

**Waiver Hearings in Juvenile Court**  
**Presentation for 2009 SPD Conference – Juvenile Certification Training**  
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<b>Who is eligible to be waived? [Sec. 938.18(1)(a)1-3]</b>
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1. Age 14 or older\*, alleged to have violated any of the following offenses:
  - a. Felony Murder [s. 940.03]
  - b. Second degree Reckless Homicide [s. 940.06]
  - c. First Degree Sexual Assault [s. 940.225(1)]
  - d. Second Degree Sexual Assault [s. 940.225(2)]
  - e. Taking hostages [s. 940.305]
  - f. Kidnapping [s. 940.31]
  - g. Armed burglary or other violation of s. 943.10(2)
  - h. Armed robbery [s. 943.32(2)]
  - i. Robbery of a financial institution [s. 943.87]
  - j. Manufacture, distribution or delivery of certain controlled substances under s. 961.41(1)

2. Age 14 or older\*, alleged to have violated:
  - a. ANY FELONY, and
  - b. at the request of or for the benefit of a CRIMINAL GANG.

“Criminal gang,” under s. 939.22(9), means:

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, specified in s. 939.22(21)(a) – (s); that has a common name or a common identifying sign or symbol; and whose members collectively or individually engage in or have engaged in a pattern of criminal gang activity

3. Age 15 or older\*, alleged to have violated:
  - a. ANY STATE CRIMINAL LAW

\*The age requirement refers to the **age at time of offense**, as opposed to the age at the time of filing. That said, the age at the time of filing will still determine whether the case is brought in juvenile or adult court. Issues relating to the State’s possible delay in charging are addressed by case law. See State v. Becker, 74 Wis. 2d 675, 247 N.W.2d

495 (1976); State v. Montgomery, 148 Wis. 2d 593, 436 N.W.2d 303 (1989); State v. Schroeder, 224 Wis. 2d 706, 593 N.W.2d 76 (Ct. App. 1999).

**Who can file a petition for waiver? [Sec. 938.18(2)]**

1. the District Attorney
2. the juvenile
3. the court can “initiate” the petition, though must then disqualify him/herself from future proceedings

**When must the petition be filed? [Sec. 938.18(2)]**

1. in conjunction with or after a **properly filed\*** delinquency petition, but before 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 -

2. if the juvenile denies the facts at the plea hearing and becomes 17 before being adjudicated delinquent, the waiver petition can be filed at any time prior to adjudication.

**What must be written in the waiver petition? [Sec. 938.18(2)]**

The petition for waiver of jurisdiction must contain a brief statement of the facts supporting the request for waiver. See attached standard form.

It is not sufficient to simply refer to the underlying charge. In the Interest of J.V.R., 127 Wis. 2d 192, 378 N.W.2d 266 (1985).

**What are the rights of a juvenile once waiver petition is filed? [Sec. 938.18(3)(a)]**

1. the juvenile shall be represented by counsel
2. written notice of time and date to the juvenile, parent, guardian or legal custodian, and to counsel **at least three days** prior
3. substitution of judge, consistent with s. 938.29

938.29(1g) indicates substitution is not allowed in a proceeding under 938.12 if:

- (a) the assigned judge has previously entered a dispositional order, or
- (b) the juvenile has previously requested a substitution of judge.

This is not a proceeding under 938.12, so arguably those limitations do not apply. That said, 938.29(2) sets up a special rule indicating that a request for substitution on a judge set to conduct a waiver hearing **shall be filed before the close of the working day preceding the day that the waiver hearing is scheduled.** It then references (1g) in discussing requests for substitution made by “authorized” parties on the day of the waiver hearing.

4. access to social records and other reports under s. 938.293

**What discovery rights does 4, above, encompass?**

Sec. 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.** Releases of information may be necessary. The court may order counsel not to disclose specified items to the juvenile or parent.

Compare that language to:

938.293(1) which indicates that law enforcement officer reports shall be made available upon request **prior to a plea hearing.**

Courts have clarified that, because waiver hearings are generally conducted prior to a plea hearing, 938.293(1) is inapplicable and, instead, discovery rights mirror those for criminal defendants prior to a preliminary hearing. In the Interest of T.M.J., 110 Wis. 2d 7 (1982). Try to use case law to your advantage. See attached motion.

**What should your initial steps be upon receiving the waiver petition/notice of waiver hearing?**

1. Review any prior juvenile court files to determine delinquency history, prior dispositions, any prior evaluations or reports. Will likely be indicated in the waiver petition, but only summarily. Need to have a good understanding of this before moving on to step 2.
2. “Feel out” the District Attorney: why was this filed? bargaining chip for a forthcoming offer?

3. Talk with your client, laying out his/her options: agree to be waived? accept an offer to stay in juvenile court? contest? **ETHICAL OBLIGATIONS ...**

**If your client is clear about a desire to contest, or rejects an offer, or there is no offer, or your client is simply unsure, then what? How should you prepare for a contested hearing?**

1. Familiarize yourself with the criteria the Court will be using (see attached)
2. Talk with client and parent/guardian:
  - a. psychological issues? meds? therapy?
  - b. school? IEP?
  - c. have them sign releases to talk with school, doctors, therapists
  - d. lifestyle?
    - have a job? ever have one?
    - earn allowance?
    - have chores?
    - what other parental expectations/rules are there?
    - what happens when rules are not followed? grounding?
    - who pays for rent? groceries? clothes?
    - ever lived anywhere else?
  - e. who knows this kid and is willing to say something positive?
    - teacher?
    - coaches?
    - pastor?
  - f. explain the role of the social worker/PO and their importance in this process
3. Consider whether a psychological and/or AODA evaluation might be good; then consider whether you want them to be court-ordered
4. Plant some seeds with the social worker/PO if he/she hasn't met kid yet; if he/she has met kid and family, talk about their impressions/recommendation
5. Investigate the allegations in the delinquency petition
6. Have a fuller conversation with the DA: is there now an offer to be made? Will they withdraw the waiver out of principle?

**What does a waiver hearing look like?**

**STAGE ONE: PROSECUTIVE MERIT**

938.18(4) indicates, "The court shall determine whether the matter has prosecutive merit before proceeding to determine if it should waive jurisdiction."

1. What does that mean?

“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).

2. How does that work? What does the State have to do?

“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.

“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 ..., in any given case they could constitute sufficient evidence from which the juvenile court may determine that the matter has prosecutive merit, even when the issue of prosecutive merit is contested. Under those circumstances, there is no absolute requirement that the state present, or that the court consider, testimony and evidence in addition to the petitions before the court may determine that the matter has prosecutive merit.” Id., at 886.

If the State does put on evidence, keep in mind sec. 938.299(4)(b), indicating “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 evidence may be admitted if it has demonstrable guarantees of trustworthiness.”

3. Challenging 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 (emphasis added)

For a discussion regarding reliability of a confession, see In the Interest of J.G., 119 Wis. 2d 748 (1984).

#### **STAGE TWO: SUB (5) CRITERIA [see attached]**

938.18(4)(b) indicates, "[i]f a petition for waiver of jurisdiction is contested, the district attorney **shall present relevant testimony** and the court, after taking that testimony and considering other relevant evidence, shall base its decision whether to waive jurisdiction on the criteria specified in sub. (5)."

938.18(2m) indicates, "[t]he 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 under sub. (5)."

"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." Sec. 938.18(3)(b).

#### **The Court's decision**

"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 it is contrary to the best interests of the juvenile or of the public to hear the case, the court shall enter an order waiving jurisdiction ...." Sec. 938.18(6).

While the Court must consider all the criteria, "[t]he 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).

#### **What if the juvenile elects not to contest waiver?**

938.18(4)(c) indicates, "the court shall inquire into the capacity of the juvenile to knowingly, intelligently and voluntarily decide not to contest the waiver of jurisdiction."

If the court is satisfied, then "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)."

"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.” T.R.B., 109 Wis. 2d at 196-97.

### **What happens if the juvenile is waived?**

If the juvenile was 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.” Sec. 938.18(8).

The district attorney has the authority to charge any offense he/she deems appropriate in adult criminal court. See 938.18(9).

All further law violations will be prosecuted in the adult criminal system. See 938.183(1)(b).

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

Sec. 938.18(7), indicates, “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 the juvenile is waived in his/her absence, “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.”

If the criminal court finds good cause, the case is transferred back to the juvenile court for the purpose of conducting a waiver hearing.

### **Final considerations?**

Always be prepared to remind the Court that:

1. **Kids are different.** Cite early and often to Justice Kennedy in Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183 (2005).
2. **Juvenile Court is different.** We operate under a different set of rules with a corresponding sense of optimism.

“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.