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STATE OF WISCONSIN

IN SUPREME COURT

No. 2015AP002328-CR

In the Matter of

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

SHAUN M. SANDERS,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW AND APPENDIX

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Pursuant to Wis. Stats. §§ 808.10 and 809.62, Shaun M. Sanders, Defendant-Appellant, Petitioner, petitions this court for review of the decision or order of the Wisconsin Court of Appeals, District II, March 15, 2017, affirming his convictions as well as the adjudication by the circuit court on his Rule 809.30 post-conviction motion. The Court of Appeals' decision, ***State v. Sanders***, No. 2015AP2328-CR (Wis. Ct. App. Dist. II, March 15, 2017) will be published, and as such, it can be cited for persuasive authority. Because of the novelty of the issue herein, as well as its recurring nature,

further development by this court is appropriate.

ISSUE PRESENTED

1. Can a person be criminally responsible for acts allegedly committed before the age of original juvenile court jurisdiction?

Put differently, is there a minimum age for criminal prosecution in Wisconsin? Under the court of appeals interpretation of existing caselaw, principally ***D.V. v. State***, 100 Wis. 2d 363, 302 N.W.2d 64 (Ct. App. 1981) and this Court's holding in ***State v. Annala***, 168 Wis.2d 453, 484 N.W.2d 138 (1992) Wisconsin effectively has no minimum age for criminal responsibility and a person can later be prosecuted for crimes allegedly dating as far back as infancy, *See* ***Sanders***, Slip Op. ¶9.

Until ***Sanders***, no prior reported appellate decision had ever addressed the precise legal issue raised in this appeal. The majority of Sanders' claims of ineffective assistance of counsel relate to trial counsel's failure to challenge the portion of count one that predate his tenth birthday, which was the age of original juvenile court jurisdiction at the time of the alleged offenses, prior to trial. Therefore, the answer to the above question is critical to resolving the ineffective assistance claims. If Wisconsin has no minimum age for criminal responsibility, as the court of appeals found, then Sanders claims will likely fail.

On the other hand, if Wisconsin does have a minimum age a person can later be held criminally responsible, what is that age? Judge Reilly, for instance, in his concurring opinion, wrote separately "to express my concern that at some stage a child does not have the capacity to commit to commit a crime, i.e., siblings, aged two and three, sharing a bath and playing 'doctor' do not have the capacity to commit the crime of sexual assault of a child. The disturbed four year old who abuses animals and five year old who likes to play with matches and burn things should be treated as children who need help rather than convicted and locked up as animal abusers or arsonists." ***Id.*** at ¶45. Judge Reilly cautioned that though "there must be some limit" for the age at which an adult can later be held criminally responsible, he nevertheless believed that ***D.V.*** applied to the facts of this case. ***Id.*** at ¶45-47.

Sanders maintains in the argument that follows, that the logical jurisdictional demarcation point for criminal responsibility in Wisconsin begins at age ten and that pre-age-ten conduct was envisioned by the legislature to be treated as a non-criminal civil CHIPS proceeding that does not blossom into criminal responsibility at a later date.

CRITERIA SUPPORTING THE PETITION FOR REVIEW

Sanders submits that the court should grant the petition for review

because this case meets the following criteria set forth in Wis. Stat. § (Rule) 809.62(1):

> (c) A decision by the Supreme Court will help develop, clarify or harmonize the law, and . . .
>
> > 2. The question presented is a novel one, the resolution of which will have statewide impact.
> >
> > 3. The question is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the Supreme Court.

Review of the decision in this case is warranted because resolution of the issue presented is necessary to clarify whether the State can prosecute individuals for criminal acts allegedly occurring before the age of original juvenile court jurisdiction. The question presented is a matter of law, requiring the interpretation of Wis. Stats. §938.02(3m); §938.12(1) and §938.183(1)(am). As stated above, no other reported decision has ever addressed the question of whether a minimum age for criminal prosecution exists in this state.

Review is also warranted because the court of appeals' decision in this case may be in conflict with several published decisions as to whether the issue raised in this petition relates to the court's "subject matter jurisdiction"

versus its "competency" to hear a charge that predates one's tenth birthday, or the age of original juvenile court jurisdiction. The court of appeals believed the issue related to the court's competency to proceed. *See* ***Sanders***, Slip Op. ¶14-23. In so finding, the court specifically cited ***State ex rel. Koopman v. County Court***, 38 Wis.2d 492, 157 N.W.2d 623 (1968); ***D.V. v. State***, 100 Wis. 2d 363, 302 N.W.2d 64 (Ct. App. 1981) and this Court's holding in ***State v. LeQue***, 150 Wis. 2d 256, 442 N.W.2d 494 (Ct. App. 1989) as all having "mistakenly used the term 'jurisdiction' instead of 'competency'" when framing the issue within the context of each case. *See* ***Sanders,*** Slip Op. ¶23.

One of the other reasons Judge Reilly wrote separately was due to the fact that he did not join in the majority's characterization that "the justices, judges, and legislators of this state have mistakenly used the term 'jurisdiction' instead of 'competency'." *See* ***Id.*** at ¶48. Judge Reilly concluded that "[w]e on the court of appeals do not have the power to overrule, modify or withdraw language from 'prior published decisions so as to change the word 'jurisdiction' to 'competency'' and did not join in that portion of the majority's opinion as a result. ***Id.***, *Citing* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

For this reason, review by this Court would help resolve any question

as to whether it's the court's "subject matter jurisdiction" or its "competency" that is invoked by this case as well as the cases cited above.

STATEMENT OF THE CASE AND FACTS

The court of appeals has accurately summarized the majority of the essential facts and the procedural history of the case. *See* ***Sanders***, Slip. Op. ¶3-8 (Pet. App. 102-104). However, some additional facts are necessary regarding the nature of Sanders' attorney's alleged neglect and how it arose in this case.

After the State rested its case, trial counsel brought, for the first time, a motion to dismiss count one (which alleged the pre-ten-year old conduct) based upon the fact that the state had failed to prove Sanders could form the necessary intent to commit the crimes because of his young age at the time. (55:23). The defense relied upon the court of appeals holding in ***State v. Stephen T.***, 2002 WI App 3, 250 Wis. 2d 26, 643 N.W. 2d 151, which held that a child's relative sexual maturity at the time of the offense was relevant as a matter in law in determining whether he or she had the capacity to commit the offense. ***Id***. The defense argued that since the State had not presented any evidence that Sanders could form the necessary intent to become sexually aroused or gratified even if the conduct did occur, the charge should be dismissed. ***Id***.

The State responded that "it [was] a little late in the game" to raise the issue of Sanders' age in the charging period in count one. (55:25). The State further contended that the issue should have been addressed in a pretrial motion instead. ***Id***.

The trial court held that the issue of evidence having already been received of Sanders being under the age of ten was jurisdictional in nature and because of this, it could be addressed at any time. (55:88). However, the court was unsure of how to appropriately remedy this jurisdictional dilemma at that point of the trial. ***Id***. Ultimately, the trial court took its own motion for mistrial under advisement and allowed the trial to proceed, with the understanding that the issue would be revisited post-verdict, if Sanders was ultimately convicted of count one. (55:95).

Because Sanders was later acquitted of count one, the trial court never revisited the jurisdictional issue. During the post-conviction proceedings, Sanders maintained that defense counsel's framing of the issue as one involving the state's burden of proof, as opposed to its jurisdiction or competency to hear the allegations involving pre-age-ten conduct prejudiced his defense on the remaining counts because it was not raised until the State had already closed its case.

APPLICABLE STATUTES

At issue in this case are four statutes, Wis. Stat. §938.12(1); Wis. Stat. §938.13(12); Wis. Stat. §938.18 and Wis. Stat. §938.183.

Wis. Stat. §938.12(1) sets a jurisdictional demarcation point at age 10 or older for any juvenile who is alleged to be delinquent. The word "delinquent" is defined in Wis. Stat. §938.02(3m). It provides in pertinent part:

> **938.02 Definitions.**
>
> (3m) "Delinquent" means a juvenile who is 10 years of age or older who has violated any state or federal criminal law, except as provided in 938.17, 938.18 and 938.183...

Wis. Stat. §938.02(10m) goes on to define "juvenile" as a person under the age of 17 for a person who is being investigated or prosecuted for a violation of state or federal criminal law.

Wis. Stat. §938.13(12) sets a jurisdictional demarcation point for persons under the age of ten thusly:

> **938.13 Jurisdiction over juveniles alleged to be in need of protection or services.**
>
> Except as provided in s. 938.028(3), the court has exclusive jurisdiction over a juvenile alleged to be in need of protection or services which can be ordered by the court if any of the following conditions apply:

> (12) DELINQUENT ACT BEFORE AGE 10. The juvenile is under 10 years of age and has committed a delinquent act.

Wis. Stats. 938.18 provides for waiver of jurisdiction for criminal proceedings for juveniles 14 years or older for certain enumerated offenses provided specific criteria can be met. It also provides for waiver for all violations of state or federal criminal law on or after the juvenile's 15th birthday as long as the same criteria can be met.

Finally, Wis. Stats. §938.183 allows for original adult court jurisdiction for certain enumerated offenses that have been alleged to occur on or after a juvenile's 10th birthday. It does allow for a transfer of jurisdiction back to juvenile court under certain limited circumstances.

ARGUMENT

I. THIS COURT SHOULD GRANT REVIEW TO CLARIFY WHETHER INDIVIDUALS CAN BE CRIMINALLY PROSECUTED FOR OFFENSES ALLEGEDLY OCCURRING BEFORE THE AGE OF ORIGINAL JUVENILE COURT JURISDICTION.

The statutory scheme outlined above works well in practice because it offers seemingly clear guidance from the legislature on how to treat offenses involving children based upon primarily two factors: age and the seriousness of the offense. §938.13(12) Wis. Stats. allows juveniles under

the age of 10 who commit what otherwise would have been a delinquent act to be subject to a non-criminal CHIPS proceeding; civil in nature with a focus on providing treatment and services to the child. *See* ***State v. Thomas J.W.***, 213 Wis. 2d 264, 266, 272-74, 570 N.W.2d 586 (Ct. App. 1997).

Under §938.12(1), Wis. Stats., juveniles aged ten years to under 17 years of age who commit a delinquent act face the consequences of the juvenile justice code. A delinquency action is similar to a criminal proceeding as the juvenile is subject to possible imprisonment and is entitled to many of the same constitutional protections given to criminal defendants. *See* ***Id.*** at 274-76. In addition to possible imprisonment or placement in a secured juvenile correctional facility, juveniles in this age category who commit sex crimes may be ordered to comply with sex offender reporting under §938.34(15m), and §301.45 Wis. Stats.

The next demarcation point in the juvenile code is found at Wis. Stat. §938.183, which is age *and* offense based. Specifically, this section confers original adult court jurisdiction (the "reverse waiver" statute) for juveniles (by definition 10 years of age or older) who are alleged to have committed or attempted to commit first or second degree intentional homicide or first degree reckless homicide. *See* Wis. Stat. §938.183(1)(am). Of note, sex crimes under Wis. Stat. §940.225, like the one charged in count one of the

information in this case, are not included in the triggering language found in this section.

The earliest age a juvenile can face adult court penalties, without committing any of the aforementioned crimes, is age 14. *See* Wis. Stat. §938.18 (titled "Jurisdiction for criminal proceedings for juveniles 14 or older; waiver hearing"). At this stage, absent certain gang related offenses, juveniles 14 years or older can face possible waiver into adult court only for specifically delineated offenses, such as felony murder and first or second degree sexual assault. *See* Wis. Stat. §938.18 (1)(a). Sanders was charged with Wis. Stat. §948.025, repeated sexual assault of the same child, which is not one of the enumerated offenses that could have triggered a possible waiver into adult court.

It is not until a juvenile reaches the age of 15, that *any* state criminal law violation can trigger a possible waiver into adult court. This would, of course, include the offense for which Sanders was charged with in this case.

In a perfect world, offenses would be reported and charged in a timely fashion so they would dovetail with the age appropriate responses originally envisioned by the legislature. In other words, gradually increasing consequences as a juvenile passes 10 years of age to 15 years of age, where any offense could potentially trigger penalties in adult court if certain

conditions can be met.

Things begin to get murkier when the offense is not reported immediately, which Sanders acknowledges is not altogether uncommon for cases of this nature, and instead is reported at a time where several or more years have passed from the date of the original allegations and when the appropriate resources originally envisioned by the legislature are no longer available because of the individual's age at the time of charging.

This scenario is also much more likely to occur in cases involving sex crimes, because the statute of limitations is far broader than the six and three year limitations period for felonies and misdemeanors respectively. *See* Wis. Stat. §939.74(1) and (2). Under Wis. Stat. §939.74(2)(c), the great majority of child sex crimes, including the one alleged here, must be prosecuted before the victim reaches 45 years of age. In this case, for example, the statute of limitations would not run until September 26, 2041.

During the post-conviction proceedings in this case and in the court of appeals, the State relied primarily on this Court's holding in ***State v. Annala***, 168 Wis. 2d 453, 484 N.W. 2d 138 (1982), to support its prosecution of Sanders in adult court for offenses allegedly committed during a time when he would have originally been subject to a non-delinquency CHIPS proceeding (i.e. pre-age-ten conduct). Sanders maintained throughout the

lower court proceedings that ***Annala*** could not be used for this broad purpose. (*See* Sanders Brief p.12-13).

Annala was charged with molesting a young child when he would have been 15 years old, but he was twenty years old by the time it was reported to the authorities. ***Id.*** at 458. The sole issue in ***Annala*** was whether juvenile court still had jurisdiction to hear the case since the crime was allegedly committed while Annala was a juvenile. This court held that it is the age of the defendant at the time of *charging* that controls which court will have jurisdiction to hear the case, subject to any claims by the defense that the State intentionally delayed the prosecution in order to charge the defendant as an adult. ***Id.*** *See also* ***State v. Becker***, 74 Wis. 2d 675, 247 N.W. 2d 495 (1976).

Significantly, at the time the Annala was charged, juvenile court jurisdiction for a delinquency (i.e. a violation of state or federal criminal law) began at age 12. This court was not asked to consider the broader question raised in this case of whether the adult court would retain jurisdiction to hear an offense occurring *before* Annala's twelfth birthday, during a time period the legislature originally envisioned a non-punitive CHIPS based outcome.

Sanders has already conceded that absent a claim under ***Becker***, *Supra*., for intentional prosecutorial delay, which is not being raised in this

case, the State could arguably prosecute an adult in criminal court for state crimes occurring on or after the age of original juvenile court jurisdiction based on this Court's holding in ***Annala***. All of the other reported decisions are similar to ***Annala*** in that they relate to *post*-CHIPS juvenile court era conduct that was later reported and charged after the defendant had already become an adult. *See* ***State ex rel. Koopman v. County Court***, 38 Wis. 2d 492, 157 N.W. 2d 492, 157 N.W. 2d 623 (1968); *See also* ***State v. LeQue***, 150 Wis.2d 256, 442 N.W. 2d 494 (Ct. App. 1989).

The decision, however, that the court of appeals ultimately relied upon was ***D.V. v. State***, *Supra*. Unlike the cases cited above, ***D.V***. *did* involve conduct that occurred before the age of original juvenile court jurisdiction (twelve years of age at the time). D.V. allegedly committed a robbery several weeks before his twelfth birthday. The State filed a delinquency petition approximately twenty-seven days later, at a time when D.V. would have just turned twelve by one week. ***Id.*** at 364. The court of appeals in ***D.V.*** held that the prosecution could proceed under the juvenile justice code and that the twenty-seven day delay in charging was neither intentional nor negligent for juvenile court practices at the time, thus satisfying ***Becker***. ***Id.*** at 371.

Applying the same logic to this case, the court of appeals held Sanders had essentially no legal basis to challenge the criminal prosecution for his

conduct that allegedly occurred before the age of original juvenile court jurisdiction. *See* ***Sanders***, at ¶24-28. Therefore, the court concluded, Sanders' trial counsel could not have rendered prejudicially deficient performance for failing to challenge Sanders' CHIPS era conduct prior to trial. ***Id.*** at ¶29.

Missing in the court of appeals' decision in this case, however, is the actual *analysis* used by the court in ***D.V.*** to arrive at its conclusion that D.V.'s CHIPS era conduct could be prosecuted in juvenile court. Critical to the court's decision was a direct comparison between Children's Code (Chapter 48 at the time) and CHIPS (§48.13(12) at the time). *See* ***D.V.***, 100 Wis. 2d at 369. The court in ***D.V.*** found and listed twenty three similarities between the two codes. ***Id.*** at 369-370. In contrast, the court then went on to note there were only six differences between the two codes. ***Id.*** at 370. The court in ***D.V.*** ultimately concluded the differences in the two proceedings were "minimal" and did not "constitute the kind of 'substantial differences' that implicate the equal protection and due process procedural protections of an evidentiary hearing" with respect to the twenty-seven day delay in charging D.V. under the Children's Code. ***Id.*** at 371.

Likewise, Sanders highlighted the jurisdictional division points created by the legislature and the ages where profound differences begin to

occur in the CHIPS code, the Juvenile Code and the pathways to the Criminal Justice Code. It goes without saying that there are "substantial differences" between the CHIPS code and the Criminal Justice Code. There are even more substantial differences between the CHIPS code and the Criminal Justice Code when it relates to child sex crimes (chiefly up to 40 years of imprisonment and mandatory sex offender registration for the offense in this case, as an example). Had the court in this case applied the same analysis that was applied in ***D.V.***, it is doubtful they would have reached the conclusion they did.

Sanders still maintains this court should attempt to harmonize the three statutory layers (CHIPS, Juvenile Justice Code and Criminal Justice Code) and employ a similar analysis to avoid conflict if at all possible. *See* ***State v. Ray***, 166 Wis. 2d 855, 873, 481 N.W.2d 288 (Ct. App. 1992); *See also* ***Edelman v. State***, 62 Wis. 2d 613, 215 N.W. 2d 386 (1974). The legislature intended to address pre-age-ten conduct under a civil CHIPS proceeding without *any* exception based upon on the seriousness of the alleged offense (contrast this with the Juvenile Code which has multiple jurisdiction points based on age and the seriousness of the offense). The clear purpose of the legislature in creating a CHIPS proceeding in the first place is to provide treatment and services to the child, *not* punishment. *See* ***State v.***

Thomas J.W., *Supra*.

If the analysis in ***Annala***, or the court of appeals' interpretation of ***D.V.*** in this case can be applied to pre-age-ten conduct, jurisdiction or competency can be treated like fruit, which can ripen on the tree until it is ready for picking at a later date. In other words, had Sanders been charged at the time he allegedly committed the earliest offense in this case (seven to eight years of age), he would have been the subject of a non-criminal civil CHIPS proceeding and presumably provided with treatment and services. However, solely due to the passage of time triggered by the reporting of an offense and the filing of a complaint, the State can prosecute him for a criminal offense carrying up to forty years of imprisonment and mandatory sex offender registration now that he has "ripened" into an adult.

It does not make sense, from a logical standpoint, to justify punishing a fully formed adult for an act he allegedly committed long before he was so. The statutory schemes referenced above must be harmonized to avoid this absurd result. Sanders continues to maintain this demarcation point is triggered by an individual's tenth birthday, the earliest age a juvenile can face the consequences of both the juvenile and/or adult criminal justice system.

If this Court disagrees, then it must decide when and how this issue will be addressed in future prosecutions. The court in ***D.V.***, for example,

engaged in a comparative analysis between the competing systems involved (CHIPS vs. Juvenile Code) and concluded that the differences between the two systems were not significant enough at the time to warrant a different outcome based on equal protection or due process grounds. ***D.V.***, 100 Wis. 2d at 371. That analysis may be different today, given the changes that have occurred within our Juvenile Code since ***D.V.*** was originally decided. Nevertheless, trial courts will need guidance on how to properly frame this issue in the future.

Juveniles accused of certain enumerated offenses at age 14 or any offense after age 15 under Wis. Stat. §938.18 are at least entitled to a due process hearing to determine the appropriateness of the transfer to Adult Court waiver as long as specific criteria can be met. Similarly, even juveniles who are charged crimes serious enough to warrant original adult court jurisdiction in Wis. Stat. §938.183 are entitled to a "reverse waiver hearing" before the jurisdictional decision is final. All of the jurisdictional decisions are determined *prior* to trial and *before* a judge or jury hears any evidence, unlike the scenario in this case.

Unlike the above statutory schemes, which provide clear guidance from our legislature, there is absolutely zero guidance on how to treat the special category of criminal prosecution like the one in this case. There is no

"retro-crime" provision within the Criminal Justice Code. This special category of criminal prosecution was created strictly by judicial precedent, chiefly this Court's holdings in ***Koopman*** and ***Annala***, *Supra*.

For this reason, Sanders maintains that the court does not have competency to adjudicate cases of this nature (pre-age-ten conduct resurrected into crimes after adulthood). In ***State v. Schroeder***, 224 Wis. 2d 706, 593 N.W. 2d 76 (1999), this Court held that competency refers to the "lesser power" of a court, as conferred by the *legislature***,** to adjudicate the *specific* case before it. *See* ***Schroeder***, 224 Wis. 2d at ¶16.

The legislature, in the creation of the juvenile and adult justice codes, has not conferred *either* system with *specific statutory authority* to adjudicate violations of state or federal criminal laws that pre-date an individual's tenth birthday as a criminal offense or "retro-crime." Therefore, because of the absence of a specific statutory mandate, the circuit court loses competency to proceed.

This Court has also held that a circuit court has subject matter jurisdiction to consider and determine *any* type of action (with one possible exception which will be addressed further below). *See* ***In re B.J.N***., 162 Wis. 2d 635, 645, 469 N.W.2d 845, 848 (1991). However, when a statutory mandate is not met, like the minimum age of prosecution in this state that

failure alone does not deprive the circuit court of its subject matter jurisdiction. *See* ***In re B.J.N.***, 162 Wis. 2d at 656. Instead, the court is deprived of its competency to *exercise* its subject matter jurisdiction. As a result, Sanders is more accurately challenging the circuit court's competency to exercise its subject matter jurisdiction over this special category of "retro-crimes."

As it stands, the court of appeals in ***Sanders*** has basically given the State *carte blanche* to prosecute individuals who have allegedly committed offenses dating back to infancy as long as the statute of limitations has not run and absent any claim of intentional or negligent delay. Left unanswered by the court of appeals decision, however, and raised within the concurring opinion by Judge Reilly and likely to become a recurring issue in the future if "retro-crime" prosecutions are allowed to stand, is at what age does a child not have the capacity to commit a crime?

CONCLUSION

For the reasons stated herein, Sanders requests that this Court grant his Petition for Review of the decision of the court of appeals in this case.

Dated at Waukesha, Wisconsin, this 14th day of April, 2017.

Respectfully submitted,

Walden & Schuster, S.C.
Attorneys for Shaun M. Sanders,
Defendant-Appellant

Electronically signed by Craig M. Kuhary

_____

CRAIG M. KUHARY
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CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional serif font. The brief contains 4,291 words.

Electronically signed by Craig M. Kuhary

_____

CRAIG M. KUHARY
Attorney for Defendant-Appellant-Petitioner

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 14th day of April, 2017.

Electronically signed by Craig M. Kuhary

_____

CRAIG M. KUHARY
Attorney for Defendant-Appellant-Petitioner

CERTIFICATION OF MAILING

I hereby certify that this brief and appendix was delivered on April 14, 2017, with a third party carrier for delivery to the Clerk of the Court of Appeals. I further certify that the brief and appendix was correctly addressed.

Dated this 14th day of April, 2017.

Electronically signed by Craig M. Kuhary

_____

Signature