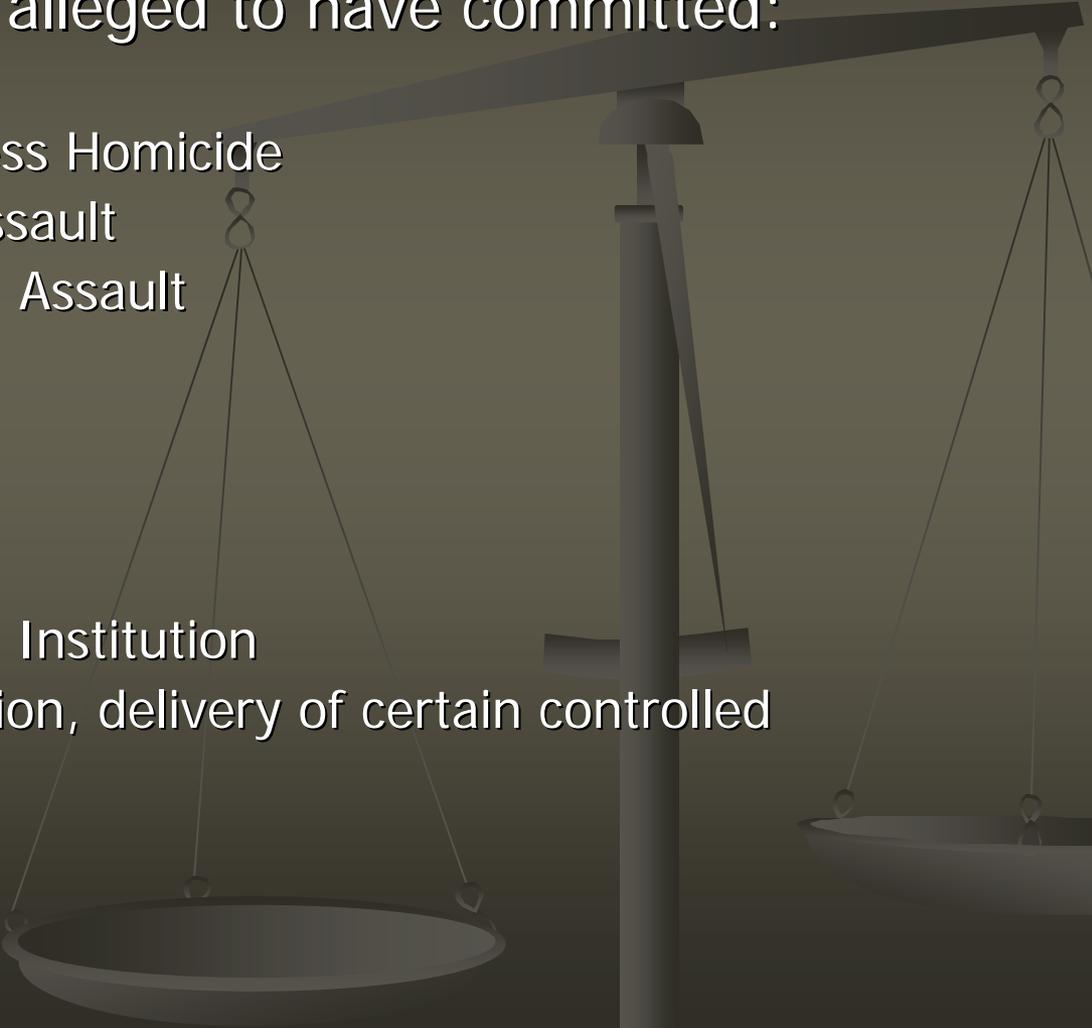


Waiver Hearings in Juvenile Court

Presentation for Juvenile Certification Training
November 7, 2012

Benjamin C. Gonring
Attorney Manager, Madison Trial
(608)267-1764
gonringb@opd.wi.gov

Who is Eligible to Be Waived?



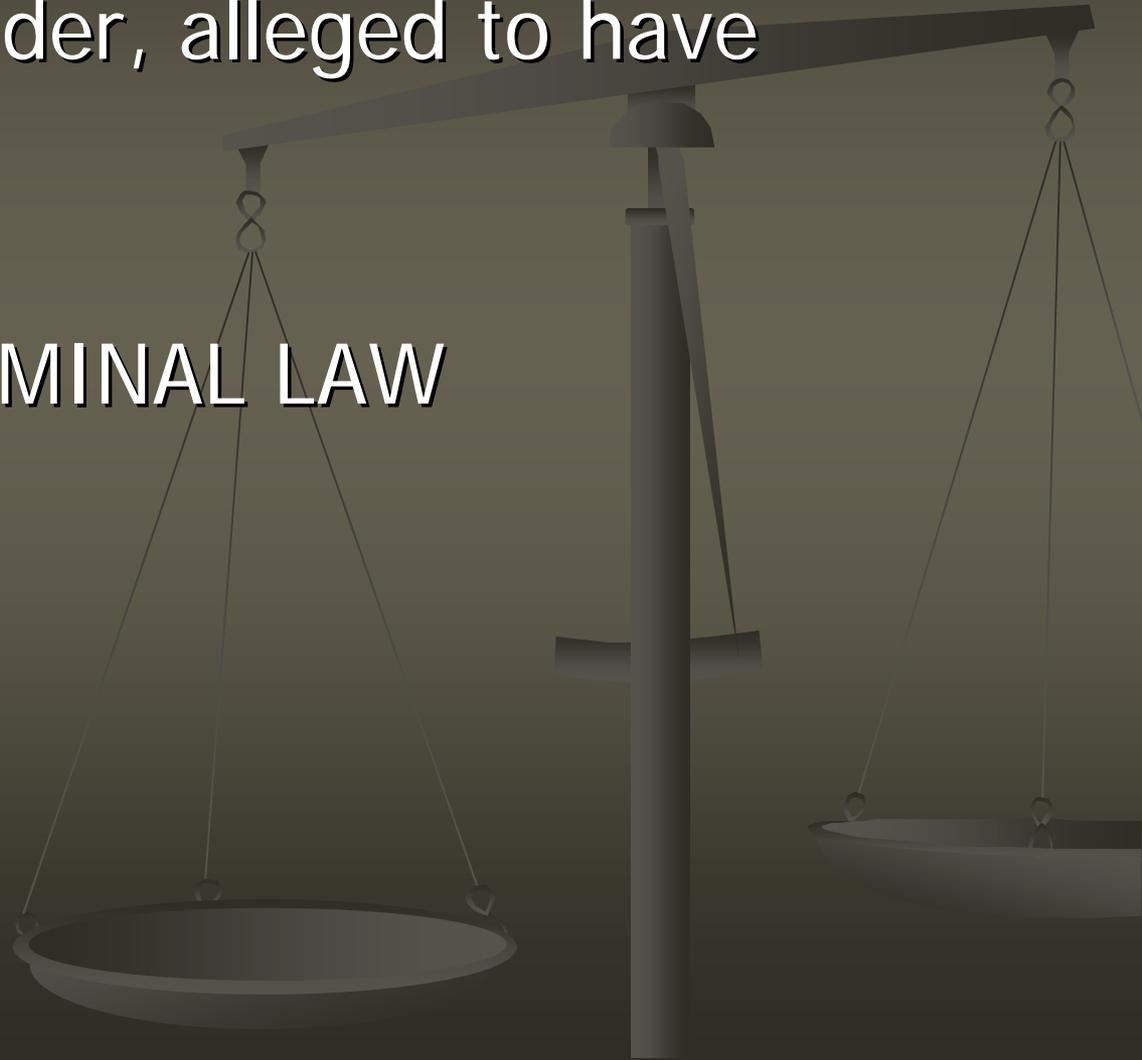
- [1] Aged 14 or older, alleged to have committed:
 - Felony Murder
 - Second Degree Reckless Homicide
 - First Degree Sexual Assault
 - Second Degree Sexual Assault
 - Taking Hostages
 - Kidnapping
 - Armed Burglary
 - Armed Robbery
 - Robbery of a Financial Institution
 - Manufacture, distribution, delivery of certain controlled substances

Who is Eligible to Be Waived?

- [2] Age 14 or older, alleged to have committed:
 - ANY FELONY, and
 - At the request of or for the benefit of a “Criminal Gang”
 - s. 939.22(9): an ongoing organization, association or group of 3 or more persons, whether formal or informal, that has as one of its primary activities the commission of one or more criminal acts, or acts that would be criminal if the actor were an adult ...; that has a common name or common identifying sign or symbol; and whose members collectively or individually engage in or have engaged in a pattern of criminal gang activity
 - See s. 939.22(21) for definition of “pattern of criminal gang activity”

Who is Eligible to be Waived?

- [3] Age 15 or older, alleged to have violated:
- ANY STATE CRIMINAL LAW

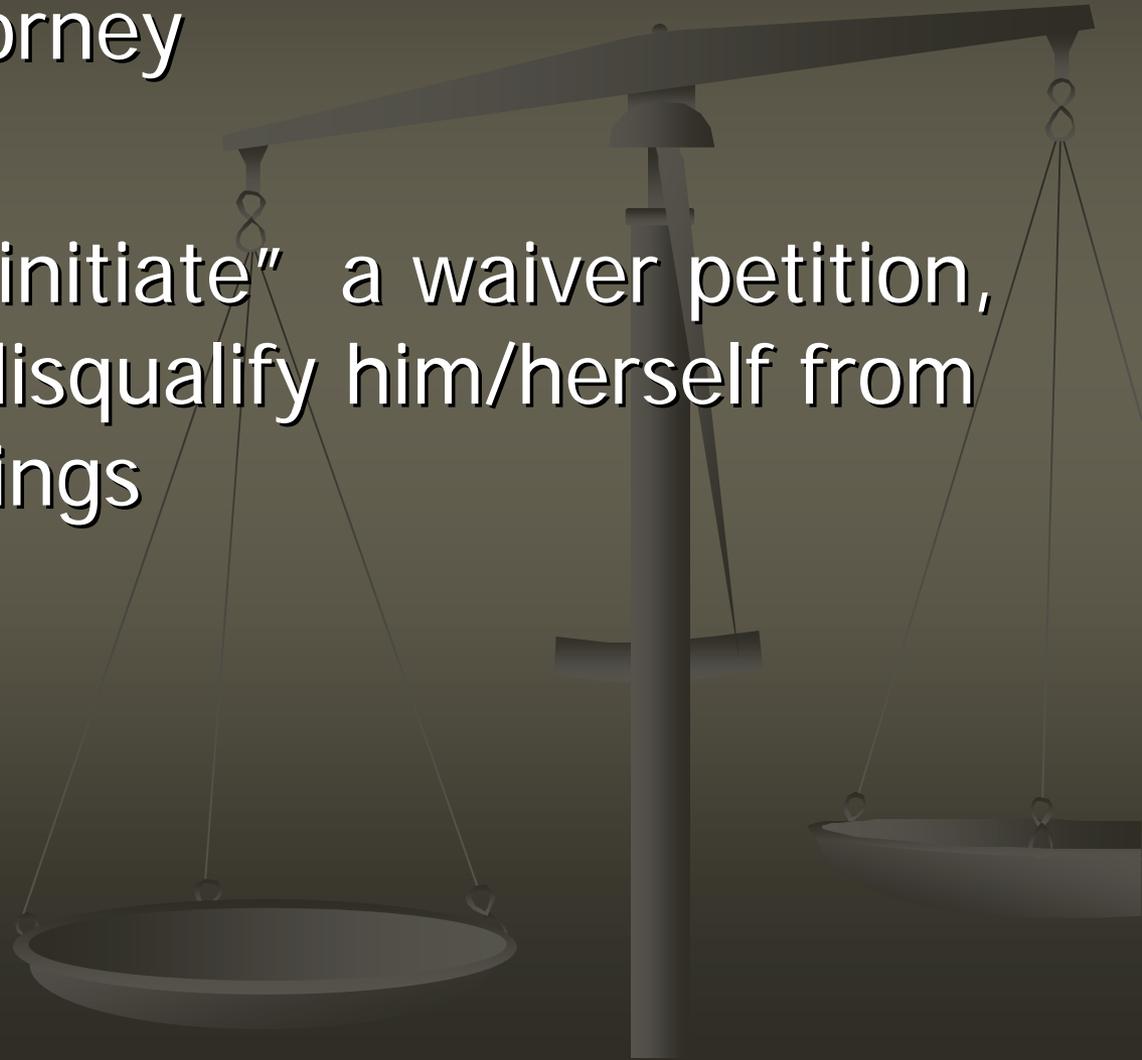


Who is Eligible to be Waived?

- A WORD ABOUT AGE
 - Ordinarily concerned with age at time of FILING for determining jurisdiction (i.e., adult v. juvenile court, JIPS v. delinquency)
 - See case law for issues relating to intentional delay by the State:
 - State v. Becker, 74 Wis. 2d 675 (1976)
 - State v. Montgomery, 148 Wis. 2d 593 (1989)
 - State v. Schroeder, 224 Wis. 2d 706 (Ct. App. 1999)
 - State v. Bergwin, 2010 WI App 137
- For purposes of Waiver, it is THE AGE AT THE TIME OF THE OFFENSE which controls ...

Who can file a waiver petition?

- The District Attorney
- The juvenile
- The Court can “initiate” a waiver petition, but must then disqualify him/herself from further proceedings

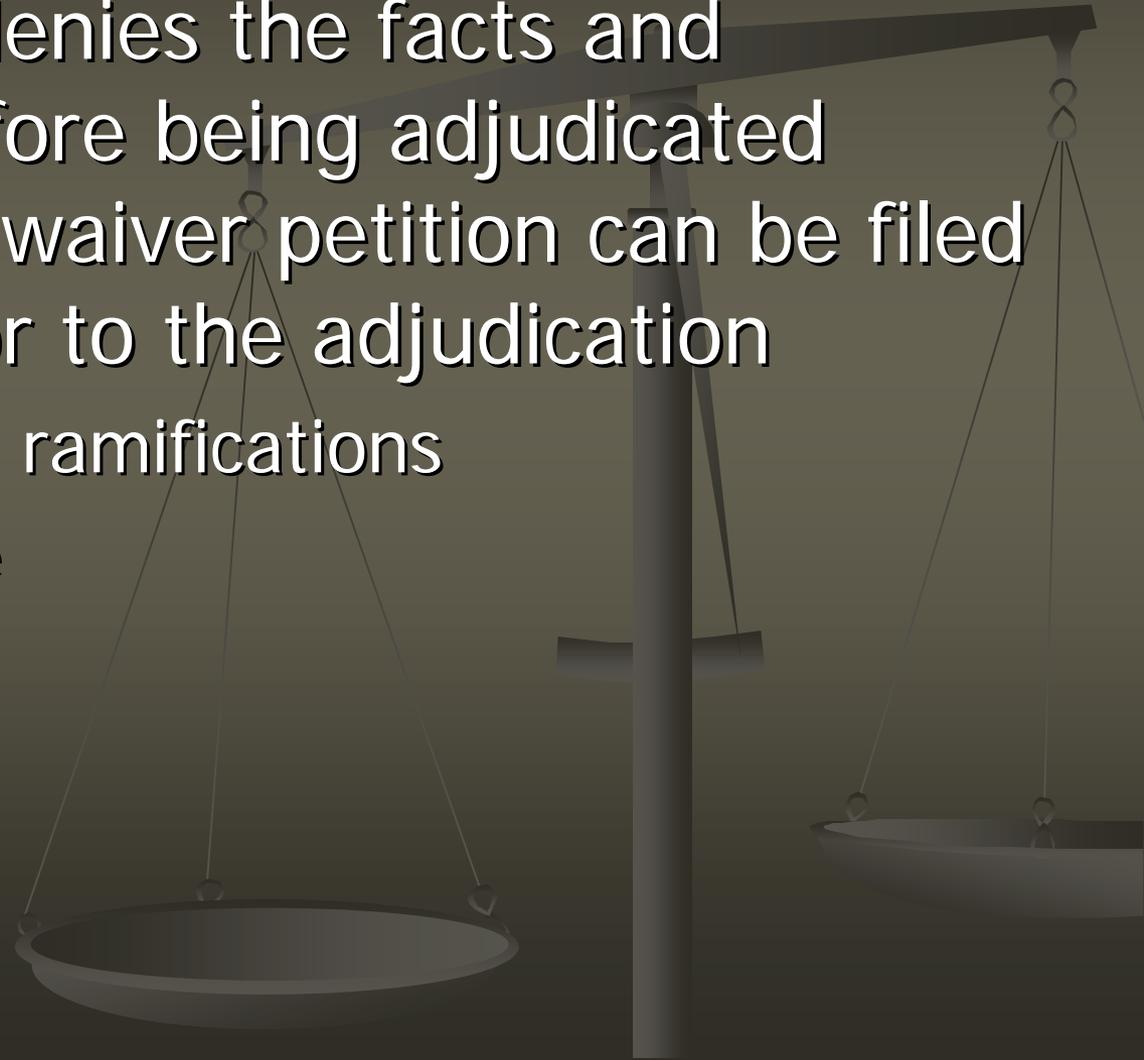


When Must the Petition be Filed?

- In conjunction with or after a PROPERLY FILED delinquency petition, but prior to the plea hearing
 - The time limits relating to the filing of a delinquency petition still apply
 - In the Interest of Michael J.L., 174 Wis. 2d 131, 496 N.W.2d 758 (Ct. App. 1993)
- Or ...

When Must the Petition be Filed?

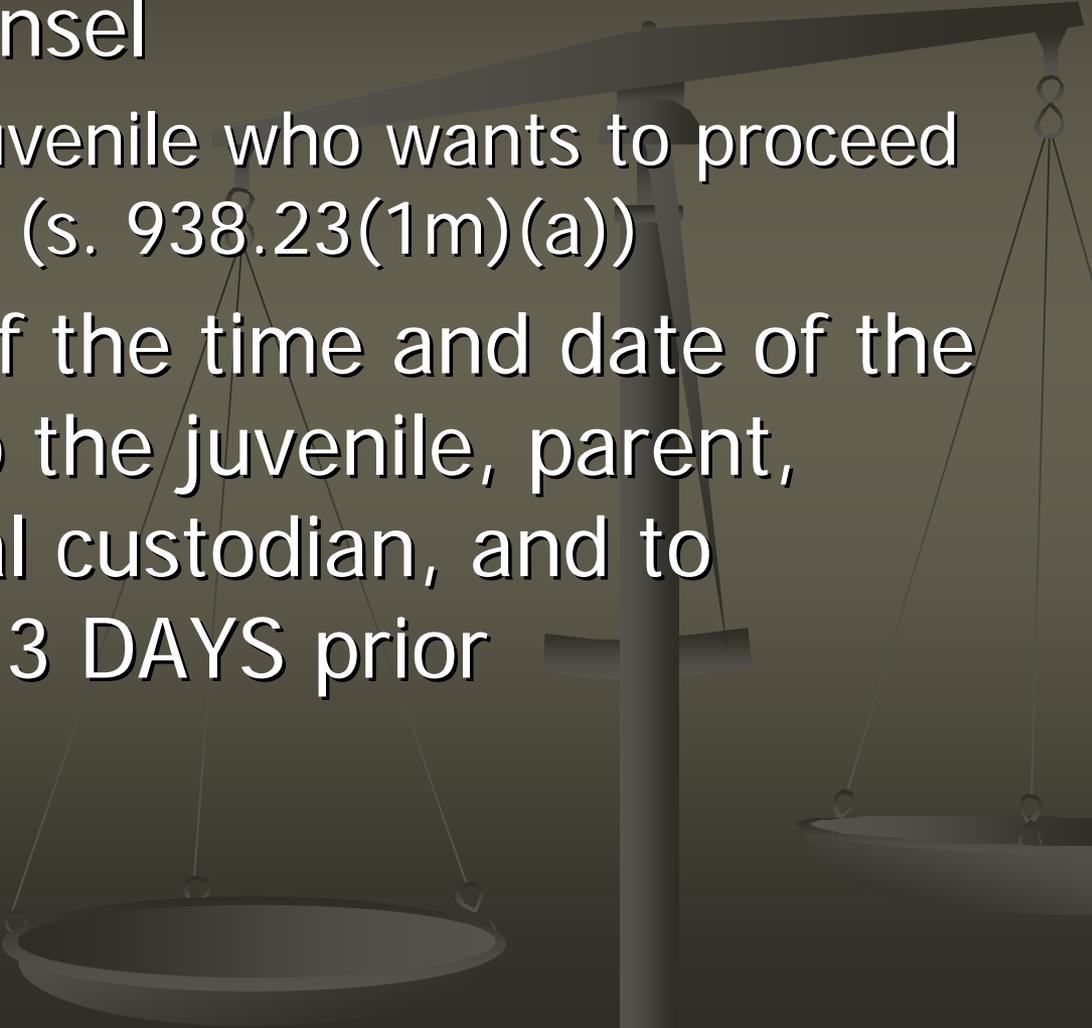
- If the juvenile denies the facts and becomes 17 before being adjudicated delinquent, the waiver petition can be filed at any time prior to the adjudication
 - Consent decree ramifications
 - Strategy/advice



What Must be Written in the Petition?

- “Must contain a brief statement of the facts supporting the request for waiver.” (s.938.13(2))
- Standard form: JD-1722
- It is not sufficient to simply refer to the underlying charge; must be reference to the waiver criteria under sub (5). In the interest of J.V.R., 127 Wis. 2d 192, 378 N.W.2d 266 (1985).

What are the Juvenile's Rights once the Petition is Filed?

- The right to counsel
 - Cannot waive juvenile who wants to proceed without counsel (s. 938.23(1m)(a))
 - Written notice of the time and date of the hearing given to the juvenile, parent, guardian or legal custodian, and to counsel at least 3 DAYS prior
- 

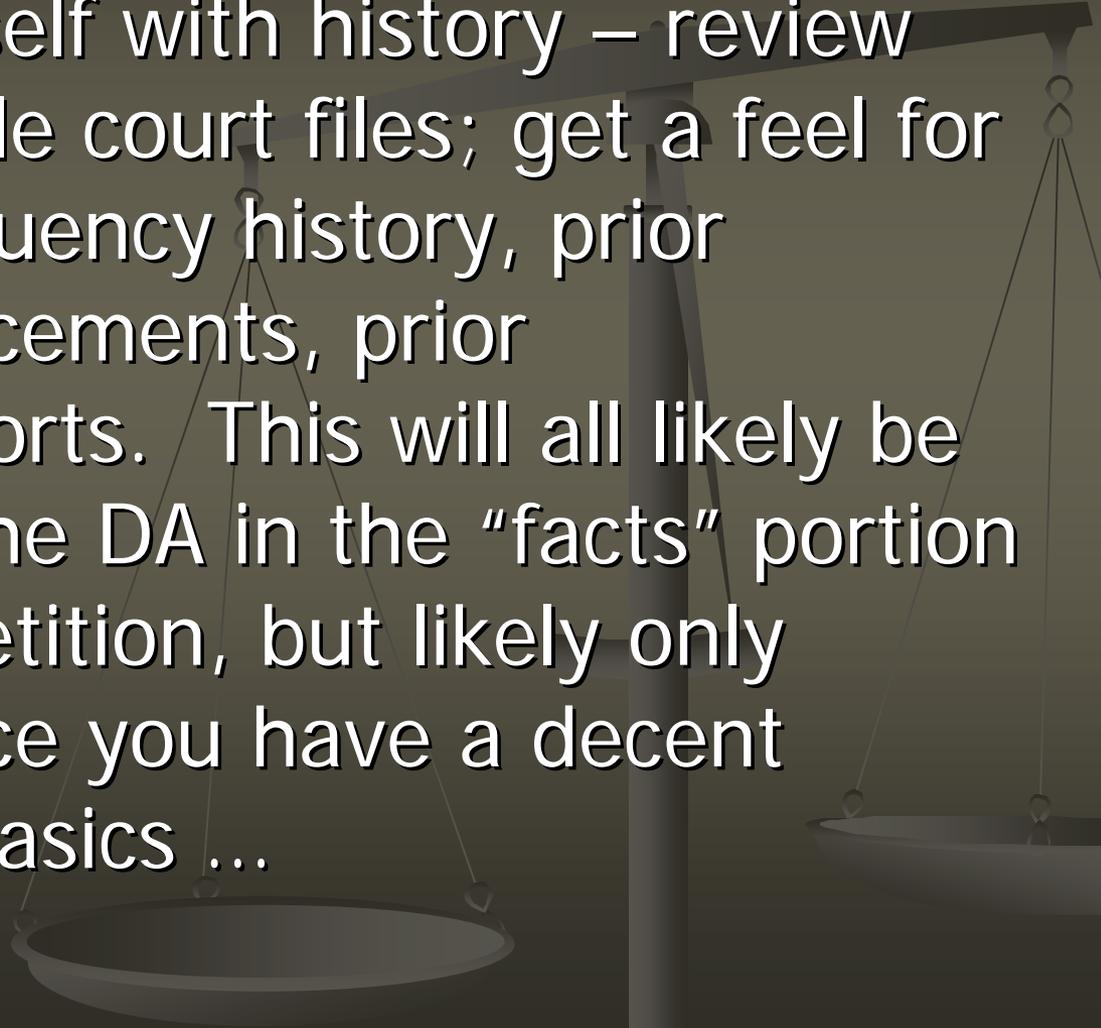
What are the Juvenile's Rights once the Petition is Filed?

- Substitution of judge, consistent with sec. 938.29
 - s. 938.29(1g): basic rule –
 - Substitution is not allowed in a proceeding under 938.12 if:
 - The assigned judge has previously entered a dispo order
 - The juvenile has previously requested a substitution
 - This is not a proceeding under s. 938.12
 - And, see s. 938.29(2): specific rule – “if the request for substitution of judge is made for the judge scheduled to conduct a waiver hearing under s. 938.18, the request shall be filed before the close of the working day preceding the day that the waiver hearing is scheduled”
 - However, next sentence ... “*Except as provided in sub. (1g), the judge may allow an authorized party to make a request for substitution the day of the waiver hearing.*”

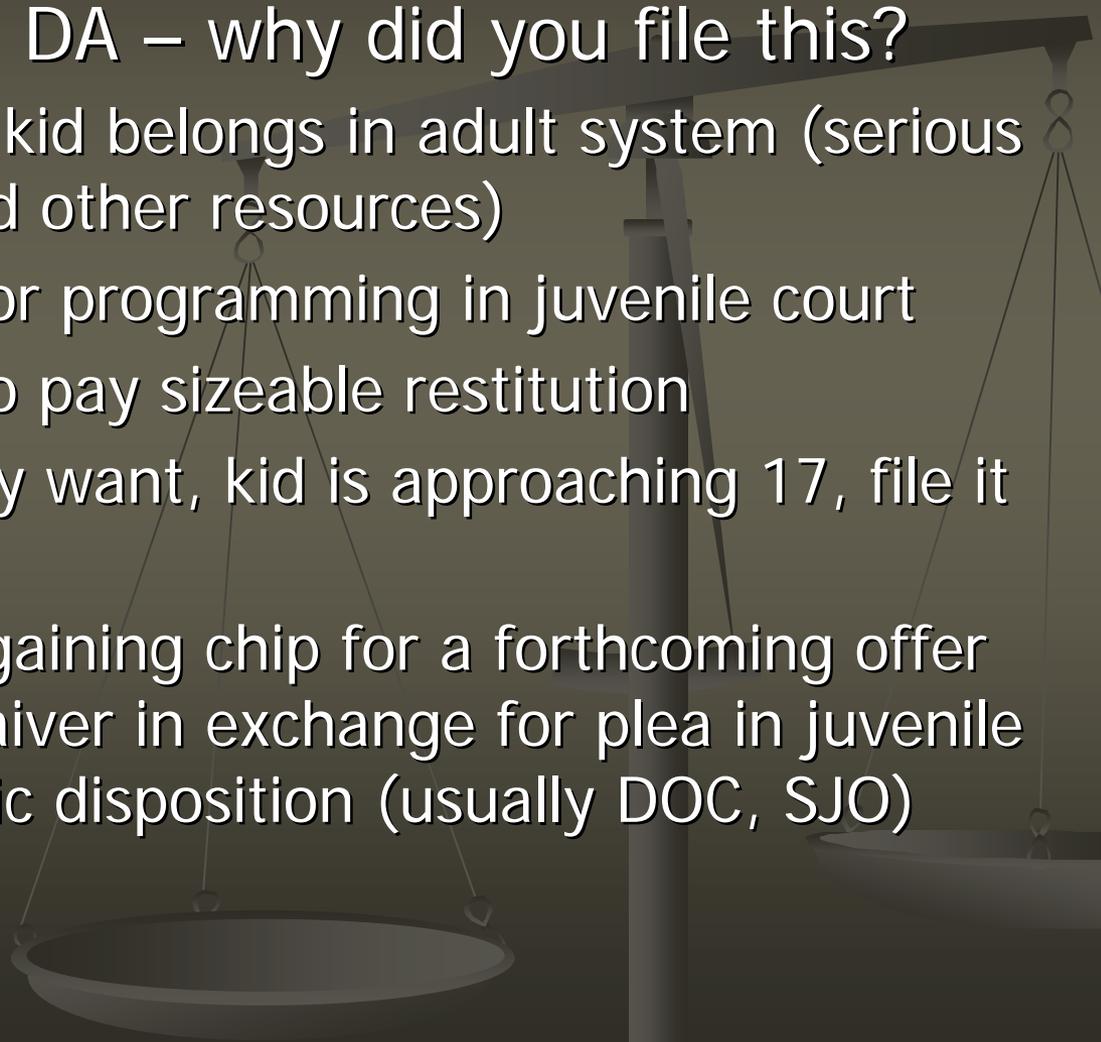
What are the Juvenile's Rights once the Petition is Filed?

- Access to social records and other reports under s. 938.293
 - s. 938.293(2) allows access to all records relating to a juvenile which are relevant to the subject matter OF A PROCEEDING UNDER THIS CHAPTER
 - s. 938.293(1): law enforcement officer reports shall be made available upon request PRIOR TO A PLEA HEARING
 - Because waivers are held, generally, prior to a plea hearing, s. 938.293(1) is inapplicable and discovery rights mirror those for criminal defendants prior to a preliminary hearing. In the Interest of T.M.J., 110 Wis. 2d 7 (1982)
 - Use case law to your advantage ... be creative, exculpatory evidence, talk about a "particularized need" for the evidence

Initial Steps Upon Receipt of Petition

- (1) Familiarize self with history – review any prior juvenile court files; get a feel for any prior delinquency history, prior dispositions/placements, prior evaluations/reports. This will all likely be referenced by the DA in the “facts” portion of the waiver petition, but likely only summarily. Once you have a decent handle on the basics ...
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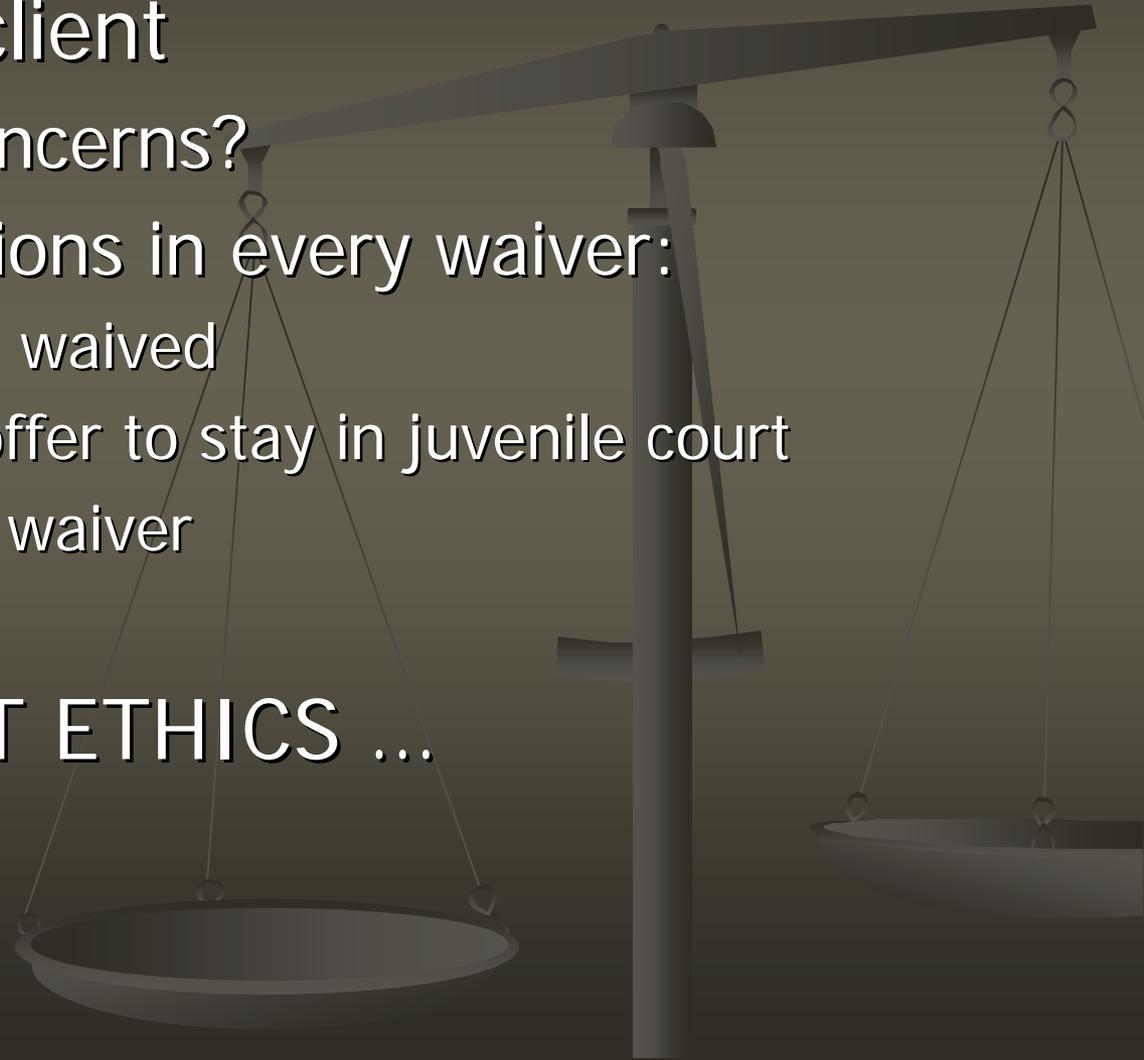
Initial Steps Upon Receipt of Petition

- (2) “Feel out” the DA – why did you file this?
 - Sincerely believes kid belongs in adult system (serious offense, exhausted other resources)
 - Insufficient time for programming in juvenile court
 - Insufficient time to pay sizeable restitution
 - Not sure what they want, kid is approaching 17, file it prior to the plea
 - Going to be a bargaining chip for a forthcoming offer – withdraw the waiver in exchange for plea in juvenile court and a specific disposition (usually DOC, SJO)
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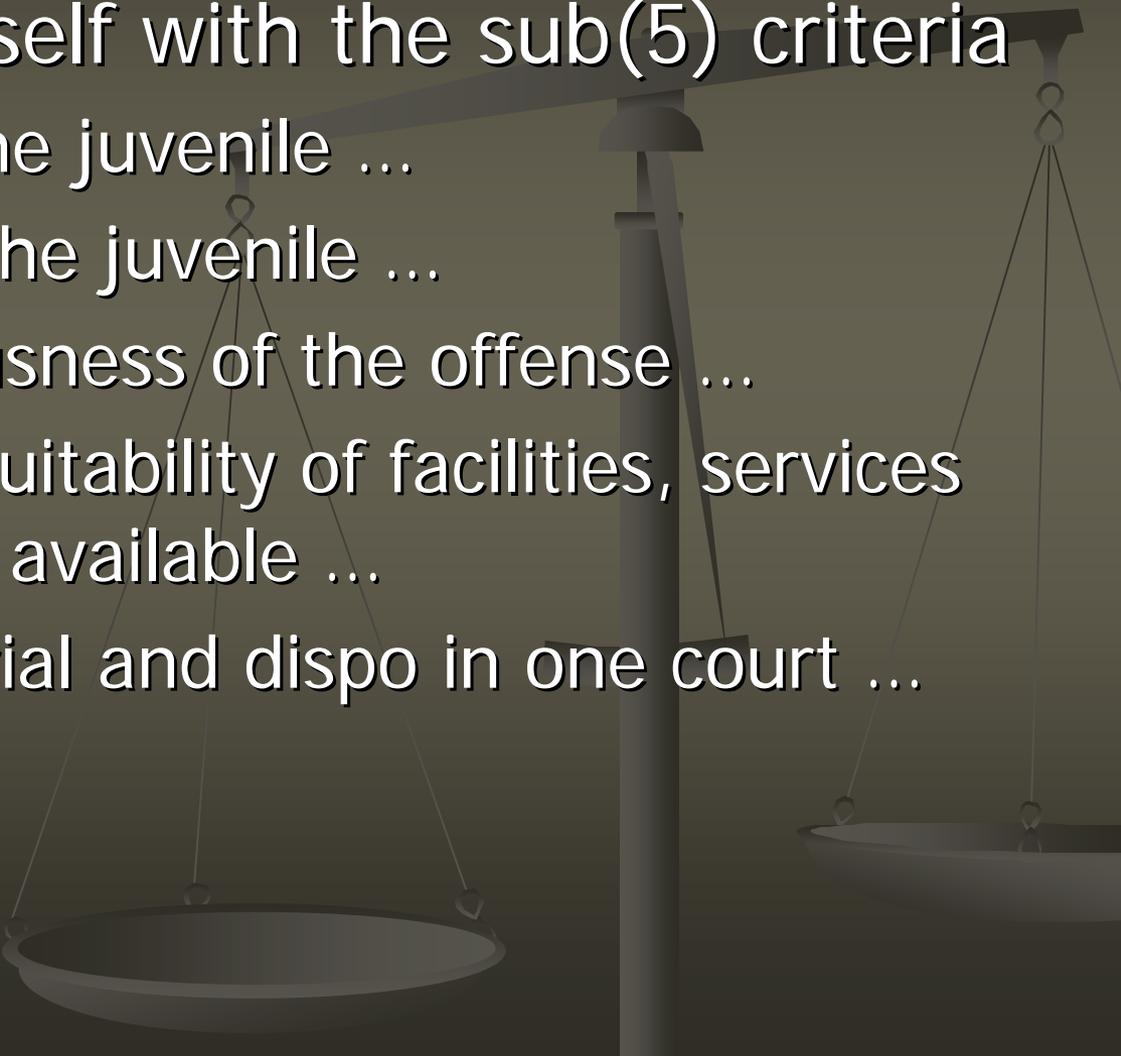
Initial Steps Upon Receipt of Petition

- Talk with your client
 - Competency concerns?
 - Same basic options in every waiver:
 - (a) agree to be waived
 - (b) accept an offer to stay in juvenile court
 - (c) contest the waiver

- A WORD ABOUT ETHICS ...

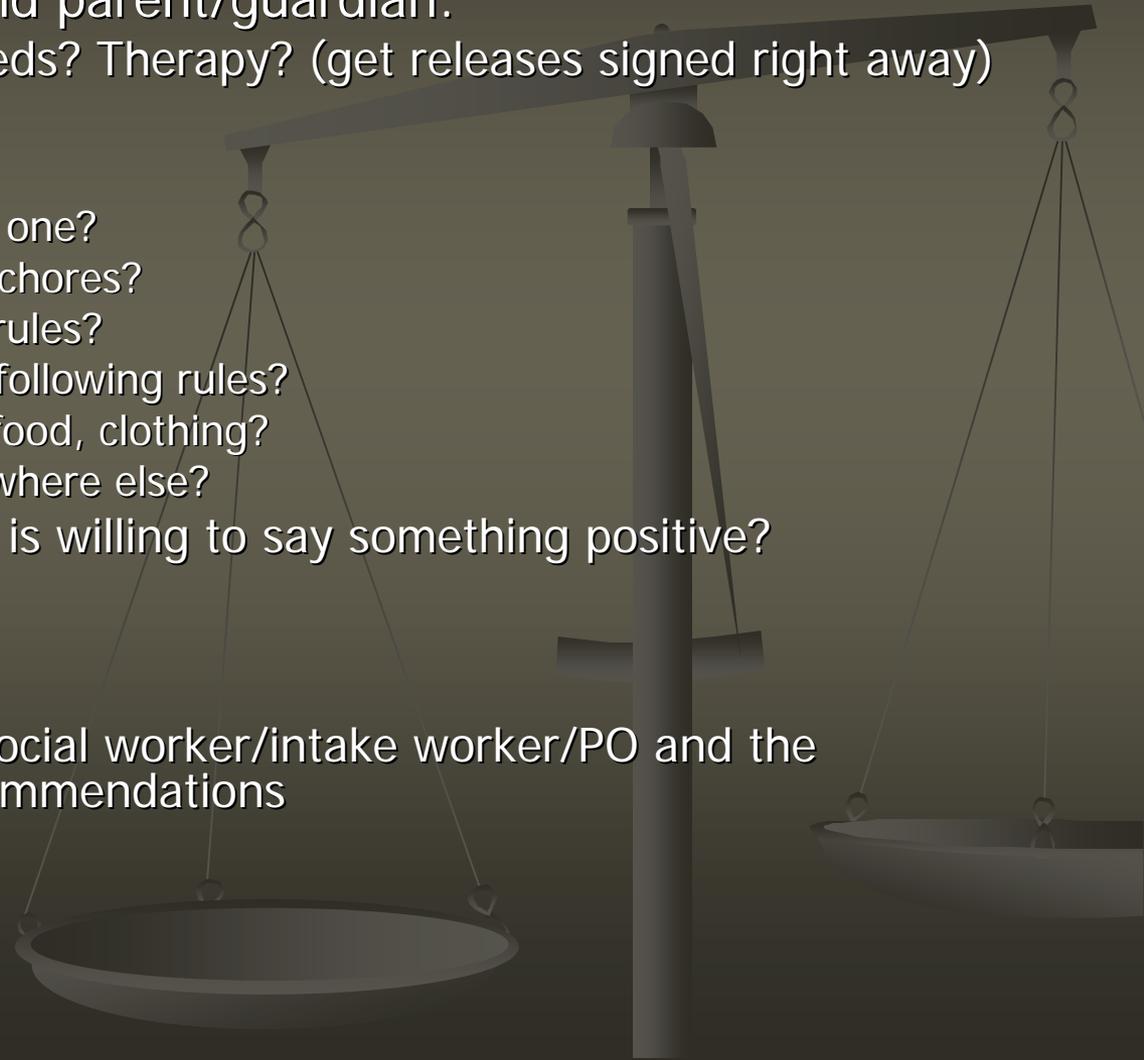


Preparing for a Contested Waiver Hearing

- Familiarize yourself with the sub(5) criteria
 - Personality of the juvenile ...
 - Prior record of the juvenile ...
 - Type and seriousness of the offense ...
 - Adequacy and suitability of facilities, services and procedures available ...
 - Desirability of trial and dispo in one court ...
- 

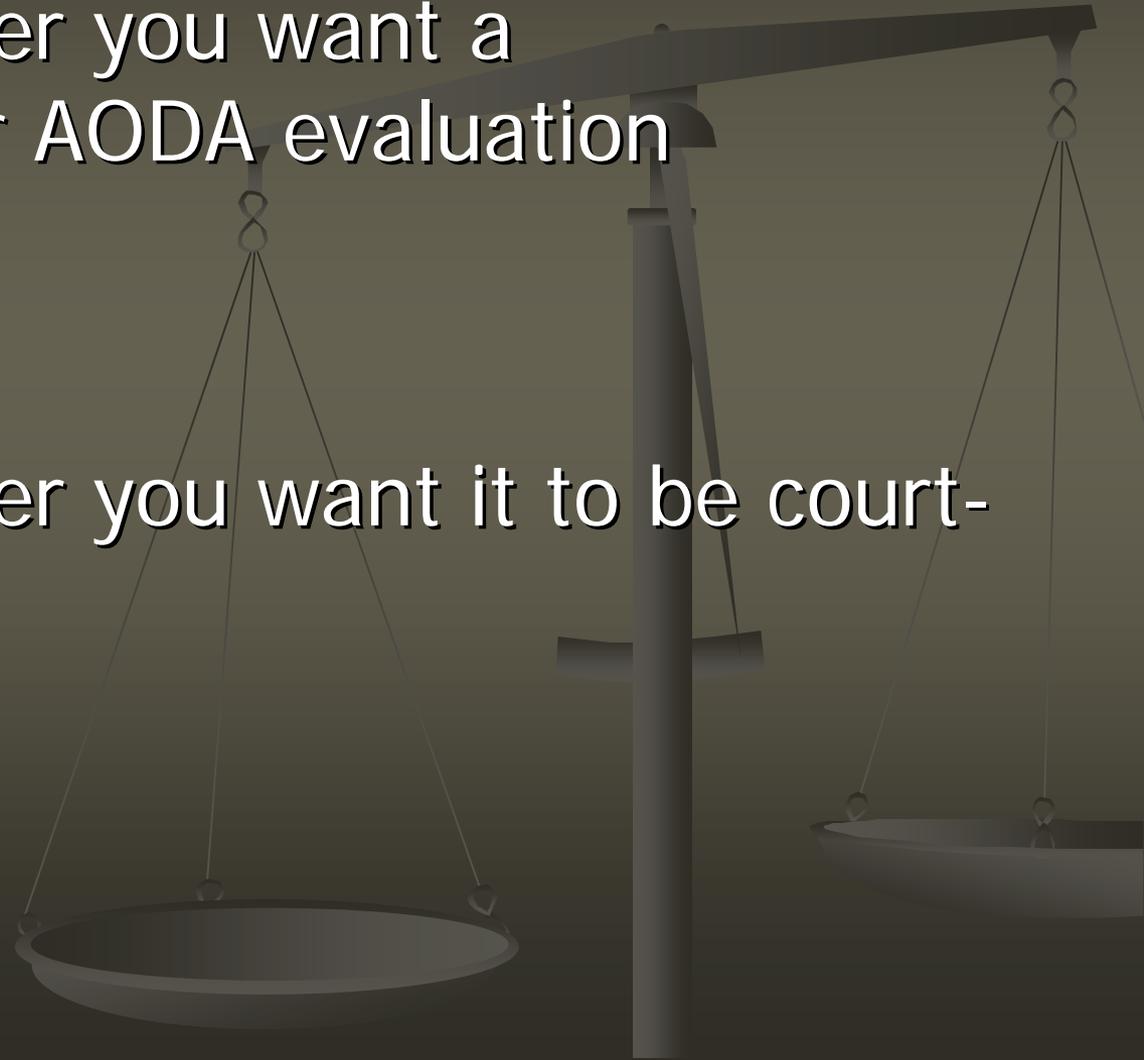
Preparing for a Contested Waiver Hearing

- Gather info from client and parent/guardian:
 - Psychological issues? Meds? Therapy? (get releases signed right away)
 - School? IEP?
 - Lifestyle
 - Have a job? ever have one?
 - Earn allowance? Have chores?
 - Parental expectations/rules?
 - Consequences for not following rules?
 - Contributions to rent, food, clothing?
 - Has kid ever lived anywhere else?
 - Who knows this kid and is willing to say something positive?
 - Teacher
 - Coaches
 - Pastor
 - Explain the role of the social worker/intake worker/PO and the importance of their recommendations



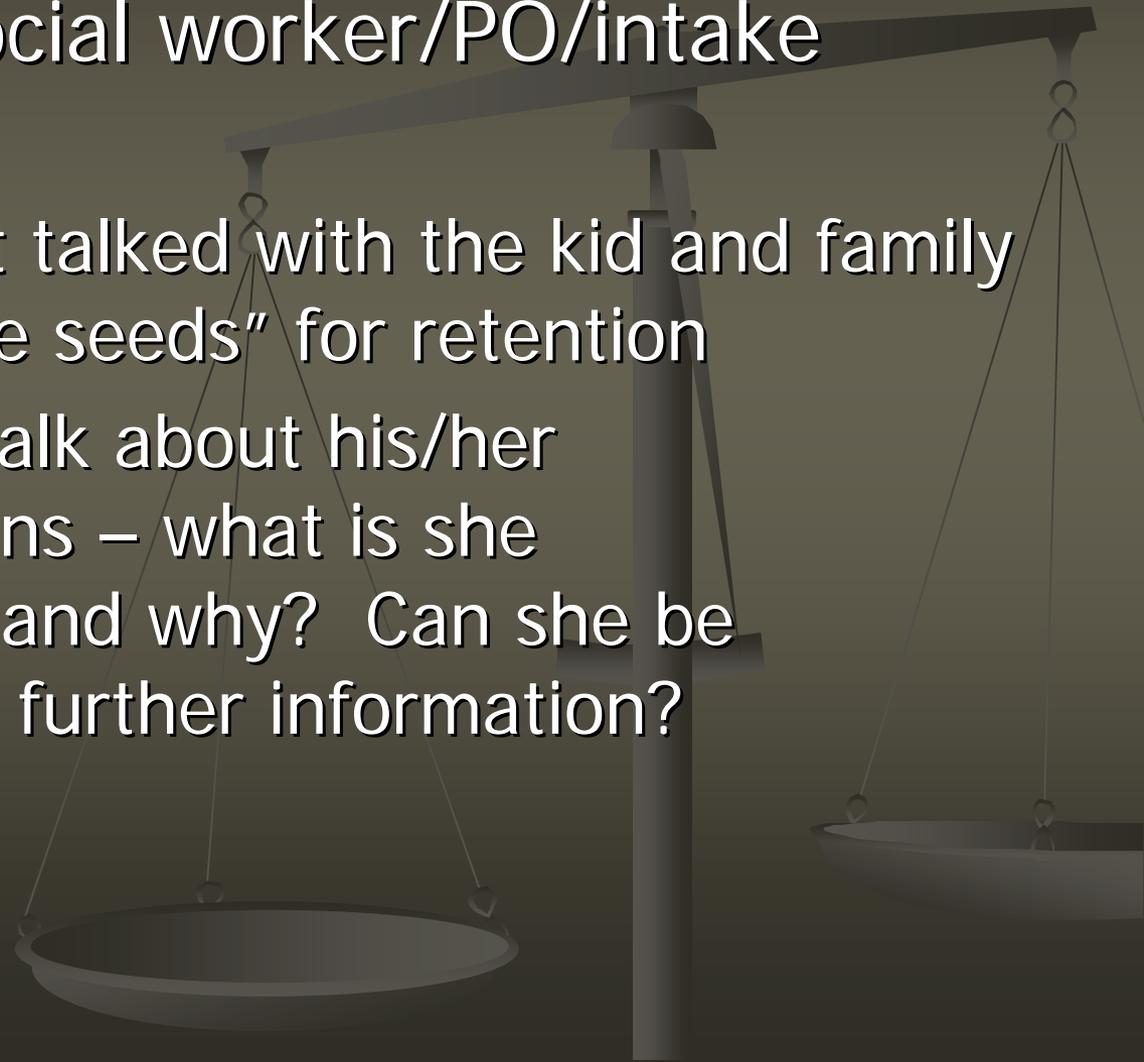
Preparing for a Contested Waiver Hearing

- Consider whether you want a psychological or AODA evaluation
- Consider whether you want it to be court-ordered

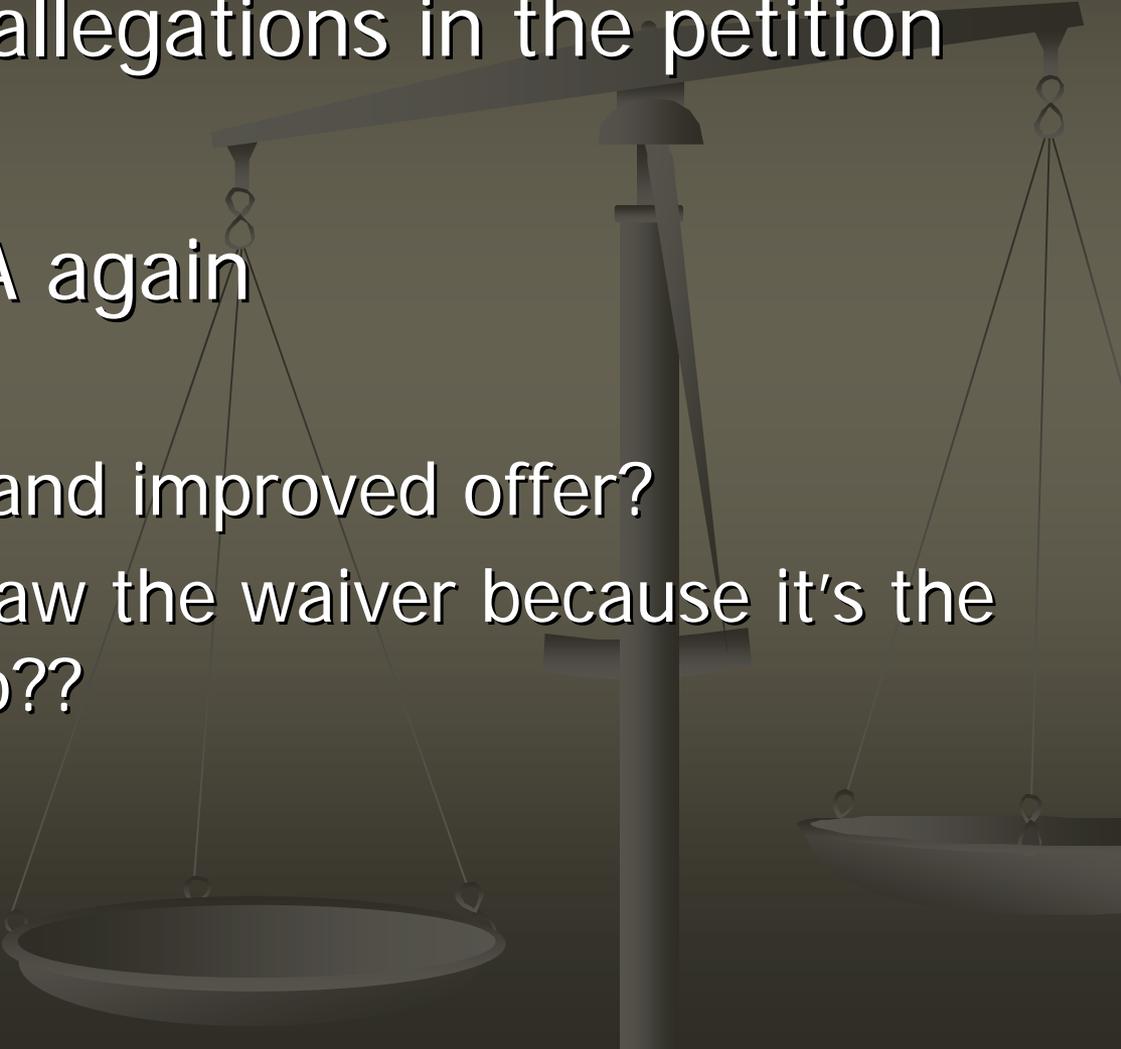


Preparing for a Contested Waiver Hearing

- Talk with the social worker/PO/intake worker
 - If he/she hasn't talked with the kid and family yet, "plant some seeds" for retention
 - If he/she has, talk about his/her recommendations – what is she recommending and why? Can she be persuaded with further information?



Preparing for a Contested Waiver Hearing

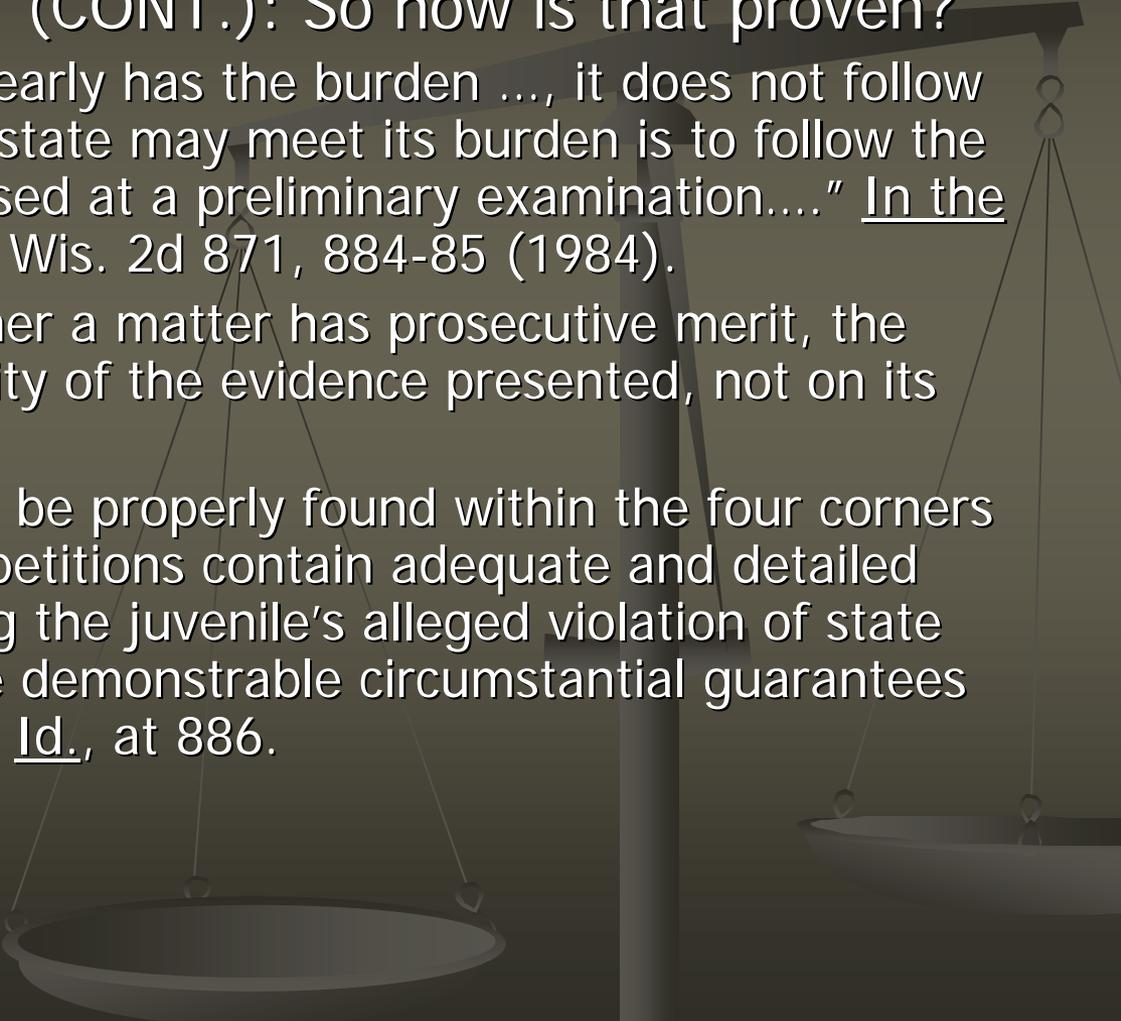
- Investigate the allegations in the petition
 - Talk with the DA again
 - Now, an offer?
 - Perhaps a new and improved offer?
 - Will they withdraw the waiver because it's the right thing to do??
- 

What does a waiver hearing look like?

■ STEP ONE: PROSECUTIVE MERIT

- s. 938.18(4): “The court shall determine whether the matter has prosecutive merit before proceeding to determine if it should waive jurisdiction.”
- “The juvenile court, before considering the waiver criteria, must satisfy itself that the record establishes to a reasonable probability that **the violation of the criminal law alleged** has been committed and that the juvenile has probably committed it. This is the degree of probable cause required to bind over an adult for criminal trial.” In the interest of T.R.B., 109 Wis 2d 179, 192 (1982)(emphasis added).

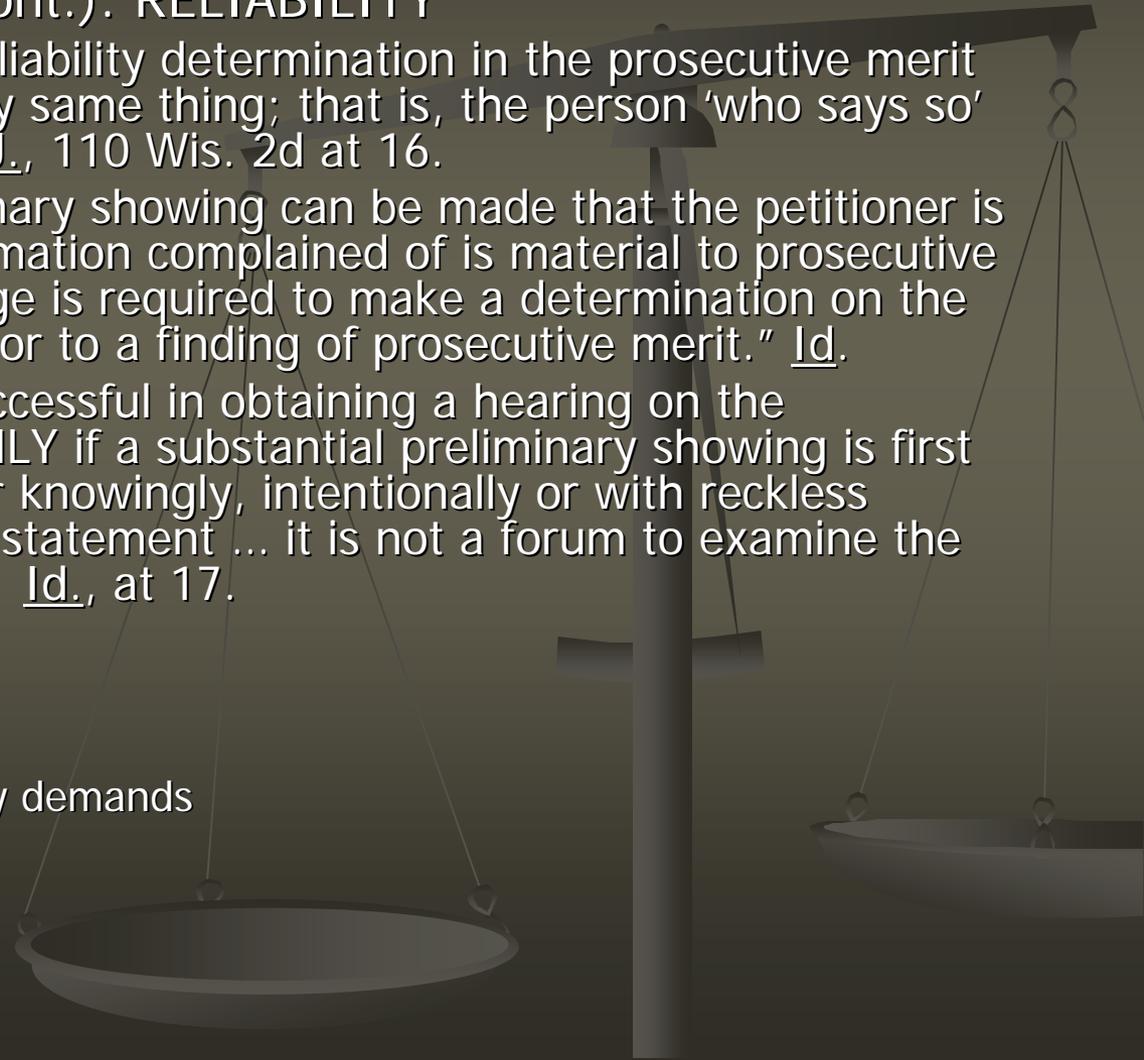
What does a waiver hearing look like?

- PROSECUTIVE MERIT (CONT.): So how is that proven?
 - “Although the State clearly has the burden ..., it does not follow that the only way the state may meet its burden is to follow the procedures typically used at a preliminary examination....” In the interest of P.A.K., 119 Wis. 2d 871, 884-85 (1984).
 - “In determining whether a matter has prosecutive merit, the focus is on the reliability of the evidence presented, not on its form.” Id., at 885.
 - Prosecutive merit may be properly found within the four corners of the petition “if the petitions contain adequate and detailed information concerning the juvenile’s alleged violation of state criminal law, and have demonstrable circumstantial guarantees of trustworthiness” Id., at 886.
- 

What does a waiver hearing look like?

■ PROSECUTIVE MERIT (Cont.): RELIABILITY

- “When we speak of a reliability determination in the prosecutive merit stage, we mean the very same thing; that is, the person ‘who says so’ must be reliable.” T.M.J., 110 Wis. 2d at 16.
- “If a substantial preliminary showing can be made that the petitioner is untruthful and the information complained of is material to prosecutive merit, then the trial judge is required to make a determination on the question of reliability prior to a finding of prosecutive merit.” Id.
- “The juvenile can be successful in obtaining a hearing on the petitioner’s reliability ONLY if a substantial preliminary showing is first made that the petitioner knowingly, intentionally or with reckless disregard, made a false statement ... it is not a forum to examine the credibility of a witness.” Id., at 17.
- CONSIDERATIONS:
 - Police practices
 - Confessions
 - Fire up those discovery demands

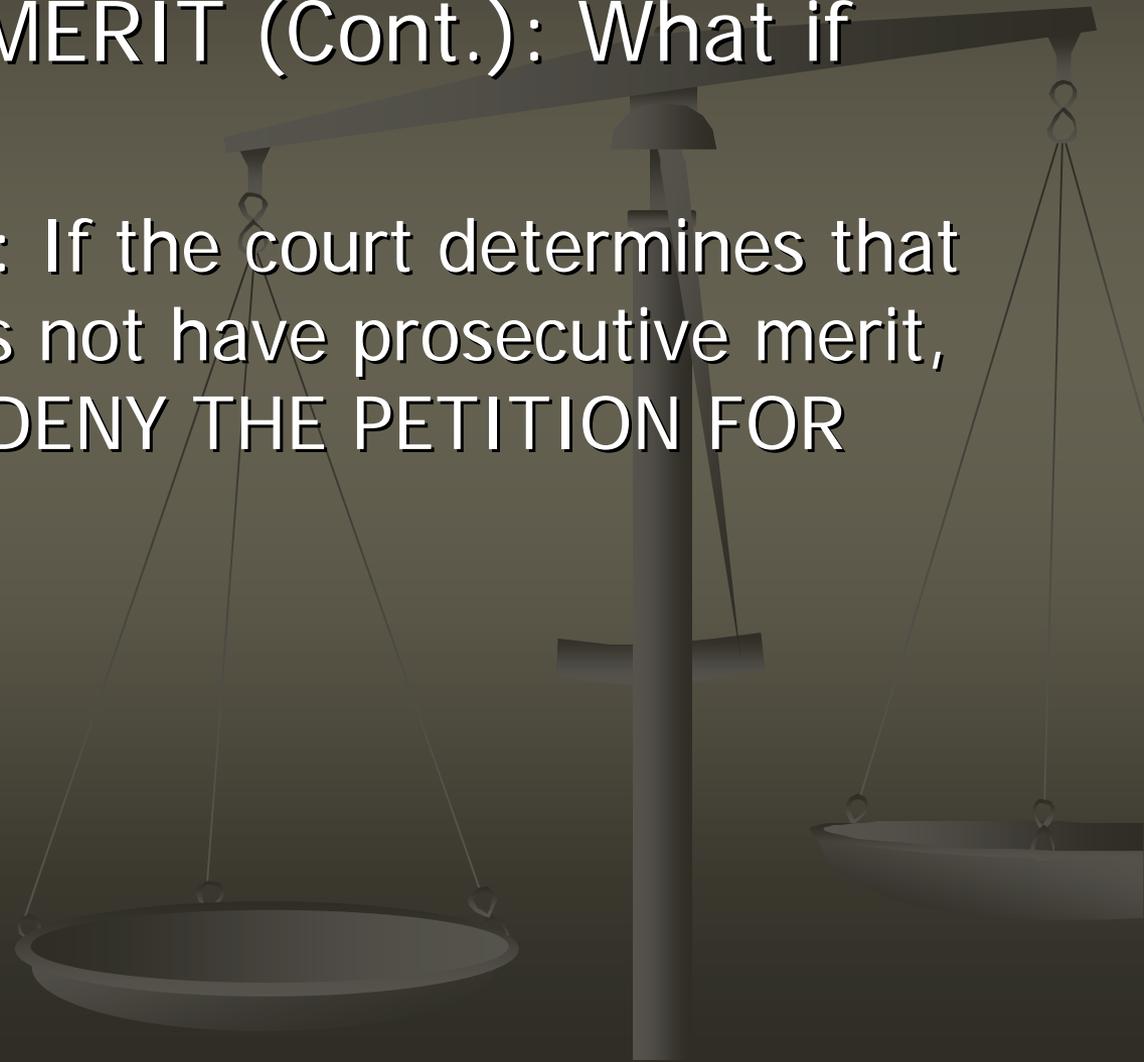


What does a waiver hearing look like?

- PROSECUTIVE MERIT (Cont.): EVIDENCE
 - s. 938.299(4)(b): "common law and statutory rules of evidence are not binding at a waiver hearing under s. 938.18 At those hearings, the court shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant, or unduly repetitious testimony Hearsay testimony may be admitted if it has demonstrable guarantees of trustworthiness."

What does a waiver hearing look like?

- PROSECUTIVE MERIT (Cont.): What if there isn't??
 - s. 938.18(4)(a): If the court determines that the matter does not have prosecutive merit, the court shall DENY THE PETITION FOR WAIVER



What does a waiver hearing look like?

■ STEP TWO: SUB (5) CRITERIA

- s. 938.18(4)(b): "If a petition for waiver of jurisdiction is contested, the district attorney SHALL PRESENT RELEVANT TESTIMONY"
- s. 938.18(2m): "The court may designate an agency ... to submit a report analyzing the criteria specified in sub (5) The court may rely on facts stated in the report in making its findings with respect to the criteria"

What does a waiver hearing look like?

■ SUB (5) CRITERIA (Cont.):

■ Speaking of the report:

- Human Services/Social Worker/PO “is free to compile information for a waiver investigation report in the manner it deems most beneficial to the circuit court.” In the Interest of Tyler T., 2012 WI 52, ¶ 4.
- “While we have reservations about DHHS’s decision to invite only [the DA] to its final staffing meeting, we decline to create a bright-line rule precluding DHHS from communicating directly with either party, be it the State or the juvenile, for purposes of preparing a waiver investigation report.” Id., at ¶ 35.

What does a waiver hearing look like?

■ SUB (5) CRITERIA (Cont.)

- s. 938.18(3)(b): “The juvenile has the right to present testimony on his or her own behalf including expert testimony and has the right to cross-examine witnesses.”

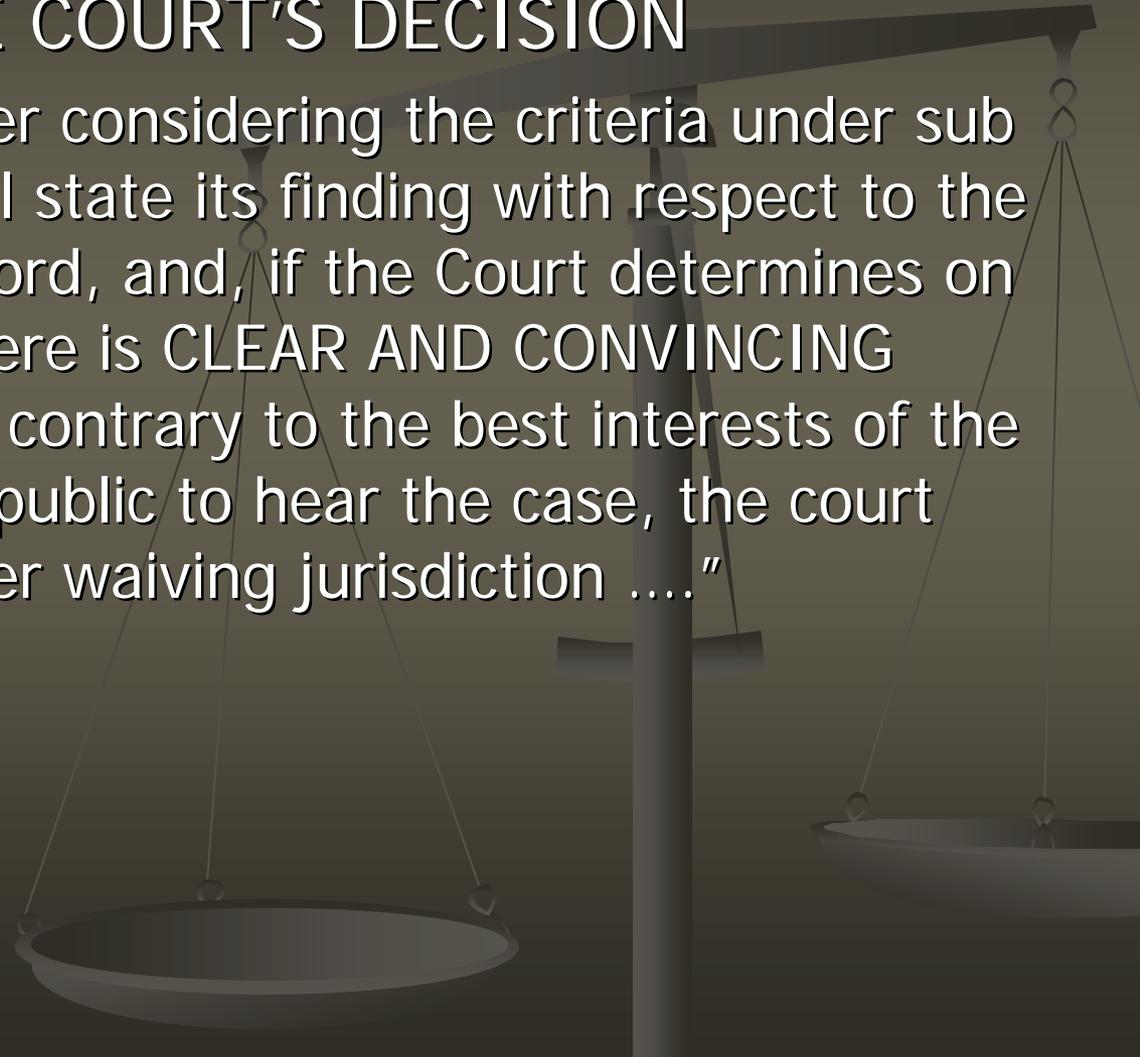
■ CALL YOUR OWN WITNESSES

- “Our courts have recognized that the juvenile court’s dual responsibility to protect both the juvenile and the public is ‘best served when the court has access to the fullest information possible.’” Id., at ¶ 40 (internal cite omitted)
- “Indeed, the application of rigid rules to a waiver proceeding is more likely to impair the court’s ability to make an informed and intelligent decision than to lead to a just result.” Id.

What does a waiver hearing look like?

■ STEP THREE: THE COURT'S DECISION

- s. 938.18(6): "After considering the criteria under sub (5), the court shall state its finding with respect to the criteria on the record, and, if the Court determines on the record that there is **CLEAR AND CONVINCING** evidence that is it contrary to the best interests of the juvenile or of the public to hear the case, the court shall enter an order waiving jurisdiction"



What does a waiver hearing look like?

- COURT'S DECISION (Cont.):
 - The Court must consider and make findings regarding EACH OF THE CRITERIA FOR WHICH THE RECORD CONTAINS EVIDENCE. In the Interest of C.W., 142 Wis. 2d 763 (Ct. App. 1987)
 - BUT ... "The juvenile court has discretion as to the weight it affords each of the criteria" In the Interest of J.A.L., 162 Wis. 2d 940, 960 (1991).
 - THUS ... it will not be deemed an erroneous exercise of discretion if/when the court gives substantial weight to the seriousness of the offense. See In the Interest of B.B., 166 Wis 2d 202 (Ct. App. 1991)

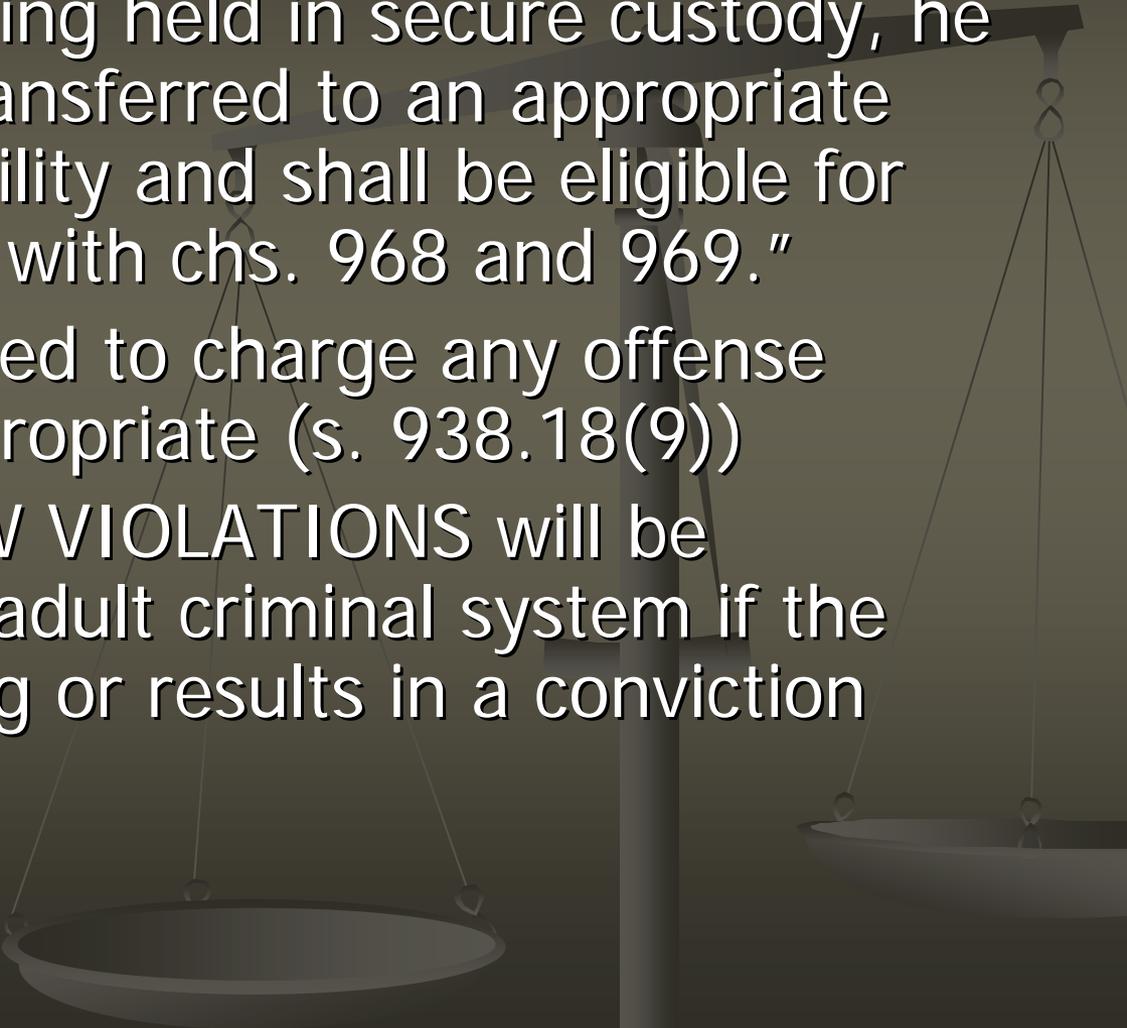
What if the Juvenile Doesn't Contest?

- Still a step one – must be a finding of prosecutive merit
- Then ...
 - s. 938.18(4)(c): “If a petition for waiver of jurisdiction is uncontested, the court shall inquire into the capacity of the juvenile to knowingly, intelligently and voluntarily decide not to contest the waiver of jurisdiction.”
- Then, if satisfied ...
 - “no testimony need be taken and the court, after considering the petition for waiver of jurisdiction and other relevant evidence in the record before the court, shall base its decision whether to waive jurisdiction on the criteria specified in sub (5).”

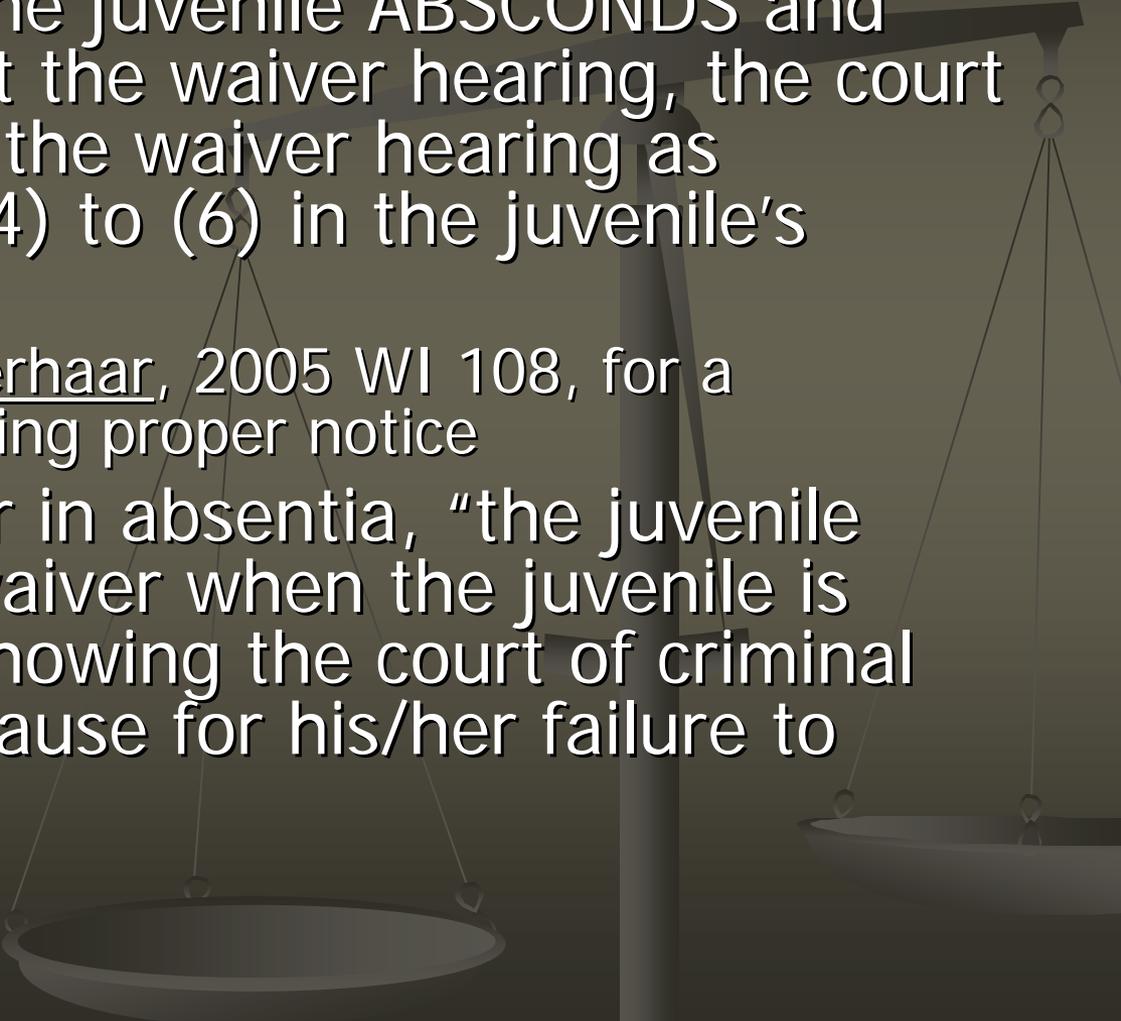
What if the juvenile doesn't contest?

- BUT ...
 - “Rather than deferring to the district attorney’s or to the juvenile’s request to waive the juvenile court’s jurisdiction or to either party’s acquiescence in the other party’s request, the juvenile court must independently determine whether waiver is appropriate.” In the Interest of T.R.B., 109 Wis 2d at 196-97.
- BE PREPARED

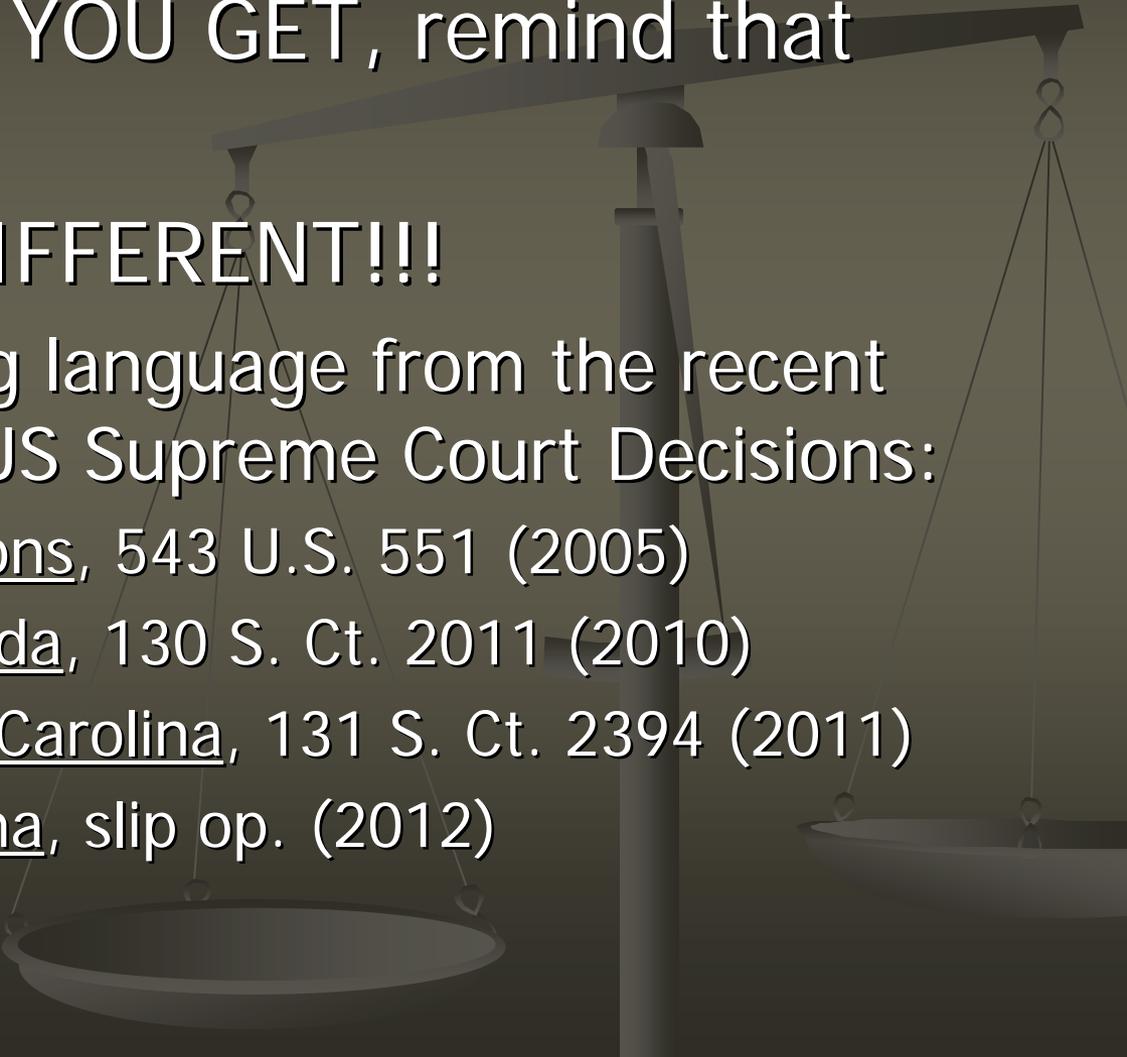
What happens if the juvenile is waived?

- S. 938.18(8): if being held in secure custody, he or she "shall be transferred to an appropriate officer or adult facility and shall be eligible for bail in accordance with chs. 968 and 969."
 - The DA is authorized to charge any offense he/she deems appropriate (s. 938.18(9))
 - ALL FURTHER LAW VIOLATIONS will be prosecuted in the adult criminal system if the case is still pending or results in a conviction (s. 938.183(1)(b))
- 

What happens if the juvenile takes off and misses the waiver hearing?

- S. 938.18(7): "If the juvenile ABSCONDS and does not appear at the waiver hearing, the court may proceed with the waiver hearing as provided in subs (4) to (6) in the juvenile's absence."
 - SEE State v. Aufderhaar, 2005 WI 108, for a discussion of insuring proper notice
 - If there is a waiver in absentia, "the juvenile may contest the waiver when the juvenile is apprehended by showing the court of criminal jurisdiction good cause for his/her failure to appear."
- 

FINAL CONSIDERATIONS



- EVERY CHANCE YOU GET, remind that Court that:
- (1) KIDS ARE DIFFERENT!!!
 - Pull out amazing language from the recent progression of US Supreme Court Decisions:
 - Roper v. Simmons, 543 U.S. 551 (2005)
 - Graham v. Florida, 130 S. Ct. 2011 (2010)
 - J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011)
 - Miller v. Alabama, slip op. (2012)

FINAL CONSIDERATIONS

- (2) JUVENILE COURT IS DIFFERENT!!!
 - “The Juvenile Justice Code must be construed to give effect to ‘its leading idea.’ And the leading idea is to keep juveniles away from the adult system in all but a few instances because there is so much hope that we can use the capabilities of the juvenile justice system to turn the child around before it is too late.” State v. Pablo R., 2000 WI App 242, ¶ 17.