminary hearing. (111:15-16; App 32-33). The court found that the testimony indicated there was preplanning of the offense in that Noah "took the keys to the gun safe, unlocked the gun, retrieved the gun, went downstairs to confront his mother and shot her at very close range." The court stated the conduct was "aggravated, dangerous, and violent." (111:16; App. 33).

The court also asked for victim input "when determining the seriousness of the offense." (111:16; App. 33). The court indicated that although the statute does not mention victim input, "I don't know how a court can judge the seriousness of the offense" without considering the effects on the victim. (111:16; App. 33). It then concluded that Noah's family loves him and noted the family was not in agreement as to which court should have jurisdiction. (111:16; App. 33).

Recognizing the effect of the offense on the family is not an inappropriate consideration when determining whether waiving jurisdiction would depreciate its seriousness. *See Interest of Adams*, 2024 WI App 44, ¶ 35, 413 Wis. 2d 202, 11 N.W.3d 190. In *Adams*, the court considered the fact that the family

was present in court in order to underscore the ongoing trauma and tragedy for the victim's family. *Adams* at ¶35. But nothing in Wis. Stat. § 970.032 indicates that the effect on the victim must be considered. In concluding that it *could not* determine the seriousness of the offense without victim input, the court erred.

The circuit court also erroneously exercised its discretion in concluding that Noah failed to prove that reverse waiver would not depreciate the seriousness of the offense. First degree intentional homicides are by their nature aggravated, dangerous, and violent. Even so, the legislature has created a means for a child charged with this offense to have his case heard in juvenile court. Here, the circuit court failed to explain why Noah's case being heard in juvenile court would depreciate the seriousness of the offense.

Overall, the court erred in concluding that Noah—who due to his age is immature, who has an underdeveloped sense of responsibility, whose character is not as well formed as an adult's, whose actions are less likely than an adult's to be evidence of irretrievable depravity, who was described as being amenable to rehabilitation, and who described having a turtle, a kitten, and a baby zebra as imaginary pets (51:183) – should be tried as an adult in this matter.

CONCLUSION

For the reasons stated above, Noah asks that this court: (1) find that Wis. Stat. § 970.032(2) is unconstitutional and (2) reverse the order denying his motion that the circuit court waive its jurisdiction.

Dated this 16th day of July, 2025.

Respectfully submitted,

Electronically signed by
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CERTIFICATIONS

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 10,664 words.

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 16th day of July, 2025.

Signed:

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