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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2010AP000784

In the interest of Tyler T., a person under the age of 17:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

TYLER T.,

Respondent-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, Affirming a Nonfinal Order Entered in the Circuit Court of Walworth County, the Honorable James L. Carlson, Presiding.

BRIEF AND APPENDIX OF RESPONDENT-APPELLANT-PETITIONER

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CASES CITED

STATUTES CITED

ISSUE PRESENTED

1. On a petition to waive a juvenile into adult court, may the State give ex parte input to the agency preparing the waiver investigation report for the court?

   The juvenile court answered: Yes.

   The court of appeals answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

In light of this court's decision to grant Tyler's petition for review, both oral argument and publication are warranted.

STATEMENT OF THE CASE

Walworth County filed a delinquency petition on July 21, 2009, alleging that Tyler T. committed an armed robbery as a party to a crime in violation of Wis. Stat. § 943.32(2). (1). On that same date, the state filed a petition to waive Tyler into adult court. (4). The court held waiver hearings on March 10 and March 12, 2010. (20-21). Tyler objected to the waiver investigation report because the district attorney participated in the staffing meeting and advocated for a waiver recommendation while defense counsel was not invited to the meeting. (21:111-112). The court denied defense counsel's request to strike the report and ordered that Tyler be waived into adult court. (10; App. 108). Tyler petitioned for leave to appeal the nonfinal order for waiver. On April 8, 2010, the court of appeals granted the petition for leave to appeal. (14). On December 29, 2010, the court of appeals issued a decision affirming the trial court, holding

that a waiver investigation report is distinct from a presentence investigation report and therefore the court of appeals would not apply the case law governing presentence investigation reports to this case. (Slip op. at ¶ 16, App. 107). Tyler petitioned for review and this court granted the petition on September 13, 2011.

STATEMENT OF FACTS

Fifteen-year-old Tyler T. lived with his mother but spent many weekends with his former step-father, 40-year-old Michael Boyle. (20:12-13, 16-17, 21). Mr. Boyle was a part of Tyler's life since Tyler was two years old. Mr. Boyle lived with Tyler and his mother for eight years and was a father figure to Tyler. (20:45-46, 62).

During their weekend visits, Mr. Boyle gave Tyler drugs and alcohol. (20:41; 21:64). Mr. Boyle also involved Tyler in a spree of armed robberies. (20:22). Between May and June 2009, Mr. Boyle, Tyler and a 20-year-old named Terrance Walker committed six armed robberies using a pellet gun in Illinois, Walworth County and Kenosha County. (20:29, 37, 40, 21:76). Mr. Boyle was linked to 15-20 armed robberies. (20:22). These crimes were planned by Mr. Boyle. He decided where and when the robberies would take place and usually waited outside the businesses while Tyler and Terrance went in. (20:23, 21:71, 72, 75, 76, 78). Tyler was often under the influence of alcohol and drugs when he committed these crimes. (21:64).

The apparent purpose behind the crimes was to raise money for Mr. Boyle's legal expenses. Mr. Boyle hoped to regain custody of his two daughters who were placed in foster care and the money obtained in the armed robberies was used to pay the attorney fees. (20:25). Tyler contributed more than

half of his share of the robbery proceeds to this attorney fund. (20:26). Later, Tyler learned that Mr. Boyle was sexually assaulting his eleven-year-old daughter. (21:65-66).

Tyler's mother suspected that Mr. Boyle involved Tyler in the crimes as a way of getting back at her for ending their relationship. (20:49).

Other than an underage drinking citation, Tyler's only contact with the juvenile system was a vandalism case in 2007. In that case Tyler successfully completed a deferred prosecution. (20:34-35).

In June 2009, Illinois police arrested Tyler. (8:7). Tyler cooperated with police. He expressed remorse and concern for the victims. (20:49).

Illinois kept Tyler in the juvenile system and placed him on five years supervision in January 2010. He was ordered to participate in a residential treatment center program called Face-It, but was unable to begin the program until his Wisconsin charges were resolved. (20:51-52). Likewise, Kenosha County did not waive Tyler into adult court. At the time of the Walworth County waiver hearing Tyler had not yet had his dispositional hearing in Kenosha. (20:52-53).

Tyler was taken into custody in Wisconsin in June 2010, and held in secure detention. He had no disciplinary problems while in secure detention. (20:51). Tyler earned good grades and had no behavioral issues. (20:54).

About one week before the waiver hearing in Walworth County, approximately ten members of the Walworth County Department of Health and Human Services

met in a staffing meeting to decide the Department's recommendation regarding waiver. The assistant district attorney was invited to attend this meeting; defense counsel was not. (21:12-13). During the meeting, the assistant district attorney advocated waiving Tyler into adult court. (21:14-15). There were differing opinions within the Department regarding waiver. (21:24). The author of the court report, social worker Erin Bradley, went into the meeting feeling that "there were reasons and information provided that a recommendation could be made to – to retain him in juvenile court." (21:15). Ultimately the Department decided to make no recommendation in its waiver investigation report, a decision Ms. Bradley described as "probably not very common." (21:15).

Ms. Bradley discussed Tyler's case with defense counsel, but not in the same formal way the district attorney participated. Ms. Bradley only had short conversations with Tyler's attorney in the hallway prior to court appearances. (21:20).

At the waiver hearing, defense counsel strongly objected to the district attorney's involvement in the waiver investigation report, arguing that his involvement in the staffing meeting was ex parte communication. (21:112). Defense counsel argued that the district attorney improperly influenced the Department's recommendation. (21:113).

The court waived Tyler into adult court. (10; App. 108). The court also rejected defense counsel's argument that the waiver investigation report was tainted by the district attorney's involvement. The court noted, "apparently the District Attorney was invited and the defense was not. I tend to think that that is not a good idea, myself." (21:123; App. 109). However, the court found that there were differing

opinions within the Department regarding waiver and that the district attorney did not coerce the recommendation. (21:123; App. 109).

Tyler filed a Petition for Leave to Appeal a Nonfinal Order and this court granted the Petition. (14). On December 29, 2010, the court of appeals affirmed the juvenile court's order. The court of appeals held: "As a waiver investigation report is distinct from a PSI, we decline to apply the case law governing PSI reports to waiver investigation reports." (Slip op. at ¶ 16; App. 107).

This court granted Tyler's petition for review on September 13, 2011.

ARGUMENT

I. The District Attorney's Ex Parte Participation in the Department's Staffing Meeting Regarding Waiver Negated the Neutrality of the Waiver Investigation Report.

Tyler's former stepfather involved Tyler in an armed robbery spree that covered three counties. The first two counties, Lake County, Illinois and Kenosha County, did not waive Tyler into adult court. (20:51-53). The Walworth County prosecutor filed a waiver petition. (4). When Walworth County Department of Human Services staff met to discuss what it would recommend in its waiver investigation report, the prosecutor attended the meeting and advocated for waiver. Defense counsel was not invited and was not present at this meeting. (21:12-15). The prosecutor's involvement in this meeting was improper ex parte communication that compromised the neutrality of the report. Therefore, Tyler should have a new wavier hearing with a

new waiver investigation report that is prepared without the involvement of the district attorney's office.

When the state files a petition to waive a juvenile into adult court, Wis. Stat. § 938.18(2m) provides that the juvenile court may designate an agency to submit a report analyzing the waiver criteria. The court may rely on facts stated in the report in making its findings with respect to the waiver criteria.

After the state filed its waiver petition in Tyler's case, the Walworth County Department of Health and Human Services held a staffing meeting to discuss its waiver investigation report and the recommendation the Department would make regarding waiver. (21:12-13).

At the time of the meeting, there was not consensus about the recommendation. Social worker Erin Bradley, the author of the waiver investigation report and the only member of the Department who had met Tyler, went into the meeting feeling that "there were reasons and information provided that a recommendation could be made to – to retain him in juvenile court." (21:15, 55).

However, instead of being purely a Departmental staffing meeting, the district attorney was invited. Defense counsel was neither invited to nor informed of the meeting. (21:13). The prosecutor attended the meeting and argued that the Department should recommend in its report that Tyler be waived to adult court. (21:13,15). The Department ultimately chose not to make any recommendation, a situation Ms. Bradley described as "probably not very common." (21:15).

Whether the objectivity of the court report was tainted by the district attorney presents a question of law that this

court determines without deference to the trial court. ***State v. Suchocki***, 208 Wis. 2d 509, 514, 561 N.W.2d 332 (Ct. App. 1997).

A waiver investigation report is comparable to a Presentence Investigation Report (PSI) in the criminal court. Both are provided for by statute: Wis. Stat. § 938.18(2m) and Wis. Stat. § 972.15. Both reports gather information for the court at the request of the court. Both reports are prepared by a neutral author. Neither report is associated with the district attorney's office nor defense counsel.

This autonomy of the report's author is fundamental and consistent in both the criminal and juvenile contexts: "independence is crucial because the prosecution and the defense are the two parties to a criminal action, and the report's author functions as an agent of the court which must deal impartially with both parties." ***State v. Thexton***, 2007 WI App 11, ¶ 5, 298 Wis. 2d 263, 727 N.W.2d 560. Likewise, Wis. Stat. § 938.08(1) makes it clear that the author of reports to the court is an agent of the court. This statute sets forth that the court directs what investigations shall be done and what discretionary powers are delegated and "shall report on the conduct and condition as the court directs."

The PSI and the waiver investigation report provide very similar information. Wisconsin Statute § 938.18(2m) refers to the waiver criteria in Wis. Stat. § 938.18(5) as guidance for what information should be included in a waiver investigation report. The criteria under sub. (5) includes: the personality of the juvenile; the juvenile's past record; the type and seriousness of the offense; the adequacy and suitability of available facilities and the desirability of trial and disposition of the entire offense in one court. These criteria match the purpose of the PSI: "Presentence reports are designed to

gather information concerning a defendant's personality, social circumstances and general pattern of behavior so the judge can make an informed sentencing decision." ***State v. Howland***, 2003 WI App 104, ¶ 33, 264 Wis. 2d 279, 663 N.W.2d 340, citing ***State v. Knapp***, 111 Wis. 2d 380, 386, 330 N.W.2d 242 (Ct. App. 1983).

While there is minimal juvenile case law in Wisconsin that provides additional guidance on the function of the waiver investigation report, there are several cases that address this issue in the context of a PSI. These PSI cases should apply in the juvenile context both because of the comparability of a PSI to a waiver investigation report and also because of the similarities between the general structure of the juvenile system and the adult system: both have a prosecutor, a defense attorney and an independent agency that provides information to the court.

The purpose of the PSI is to assist the court by providing information "to protect the integrity of the sentencing, the court must have a reliable information base…It is the PSI that principally serves as the court's information base." ***State v. Perez***, 170 Wis. 2d 130, 140, 487 N.W.2d 630 (Ct. App. 1992).

Because the PSI serves as the court's information base, the author of the PSI acts exclusively on behalf of the court and therefore cannot be aligned with either party, "The DOC does not function as an agent of either the State or defense in fulfilling its PSI role but as an agent of the court in gathering information relating to a specific defendant." ***State v. Washington***, 2009 WI App 148, ¶ 9, 321 Wis. 2d 508, 775 N.W.2d 535.

It is critical that the information presented to the court be neutral and unbiased. The only way to achieve this

neutrality is to ensure that the author of the report is not improperly influenced by advocate counsel for either party. "To safeguard the accuracy of the PSI, the probation and parole agent preparing the report must be neutral and independent of either the prosecution or the defense." ***State v. Perez***, 170 Wis. 2d at 140-141, *see also* ***State v. McQuay***, 154 Wis. 2d 116, 131, 452 N.W.2d 377 (1990).

With this neutrality and independence in mind, Wisconsin courts have repeatedly rejected the argument that due process requires defense counsel to be present during the PSI interview. In ***State v. Knapp***, 111 Wis. 2d at 385, the court held that "having counsel present at the interview might seriously impede the ability of the trial court to obtain and consider all facts that might aid in forming an intelligent sentencing decision."

Likewise, the court in ***State v. Perez*** held that the presence of counsel during the PSI interview is contrary to the independent, information-gathering role of the PSI author and would "only tend to transform what now is an unbiased information-gathering proceeding into an adversarial proceeding." 170 Wis. 2d at 141. The court stated that "the presence of counsel could jeopardize the neutral objectivity of the PSI author and the cooperative surroundings of an independent investigation. The active involvement of an advocate – defense counsel *or, for that matter, the prosecution* – in the information-gathering process could cause a serious degradation in the reliability and impartiality of the sentencing court's information base." ***Id.*** (emphasis added).

Two cases in particular emphasize the critical importance of neutrality in the PSI. In ***State v. Suchocki***, 208 Wis. 2d 509, 561 N.W.2d 332 (Ct. App. 1997), the defendant

argued that the author of the presentence report was biased because she was married to the prosecutor. The defendant asked to strike the presentence report and have a resentencing hearing with a new presentence prepared by an independent and neutral agent.

The ***Suchocki*** court held that the report was biased and that the trial court erred when it refused to strike the report. The court stated, "Because of the requirement that the report be objective, it is of vital importance that the author of the report be neutral and independent from either the prosecution or the defense." 208 Wis. 2d at 518.

The court noted that the PSI writer is required to make discretionary determinations including a recommendation. By their nature these determinations are subjective. The danger of these discretionary determinations and their subjectivity is that they can be influenced, even unconsciously, by relationships or impressions offered by the state. ***Id.*** at 519. "The reasons for an agent's impression may operate at a subjective level of which the report's author is unaware." ***Id.*** at 520. For this reason, the court in ***Suchocki*** found that the marital relationship between the PSI author and the prosecutor was sufficient to draw into question the objectivity of the PSI. ***Id.***

The same reasoning applies in Tyler's case. The waiver investigation report contains many subjective components, including the analysis of the adequacy and suitability of the juvenile system in each case. Wis. Stat. § 938.18(5). The presence of the district attorney at the staffing meeting and his advocacy for waiver clearly could influence those subjective determinations, even on an unconscious level. The Department frequently works with the district attorney's office and it would be difficult not to be

persuaded by the prosecutor's advocacy both due to the ongoing relationship between the agencies and the familiarity between the two.

A district attorney's discussion with the PSI author was found to be improper ex parte communication in ***State v. Howland***, 2003 WI App 104. In ***Howland***, the district attorney's office met with the probation and parole office, without including defense counsel, to complain about an agent's recommendation in a PSI. ***Id.*** at ¶ 1. The PSI author then changed the recommendation. Although the court found that the district attorney did not have bad motive or intent, "[t]he inescapable conclusion to be drawn from the facts is that the final PSI recommendation was the product of the district attorney's intervention. Thus the State was able to procure a sentence recommendation through the Division of Community Corrections by challenging the methods it used." ***Id.*** at ¶ 31.

Like ***Suchocki***, the court in ***Howland*** was concerned about the subconscious impact a prosecutor's involvement might have on the PSI author:

> It is not the mere existence of contact between the prosecuting attorney and the PSI writer that is at issue. It is whether the PSI writer may be subconsciously influenced by this relationship in forming impressions regarding the defendant and in making recommendations to the court. (citations omitted).

Id. at ¶ 35.

The court was particularly concerned with the fact that the district attorney contacted the agent without the knowledge or involvement of defense counsel "we must also note that the inappropriate nature of the contact between the

district attorney's office and the Division of Community Corrections borders on ex parte communications." ***Id***. at ¶ 32.

In the concurring opinion, the court again expressed concern with the district attorney's contact with the probation agent, describing it as "a series of presentence, ex parte communications with the Division of Community Corrections about the method employed in this case, all of which occurred before the final sentencing hearing. I think this was improper. The correct avenue would have been to bring its concerns to the attention of the court, with notice to opposing counsel, and ask the court to deal with these concerns." ***Id***. at ¶ 42. "Such as it is, the ex parte communications ruined the independent nature of this PSI." ***Id***. at ¶ 43.

Although the court of appeals rejected the analogy between PSIs and waiver investigation reports, the court of appeals' distinctions between the two are not persuasive. First, the court rejected the analogy to the PSI because a PSI occurs after conviction. (Slip op. at ¶ 10, App. 104). If anything, this distinction makes the neutrality of the report even more critical in a waiver situation. In the criminal context, at the time of sentencing the defendant has already been found guilty of a criminal offense, the parties have often already negotiated a range of sentence recommendations and the court is likely familiar not only with the facts of the case but also with similar offenses and/or defendants and what sentences are typically imposed. In a waiver case, however, the situation is much more fluid. Prior to the waiver hearing the court likely does not have much information about the juvenile or even the crime. The stakes are very high; the difference between retention in the juvenile system and waiver into the adult system is tremendous, not only in terms of the length of the potential penalty but also how the decision will impact the juvenile. The waiver investigation

report is a critical piece for the court in making this decision and its neutrality should not be compromised.

The court of appeals also noted that the waiver petition can be filed by the court, the state or the juvenile and since the prosecutor filed the petition in this case it was appropriate for him to be involved in the meeting. (Slip op. at ¶ 10, App. 105). The fact that the prosecutor filed the waiver petition only strengthens the argument that the prosecutor should not be involved in the waiver investigation report process. The prosecutor is an advocate. The prosecutor will have every opportunity to advocate for waiver at the waiver hearing. The court designates an agency to prepare the waiver investigation report and directs the agency to analyze the waiver criteria. Wis. Stat. § 938.18(2m). This is why ultimately the court of appeals focus on who filed the petition is a non sequitur. Regardless of who filed the waiver petition, a waiver investigation report is no less within the exclusive purview of the judiciary than a PSI.

The court of appeals also attempted to differentiate the holdings in ***Howland***, ***Suchocki*** and ***Perez*** by making factual distinctions that ignore the rulings. The court of appeals relied on the fact that ***Howland*** involved a plea bargain and ***Suchocki*** the marriage between the prosecutor and the PSI author. (Slip op. at ¶ 14, App. 106). The ***Suchocki*** court held that a marital relationship between a prosecutor and the PSI author creates bias as a matter of law. ***Suchocki***, 208 Wis. 2d at 520. However, the decision is not limited to situations where the prosecutor and the PSI author are married. The reasoning the court used also applies to Tyler's case. The waiver investigation report contains subjective elements and, "because the author's impressions could be subconsciously influenced, the writer may not even be aware of the relationship's influence." ***Id***. The analysis is whether the

prosecutor's advocacy at the Departmental meeting could consciously or subconsciously influence the author of the waiver investigation report, not simply whether the prosecutor and the PSI author are married.

Howland involved a prosecutor and a PSI author who were not married. Yet like ***Suchocki***, the court in ***Howland*** also expressed concern that the prosecutor's involvement might improperly influence the PSI author, "…the PSI writer may be subconsciously influenced by this relationship in forming impressions regarding the defendant and in making recommendations to the court. 2003 WI App 104 ¶ 35.

Howland and ***Suchocki*** make it clear that the neutrality of the report is compromised when the district attorney is involved in the process of preparing the PSI. In Tyler's case, the facts are particularly egregious. The prosecutor participated in the meeting where he could have great influence, consciously and unconsciously, on the subjective portions of the report. Defense counsel had no opportunity to counter that influence.

Case law requires that the PSI be an independent and neutral document. The same condition must apply to waiver investigation reports. This court has stressed that the juvenile court has an independent duty to determine whether waiver is appropriate "rather than deferring to the state's or the juvenile's request for waiver or to either party's acquiescence in the other party's request." ***In the Interest of S.N.***, 139 Wis. 2d 270, 275, 407 N.W.2d 562 (Ct. App. 1987), citing ***In re T.R.B.***, 109 Wis. 2d 179, 196-97, 325 N.W.2d 329 (1982).

Consistent with the court's independent duty is disallowing any ex parte involvement with the preparation of the waiver investigation report. The department serves a

quasi-judicial function. Ex parte involvement in this quasi-judicial function tips the balance of neutrality and puts a potentially tainted report before the court. The court should be able to rely on the independence of the report and the way to ensure that independence is to prohibit any ex parte contact with the department.

In Tyler's case, the report's neutrality was compromised. The prosecutor's participation was improper involvement in what should have been a neutral part of the waiver process. Given that the prosecution itself requested waiver, it is unfair to allow the state to implore the local agency to make a quasi-judicial ratification of the state's own request. Because the prosecutor's ex parte involvement tainted the waiver report, this court should vacate the waiver order, strike the waiver investigation report and order that a new report be prepared and a new waiver hearing held before a different judge.

CONCLUSION

For the reasons set forth above, Tyler respectfully requests that this court vacate the waiver order, order the preparation of a new waiver investigation report without the participation of the district attorney and order the juvenile court to hold a new waiver hearing with a different judge.

Dated this 12th day of October, 2011.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 3,946 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 12th day of October, 2011.

Signed:

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CERTIFICATION AS TO APPENDIX

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

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

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

Dated this 12th day of October, 2011.

Signed:

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APPENDIX

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COURT OF APPEALS
DECISION
DATED AND FILED

December 29, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP784 **Cir. Ct. No. 2009JV59**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN THE INTEREST OF TYLER T., A PERSON UNDER THE AGE OF 17:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

TYLER T.,

RESPONDENT-APPELLANT.

RECEIVED
DEC 30 2010
STATE PUBLIC DEFENDER
MADISON APPELLATE

APPEAL from an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

¶1 REILLY, J.[1] Tyler T. appeals from an order of the circuit court waiving him into adult court. He argues that it was improper for the assistant district attorney to appear at a waiver recommendation meeting when neither Tyler nor his attorney were asked to attend. As Tyler believes the waiver investigation report was tainted by the assistant district attorney's presence, he asks that we vacate the circuit court's order and order a new waiver investigation report. We hold that there is nothing to preclude the prosecution from appearing at a waiver recommendation meeting. The order of the circuit court is affirmed.

FACTUAL BACKGROUND

¶2 On June 19, 2009, Tyler was allegedly involved in an armed robbery of a gas station. As Tyler was fifteen years old at the time, Walworth County filed a delinquency petition alleging that Tyler was a party to an armed robbery in violation of WIS. STAT. §§ 939.05 and 943.32(2). The State also requested that the juvenile court waive Tyler into adult court because armed robbery is a felony and it involves aggression and premeditation.

¶3 Pursuant to WIS. STAT. § 938.18(2m), the circuit court requested that the Walworth County Department of Health and Human Services (WDHHS) prepare a waiver investigation report. Members of the WDHHS held a staffing meeting to decide whether the WDHHS would recommend that Tyler be tried as an adult. The assistant district attorney was invited to this meeting but Tyler and his defense counsel were not. At the meeting, the assistant district attorney

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

recommended that Tyler be tried as an adult. The WDHHS eventually chose to make no recommendation in its report as to whether Tyler should be tried in adult court or juvenile court because the staffing members could not reach a consensus.

¶4 Roughly a week later, the circuit court held a waiver hearing to determine whether Tyler would be waived into adult court. At the hearing, Tyler's attorney objected to the fact that the assistant district attorney was present at the WDHHS meeting. Tyler's attorney argued that because she was not invited, the meeting constituted an ex parte communication and the WDHHS's waiver investigation report was invalid.

¶5 The circuit court waived Tyler into adult court. The court noted that while it did not think that it was a good idea to invite the assistant district attorney but not Tyler's attorney to the WDHHS staffing meeting, there was no evidence in the record that the WDHHS's report was "coerced" by the assistant district attorney's presence. Tyler appeals the circuit court's order.

STANDARD OF REVIEW

¶6 This appeal requires us to decide whether the prosecution can appear at a waiver investigation meeting under WIS. STAT. § 938.18(2m). The interpretation of a statute is a question of law subject to de novo review. *See* ***City of Muskego v. Godec***, 167 Wis. 2d 536, 545, 482 N.W.2d 79 (1992).

DISCUSSION

¶7 Tyler argues that the waiver investigation report was tainted by the assistant district attorney's presence, and that he is therefore entitled to a new report and a new waiver hearing. Tyler asserts that a waiver investigation report should be treated the same as a presentence investigation (PSI) report.

¶8 After a petition to waive a juvenile into adult court is filed, WIS. STAT. § 938.18(2m) permits the circuit court to designate an agency to submit a report analyzing whether a juvenile should be tried as an adult. Section 938.18(2m) is permissive and does not require the circuit court to order a waiver investigation report. If the circuit court does request a waiver investigation report, it is then entitled to use the report to determine whether to waive the juvenile into adult court. ***Id.*** A PSI, on the other hand, occurs after a defendant is convicted. WIS. STAT. § 972.15(1). It is for the circuit court to decide whether to order a PSI. *See* ***id.*** The purpose of a PSI report is to assist the circuit court in selecting the appropriate sentence for the defendant. ***State v. Washington***, 2009 WI App 148, ¶9, 321 Wis. 2d 508, 775 N.W.2d 535.

¶9 Tyler argues that because an administrative agency gathers information for the court in both a waiver investigation report and a PSI report, the two reports should be treated the same. Specifically, Tyler points out that this court has held that a convicted defendant does not have a constitutional right to have his attorney present during a PSI interview because it would threaten the independence of the PSI. *See* ***State v. Perez***, 170 Wis. 2d 130, 140-42, 487 N.W.2d 630 (Ct. App. 1992). Additionally, Tyler cites ***State v. Suchocki***, 208 Wis. 2d 509, 520, 561 N.W.2d 332 (Ct. App. 1997), *abrogated on other grounds by* ***State v. Tiepelman***, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1, where we held that a PSI report is biased as a matter of law when the report's author is married to the prosecutor. Finally, Tyler refers to ***State v. Howland***, 2003 WI App 104, ¶¶32, 37, 264 Wis. 2d 279, 663 N.W.2d 340, where we held that it was inappropriate for the district attorney to contact a parole agent to complain about a PSI report recommendation after the prosecution agreed in a plea bargain not to make a sentence recommendation. Tyler would like us to extend these PSI cases

and hold that a prosecutor may never be present at a waiver investigation recommendation meeting. We decline to do so.

¶10 A waiver investigation report is distinct from a PSI report. A petition to waive a juvenile into adult court can be filed by the prosecution, the juvenile, or the court. *See* WIS. STAT. § 938.18(2). A PSI is ordered exclusively by the court. *See* § 972.15(1). In this case, the assistant district attorney filed the waiver petition. While § 938.18 does not address whether a prosecutor may be present at a waiver recommendation report meeting, there is nothing in the Wisconsin statutes or case law that precludes a prosecutor from appearing. Indeed, it is entirely appropriate for the prosecution to appear at this meeting given that the assistant district attorney was the one who requested that Tyler be tried as an adult.

¶11 The cases that Tyler cites to are unpersuasive. In ***Perez***, the agent preparing the PSI report refused to allow Perez's attorney to attend the PSI interview. ***Perez***, 170 Wis. 2d at 136. Perez argued that there was a due process right to have counsel present. ***Id.*** We rejected his argument and held that there is no due process right to have counsel present for a PSI interview because "[t]he presence of counsel could jeopardize the neutral objectivity of the PSI author and the cooperative surroundings of an independent investigation." ***Id.*** at 141.

¶12 ***Perez*** held that a defendant does not have a constitutional right to have his attorney present during a PSI interview—that case did not hold that a defense attorney or a prosecutor may *never* be present during a PSI interview. While the ***Perez*** court noted that "[t]he active involvement of an advocate—defense counsel or, for that matter, the prosecution—in the information-gathering process could cause a serious degradation in the reliability and impartiality of the

sentencing court's information base," this statement does not imply that it is unlawful for the prosecution to be present during a PSI interview. ***Perez***, 170 Wis. 2d at 141. Rather, the PSI report author still has discretion over whether he will allow the defense attorney or the prosecution to be present during a PSI interview.

¶13 The ***Howland*** and ***Suchocki*** decisions are also inapplicable. In ***Howland***, the prosecution agreed not to make a sentencing recommendation in exchange for Howland pleading no contest. ***Howland***, 264 Wis. 2d 279, ¶2. The prosecution then effectively ran an "end run" around the plea bargain by repeatedly contacting the Division of Community Corrections to complain about the PSI report recommendation. ***Id.***, ¶¶29, 31. We held that this was an inappropriate ex parte communication on the part of the prosecution that violated the terms of the plea bargain. ***Id.***, ¶¶32, 37. In ***Suchocki***, we held that a PSI report prepared by an agent who was married to the prosecutor was impermissibly biased as a matter of law. ***Suchocki***, 208 Wis. 2d at 520.

¶14 Neither of these cases support Tyler's argument that it was unlawful for the assistant district attorney to be present during Tyler's waiver recommendation meeting. In ***Howland***, we found that it was inappropriate for the prosecution to contact Howland's probation and parole agent to complain about the PSI report recommendation because Howland's plea bargain stated that the prosecution would not make a recommendation. ***Howland***, 264 Wis. 2d 279, ¶¶2, 29, 31-32. In Tyler's case, there is no plea bargain that would have prevented the assistant district attorney from appearing at the waiver recommendation meeting. And the facts in ***Suchocki***—where the prosecutor was married to the PSI report author—are far more egregious than the prosecution appearing at a waiver recommendation meeting. Additionally, ***Perez***, ***Howland***, and ***Suchocki*** all dealt

with PSIs, which as we noted earlier, are distinct from waiver investigation reports. None of these cases stand for the proposition that a prosecutor cannot attend a waiver recommendation meeting.

¶15 Finally, we note that waiver of juvenile jurisdiction under WIS. STAT. § 938.18 is within the sound discretion of the circuit court. ***Elmer J.K. v. State***, 224 Wis. 2d 372, 383, 591 N.W.2d 176 (Ct. App. 1999), *superseded by statute on other grounds*, WIS. STAT. ch. 938. We review the circuit court's decision for a misuse of discretion. ***Id.*** We will also look for any reason to sustain the circuit court's discretionary decision, and will reverse a waiver determination only if the record does not reflect a reasonable basis for the circuit court's decision or the basis of the circuit court's rationale is not found in the record. ***Id.*** Here, the circuit court made an independent decision to waive Tyler into adult court. The waiver investigation report did not make a recommendation. Furthermore, the circuit court stated that "I have judged this on my own feelings and not based on the recommendations."

CONCLUSION

¶16 As a waiver investigation report is distinct from a PSI, we decline to apply the case law governing PSI reports to waiver investigation reports. The record demonstrates that the circuit court's decision was made independently. The order of the circuit court is affirmed.

By the court—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)(4).

STATE OF WISCONSIN | CIRCUIT COURT | WALWORTH COUNTY | *For Official Use Only*

In the Interest of Tyler J. T

Date of Birth: 11-19-1993

Order Waiving Juvenile Court Jurisdiction

Case No.: 2009JV000059

FILED
Circuit Court
MAR 1 5 2010
Clerk of Courts-Walworth Co
By: Loretta Melnel, Deputy

The wavier hearing was held on March 12, 2010, which is the effective date of this order.

THE COURT FINDS

1. A petition alleging delinquency and a petition for waiver were filed.
2. This matter has prosecutive merit.

[X] 3a. The petition for waiver was contested and relevant testimony taken.

[ ] 3b. The petition for waiver was not contested. The juvenile's decision to not contest is a knowing, intelligent and voluntary decision.

[ ] 3c. The juvenile failed to appear for the waiver hearing and the hearing was conducted *in absentia.*

4. The court has reviewed the petition(s), testimony (if any) and court reports (if any), as they relate to the following factors. The court has stated on the record the relevancy of these factors to the decision on the waiver. These findings are incorporated into this order.

Personality and prior record of juvenile:

- Whether the juvenile is mentally ill or developmentally disabled
- Whether the juvenile court has previously waived its jurisdiction and, if so, whether the juvenile was convicted
- Whether the juvenile has been previously found delinquent
- Whether the adult conviction or delinquency involved the infliction of serious bodily injury
- The juvenile's motives, attitude and pattern of living
- The juvenile's physical and mental maturity
- The juvenile's prior offenses
- The juvenile's prior treatment history
- The juvenile's potential for responding to future treatment

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ELKHORN TRIAL OFFICE

Type and seriousness of offense:

- Whether the crime was against persons and/or property
- Whether the crime was violent, aggressive, premeditated or willful, and has prosecutive merit

Adequacy and suitability of juvenile system (where applicable, mental health system):

- Whether there are facilities or services available for the treatment of the juvenile and the protection of the public
- Whether the juvenile is suitable for placement in the serious juvenile offender program or the adult intensive sanctions program
- Whether there are other persons who are alleged to be involved with the same act or offense, making it desirable for trial and disposition in one court

IT IS ORDERED

[X] 1a. **The waiver petition is granted** because it is contrary to the best interests of the juvenile or the public for the circuit court with juvenile jurisdiction to hear this case. This matter is referred to the district attorney for appropriate criminal proceedings.

[ ] 1b. **The waiver petition is denied** because it is in the best interests of the juvenile or the public for the circuit court with juvenile jurisdiction to hear this case.

Distribution:

1. Juvenile Court - Original
2. District Attorney
3. Juvenile/Juvenile's Parents
4. Juvenile's Attorney
5. Other: _____

BY THE COURT:

James L. Carlson
Circuit Court Judge

Hon. James L. Carlson
Name Printed or Typed

3/15/10
Date

there should be some record made on that.

THE COURT: Yes. I was going to address that. I have drawn the inference from the testimony of some very reliable people here that this was a split decision, a hung jury basically and unusual for them to make the decision that they did. I didn't hear that they were being coerced or anything like this. It was a staffing decision with all points made, and apparently the District Attorney was invited and the defense was not. I tend to think that that is not a good idea, myself. I think, however, because we don't have a record of what happened there -- however, I have Dr. Thompson and everyone else saying that there were people who were in favor of -- strongly in favor of waiver and strongly in favor of waiver -- pardon me, waiver -- or not waiving, retaining.

You made your record and you may have a successful appeal. I don't know. I have judged this on my own feelings and not based on the recommendations. I do take recommendations highly but in a situation like this, you obviously have another court who has waived and you have information that he has been retained upon a recommendation of not to waive; and I think I have -- and I don't know what the basis of that was and what the judge said there about

the public.

I've indicated my -- I've weighed that quite heavily. And I think I've been fair in saying that I think he's -- he has some good opportunities for rehabilitation, but I think that it should be over a longer period of time for the public safety and that there should be accountability in the public for this -- for the benefit of the public because these are crimes -- very serious crimes, involved drug and alcohol and I have a concern.

So I don't think there was anything that I should have said, for instance, restaff it, give us some further advice. I could have done that. I'm satisfied with the thorough input from both parties as to the situation, and I believe I've made my decision which is ultimately the Court's responsibility and not the Department's. So that's my record on that.

Did you give them a date for appearing?

THE CLERK: No. Is it before Kennedy or Gibbs?

THE COURT: Gibbs; felony court at 1:00 o'clock call. What do you want it, in a weeks or a couple days?

MR. WIEDENFELD: A week is fine. Or did you want to set it out after Kenosha County stuff?

CERTIFICATION AS TO APPENDIX

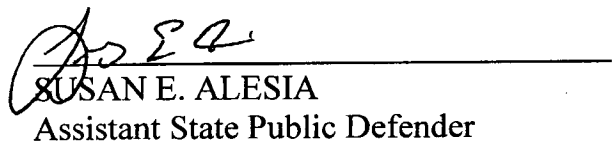
I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential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

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

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

Dated this 12th day of October, 2011.

Signed:



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OF WISCONSIN

STATE OF WISCONSIN
IN SUPREME COURT

CASE NO. 2010AP000784

In the Interest of Tyler T., a person under the age of 17:
STATE OF WISCONSIN,

Petitioner-Respondent,

v.

TYLER T.,

Respondent-Appellant-Petitioner.

BRIEF OF PETITIONER-RESPONDENT

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, AFFIRMING THE DECISION OF THE HONORABLE JAMES L. CARLSON, CIRCUIT COURT JUDGE CIRCUIT COURT FOR WALWORTH COUNTY, BRANCH II

Phillip A. Koss
District Attorney for
Walworth County, Wisconsin

By: Zeke S. Wiedenfeld
Assistant District Attorney
Attorney for Plaintiff-
Respondent
State Bar No. 1069306
Authorized and Supervised by the Attorney General Pursuant to § 978.05(5)

ADDRESS:

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Elkhorn, WI 53121
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STATEMENT OF THE ISSUES

IS IT PROPER FOR THE ASSISTANT DISTRICT ATTORNEY TO APPEAR AT A WAIVER RECOMMENDATION MEETING WHEN NEITHER THE JUVENILE NOR HIS ATTORNEY WERE ASKED TO ATTEND?

Juvenile Court answer: Yes.

Appellate Court answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with all cases meriting this court's attention, the State requests oral argument and publication of its decision and opinion.

STATEMENT OF THE CASE

The court of appeals' decision accurately summarized the relevant facts, the procedural status of the case, and the disposition of the case in the trial court, as follows:

> ¶ 2 On June 19, 2009, Tyler was allegedly involved in an armed robbery of a gas station. As Tyler was fifteen years old at the time, Walworth County filed a delinquency petition alleging that Tyler was a party to an armed robbery in violation of Wis. Stat. §§ 939.05 and 943.32(2). The State also requested that the juvenile court waive Tyler into adult court because armed robbery is a felony and it involves aggression and premeditation.
>
> ¶ 3 Pursuant to Wis. Stat. § 938.18(2m), the circuit court requested that the Walworth County Department of Health and Human Services (WDHHS) prepare a waiver investigation report. Members of the WDHHS held a staffing meeting to decide whether the WDHHS would recommend that Tyler be tried as an adult. The assistant district attorney was invited to this meeting but Tyler and his defense counsel were not. At the meeting, the assistant district attorney recommended that

> Tyler be tried as an adult. The WDHHS eventually chose to make no recommendation in its report as to whether Tyler should be tried in adult court or juvenile court because the staffing members could not reach a consensus.
>
> ¶ 4 Roughly a week later, the circuit court held a waiver hearing to determine whether Tyler would be waived into adult court. At the hearing, Tyler's attorney objected to the fact that the assistant district attorney was present at the WDHHS meeting. Tyler's attorney argued that because she was not invited, the meeting constituted an ex parte communication and the WDHHS's waiver investigation report was invalid.
>
> ¶ 5 The circuit court waived Tyler into adult court. The court noted that while it did not think that it was a good idea to invite the assistant district attorney but not Tyler's attorney to the WDHHS staffing meeting, there was no evidence in the record that the WDHHS's report was "coerced" by the assistant district attorney's presence. Tyler appeals the circuit court's order.

In the Interest of Tyler T., 2011 WI App 19, ¶¶ 2-5, 331 Wis. 2d 489, 795 N.W.2d 64.

The court of appeals affirmed the circuit court's waiver, concluding that:

> ¶ 10 A waiver investigation report is distinct from a PSI report. A petition to waive a juvenile into adult court can be filed by the prosecution, the juvenile, or the court. *See* WIS. STAT. § 938.18(2). A PSI is ordered exclusively by the court. *See* § 972.15(1). In this case, the assistant district attorney filed the waiver petition. While § 938.18 does not address whether a prosecutor may be present at a waiver recommendation report meeting, there is nothing in the Wisconsin statutes or case law that precludes a prosecutor from appearing. Indeed, it is entirely appropriate for the prosecution to

> appear at this meeting given that the assistant district attorney was the one who requested that Tyler be tried as an adult.

Id., ¶ 10. The court of appeals further concluded:

> ¶ 15 Finally, we note that waiver of juvenile jurisdiction under WIS. STAT. § 938.18 is within the sound discretion of the circuit court. *Elmer J.K. v. State,* 224 Wis.2d 372, 383, 591 N.W.2d 176 (Ct.App.1999), *superseded by statute on other grounds,* Wis. Stat. ch. 938. We review the circuit court's decision for a misuse of discretion. *Id.* We will also look for any reason to sustain the circuit court's discretionary decision, and will reverse a waiver determination only if the record does not reflect a reasonable basis for the circuit court's decision or the basis of the circuit court's rationale is not found in the record. *Id.* Here, the circuit court made an independent decision to waive Tyler into adult court. The waiver investigation report did not make a recommendation. Furthermore, the circuit court stated that "I have judged this on my own feelings and not based on the recommendations."

Id., ¶ 15.

This court granted Tyler T's petition for review on September 13, 2011.

STATEMENT OF THE FACTS

The issues presented in this case involve the interpretation of statutes relating to trial court procedures in juvenile delinquency cases. Although Tyler T. goes to great lengths to argue the propriety of waiver in his statement of facts, the facts underlying Tyler T.'s alleged delinquent conduct are not dispositive.

At the waiver hearing the waiver report writer, Erin Bradley, and her supervisor, Dr. David Thompson, testified regarding the facts relevant to this appeal.

Testimony of Erin Bradley:

Erin Bradley, a juvenile intake worker at the Walworth County Department of Health and Human Services, prepared the waiver investigation report in Tyler T.'s case (20:8-9, 11; 21:12). Erin Bradley stated that it was her job to write up the waiver report objectively and present the facts (20:44). Ms. Bradley's report did not make any recommendation to the court regarding whether Tyler T. should be waived. Ms. Bradley explained that she worked very hard to make sure that the report was not persuasive to one side or the other (20:44). Ms. Bradley was clear that the recommendation in Tyler T.'s case was a Department of Health and Human Services (WDHHS) recommendation, not her recommendation (21:18, R20:44). Ms. Bradley explained that a waiver decision is staffed and is a WDHHS recommendation and not an individual worker's recommendation (20:44).

Ms. Bradley further stated that the decision to not make a waiver recommendation in Tyler T.'s case was made by the WDHHS because some people within the WDHHS felt very strongly that waiver was appropriate and others within the

WDHHS felt strongly that the juvenile court should retain jurisdiction (20:44-45). Ms. Bradley stated that it was not very common that the WDHHS chooses to make no recommendation regarding waiver (21:15).

Erin Bradley testified that prior to writing the report there was a staffing meeting at the WDHHS with approximately ten people in attendance, including the assistant district attorney (21:12-13). This occurred approximately one week before the waiver hearing (21:14). The meeting was a staffing to discuss the information that was gathered in regard to the waiver (21:14). The assistant district attorney had been invited to attend, however, no one from the public defender's office was present or invited (21:13). During the meeting there was active discussion in terms of the pros and cons of waiving Tyler T. (21:14). The assistant district attorney present advocated for waiver to the adult system (21:15, 16). Prior to the staffing meeting, Ms. Bradley had not clearly made up her mind, but certainly felt there were reasons and information provided that a recommendation could be made to retain Tyler T. in juvenile court (21:15).

Ms. Bradley further stated that in preparing for the waiver report she had communicated with Tyler T.'s attorney about the case (21:18). Mr. Bradley indicated that she

gathered information from Tyler T.'s attorney and provided that information at the staffing meeting so both sides were fairly represented (21:18, 20-21).

Testimony of Dr. David Thompson:

Dr. Thompson, the Deputy Director of the Walworth County Department of Health and Human Services, testified that he supervises the juvenile court intake and as part of his duties he discusses the possible waiver of a juvenile (21:22-23).

Dr. Thompson was involved in the discussions about Tyler T.'s waiver (21:23). Dr. Thompson was further aware that the WDHHS did not make a specific recommendation in Tyler T.'s case. Dr. Thompson explained, "In this situation the Department chose not to make a recommendation because there was – we simply couldn't reach a consensus on what the recommendation should be. There were strong feelings in our staffing [by other workers and supervisors] that Tyler should be waived into adult court, and there were also strong feelings that he was a suitable candidate for remaining in the juvenile justice system" (21:23-24). Dr. Thompson explained that there were fairly strong feelings in favor of waiver prior to the assistant district attorney's presence at the meeting (21:24).

Dr. Thompson further explained that the WDHHS takes waiver recommendations very seriously and that the WDHHS tries to get as much information as possible in order to make informed decisions regarding waiver recommendations (21:24). Dr. Thompson recalled that the public defender's office had been present at previous staffing meetings and that if Tyler T's attorney had asked to discuss the case he absolutely would have met with her (21:25). His understanding was that Erin Bradley had indeed spoken with Tyler T.'s attorney and had been provided with documents (21:26).

The Court's Findings:

The Court specifically concluded that it was satisfied with the waiver investigation report and did not find that it was the result of any undue influence. The Court stated,

> "I have drawn the inference from the testimony of some very reliable people here that this was a split decision, a hung jury basically and unusual for them to make the decision that they did. I didn't hear that they were being coerced or anything like this. It was a staffing decision with all points made, and apparently the District Attorney was invited and the defense was not….I have Dr. Thompson and everyone else saying that there were people who were … strongly in favor of waiver and strongly in favor of …not waiving, retaining" (21:124).

The Court further concluded that it was satisfied with the thorough input from both parties as to the waiver situation and concluded that it was unnecessary to order the WDHHS to restaff the waiver recommendation (21:124). The Court stated that its decision was not based upon any recommendation of the WDHHS, but rather was based upon the evidence presented at the waiver hearing (21:124).

ARGUMENT

I. TYLER T. IS NOT ENTITLED TO A NEW WAIVER INVESTIGATION REPORT AND WAIVER HEARING BEFORE A DIFFERENT JUDGE ON THE GROUND THAT THE ASSISTANT DISTRICT ATTORNEY WAS INVITED TO AND PARTICIPATED IN THE DEPARTMENT'S STAFFING MEETING REGARDING WAIVER.

This case raises the issue of whether the prosecutor can appear at a waiver investigation meeting under Wis. Stat. § 938.18(2m). The purpose of the waiver investigation report is to gather as much information as possible about the juvenile to help the court analyze the criteria of waiver. *See* Wis. Stat. § 938.18(2m), (4), and (5). Nothing in Wis. Stat. § 938.18(2m) specifies or limits the manner in which the writer of the waiver report gathers this information.

Rather, in gathering the fullest information possible regarding the propriety of waiver, it is prudent for the writer to speak with all interested parties, including the prosecutor, the juvenile, the juvenile's attorney, law

enforcement, victims, and mental health care workers. If inviting the district attorney to the Department's staffing meeting is a convenient way for the Department and the district attorney to share information, that is permissible. There is simply no obstacle or impediment to communicating with the district attorney under any statute, administrative rule, or published court opinion.

A. The Fluid Roles Of The Intake Worker, Prosecutor, And Judge In The Juvenile Justice Code Support And Encourage An Informal Free Flow Of Information Between The Parties Involved In A Waiver Proceeding; And Is Necessary To Meet The Objectives Of The Juvenile Justice Code. Therefore, The Department Properly Sought Input Regarding Waiver From The Assistant District Attorney.

Approximately one week before Tyler T.'s waiver hearing, the Assistant District Attorney was invited to a staffing meeting at the Walworth County Department of Health and Human Services (21:12-14). The purpose of the staffing meeting was to discuss the information that was gathered regarding Tyler T.'s waiver. At the hearing the Assistant District Attorney gave his concerns regarding feelings for waiver (21:14-15). In gathering information for the waiver investigation report intake worker Erin Bradley also spoke with Tyler T.'s attorney and received documentation from Tyler T's attorney, which Bradley shared at the staffing meeting (21:18-21). The Assistant District

Attorney was not present when Ms. Bradley spoke with Tyler T.'s attorney (21:18-19). Tyler T. argues that the Assistant District Attorney's participation at the Department's meeting tainted the objectivity of the waiver report.

The fundamental problem with Tyler T.'s argument, however, is that his basic premise – the alleged impropriety in gathering input regarding waiver from the District Attorney's Office – is wrong.

The legislature's purpose in enacting the Juvenile Justice Code was to provide a "balanced approach to juvenile delinquency, adding personal accountability and community protection to the legislature's primary objectives, in addition to the rehabilitation of juveniles." *See State v. Hezzie R.*, 219 Wis. 2d 848, 871, 580 N.W.2d 660 (1998).

The legislature expressly articulated the purposes behind the Juvenile Justice as follows:

> (2) It is the intent of the legislature to promote a juvenile justice system capable of dealing with the problem of juvenile delinquency, a system which will protect the community, impose accountability for violations of law and equip juvenile offenders with competencies to live responsibly and productively. To effectuate this intent, the legislature declares the following to be equally important purposes of this chapter:
>
> (a) To protect citizens from juvenile crime.

(b) To hold each juvenile offender directly accountable for his or her acts.

(c) To provide an individualized assessment of each alleged and adjudicated delinquent juvenile, in order to prevent further delinquent behavior through the development of competency in the juvenile offender, so that he or she is more capable of living productively and responsibly in the community.

(d) To provide due process through which each juvenile offender and all other interested parties are assured fair hearing, during which constitutional and other legal rights are recognized and enforced.

(e) To divert juveniles from the juvenile justice system through early intervention as warranted, when consistent with the protection of the public.

(f) To respond to a juvenile offender's needs for care and treatment, consistent with the prevention of delinquency, each juveniles best interest and the protection of the public, by allowing the judge to utilize the most effective dispositional option.

(g) To ensure that victims and witnesses of acts committed by juveniles that result in proceedings under this chapter are, consistent with this chapter and the Wisconsin constitution, afforded the same rights as victims and witnesses of crimes committed by adults, and are treated with dignity, respect, courtesy, and sensitivity throughout those proceedings.

Wis. Stat. § 938.01(2)(a)-(g).

The Legislature has directed the courts to "liberally" construe the provisions of the Juvenile Justice Code "in

accordance with the objectives expressed" in § 938.01(2). Wis. Stat. § 938.01(1).

The creation of Chapter 938, Juvenile Justice Code, was based upon a report prepared by the Juvenile Justice Study Committee (JJSC), which outlined several principles on which its recommendations were grounded. One of the principles enumerated in the report was that "the system should operate more efficiently through streamlining of processes and improved access to information by entities that work with juvenile delinquents." *See State v. Kleser*, 2010 WI 88, ¶40-42, 328 Wis.2d 42, 61-63, 786 N.W.2d 144, 153. (citations omitted). The provisions in the JJC provide several indicia of this focus. The Juvenile Justice Code has a built-in system of checks and balances that encourage a free exchange of information between the parties involved. This is clearly demonstrated when one looks at the role of the intake worker, district attorney, and court in the JJC.

Wis. Stat. §§ 938.24 and 938.25, Stats., set forth the procedures for institution of juvenile delinquency. In a delinquency case in which a juvenile is *not* taken into custody, the case begins with a referral by law enforcement

to the intake worker.[1] Wis. Stat. § 938.24(1).[2] The intake worker "conduct[s] an intake inquiry on behalf of the court to determine whether the available facts establish prima facie jurisdiction and to determine the best interests of the juvenile and of the public with regard to any action to be taken." *Id*. Within forty days of receiving the referral, the intake worker must complete the inquiry and decide whether to refer the case to the district attorney for a delinquency petition, enter into a deferred prosecution agreement, or close the case. Wis. Stat. § 938.24(5). The intake worker must give written notice to the district attorney if the case is closed or a deferred prosecution agreement is entered. *Id*. The district attorney may file a delinquency petition within twenty days of receiving notice of a case closing or deferred prosecution agreement. *Id.* The filing of a petition has the effect of terminating a deferred prosecution agreement entered by the intake worker. Wis. Stat. § 938.245(6).

[1] The intake worker is a person designated to provide intake services for the juvenile court. *See* Wis. Stat. §§ 938.01(3) and 938.067. The intake worker is generally a social worker employed by the county. However, chapter 938 authorizes a judge to act as an intake worker "from time to time by the judge at his or her discretion, but if a request to file a petition is made, a citation is issued or a deferred prosecution agreement is entered into, the judge shall be disqualified from participating further in the proceedings." Wis. Stat. § 938.10.

[2] In a delinquency case in which a juvenile is held in custody, the pre-charging time periods are substantially shortened under § 938.21. If a juvenile is being held in custody, the court must hold a hearing within twenty-four hours of the end of the day the juvenile is taken into custody to determine if custody should continue. Wis. Stat. § 938.21(1). The district attorney must file the delinquency petition by the time of the hearing on custody. *Id.*

The court serves as a further check on the delinquency process by operation of Wis. Stat. § 938.21(7), which gives the court authority to dismiss a juvenile delinquency petition and refer the matter for deferred prosecution regardless of whether the juvenile is in custody. *See In Re Lindsey A.F.*, 2003 WI 63, ¶25, 262 Wis.2d 200, 663 N.W.2d 757. In the event the court exercises its authority under Wis. Stat. § 938.21(7), the district attorney cannot terminate the court ordered deferred prosecution by filing a second delinquency petition containing the same charge and factual basis. *Id*. at ¶34.

As these statutes demonstrate, the legislature designed a scheme whereby all delinquency allegations would be promptly and efficiently inquired into by an intake worker on behalf of the court. The intake worker, in light of his or her training and in light of the revelations of the inquiry, would then proceed on a course of action. The Legislature scheme also purports that the additional information about background and intake involvement is crucial for the district attorney to review before making a determination that a petition is in order, rather than a deferred resolution, or closure.

The receipt of this information benefits both the juvenile and the public. The juvenile is assured that all

pertinent personal data is available to the State so that it may make an informed determination before going forward. This sharing of information also assures that the purpose of the JJC is fulfilled, i.e. to determine whether judicial action is in the best interest of the juvenile and the public.

This same philosophy of a free flow of information during the intake process, is equally applicable when determining the propriety of waiving a juvenile into adult court. The free exchange of information between interested parties is equally, if not more important, in assuring that the court has complete and accurate information in determining whether waiver is in the best interest of the juvenile and the public. *See* Wis. Stat. § 938.18(6). The juvenile court's function of protecting the child and the public through its discretion at waiver is best served when the court has access to the fullest information possible. *See In re S.N.*, 139 Wis.2d 270, 275, 407 N.W.2d 562 (Ct. App. 1987). As Tyler T. argues, "[p]rior to the waiver hearing the court likely does not have much information about the juvenile or even the crime." Tyler T.'s brief at p. 12. Prohibiting communication between the intake worker and the district attorney, or for that matter any interested party, at this stage of the proceedings would

seem incompatible with assuring a waiver decision based on complete and accurate information.

The fluid roles and free exchange of information by those involved in the Juvenile Justice System, is further evidenced by the legislatures choice of who may request a waiver petition. A waiver petition may be initiated by the district attorney, the juvenile, or the court. *See* Wis. Stat. § 938.18(2). In this case, the State sought to waive Tyler T. into adult criminal court. In accordance with Wis. Stat. § 939.18(2m), the juvenile court in its discretion, required the WDHHS to submit a report analyzing the criteria for waiver specified in Wis. Stat. § 939.18(5).

Wis. Stat. § 938.08(1) specifically states that an intake worker appointed to furnish services to the court "shall make any investigation and exercise any discretionary powers that the court may direct, keep a written report of the investigation, and submit a report to the court." The statute makes no reference as to how the WDHHS is charged with obtaining that information. However, in gathering the information specified in Wis. Stat. § 938.18(5) it would seem prudent for the WDHHS to speak to the party requesting waiver, whether it be the prosecutor or the juvenile.

There is no question that when a sufficient waiver petition is submitted, a court may consider information or materials which go beyond the facts contained in a sufficient waiver petition. *In re S.N.*, 139 Wis.2d 270, 407 N.W.2d 562 (Ct. App. 1987). This is the case, because the juvenile court may inform itself regarding facts and circumstances bearing on waiver 'in any manner it deems suitably reliable,' subject to the juvenile's rights to notice and to contest or supplement the information. *In re D. H.*, 76 Wis.2d 286, 303, 251 N.W.2d 196, 205 (1977). The juvenile court's function of protecting the child and the public through its decision on waiver is best served when the court has access to the fullest information possible. *In re S.N.,* 139 Wis.2d at 275. Gathering any possible additional information from the party responsible for requesting waiver, serves to aid the court in making a fully informed waiver decision. Similarly, gaining insight from both the juvenile, the district attorney who represents the interest of the public in juvenile hearings, Wis. Stat. § 938.09(1), or from any other interested party, can only benefit the court in obtaining complete information to aid the court in its waiver decision.

B. Because A Waiver Investigation Report Is Distinct From A Presentence Investigation Report (PSI), The Case Law Interpreting PSI's Are Inapplicable.

In framing his argument, Tyler T. relies almost exclusively on adult criminal case law. Specifically, Tyler T. equates a waiver investigation report to a PSI, and cites *State v. Suchocki*, 208 Wis.2d 509, 561 N.W.2d 332 (Ct. App. 1997) and *State v. Howland*, 2003 WI App 104, 264 Wis.2d 279, 663 N.W.2d 340, to support his position that a prosecutor may never be at a waiver investigation meeting. Contrary to Tyler T.'s claim, however, a waiver investigation report is distinct from an adult PSI; and therefore, case law interpreting PSI's are inapplicable to this case.

Although this Court has acknowledged that a wavier hearing and a sentencing hearing are analogous in a number of ways, it is important to note a significant difference between the hearings. *See In the Interest of J.A.L.*, 162 Wis.2d 940, 973, 471 N.W.2d 493, 506-07 (1991). Obviously, the purpose of a sentencing hearing is to determine punishment and a PSI is written to assist the court in determining what punishment is appropriate. In contrast, a juvenile waiver hearing is distinguishable because it is a hearing to determine whether the best interests of the public and the juvenile would be served by waiving

jurisdiction of the juvenile to an adult court. Wis. Stat. § 938.18(5)(a). A clear purpose of the waiver hearing is to determine whether the juvenile is amenable to treatment in the juvenile justice system. If not, it is determined that the adult system is better equipped to handle the case; the determination is not to inflict punishment. See *In re C.W.*, 142 Wis.2d 763, 768, 419 N.W.2d 327 (Ct. App. 1987) (Court determined it was an erroneous exercise of discretion to rely heavily on what would be the sentence in adult court when deciding the appropriateness of waiver.). Thus, the waiver precedes any determination of guilt.[3] Therefore, while the State agrees with Tyler T. that a waiver report and a PSI may contain similar information, their purpose is vastly different.

Moreover, a juvenile's interest in assuring the court is provided with accurate and unbiased information is protected by the juvenile's right to present information and to cross-examine witnesses at the waiver hearing. *See* Wis. Stat. § 938.18(3)(b). *See also State v. Barreau*, 2002 WI App 198, ¶47, 257 Wis.2d 203, 230, 651 N.W.2d 12, 25 (citations omitted) (The right of confrontation includes

[3] Waiver to the adult criminal system does not carry a certainty of punishment because the juvenile is still afforded the right to a jury trial and the possibility of acquittal, or even probation.

the right to cross-examine adverse witnesses to expose potential bias.).

Whether or not a juvenile contests waiver, Wis. Stat. §938.18(5) requires the district attorney to present testimony on the issue of waiver. *In re T.R.B.*, 109 Wis.2d 179, 195-96, 325 N.W.2d 329, 337 (1982). Generally this testimony is taken from the intake worker who prepared the waiver report. Thus, unlike the author of a PSI, the juvenile is allowed to cross-examine the author of the waiver report, and present any additional evidence relevant to the waiver issue.

With these differing purposes in mind, the cases Tyler T. cites are unpersuasive.

In *Suchocki*, the Court concluded that a marital relationship between the district attorney prosecuting the defendant and the probation agent preparing his PSI demonstrated bias in the PSI writer as a matter of law. *Id.* at 520. Further,

> Once a defendant has established bias in the writer, the defendant need not show that the PSI was influenced by that bias. … [T]he writer's impressions may be formulated at both a conscious and subconscious level. A biased writer could unknowingly shape a PSI in even subtle ways that affect the defendant's right to a fair sentencing process. Therefore, establishing bias in the writer also establishes bias in the PSI as a matter of law.

Id. at 520-21.

Tyler T. asks this court to extend *Suchocki* to the present case. Tyler T. argues that the Assistant District Attorney's participation at the WDHHS's staffing meeting makes the writer and the waiver report biased as a matter of law under *Suchocki*. Tyler T.'s bias theory fails. This fact situation is a far cry from the *Suchocki* case and clearly distinguishable. As the court explained there:

> It is not the mere existence of contact between the prosecuting attorney and the PSI writer that is at issue. It is whether the PSI writer may be subconsciously influenced by this relationship in forming impressions regarding the defendant and in making recommendations to the court. …. [T]he attitudes of a prosecutor are likely to operate differently upon a PSI writer who has a marital relationship with the prosecutor than upon a PSI writer having no significant relationship with the prosecutor.
>
> ….
>
> Requiring any defendant to demonstrate that the marital relationship actually influenced the writer's impressions and recommendations would present an insurmountable hurdle to any defendant attempting to challenge a PSI. The reasons for an agent's impression may operate at a subjective level of which the report's author is unaware. The information, attitude and impressions received from an author's spouse may influence the author's impressions at either a conscious or subconscious level. Because the author's impressions could be subconsciously influenced, the writer may not even be aware of the relationship's influence. It would be difficult, if not impossible, for a defendant to challenge a PSI when the writer is not even conscious of the influence the marital relationship had on the preparation of the PSI. Further, the marital

> relationship draws the PSI's objectivity into question and, at the least, raises serious questions as to the fairness of the sentencing process to the defendant.
>
> … [W]e conclude that bias in the writer will be implied as a matter of law by the existence of the marital relationship.

Suchocki, 208 Wis. 2d at 519-20.

Tyler T. argues that the presence of the district attorney at the staffing meeting and his advocacy for waiver clearly could influence those subjective determinations, even on an unconscious level to the same degree as the *Suchocki* PSI writer. This court should reject Tyler T.'s assertion. Did Bradley have the kind of relationship with the district attorney's office that would influence her "impressions at either a conscious or subconscious level"? *Suchocki*, 208 Wis. 2d at 520. Not at all. Instead, Bradley is the typical "[waiver report] writer having no significant relationship with the prosecutor" upon whom "the attitudes of a prosecutor are [not] likely to operate differently" as opposed to the case where the PSI writer is the prosecutor's spouse. *Id.* at 519. Tyler T. claims that because the WDHHS frequently works with the district attorney's office….it would be difficult not to be persuaded by the prosecutor's advocacy both due to the ongoing relationship between the agencies

and the familiarity between the two. However, if this Court were to accept Tyler T.'s position, no one in the WDHHS would ever be able to objectively write a waiver report, or for that matter would the presiding judge be objective based on his working relationship with the District Attorney's Office. A working relationship between parties is hardly analogous to an intimate relationship such as marriage.

Similarly, Tyler's reliance on *Howland* to support his position is misplaced. In *Howland*,

> pursuant to the terms of the plea agreement, the State agreed to make no sentence recommendation. The original PSI recommended five to seven years' incarceration. However, at the rescheduled sentencing hearing … , the PSI author indicated that a witness to the crime had additional information relevant to the sentence recommendation. After talking to this witness, the author amended her report and changed the recommendation to a stayed sentence and probation.

Howland, 264 Wis. 2d 279, ¶28; *accord id.* at ¶¶3-6. Subsequently, on at least three occasions, the State contacted the Division of Community Corrections ("DCC") "to express its displeasure with the agent's recommendations, even going so far as to say that the recommendation, based upon an additional witness statement without recontacting the victim, was 'inappropriate.'" *Id.* at ¶29; *accord id.* at ¶¶6-15. Ultimately, the PSI was again amended, and the

original recommendation of five to seven years of prison time resurrected. *Id.*

The Appellate Court found that the prosecutors' vigorous and aggressive complaints to the DCC about the PSI's sentence recommendations constituted an "end run" around the no-sentence-recommendation plea agreement.

> The inescapable conclusion to be drawn from the facts is that the final PSI recommendation was the product of the district attorney's intervention. Thus the State was able to procure a sentence recommendation through the [DCC] by challenging the methods it used. This constituted an "end run" around the plea agreement. … If the prosecutor agreed to make no sentence recommendation, action by the prosecutor via influence with the presentence investigator would have rendered this no-sentence recommendation bargain meaningless.

Id. at ¶31.

Consequently, the court found that the State had materially and substantially breached the plea agreement and remanded the case for resentencing. *Id.* at ¶37.

This case is clearly distinguishable from *Howland*.

First, there is no absolutely no agreement in place between Tyler T. and the State. Here, the prosecutor simply attended a staffing meeting at the WDHHS's request and expressed his views on waiver, which as the State has amply demonstrated above is proper. The direct communications in *Howland* followed the initial PSI

recommendation and ran contrary to the plea agreement under which the State would make no sentencing recommendation. *Id*., ¶2. In this case, there is absolutely no indication that the district attorney's office was attempting to influence the waiver report writer in a direction contrary to an agreement with the juvenile.

Finally, Tyler T. argues that a waiver report writer's contact with the Assistant District Attorney as part of her preparation for the waiver report violates the principle that the waiver report be neutral and independent and insulated from the State's view of the case. Tyler T. fails to cite any legal authority prohibiting a waiver reports author gathering input from the district attorney as happened here. As demonstrated, Tyler T.'s attempt to apply case law governing PSI reports to waiver investigation reports is misplaced. "The juvenile law is not to be administered as a criminal statute, and the rules of criminal procedure are not to be engrafted upon the Children's Code." *Winburn v. State*, 32 Wis.2d 152, 157-58, 145 N.W.2d 178, 180 (1966). In enacting the current Juvenile Justice Code (JJC) the legislature did not lose sight of the fact that the JJC provisions are distinct from the criminal code provisions, and that the rehabilitation of juveniles is a primary objective. *See State v. Hezzie*

R., 219 Wis. 2d 848, 873, 580 N.W.2d 660 (1998). In fact, the JJC specifically states that a "judgment in a [juvenile delinquency] proceeding on a petition under this subchapter is not a conviction of a crime." *See* Wis. Stat. § 938.35(1).

Therefore, the proper place to first look in determining the procedure in a juvenile proceeding is Chapter 938, the Juvenile Justice Code, not to the adult criminal code or to cases interpreting the adult system, as Tyler T. suggests.

Accordingly, Tyler T.'s argument should be rejected.

CONCLUSION

For the reasons set forth above, the State respectfully requests that the Juvenile Court and Court of Appeals be affirmed in its entry of order to waive juvenile court jurisdiction over Tyler T.

Dated this _____ day of October, 2011.

Respectfully submitted,

_____
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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Signed,

_____
Attorney

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IN SUPREME COURT

Case No. 2010AP000784

In the Interest of Tyler T., A Person Under the Age of 17:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

TYLER T.

Respondent-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, Affirming a Nonfinal Order Entered in the Circuit Court of Walworth County, the Honorable James L. Carlson, Presiding.

REPLY BRIEF OF RESPONDENT-APPELLANT-PETITIONER

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ARGUMENT

I. The District Attorney's Ex Parte Participation in the Department's Staffing Meeting Regarding Waiver Negated the Neutrality of the Waiver Investigation Report and Therefore Tyler Should Have a New Waiver Hearing with a New Waiver Investigation Report.

A. Chapter 938 clearly delineates the role of the department as an independent agency that provides information for the court.

The state in its brief argues that the Juvenile Justice Code provides for a free exchange of information and therefore the district attorney's ex parte advocacy at the staffing meeting was appropriate. (State's Brief at 12-20).

The first major flaw in the state's argument is that it assumes that if the prosecutor is precluded from having ex parte contact with the author of the wavier investigation report then the court will be denied complete and accurate information at the wavier hearing. (State's Brief at 18). This is completely false. The court will hold a waiver hearing pursuant to Wis. Stat. § 938.18(4). At that hearing the state can present evidence to support its position on waiver. The court can be informed of exactly the same information the prosecutor would provide to the Department. In no way is the court's access to the fullest information possible compromised. The prosecutor tells the court why the juvenile should be waived, defense counsel tells the court why the juvenile should be retained and the Department presents the court with an independent and neutral report. The court has every argument and every piece of information before it and

this can all be accomplished without any ex parte communications.

Perhaps most importantly, the state's emphasis on the "free flow of information" is disingenuous in this context. (State's Brief at 18). The state was not merely providing a "free flow of information" at the staffing meeting. The state attended the meeting to advocate for waiver. (21:14-15). Providing information and advocacy are two distinct actions and the state's attempt to blur the distinction must fail.

Another major flaw with the state's position is that its claim of fluidity is overstated and inconsistent with the plain language in Chapter 938. An examination of the structure of the Juvenile Justice Code reveals a clear delineation of roles whereby the Department provides services and information for the court. The state is correct that the Juvenile Justice Code has "a built-in system of checks and balances…" (State's Brief at 15). One of those built in checks and balances is the neutral and independent role of the Department when it undertakes quasi-judicial functions.

The Juvenile Justice Code contains many examples of the Department functioning as an arm of the court. Wisconsin Statute § 938.06 is entitled "Services *for* court." (emphasis added). The statute sets forth that "intake workers shall be governed in their intake work, including their responsibilities for requesting the filing of a petition and entering into a deferred prosecution agreement, by general written policies established by the circuit judges for the county, subject to the approval of the chief judge of the judicial administrative district." Wis. Stat. § 938.06(2).

The powers and duties of the intake workers are established in Wis. Stat. § 938.067. In sub (9), the legislature clearly puts these workers in the purview of the court:

"OTHER FUNCTIONS. Perform any other functions ordered by the court…" This is consistent with Wis. Stat. § 938.08, which defines the duties of the persons furnishing services to the court. In this statute, the author of reports is clearly an ancillary of the court:

> INVESTIGATIONS; REPORTS. A person appointed to furnish services to the court under ss. 938.06 and 938.07 shall make any investigations and exercise any discretionary powers that the court may direct, keep a written record of the investigations, and submit a report to the court. The person shall keep informed concerning the conduct and condition of the juvenile under the person's supervision and shall report on the conduct and condition as the court directs.

Likewise, the waiver statute defines the agency as an arm of the court when it comes to preparing the waiver investigation report. Wisconsin Statute § 938.18(2m) has the court designate the agency to submit the report, the agency is required to file the report with the court and the court distributes copies of the report to the parties:

> AGENCY REPORT: The court may designate an agency, as defined in s. 938.38(1)(a), to submit a report analyzing the criteria specified in sub (5). The agency shall file the report with the court and the court shall cause copies of the report to be given to the juvenile, any parent, guardian or legal custodian of the juvenile and counsel at least 3 days before the hearing.

Clearly the agency is working for the court at the direction of the court.

Further emphasizing this connection between the court and the Department is Wis. Stat. § 938.24(1). This statute sets out the intake procedure and directs the intake worker to "conduct an intake inquiry on behalf of the court…" The

state argues that statutes allow an exchange of information between the district attorney and the intake worker during the intake process and this justifies the prosecutor's ex parte participation in the waiver process. (State's Brief at 18). However, the state fails to note that the statutes do not provide for the intake worker and the district attorney to make the charging decision as a team. Instead, they have separate roles and the intake worker's role alone to decide on how to proceed, "If the intake worker determines as a result of the intake inquiry that the juvenile should be referred to the court, the intake worker shall request that the district attorney…file a petition." Wis. Stat. § 938.24(3).

The state tries to evade the clear link between the court and the Department by arguing that the juvenile justice system encourages free and unregulated exchange of information. (State's Brief at 18). Taking this argument to its logical conclusion, the district attorney could participate ex parte in the preparation of a court report prior to disposition. Yet Wis. Stat. § 938.33(1) again clearly places the author of this report under the purview of the court, "Before the disposition of a juvenile adjudicated to be delinquent or in need of protection or services, the court shall designate an agency, as defined in s. 938.38(1)(a), to submit a report…"

As part of its argument that the roles within the juvenile code are fluid and therefore ex parte communication is proper, the state notes that defense counsel also discussed the case with the social worker. (State's Brief at 12-13). This argument fails because the contacts were so dissimilar. The state was invited to and participated in a staffing meeting to discuss whether or not the Department should recommend waiver. Ten members of the Walworth County Department of

Health and Human Services participated in this meeting. The district attorney strongly advocated for waiver. (21:14-15).

Over the course of eight months, defense counsel's only contact with the Department consisted of brief hallway discussions outside the courtroom. Social worker Erin Bradley described these conversations as, "we would probably chat in the hallway prior to an appearance or maybe discuss the case when we were both here for another hearing." (21:20). Advocating in a ten-person Departmental staffing meeting and chatting in the hallway are incongruous and cannot be presented as equal participation in the Department's waiver decision.

Chapter 938 is carefully crafted code that defines the Department as an agent of the court. The juvenile is entitled to due process. Wis. Stat. § 938.01(1)(d). As part of that due process the judicial role is clearly delineated. It's unlikely that the state would argue that it is acceptable for a district attorney to advocate ex parte with the court prior to a waiver hearing. It is also unacceptable for the district attorney to advocate ex parte with an agent of the court prior to the waiver hearing.

B. The waiver investigation report is analogous to a presentence investigation.

The criminal case law is clear that the PSI must be an independent source of information for the court. The reasoning behind that case law is equally applicable to the waiver investigation report.

There are many similarities in the basic structure of the criminal system and the juvenile system. The district attorney prosecutes the cases. There is a right to defense counsel. The court has an independent agency that prepares reports for its

consideration. The process has similarities as well. For example, in juvenile court discovery rules and the procedure for accepting a guilty plea or admission mirror the adult system. Wis. Stat. §§ 938.30(8); 971.08; 938.293(2); 971.23.

Simply because a line of cases originates in the criminal system does not preclude its application to the juvenile law. This is particularly true when the reasoning behind a principle in the adult system is consistent with the juvenile system. The independent nature of agency reports prepared for the court is one of those consistencies.

The state's attempt to distinguish between a PSI and a wavier investigation report is not persuasive. The state argues that a PSI is "written to assist the court in determining what punishment is appropriate" while the waiver hearing is to determine if the juvenile or adult system is better equipped to handle the case. (State's Brief at 21-22). This argument misses the point. The focus is not on the decision the court will make but the purpose of the report. The purpose of both the PSI and the waiver investigation report is for an agent of the court to present independent, neutral information to assist the court.

The state also argues that ex parte advocacy by the prosecutor is permissible in a waiver proceeding because a juvenile can present information and cross-examine witnesses at a waiver hearing. (State's Brief at 22). Again, this is a meaningless distinction. The same right to present information and cross-examine witnesses applies at a sentencing hearing and there is nothing to prevent a defendant from calling the author of the PSI as a witness.

The state tries to distinguish two of the cases cited in Tyler's brief, ***State v. Suchocki***, 208 Wis. 2d 509, 561 N.W.2d 332 (Ct. App. 1997), and ***State v. Howland***, 2003 WI

App 104, 264 Wis. 2d 279, 663 N.W.2d 340. (State's Brief at 25-27). The state argues that ***Suchocki*** does not apply because in that case the author of the PSI was married to the prosecutor and in Tyler's case there was no such personal relationship. (State's Brief at 25). The state's claim that if Tyler prevails in this case "no one in the WDHHS would ever be able to objectively write a waiver report, or for that matter would the presiding judge be objective based on his working relationship with the District Attorney's Office" is not convincing. (State's Brief at 26). A critical fact in Tyler's case is the ex parte nature of the prosecutor's participation. The Department was faced with strong advocacy by the prosecutor and no counter balance by the defense. The problem isn't the mere fact of the relationship between the Department and the prosecutor; the problem is prosecutor's use of his position to appear ex parte at the staffing meeting and advocate for waiver.

The danger of ex parte communication between a prosecutor and the PSI author was at the heart of the ***Howland*** case. The state argues that ***Howland*** does not control because that case involved a plea agreement and there was no plea agreement in Tyler's case. (State's Brief at 27). Again, the state is attempting to limit the decision to its specific facts and fails to address the reasoning behind the court's holding. The ***Howland*** court cited ***Suchocki*** and emphasized the importance of the PSI to the sentencing process and the neutral and independent nature of the PSI. ***State v. Howland***, 2003 WI App. 104 at ¶¶ 32-37. The court noted "the preparer of the PSI is to be a neutral and independent participant…" ***Id.*** at ¶ 33, *citing* ***State v. McQuay***, 154 Wis. 2d 116, 131, 452 N.W.2d 377 (1990). The same importance of neutrality and independence applies to waiver investigation reports.

The state chose not to address ***State v. Perez***, 170 Wis. 2d 130, 141, 487 N.W.2d 630 (Ct. App. 1992), which noted that, "The active involvement of an advocate – defense counsel or, for that matter, the prosecution – in the information-gathering process could cause a serious degradation in the reliability and impartiality of the sentencing court's information base."

It is impossible to precisely determine how the state's influence affected the report and therefore affected the court. The ex parte involvement in the staffing meeting raises multiple questions: Was the author consciously or subconsciously affected by the prosecutor's advocacy and presence? Was the "not very common" failure to make any recommendation in the report influenced by the prosecutor's involvement? (21:20). Was the court consciously or subconsciously influenced by the report's lack of a recommendation? Would the court have interpreted the information differently if the Department had recommended retention in the juvenile system? It becomes a question of trying to unring the bell. The record cannot reveal how the author was affected or how the court was impacted by the prosecutor's ex parte involvement in the waiver recommendation. The bottom line is that the prosecutor's ex parte involvement violated the critical rule that the report be neutral, unbiased and independent. For that reason, Tyler should receive a new waiver hearing with a new waiver investigation report in front of a different judge.

CONCLUSION

For the reasons set forth above, as well as those in the brief-in-chief, Tyler respectfully requests that this court vacate the waiver order, order the preparation of a new waiver investigation report without the participation of the district attorney and order the juvenile court to hold a new waiver hearing with a different judge.

Dated this 16th day of November, 2011.

Respectfully submitted,

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