

STATE OF WISCONSIN  
IN SUPREME COURT

Case No. 2022AP807

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*In the interest of K.J.P., a person under the age of 17:*

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

K.J.P.,

Respondent-Appellant-Petitioner.

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PETITION FOR REVIEW

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### **ISSUE PRESENTED**

At the time of a juvenile waiver hearing, a child possesses the presumption of innocence because the State has not been required to provide their guilt to the charged offense beyond a reasonable doubt. Given a child's right to make the State prove their case beyond a reasonable doubt, is it proper for a circuit court presiding over a waiver hearing to nonetheless consider a child's refusal to confess to a crime when considering the appropriateness of waiver?

The court of appeals affirmed the decision of the circuit court, holding that the circuit court did not improperly assume that K.J.P. was guilty; however, the court of appeals also commented that "the court could reasonably infer from K.J.P.'s refusal to acknowledge the sexual assault, when contrasted with his acknowledgment to other charged conduct, that K.J.P. would not be amenable to the treatment recommended to address the assault." (App. 15).

### **CRITERIA FOR REVIEW**

This case warrants review because it presents a real and significant law of constitutional law: a child's right to due process. § 809.62(1r)(a). The extent to which a circuit court deciding whether to waive a child into adult court may consider a child's failure to confess to criminal conduct implicates an accused's right to due process, and their right to the

presumption of innocence until proven guilty beyond a reasonable doubt. *Spick v. State*, 121 N.W. 664, 140 Wis. 104. (1909). *In re Winship*, 397 U.S. 358, 363, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970).

This is an issue that is likely to recur, because the question presented here may be implicated in virtually every juvenile waiver case where a child does not confess to the underlying allegations. Wis. Stat. § 809.62(1r)(c)3. Unlike a sentencing or dispositional hearing, where the State has proven the person's guilt beyond a reasonable doubt, a juvenile facing waiver has not yet had a meaningful opportunity to hold the State to its burden. This Court should grant review to provide clarity to litigants and the courts involved in waiver hearings regarding to what extent, if any, due process permits a court to consider a juvenile's failure to confess to the underlying conduct when weighing the waiver factors.

### STATEMENT OF THE CASE AND FACTS

Kyle<sup>1</sup> was 14 years old when he was charged in his first and only delinquency case. Given his young age, the presumption was that any charges he faced would be addressed in juvenile court. However, the State moved the court to take the grave step of removing Kyle from juvenile court and sought to force him to defend his case in adult court instead. *See Wis.*

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<sup>1</sup> A pseudonym is being used in accordance with Wis. Stat. § 809.19(1)(g).

Stat. § 939.18. The court ultimately found that the State had met its burden, and granted the request to waive Kyle into adult court. The court of appeals affirmed and this petition for review follows.

On December 2, 2021, a delinquency petition was filed charging Kyle, then 14 years old, with four counts: 1st degree sexual assault, armed robbery with use of force, armed carjacking, and kidnapping. (3)(9). Kyle was alleged to have robbed an elderly victim at knifepoint, kidnapping her, stealing her car, and sexually assaulting her. (3)(9). A waiver petition was filed simultaneously, seeking to move Kyle into adult court. (4)(5).

Prior to the hearing, Dr. Karyn Gust-Brey conducted a court-ordered psychological evaluation on Kyle and submitted a report that summarized her findings, which ultimately recommended retention in juvenile court. (37:10). To prepare the report, Dr. Gust-Brey interviewed Kyle and his mother, reviewed the delinquency and waiver petitions, administered several psychological instruments on Kyle, and observed his behavior. (37:1-2).

Kyle reported that he was raised by his mother and had lived in several different parts of Wisconsin. (37:2). He has two brothers and sisters and his father was sporadically involved in life, having a history of drug abuse and incarceration. (37:2). Kyle's mother reported to Dr. Gust-Brey that he had spent a year in foster care after an aunt abused his brother in the family home; she indicated that Kyle had been

mistreated in one of the foster homes. (37:2). She said that Kyle had at one point stayed with his father until she learned that he would leave Kyle alone to use drugs, and wouldn't send him to school. (37:2). She said that recently, in 2021, Kyle's father left the family home and he did not speak at all for a month. (37:2). She reported a family history of bipolar disorder and schizophrenia. (37:2). She denied any developmental or physical issues for Kyle. (37:2).

Kyle reported that he was physically abused in a foster home and had been touched by an adult male when he was a child. (37:3). He was also "jumped and robbed" at age 12 or 13. (37:3). Kyle reported using marijuana periodically to calm himself down; he denied using any other illegal substances. (37:3).

The family did not report any previous mental health diagnosis for Kyle. (37:3). Kyle reported feeling sad and guilty about the allegations against him. (37:3). Kyle reported that he experienced blackouts, which he reported happened during the incident. (37:3). He told Dr. Gust-Brey that he can sometimes hear someone talking to him and telling him to hurt other people. (37:3). Kyle reported that he had cut himself in the past. (38:3). He reported being interested in medication to help with his symptoms; he demonstrated reluctance to participate in therapy because he finds it difficult to talk to people. (37:3).

Kyle's mother told Dr. Gust-Brey that she had concerns about Kyle's mental health and that several months prior, he had reported hearing voices and

blacking out; she described an incident in which he blacked out and family members had to restrain him. (37:3). She said that she had tried to get Kyle mental health treatment but that it had been difficult due to issues with transportation. (37:3-4).

Dr. Gust-Brey reported that Kyle was readily engaged during the four hours of testing she conducted with him at Washington County Secure Detention. (37:4). Kyle completed eight self-report measures, seven of which had validity scores. (37:4). Five of the seven instruments had validity issues, two of which were invalid and three with cautionary validity; as a result, Dr. Gust-Brey indicated that caution was taking with interpretation. (37:4).

In her opinion, Dr. Gust-Brey reported that the area that could be confidently diagnosed are posttraumatic stress disorder with disassociative symptoms, cannabis use disorder, and adolescent antisocial behavior. (37:8).

Dr. Gust-Brey considered the "personality of the juvenile" waiver factor through the psychological tests and the RSTI, a rating scale used to assess the functioning of juvenile offenders in three areas: risk for dangerousness, sophistication-maturity, and treatment amenability. (37:9). She reported the following conclusions:

- She measured Kyle to be at the upper limit of the low range in terms of dangerousness, and was noted to be in the middle range in terms of violent and



aggressive tendencies and planned criminality. (37:9).

- She measured Kyle to be in the middle range in terms of sophistication-maturity. (37:9).
- She measured Kyle to be in the high range for treatment amenability across the three clusters tested: psychopathology (degree and type), responsibility and motivation to change, and consideration and tolerance of others. (37:9).

Based on the results, Dr. Gust-Brey noted that Kyle fits the profile of a juvenile who should remain in juvenile court in two of the three areas recommended by the RSTI. (37:9-10).

Dr. Gust-Brey noted mental health and substance use concerns for Kyle, and recommended continued monitoring for future mental health concerns given the family history. (37:10). Dr. Gust-Brey noted that Kyle's delinquency case is clearly serious, but recognized that this is his first delinquency case and that he had not received juvenile services previously; she considered the Serious Juvenile Offender program to be an option that would provide a longer period of treatment, services, and supervision. (37:10). She opined, to a reasonable degree of professional certainty, that Kyle should remain in juvenile court. (37:10).

A waiver hearing was held on March 9, 2022, where Kyle stipulated to prosecutive merit. (92:6).

The first witness to testify was Michelle Ederle, a school resource officer at Les Paul Middle School who was on duty on November 30, 2021 at 1:30. (92:17). She recalled that on that date, an elderly woman came to the front door of the school and began waving frantically. (92:17). The elderly woman said she had been robbed at knife point by a young black male. (92:19). She said he came up to her at the library book drop, put a knife to her throat, and took her car and phone; she provided the license plate number of her car. (92:19).

The woman was brought inside and given paper to write what happened, while also explaining the incident out loud. (92:20). She said the male had attempted to sexually assault her, showing the officer that the top button of her pants was undone; she said that she told the male that she was too old for that and that he made her perform oral sex on him, but that "it didn't really work." (92: 20-21).

The second witness was Detective Timothy Probst of the Waukesha Police Department, who responded to the middle school. (92:34). He said that he was familiar with the alleged victim. (92:34)

He met with the victim who said she was assaulted at the library while returning books; she said the male helped her put books in drop but then presented a knife and told her to get into the passenger seat. (92:36). The male drove through some city streets

and then drove to a long apartment building where he forced her to perform oral sex. (92:37). He also tried to take her pants off to have sex but she told him it wouldn't work due to her age. (92:39).

Detective Probst said she was initially calm but eventually became very emotional and they had to summon an ambulance. (92:40). She told police that her cell phone had been taken from her so she couldn't call anyone; she said the male threatened to kill her if she did anything. (92:43).

Detective Probst testified that he eventually heard through dispatch that another officer had seen the victim's vehicle; after a short pursuit in the car and on foot, the male was arrested. (92:43). He heard through the radio that the suspect was identified as Kyle. (92:44).

The victim's husband called police later the same day and described other property that was missing (92:45). Some of the victim's property was ultimately recovered from Kyle. (92:45).

The next witness was Detective Kenny Stucker. (92:58). Detective Stucker interviewed Kyle after he was arrested, and identified him in court. (92:60, 62).

Detective Stucker testified that he read Kyle his *Miranda* rights, and that Kyle agreed to speak with him. *Miranda v. Arizona*, 384 U.S. 436 (1966). (92:63). He testified that earlier that day, he was going around Waukesha looking for a job. (92:65). He indicated that he went to the library, where he saw an elderly lady

having a hard time getting her books in the book drop. (92:65). He said that he then became enraged and pulled a knife out of his pants pocket, told her to get in the passenger seat of her car, and then got in the driver's side seat and drove away from the area. (92:66).

Kyle described the route he took, including stopping behind a Taco John's, and said he asked the victim for money; she gave him her credit card. (92:67). He testified that he left the victim at an apartment building on Maple, and then drove to his house. (92:67). After going by his house, he got back in the car to "ditch it" somewhere else. (92:68). He consented to a SANE exam, but denied that he sexually assaulted the victim. (92:68).

Detective Stucker testified that Kyle was coherent during the interview and did not mention anything about "blacking out" during the incident. (92:69). He testified that Kyle did not know who the president was. (92:73). He recalled that Kyle had been cited for a few municipal violations in the last year. (92:70).

A search warrant was executed on Kyle's house; several of the victim's items were located at the bottom of a black trash bag underneath some grass clippings which was right next to the garage door. (92:72).

The next witness was Kevin Tolzman, a social worker with the Waukesha County Department of Health and Human Services with a little under 25 years of experience. (92:82). He testified that he was

assigned to Kyle's case, and that in waiver cases he works with other members of the department to determine what the overall recommendation will be. (92:84)(92:83). He testified that the Department opposed waiver, and instead supported placing Kyle in the Serious Juvenile Offender Program. (SJO). (92:84).

He confirmed that Kyle was eligible for a five-year order, based on his charges. (92:86). He testified that that children are generally confined at Lincoln Hills, though they can be transferred. (92:88).

Mr. Tolzman testified that he reviewed the report of Dr. Gust-Brey and was aware of the report when the recommendation for retention was made. (92:91). He opined that five years of supervision would be sufficient to provide treatment and services for Kyle. (92:97). The State questioned whether his opinion would change if the DOC were to terminate Kyle after three years; Mr. Tolzman explained if the DOC made such a recommendation, it would be because Kyle's treatment goals and conditions would have been met. (92:97).

The State confronted Mr. Tolzman regarding a line in his report that indicated that he had not yet been able to determine Kyle's potential for responding to treatment. (92:99). Mr. Tolzman explained that because Kyle was in custody, he was not receiving any treatment services; as a result, the Department was unable to observe Kyle receiving treatment. (92:100). The court received the Department's report into evidence. (92:104).

Mr. Tolzman confirmed that, in addition to Dr. Gust-Brey's report, the Department also considered the type and seriousness of Kyle's offense and the protection of the public. (92:105)(93:17). He testified that the decision to recommend retention was not made lightly, and that many conversations were had in terms of available resources and alternatives. (92:110). He confirmed that this case was Kyle's first delinquency referral and that he had one prior truancy referral that was superseded by the present case. (91:111).

Mr. Tolzman testified that in working with Kyle, he was aware of his family structure; specifically, that he lived with his single mother, was one of five children, and was the second oldest. (92:111). Kyle's father had legal and substance abuse problems, and was in warrant status at the time. (92:112). Kyle had primarily lived with his mother, but had spent one year in foster care. (92:112). He testified that the family was unable to confirm any formal mental health diagnosis, but indicated that there was a family history of schizophrenia and bipolar disorder. (94:4). They also indicated that Kyle would sometimes have "blackouts." (94:5). He discussed a few incidents in the detention facility; in one, Kyle had a blackout episode, in another, he was placed on suicide watch, and in a third, he appeared to be in a catatonic state. (94:6).

Mr. Tolzman testified that services that may be beneficial for Kyle included treatment for marijuana use, post-traumatic stress disorder, trauma informed care, treatment for the sex offense, dialectical

behavioral therapy, aggression replacement therapy, and restorative justice. (92:115).

He testified that he was familiar with the programming and therapy available at Lincoln Hills and SJO, both of which he believed offered the appropriate services. (92:116). He testified that his recommendations came largely from his conversations with Kyle, his experience as the corrections liaison for Waukesha County, and his familiarity with the programming offered at Lincoln Hills. (94:3).

He testified that he considered Kyle to be physically mature for his age and that he was not on track to graduate. (94:8). He testified that Kyle had been cooperative with school services while in custody, and that he generally handled himself well when he had minor disagreements with peers. (94:9). He testified that that demonstrated a level of cooperation and ability to manage and control his behavior. (94:9-10). He testified that Kyle had expressed to him a willingness to cooperate with treatment and a desire to find answers for some of the issues he had. (94:11). He testified that Dr. Gust-Brey also reported that Kyle had a high level of amenability to treatment. (94:10). He confirmed that she had rated Kyle low on the dangerousness scale and as very low to low average cognitively. (94:7, 13).

The case was adjourned for an oral ruling.

On April 28, 2022, the circuit court issued its oral ruling. (91)(App. 5).

The court began by summarizing the background of the case, beginning with a recitation of the evidence presented regarding the underlying allegations, including an impact statement submitted by the complainant. (91:6-9, 11)(App. 10-13, 14).

The court next discussed the professional reports and recommendations submitted regarding waiver. (91:10)(App. 14). The court noted the psychological assessment of Dr. Karyn Gust-Brey, who concluded that Kyle scored low for risk of dangerousness, high in sophistication maturity, and high for treatment amenability. (91:10)(App. 14). The court acknowledged Dr. Gust-Brey's professional opinion that Kyle should remain in juvenile court. (91:10)(App. 14). The court also noted the waiver report produced by social worker Kevin Tolzman of the Waukesha Department of Health and Human Services, which recommended that Kyle be retained in juvenile court. (91:11)(App. 15). The court acknowledged that both reports were admitted into evidence. (91:16)(App. 20).

The court next summarized the evidence presented at the waiver hearing, first acknowledging that Kyle stipulated to prosecutive merit. (91:11-12)(App. 15-16).

The court summarized the testimony of Officer Endre (the school resource officer at Les Paul Middle School), Detect Probst (the investigating detective), and Detective Stucker (the sensitive crimes detective who interviewed Kyle). (91:12-14)(App. 16-20). The



court noted that Detective Stucker's testimony regarding the concealment of the victim's property in a garbage bag was "key to the court's decision" regarding waiver. (91:14)(App. 18).

The court summarized the testimony of social worker Kevin Tolzman, a profession with 24 years of experience. (91:15)(App. 19). She discussed his testimony that Kyle was eligible for the SJO and could be placed in the program for up to five years should Kyle be adjudicated of the sexual assault charge, a Class B felony. (91:15)(App. 19). Through that program, the DOC could place Kyle at Lincoln Hills, at Lad Lake Residential, or in the community with electronic monitoring. (91:15)(App. 19).

The circuit court expressed concern at Mr. Tolzman's testimony that Kyle's term of confinement could be shortened at the discretion of the DOC, stating:

When pressed, Mr. Tolzman merely stated, without answering the question as to whether three years was an adequate amount of supervision since that could be the least that the DOC would require, that if the DOC did decide to terminate supervision early, Mr. Tolzman would just assume they believed they had met the goals for [Kyle]. Mr. Tolzman said that he would find that acceptable.

(91:16)(App. 20).

The court next summarized the positions of the parties. The court remarked that the State believed

waiver was warranted because, in its opinion, keeping Kyle in juvenile court would unduly depreciate the seriousness of the offenses and would be inadequate to protective the public. (91:16)(App. 20). The defense, on the other hand, advocated for retention, arguing that the only statutory factor that bent towards waiver was the seriousness of the offense; the defense also emphasized that, at 14 years old, Kyle's brain was still developing, an issue that the United States Supreme Court has considered in several Eighth Amendment cases. (91:17-19)(App. 21-23). The defense argued that Kyle was a prime candidate for the SJO program, which would allow for his supervision through age 19. (91:17)(App. 21).

The court laid out the relevant law regarding juvenile waiver, and then discussed the factors the court must consider under Wis. Stat. 938.18(5). (91:20-23)(App. 24-27).

As to Kyle's personality, the court noted the Department's description of him as "an engaging 14-year-old with a sense of humor" and his mother's opinion that Kyle was a good kid and that the allegations were out of character. (91:23)(App. 27).

The court discussed defense counsel's concern that Kyle may have some mental illness, but noted that there was no previous mental health diagnosis. (91:23, 33)(App. 27, 37). While Kyle told Dr. Gust-Brey that schizophrenia ran in his family and that he heard voices, Dr. Gust-Brey noted in her report that at times Kyle acted in an overexaggerated fashion. (91:34)(App.

38). No evidence was presented regarding any developmental disabilities and Kyle was noted to be physically mature for his age. (91:34)(App. 38).

The court noted Mr. Tolzman's concerns regarding Kyle's mental maturity. (91:34)(App. 38). Mr. Tolzman had mentioned several incidents in the jail, including a blackout, a possible suicide watch, and an occasion where Kyle appeared to be in a catatonic state. (91:34)(App. 38). The court noted that Kyle had a pending charge for battery to a prisoner for an incident that occurred while in secure detention, but said that case did not factor into the waiver decision. (91:35)(App. 39).

The court acknowledged that Kyle had not previously received treatment for his mental health needs. (91:35)(App. 39). Kyle's mother reported that a few months prior to the alleged crimes, Kyle had reported hearing voices and blacking out; she tried to get him mental health services, but was unable to due to her lack of transportation. (91:38)(App. 42). The court said it was not discrediting those statements, but expressed skepticism because Kyle did not tell Dr. Stucker that he had blacked out during his interrogation. (91:38)(App. 42).

The court indicated it was putting "very little weight" on Dr. Gust-Brey and Mr. Tolzman's testimony that Kyle was amenable to treatment based on the invalid responses that were noted in several of the components of Kyle's psychological evaluation. (91:35)(App. 39). The court noted the portion of Dr.

Gust-Brey's report that Kyle was impulsive in areas that have "high potential for negative consequences, including suicidal ideation," and that he admitted to drug use. (91:40)(App. 44). The court noted that Dr. Gust-Brey opined that Kyle suffers from PTSD with dissociative symptoms, cannabis use disorder, and adolescent anti-social behavior. (91:41)(App. 45). The court expressed general concern that Dr. Gust-Brey had not been provided with the full details of the allegations and the attempts at cover-up, and that his risk rating may be artificially low. (91:41)(App. 45).

The court noted that Kyle had primarily lived with his mother; his father had a history of incarceration and drug use, and had a warrant out for his arrest. (91:34)(App. 38). Kyle's mother had criminal matters pending in another county. (91:34)(App. 38). Kyle had reported mistreatment in a prior foster home. (91:34)(App. 38).

The court opined that this factor (the personality of the juvenile) was "more neutral" with regards retention versus waiver, but acknowledged that the factor otherwise weighed in favor of retention. (91:24)(App. 28).

The court acknowledged that Kyle's prior record was the "easiest" factor to weigh, because Kyle had never been found delinquent of any juvenile offense. (91:24)(App. 28). The court noted that Kyle had received municipal citations previously but that ultimately, this factor weighed in favor of retention. (91:24)(App. 28). However, later in the hearing, the

court appeared to conflate this factor with the seriousness of the offense, stating:

As to the next criteria, the juvenile's prior record and the seriousness of the offense. In addition to the statements where the Court found the motives listed by Mr. Tolzman to not be credible, the Court adds that it finds all of that conduct to hide and cover up the offenses to be consistent with someone who knew he had committed criminal acts and outrageously awful acts.

(91:36)(App. 40).

The court expressed disdain at the section of the Department's waiver report regarding Kyle's motives and attitudes, indicating that the information showed "premeditation, planning, intent, and malicious heart." (91:25-26)(App. 29-31). Regardless, the court found that the factor tilted "somewhat" in favor of retention. (91:25)(App. 29).

As to the type and seriousness of the offense, the court determined that the allegations, if established, were serious. (91:26-28)(App. 30-32). The Court found that the State had met its burden regarding this factor. (91:28)(App. 32).

As to the adequacy and suitability of facilities and services in the juvenile system, the court recognized that the parties greatly disagreed regarding the adequacy of the SJO program. (91:28)(App. 32). The circuit court expressed its opinion that the Department had a "lack of control" over the terms, conditions, and oversight for Kyle if he

entered the SJO program. (91:28)(App. 32). The court considered that Kyle could be supervised through the SJO program until he was 19, whereas in the adult system he would face much greater exposure. (91:29)(App. 33).

The court asserted that there was “no testimony the services to be provided to Kyle would vary from the juvenile to the adult system or that he could not be able to receive some services in the adult court.” (91:29)(App. 33). She did note Mr. Tolzman’s testimony that Kyle would likely receive the following treatment if placed on a juvenile order: AODA marijuana use, PTSD, a psychological evaluation, sexualized behavior treatment or therapy, dialectic behavior therapy, aggression replacement therapy, restorative justice therapy, to provide apologies and make amends to the victim, as well as possible anger management. (91:37)(App. 41).

The court cited to Mr. Tolzman’s testimony that the services available in juvenile court, and specifically SJO, would be adequate for Kyle. (91:29)(App. 33).

Regarding Mr. Tolzman’s testimony that turning his life around and taking advantage of treatment was dependent on Kyle’s motivation, the court concluded that “nothing shows he has any intention of doing so.” (91:30)(App. 34). In support of that contention, the circuit court referred to Kyle’s concealment of the victim’s items and Kyle’s comment

that he could not recall the sexual assault but could remember other details of his crimes:

Remember, [Kyle] remembers the knife, remembers demanding the victim get in the car, remembers driving the car, remembers going down the wrong way, remembers asking for cash, remembers the victim giving him her credit card, remembers telling her he was the devil, remembers driving by Taco Johns, remembers asking her if she wanted to be dropped off at her home, remembers going to his home to ditch his coat, the incriminating items, remembers driving back out the ditch the car, but he doesn't remember the sexual assault.

(91:30)(App. 34).

Based on this, the court indicated that this factor (the adequacy and suitability of services in the juvenile program) was "neutral or possibly even tilted in favor of waiver." (91:32)(App. 36).

At the conclusion of its comments, the court summarized its findings regarding the waiver factors. (91:42)(App. 46).<sup>2</sup>

The court found that the factor that weighed most towards waiver was the type and seriousness of the offense; the court indicated that the factors regarding the personality of the juvenile and the

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<sup>2</sup> The court's concluding comments repeat some of the findings discussed previously, but also includes distinct reasoning. For this reason, counsel again summarizes the court's concluding comments despite there being some repetition.

adequacy and suitability of facilities and services available for treatment were also significant. (91:42)(App. 46).

The court noted that it must consider the best interests of the child but that the court had the discretion to attribute the weight it deemed appropriate to each of the statutory factors. (91:43, 46)(App. 47, 50).

Regarding the seriousness of the offense, the court concluded that the allegations showed “brutality” and “casual disregard for the privacy of the victim.” (91:46)(App. 50).

While the court found that Dr. Gust-Brey and Mr. Tolzman were “competent, hard-working individuals with personal integrity” who were “well represented in their fields,” it asserted that their recommendations that Kyle be retained in juvenile court were “suspect.” (61:47)(App. 51). Regarding Dr. Gust-Brey, the court reiterated its concern that she was not provided with all the relevant information and questioned whether Dr. Gust-Brey understood what the SJO program contemplated and expressed dismay that Dr. Gust-Brey did not explain what a significant period of incarceration would be, or what she would consider appropriate. (91:47)(App. 51).

While Dr. Gust-Brey’s report acknowledged that the case was “clearly serious,” the court expressed concern that that “is the only sentence that contemplates what is alleged to have occurred.” (91:48)(App. 52). The court then repeated the



allegations against Kyle, and opined that it would “call that more than, quote, clearly serious, quote.” (91:48)(App. 52). The court continued: “Query, does Dr. Gust-Brey even recognize that this case is more than clearly serious? It [is] one step below, or perhaps even is, excessively serious. It is egregious, highly serious.” (91:48). For those reasons, the court indicated it was not placing much weight on the recommendations of Dr. Gust-Brey. (91:49).

The court also expressed concerns regarding Mr. Tolzman’s testimony. Mr. Tolzman testified that Kyle’s case was one of the most serious offenses he had seen in his career, he nonetheless believed retention was appropriate because he believed the five years or less available in juvenile court would be sufficient. (91:50)(App. 54).

As to Kyle’s personality, the court found that factor bent “slightly” against waiver, given in part that he has “absolutely no prior record” save for municipal tickets. (91:50)(App. 54). The court repeated its concerns regarding that Kyle’s motives and the invalid responses on his assessment. (91:50-51)(App. 54-55). Because of its concerns about Dr. Gust-Brey’s evaluation and recommendation, the court said it was also not giving the Department’s recommendation for retention “much weight” because of its “heavy reliance” on the evaluation. (91:51)(App. 55).

The court repeated “there is no question by anyone that this is a serious case with serious charges that are shocking in their depravity,” to such a degree

that the court felt that the allegations were akin to the depravity of the offenses in *In the Interest of B.B.*, in which a juvenile was accused of shooting his father, step-mother, and three sisters, and then burned their bodies. *In the Interest of B.B.*, 166 Wis. 2d 202, 479 N.W.2d 205 (1991). The court concluded that this factor weighed “extraordinarily heavily against the juvenile and in favor of waiver.” (51:62)(App. 66).

The court concluded that the adequacy and suitability of the juvenile system to address Kyle’s needs weighed in favor of waiver, despite noting Mr. Tolzman’s testimony that there are many programs in the juvenile justice system that would provide treatment, afford insight to Kyle, and potentially help hold him accountable for his actions. (91:51)(App. 55). The court stated that “there is no guarantee that the DOC would incorporate those programs, nor that they would be an appropriate length of supervision in an appropriate setting.” (91:52)(App. 56). Additionally, based on its concerns about Dr. Gust-Brey’s report, the court indicated concerns that Kyle would be a good candidate for that treatment. (91:52)(App. 56).

Finally, the court contemplated the best interest of the public, considering the impact statement of the victim and the testimony of the law enforcement officers, which it found to be “compelling.” (91:52). The court then concluded that “that factor, too, leans in favor of waiving [Kyle’s] case into adult court. (91:52-53)(App. 56-57). The court proceeded to grant the petition for waiver. (91:53)(App. 57)(App. 3-4).

Kyle filed a petition for leave to appeal, which was granted. (89)(97). In the court of appeals, Kyle argued that the circuit court erroneously exercised its discretion erroneously exercised its discretion when it waived him into adult court in four respects:

- (1) That the circuit court failed to consider Kyle's pattern of living as required under Wis. Stat. § 938.18(5)(a);
- (2) That the circuit court's consideration of the "prior record of the juvenile" factor was erroneous because it emphasized the present, unproven offense in its comments;
- (3) That the circuit court erred in considering Kyle's amenability to treatment as part of its consideration of the "personality of the juvenile" factor under Wis. Stat. §938.18(5)(1); and
- (4) That the court erred in its assessment of the "seriousness of the offense" factor.

The court of appeals affirmed. (App. 103). As to the first argument, the court of appeals found that the circuit court did appropriately consider Kyle's pattern of living. (App. 10). Kyle is not seeking review of this portion of the decision.

As to the second claim, the court of appeals agreed that the circuit court should not have considered the present offense when assessing Kyle's "motives and attitudes," but that the circuit court

nonetheless did not erroneously exercise its discretion because that information could have been considered as part of the “type and seriousness of the offense factor.” (App. 13). Kyle is not seeking review of this portion of the decision.

As to the third claim, the circuit court affirmed, holding that Kyle did not meet the “high threshold” to show that the circuit court’s factual findings were clearly erroneous. (App. 15). The court further found that the circuit court did not improperly presume Kyle to be guilty of the sexual assault charge, and that the court could “reasonably infer from K.J.P.’s refusal to acknowledge the sexual assault, when contrasted with his acknowledgment to other charged conduct, that K.J.P. would not be amenable to the treatment recommended to address the assault.” (App. 15). Kyle is seeking review of this part of the decision.

As to the fourth claim, the court of appeals found that the circuit court did not erroneously exercise its discretion when, during its consideration of the “seriousness of the offense” factor, it analogized Kyle’s alleged offenses to a five-count homicide case, *B.B. v. State*, 166 Wis. 2d 202, 479 N.W.2d 205 (Ct. App. 1991). (App. 16). Kyle is not seeking review of this part of the decision.

## ARGUMENT

- I. Does it violate a child's right to due process at a waiver hearing for the circuit court to consider a child's refusal to confess to a crime when weighing their amenability to treatment, given that the child has not yet been able to hold the State to their burden to prove their guilt beyond a reasonable doubt?**

**A. Relevant Law.**

A person accused of a crime is presumed to be innocent until proven guilty beyond reasonable doubt. *Spick v. State*, 121 N.W. 664, 140 Wis. 104. (1909). *In re Winship*, 397 U.S. 358, 363, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970). The United States Supreme Court has affirmed that the constitutional safeguard of proof beyond a reasonable doubt is required in delinquency proceedings, just as in adult criminal proceedings. *Winship*, 397 U.S. 358, 368.

The Wisconsin legislature has created a procedure by which the State can seek to waive a child, who would otherwise be subject to the protections and services of the juvenile system, into adult court. Wis. Stat. § 938.18. The transfer of a juvenile into adult court is recognized to be 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 Kyle include what would be a felony in adult court, so Kyle 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 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 deciding whether the state has met its burden:

- (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.

Wis. Stat. § 938.18(5).

The decision to waive juvenile jurisdiction is discretionary. *J.A.L. v. State*, 162 Wis. 2d 940, 960, 471 N.W.2d 493 (1991). A discretionary decision is reviewed by this Court for an erroneous exercise of discretion. *Id.* This standard of review is deferential to the circuit court. As long as discretion was actually

exercised, this Court will look for reasons to sustain the court's decision. *Id.*

However, an exercise of discretion is not the equivalent of unfettered decision making. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). Instead, the decision being reviewed must constitute a reasonable consideration of the facts appearing in the record as measured by the applicable law. *Id.* The decision must be both reasoned and reasonable. *Milwaukee Women's Med. Serv., Inc. v. Scheidler*, 228 Wis. 2d 514, 524, 598 N.W.2d 588 (Ct. App. 1999).

A juvenile court erroneously exercises its discretion if it fails to carefully delineate the relevant facts or reasons motivating its decision or if it renders a decision not reasonably supported by the facts of record. *In re Tyler T.*, 2012 WI 52, ¶ 24, 341 Wis. 2d 1, 14, 814 N.W.2d 192, 199.

The exercise of discretion contemplates a process of reasoning and proper explanation. *State v. Salas Gayton*, 2016 WI 58, ¶19, 370 Wis. 2d 264, 882 N.W.2d 459 ("An exercise of discretion contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards."); *Int. of X. S.*, 2022 WI 49, ¶ 33, 976 N.W.2d 425, 435–36.



B. At the time of a juvenile waiver hearing, a child possesses the presumption of innocence as the State has not been required to provide their guilt to the charged offense beyond a reasonable doubt. Given a child's right to make the State prove their case beyond a reasonable doubt, is it proper for a circuit court presiding over a waiver hearing to nonetheless consider a child's refusal to confess to a crime when considering the waiver factors?

This Court should grant review to answer the question of whether a child's due process rights at a waiver hearing are violated when a circuit court relies on a juvenile's failure to confess to an as-of-yet unproven criminal offense to support waiver.

Wis. Stat. §938.18(5)(1) requires that the court consider the juvenile's apparent potential for responding to future treatment as part of its analysis of the "personality of the juvenile" factor. In the present case, the circuit court heard testimony from experts and individuals familiar with Kyle who opined that he was amenable to treatment. For example, Mr. Tolzman testified that Kyle had expressed to him a willingness to cooperate with treatment and a desire to find answers for some of the issues he faced; he also testified that Kyle demonstrated an ability to manage his behavior and cooperate in the jail. (94:9-11). While it is true that Mr. Tolzman testified that Dr. Gust-Brey also reported that Kyle had a high level of

amenability to treatment, Mr. Tolzman's conclusions regarding treatment amenability were based largely on his own interactions and observations of Kyle. (94:10). Thus, the court's exclusion of Mr. Tolzman's conclusions regarding Kyle's amenability to treatment was improper.

Furthermore, while Dr. Gust-Brey noted in her report that there were several instances where Kyle's response caused validity concerns, she was careful to note when those validity concerns factored into her analysis, and when those validity concerns resulted in unusable results. (37). In reaching her conclusions regarding his amenability to treatment, she considered not only his test results, but also her interviews with him and his history. (37:9). Additionally, Dr. Gust-Brey noted at the outset that she had reviewed the petition for waiver and the delinquency petition. (37). The waiver petition notes that Kyle was in the process of "ditching" the victim's car when he was arrested, and also notes that Kyle gave a statement to police admitting to several of the offenses; thus, the court's suggestion that Dr. Gust-Brey did not have information regarding Kyle's efforts to "cover-up" his crimes is inaccurate. (91:41)(App. 45). The documents reviewed by Dr. Gust-Brey demonstrate that Kyle both sought to conceal the offense by getting rid of the victim's car, but *also* that that he gave a statement against interest to law enforcement confessing to several of the allegations. (91:41)(App. 45).

A persistent issue throughout the court's waiver ruling, which was particularly prevalent in the amenability to treatment discussion, was the court's reliance on Kyle's denial that he committed a sex offense, despite admitting to the other offenses:

Remember, [Kyle] remembers the knife, remembers demanding the victim get in the car, remembers driving the car, remembers going down the wrong way, remembers asking for cash, remembers the victim giving him her credit card, remembers telling her he was the devil, remembers driving by Taco Johns, remembers asking her if she wanted to be dropped off at her home, remembers going to his home to ditch his coat, the incriminating items, remembers driving back out the ditch the car, but he doesn't remember the sexual assault.

(91:30)(App. 34).

Other portions of the oral ruling reflect a similar problem. Dr. Gust-Brey's report noted that the allegations against Kyle were "clearly serious." (37). The court condemned Dr. Gust-Brey for noting that the allegations were "clearly serious," noting that that portion of the report contained "the only sentence that contemplates what is alleged to have occurred." (91:48)(App. 52).

The court then repeated the allegations against Kyle, and opined that it would "call that more than, quote, clearly serious, quote." (91:48)(App. 52). The court goes so far as to say the following about Dr. Gust-Brey: "Query, does Dr. Gust-Brey even recognize that

this case is more than clearly serious? It [is] one step below, or perhaps even is, excessively serious. It is egregious, highly serious.” (91:48). The court’s attack of Dr. Gust-Brey’s reasonable assertion that the allegations against Kyle were “clearly serious” can be read to suggest that the court had already accepted the allegations as true, and that Dr. Gust-Brey should have done the same. At the waiver stage, the parties are dealing with allegations, not proven conduct; this distinction matters and is one the court seemed to brush past in this section of the ruling.

Under the American system of law, a person charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt.” *Herrera v. Collins*, 506 U.S. 390, 398 (1993). Waiver hearings are not an opportunity for a court to consider a juvenile’s guilt or innocence of the underlying charges; rather, the purpose of a waiver hearing is to determine whether there is clear and convincing evidence that it is contrary to the best interests of the juvenile or of the public to hear the case. Wis. Stat. § 938.18(6).

The court eviscerated Kyle for admitting to several of the allegations to law enforcement, including the theft of the car, stealing her debit card, and hiding the items, but declining to admit to sexual assault. (91:30)(App. 34). The court used Kyle’s failure to admit to the sexual assault to find that, when considering Kyle’s willingness to participate to treatment and change, “nothing shows he has any intention of doing so.” (91:30)(App. 34).

The court's statements indicate that the court was placing great significance on Kyle's failure to admit to the sex offense, which was not a proper factor for consideration under Wis. Stat. §938.18(5). First, Kyle has a constitutional right against self-incrimination, which is not suspended during a waiver hearing. *Herrera*, 506 U.S. 398. The question at a waiver hearing is whether juvenile court or adult court is the appropriate forum for Kyle to defend his case, not whether the child is guilty.

Secondly, a court's reliance on a child's confession or failure to confess to a crime underlying a waiver petition contorts the waiver factors and inevitably puts a juvenile in a catch-22 situation. Kyle's failure to admit to the sex offense was used by the circuit court to support its decision to waive because it demonstrated a lack of amenability to treatment and reflected poorly on his personality. (91:30). But if Kyle *had* confessed to the sex offense allegations, which the court characterized as "egregious, shocking... and heinous," the court would almost certainly have used it to establish that public protection required waiver. (91:46).

Ultimately, the circuit court's decision to root an important part of a waiver decision on a child's refusal to admit to an as-of-yet unproven allegation is entirely at odds with the purpose behind Wis. Stat. §938.18(5), and constitutes consideration of an improper factor. And, as discussed previously, the circuit court's conclusion that "nothing" suggests that Kyle would take treatment seriously is odds with the record; all of

the testimony and reports indicate that Kyle is likely to engage with treatment. (91:30).


The record in this case reflects that the circuit court viewed Kyle's failure to admit to the sex assault as an aggravating factor, impacting at least two of the waiver factors (the seriousness of the offense and Kyle's amenability to treatment). This Court should grant review and ultimately conclude that a child's due process rights at a waiver hearing are violated when the circuit court uses a child's failure to confess to the underlying criminal offense as an adverse fact supporting waiver.

### CONCLUSION

Kyle respectfully asks that this Court grant review, and reverse and remand the decision of the court of appeals.

Dated this 30th day of November, 2022.

Respectfully submitted,

  
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### **CERTIFICATION AS TO FORM/LENGTH**

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 7,909 words.

### **CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)**

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 30th day of November, 2022.

Signed:



LAUREN J. BRECKENFELDER  
Assistant State Public Defender