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STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2012AP393-CR
(Racine County Case No. 2009CF459)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CORTEZ LORENZO TOLIVER,

Defendant-Appellant-Petitioner.

Appeal from the Final Order
Entered in the Circuit Court for Racine County,
The Honorable Faye M. Flancher, Circuit Judge, Presiding

BRIEF OF DEFENDANT-APPELLANT-PETITIONER

JEFFREY O. DAVIS
State Bar No. 1011425
MATTHEW C. VOGEL
State Bar No. 1066227
JAMES E. GOLDSCHMIDT
State Bar No. 1090060

QUARLES & BRADY LLP
411 East Wisconsin Avenue, Suite 2350
Milwaukee, WI 53202-4426

Attorneys for Defendant-Appellant-Petitioner Cortez Lorenzo Toliver

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ISSUES PRESENTED FOR REVIEW

1. In his reply brief before the Court of Appeals, Toliver argued that the judgment against him was void for lack of subject matter jurisdiction. Should the Court of Appeals have considered this argument?

Answered below: The Court of Appeals refused to consider Toliver's argument, ignoring that it concerned subject matter jurisdiction and stating only that arguments first raised in a reply brief need not be addressed.

2. After a preliminary hearing in which the circuit court took no apparent notice of Toliver's juvenile status and failed to make the offense-specific probable cause finding required by Wis. Stat. § 970.032, the court tried Toliver, a 16-year-old boy, as an adult. Did the court's failure to make this statutorily required finding cause it to lose subject matter jurisdiction over the matter, necessitating Toliver's discharge?

Answered below: Toliver's first judge bound him over for trial as an adult after making only the generic probable cause determination required for adults. Six months later, after judicial rotation, a second judge reviewed the record and blessed the first judge's generic determination as statutorily adequate. The Court of Appeals noted that the circuit court's finding was not offense-specific, but declined to further address the issue.

STATEMENT OF THE CASE

I. Toliver's Preliminary Appearance, Plea, and Sentencing

On May 7, 2009, Cortez Lorenzo Toliver, age 16, appeared in the Racine County Circuit Court on charges of attempted first-degree homicide and being a person under 18 in possession of a dangerous weapon. A-Pt 014. Because the charge of attempted first-degree homicide is one of those enumerated in Wis. Stat. § 938.183(1)(am), the circuit court – sitting as a criminal court – had "exclusive original jurisdiction" to conduct a preliminary hearing under Wis. Stat. § 970.032(1). The purpose of such a hearing is to determine whether there is probable cause to believe that the juvenile committed one or more of the specific crimes which permit trying him as an adult without the protections of the waiver process ordinarily afforded juveniles under Wis. Stat. § 938.18. Only such a finding authorizes a criminal court (i.e., a court for criminal charges against an adult) to retain subject matter jurisdiction over charges against a juvenile.

The hearing conducted by the Racine County Circuit Court, however, was indistinguishable from the hearing used for adult criminal defendants under Wis. Stat. § 970.03, as was the generic probable cause finding made at that hearing. The transcript of Toliver's hearing contains

no mention of the fact that he was a juvenile or that the court was being asked to determine whether he should be tried as an adult. Nor did the court find probable cause to believe that Toliver had attempted to commit first-degree homicide, the specific crime with which he was charged, as Wis. Stat. § 970.032 required the court to do before it could subject a 16-year-old boy to a criminal trial. Instead, the court substituted the generic probable cause finding permitted for adults under Wis. Stat. § 970.03:

> STATE: State moves for bindover.
>
> DEFENSE: Object to bindover.
>
> COURT: I would note, there is probable cause to believe *a felony* has been committed. The testimony we have is from the victim. You have identification. You have a shooting. Bindover is ordered.

A-Pt 024 (emphasis added); *cf.* § 970.03(1) (requiring only "probable cause to believe *a felony* has been committed") (emphasis added). Both the State and the Court of Appeals have noted this fact:

> *State:* The court did not state on the record that it found probable cause to believe Toliver had committed the crime of attempted first-degree intentional homicide.
>
> *Ct. App.:* The record shows that the court determined at the preliminary examination that 'there is probable cause to believe *a felony* has been committed,' […] but the court did not explicitly determine that there was probable cause to believe that Toliver committed first-degree homicide *or any other qualifying offense*.

A-Pt 192 (State's response brief in Court of Appeals); A-Pt 012 (opinion of

Court of Appeals) (first emphasis in original). Nonetheless, the circuit court bound over Toliver and returned him to custody. A-Pt 024.

Toliver then filed a petition for reverse waiver pursuant to Wis. Stat. § 970.032(2), accompanied by a motion to reopen the May 7 preliminary hearing due to infirmities under Wis. Stat. § 970.032(1). A-Pt 146. Specifically, Toliver argued that the judge presiding on May 7 had failed to make the specific probable cause determination required by § 970.032(1), causing the court to lose its subject matter jurisdiction. A-Pt 146-47.

In November of 2009, following judicial rotation, a new judge held a hearing on Toliver's motion and reverse waiver petition. A-Pt 027. At the hearing, the second judge reviewed the transcript of the May 7 hearing and determined that the first judge had found what he had in fact *not* found, superimposing an after-the-fact specific probable cause determination on a six-month-old transcript. A-Pt 030-036. Toliver's motion was denied accordingly, as was his reverse waiver petition. *Id.*; A-Pt 125. Ultimately, Toliver pleaded guilty to one count of first-degree reckless injury and one count of robbery with threat of force.[1] A-Pt 193.

[1] Of course, if the State had brought these charges in the first instance, Toliver never could have been tried as an adult. *See* Wis. Stat. §§ 938.183, 940.01, 940.02, 940.05. However, Toliver does not challenge the circuit court's handling of his initial appearance on this basis.

The circuit court entered its sentence on July 7, 2011, by which time Toliver had observed his seventeenth and eighteenth birthdays in custody. *Id.* At the State's request, the circuit court sentenced Toliver to a lengthy prison sentence of 27 years of initial confinement, followed by 12.5 years of extended supervision. *Id.* The circuit court also ruled that Toliver was not eligible for challenge incarceration or earned release. A-Pt 153. Toliver's consecutive sentences mean that he will not be released from prison until the age of 45, and will continue to be supervised until the age of 58. His incarceration to date is already nearing the maximum disposition he could have received if tried for the charged crime as a juvenile.[2]

Toliver filed a post-conviction motion for sentencing relief, which the circuit court denied. A-Pt 154. Toliver then filed an appeal, challenging both his conviction and his sentence on multiple grounds. *Id.*

II. Appellate Briefing and Decision by the Court of Appeals

In his appeal, Toliver argued (among other things) that the circuit court erroneously exercised its discretion in denying his 2009 reverse waiver petition. A-Pt 150. In response, the State argued that Toliver had waived this argument, citing the general rule that the knowing, voluntary,

[2] *See* Wis. Stat. §§ 940.01(a) (first-degree homicide is Class A felony), 939.32(1)(a) (attempt to commit Class A felony is Class B felony), 938.355(4)(b) (juvenile disposition for commission of Class B or C felony cannot exceed 5 years).

and intelligent entry of a guilty plea waives all non-jurisdictional defects preceding the entry of a plea. A-Pt 193-95. However, the State also noted that this rule does not extend to defects of subject matter jurisdiction. A-Pt 193-94. Moreover, the State suggested in its own brief that the circuit court had not made the express finding required by Wis. Stat. § 970.032(1), citing *State v. Kleser*, 2010 WI 88, 328 Wis. 2d 42, 786 N.W.2d 144. A-Pt 192.

In his reply brief, Toliver (who in the interim had retained new counsel) argued that the circuit court's failure to make the statutorily required finding caused it to lose its subject matter jurisdiction, rendering void any subsequent determinations, and that this defect of subject matter jurisdiction neither had been nor could have been waived by his guilty plea. A-Pt 220-27. As such, he argued, Wis. Stat. § 970.032(1) and this Court's decision in *Kleser* required the circuit court to discharge Toliver, with further proceedings (if any) to be initiated in juvenile court. *Id.*

The Court of Appeals devoted the entirety of its opinion to Toliver's sentencing and reverse waiver arguments, both of which it rejected. A-Pt 001-12. Its only mention of Toliver's argument regarding the specific probable cause finding required by § 970.032(1) appeared in a terminal footnote, wherein the court declined to address this argument because (it

said) the issue had not been raised until Toliver addressed it in his reply brief. A-Pt 012. In doing so, however, the Court of Appeals confirmed Toliver's factual assertion: the circuit court had indeed omitted the specific finding required by § 970.032(1). *Id.*

III. Toliver's Motion for Reconsideration Denied

Toliver timely filed a § 809.24 motion for reconsideration, addressed solely to the Court of Appeals' refusal to consider his argument under § 970.032(1). A-Pt 241. In his motion, Toliver emphasized that the circuit court's failure to comply with § 970.032(1) was a defect of subject matter jurisdiction, and that Wisconsin case law permits such a defect to be raised at any time. A-Pt 246. Toliver also presented a wealth of case law from other jurisdictions agreeing that such a defect may be raised in a reply brief. A-Pt 246-48. And in any event, Toliver noted, his argument did not even fall under the reply brief rule because it was a proper response to the State's own references to Wis. Stat. § 970.032 and *Kleser*. A-Pt 248-50. On May 9, 2013, the Court of Appeals denied Toliver's motion. A-Pt 013.

Toliver timely petitioned this Court for review. A-Pt 254. By Order dated December 17, 2013, the Court granted review of the issues discussed in Toliver's petition for review: whether the circuit court's failure to

observe the requirements of Wis. Stat. § 970.032(1) necessitated Toliver's discharge, and whether the Court of Appeals should have reached and resolved this question. Toliver now asks the Court to vacate his conviction as void for lack of subject matter jurisdiction.

SUMMARY OF THE ARGUMENT

Ordinarily, a juvenile may only be tried in criminal court if the juvenile court first waives its jurisdiction. Wis. Stat. § 938.18. In rare instances, however, the allegations against a juvenile are so serious that – where there is probable cause to believe that he committed the alleged crime – he is to be tried as an adult. Wis. Stat. § 938.183. In such cases, our Legislature has expressly required a preliminary hearing at which the criminal court must make an offense-specific probable cause finding. Wis. Stat. § 970.032(1). This preliminary hearing is "quite different" from the one prescribed for adult defendants under Wis. Stat. § 970.03: while both hearings "protect the accused from hasty, improvident, or malicious prosecution," the specific probable cause finding required for juveniles serves a second, "more important" purpose: it ensures that the criminal court – as opposed to a juvenile court – has "exclusive original jurisdiction" over the young defendant's case. *Kleser*, 2010 WI 88 at ¶¶ 55, 57, 65.

The exclusive original jurisdiction conferred upon a criminal court in such cases is a creature of statute. Wis. Stat. § 938.183. It is an exception to the otherwise prevailing jurisdictional framework, in which criminal courts have subject matter jurisdiction over actions against adults and juvenile courts have subject matter jurisdiction over actions against juveniles. It is triggered only by an allegation that a juvenile has committed one of the specific crimes enumerated in Wis. Stat. § 938.183. And its continued existence depends entirely upon a finding of probable cause to believe that the juvenile committed one of those specifically enumerated crimes. Wis. Stat. § 970.032(1). "If the court does not make *that finding*, the court *shall* order that the juvenile be discharged." *Id.* (emphasis as in *Kleser*).

Here, the circuit court did not make that finding. Indeed, the record reveals a preliminary hearing indistinguishable from an adult preliminary hearing under § 970.03. But rather than discharging Toliver as the statute requires, the court went on to convict and sentence him. This was a clear violation of the plain language of § 970.032.

In identifying this error and requesting that his conviction be vacated, Toliver simply asks this Court to enforce the specific probable

cause requirement adopted by our Legislature. This requirement is a key protection for juveniles about to enter our criminal justice system, and was recognized as such by this Court in *Kleser*. Yet its effectiveness depends upon careful and consistent application in Wisconsin's courts.

Importantly, Toliver is not asking the Court to impose a "magic words" requirement upon the lower courts. The specific probable cause requirement in § 970.032 requires a probable cause finding that is specific. Toliver does not propose, nor does the statute require, that the circuit court's specific probable cause finding be perfect or even formulaic. But one would expect the record of a preliminary hearing under § 970.032 to reflect that the court is aware the defendant is a juvenile, and that the court is being asked to try him as an adult. And at the very least, the law requires the court's probable cause finding be specific to a qualifying offense (as required for juveniles), not general (as permitted for adults).

Here, the preliminary hearing did none of these. The court's probable cause finding was not offense-specific, as § 970.032 requires. Instead, it was identical to the generic probable cause finding permitted for adult defendants under Wis. Stat. § 970.03. In fact, the court's finding could have described any number of alternative offenses, only some of

which would have sustained the criminal court's "exclusive original jurisdiction" under § 938.183. Moreover, the hearing was devoid of any contextual indicia which might enable a reviewing court to evaluate the circuit court's ambiguous probable cause finding. The court did not note that Toliver was a juvenile, and gave no indication that it was conducting the preliminary hearing per the special statutory framework required under the circumstances. In short, Toliver's hearing was indistinguishable from a routine adult intake under § 970.03. This is not a close case: Toliver's preliminary hearing fell far short of the requirements of § 970.032.

Finally, because the foregoing argument is a direct challenge to the circuit court's subject matter jurisdiction, the Court of Appeals should have addressed it rather than dismissing it under the traditional reply brief rule. The mere fact that the argument concerned subject matter jurisdiction meant that the court should have addressed it, regardless of what it may have concluded on the merits. Indeed, if Toliver's conviction is void for lack of subject matter jurisdiction, it is a nullity regardless of when the point is raised. It is a nullity now, and Toliver urges the Court to say so without delay.

ARGUMENT

I. Standard of Review

The issues presented in this appeal are questions of law which this Court reviews *de novo.* Because subject matter jurisdiction is conferred upon a court solely by the constitution and statutes of Wisconsin, whether a court has subject matter jurisdiction presents a question of statutory and constitutional interpretation. *In re Carlson*, 147 Wis. 2d 630, 635, 433 N.W.2d 635 (Ct. App. 1988). Whether the reply brief rule procedurally bars Toliver from asserting that his conviction is void for lack of subject matter jurisdiction is also a question of law warranting independent review. *State v. Flowers*, 221 Wis. 2d 20, 27, 586 N.W.2d 175 (Ct. App. 1998).

II. Toliver's argument that there is no subject matter jurisdiction supporting his conviction is not barred by the reply brief rule.

While it is undoubtedly true that the Court of Appeals ordinarily will not address arguments raised for the first time in a reply brief, *A.O. Smith Corp. v. Allstate Ins. Companies*, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998), issues relating to subject matter jurisdiction – such as the one at issue here – may be raised at any time, including for the first time on appeal. *Moreland Corp. v. Retail Store Emp. Union Local No. 444, AFL-CIO*, 16 Wis. 2d 499, 502, 114 N.W.2d 876 (1962).

Toliver knows of no Wisconsin authority excluding a reply brief from this general rule. Indeed, the United States Supreme Court has long emphasized that judgments entered without subject matter jurisdiction are nullities without any further action. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95, 101, 118 S. Ct. 1003, 140 L.Ed.2d 210 (1998) (*citing Ex parte McCardle*, 7 Wall. 506, 514, 19 L. Ed. 264 (1868)); *see also Vallely v. N. Fire & Marine Ins. Co.*, 254 U.S. 348, 353-54, 41 S. Ct. 116, 65 L. Ed. 297 (1920). Wisconsin is in accord: vacating a void judgment is mandatory, not discretionary. *Neylan v. Vorwald*, 124 Wis. 2d 85, 97-100, 368 N.W.2d 648 (1985); *Halbach v. Halbach*, 259 Wis. 329, 333, 48 N.W.2d 617 (1951).

For this reason, other appellate courts routinely acknowledge that they are bound to address subject matter jurisdiction issues raised in reply briefs. *See, e.g.*, *Sadeghi v. I.N.S.*, 40 F.3d 1139, 1143 (10th Cir. 1994) (recognizing exception to reply brief rule when issue relates to subject matter jurisdiction); *Fugere v. Derwinski*, 972 F.2d 331, 334 n.5 (Fed. Cir. 1992) (although not raised until reply brief, "challenges to subject matter jurisdiction are appropriate at any stage"); *Brown v. Philadelphia Hous. Auth.*, 350 F.3d 338, 346-47 (3d Cir. 2003) ("it is well-settled that a party

can never waive lack of subject matter jurisdiction," so "[i]t is of no moment [that] lack of subject matter jurisdiction was raised by [appellant] for the first time in its reply brief on appeal"); *Sasser v. Adm'r, U.S. E.P.A.*, 990 F.2d 127, 129 (4th Cir. 1993) (same).

Even if the Court of Appeals disagreed that the statutory defect identified by Toliver caused the circuit court to lose subject matter jurisdiction, it still should have considered Toliver's argument on this point. The dispositive fact is not whether Toliver's argument should ultimately be upheld on its merits, but solely whether it raised a question concerning the court's subject matter jurisdiction. In light of the clear directive that this question must always be addressed if raised, and in light of a clear consensus in other jurisdictions that the timing of this objection – in a reply brief or otherwise – is of no moment, Toliver respectfully submits that the Court of Appeals erred in declining to address the jurisdictional issue.[3]

[3] In any event, if "fundamental fairness" is the reason for the reply brief rule, *A.O. Smith*, 222 Wis. 2d at 492, equity favors Toliver in this case. In its response brief in the Court of Appeals, the State chose to note the generic nature of the circuit court's probable cause finding and cite *Kleser* for its emphasis on the offense-specific probable cause requirement in Wis. Stat. § 970.032. A-Pt 192. As such, the State cannot claim to be unfairly surprised or disadvantaged by a reply addressing an issue the State itself identified and chose to include in prior briefing. Fairness instead supports Toliver's opportunity to reply to the State's points, as appellee arguments left unaddressed in an appellant's reply brief are deemed admitted. *See, e.g., State v. Eison*, 2011 WI App 52, ¶ 33 n.7, 332 Wis. 2d 331, 797 N.W.2d 890.

III. A court that fails to comply with Wis. Stat. § 970.032(1) loses subject matter jurisdiction and can take no further action, such that any subsequent judgment is void.

By insisting that courts observe Wis. Stat. § 970.032(1)'s specific probable cause requirement, Toliver simply asks the Court to effect the Legislature's expressed intent by adhering to the plain meaning of the statutory text. The Legislature carefully framed its 1995 revisions to the Juvenile Justice Code, establishing key procedural safeguards for juvenile defendants. The Legislature required courts to observe these safeguards with reasonable rigor, and – in the case of the preliminary hearing – also specified what the court is to do when it does not make such a finding. Toliver simply asks this Court to apply this law, as written, to the facts.

A. A criminal court's "exclusive original jurisdiction" to try a juvenile as an adult is statutory, and a specific probable cause finding is essential to that jurisdiction.

Wisconsin circuit courts' subject matter jurisdiction is expansive, but it is not purely inherent. It is conferred by Wisconsin's constitution and statutes, which give it contours outside of which the court may not act. And a statute conferring jurisdiction may likewise take it away.

This is true of Wis. Stat. § 938.183, which alters the status quo by giving a circuit court "exclusive original jurisdiction" over certain criminal

charges against a juvenile. Wis. Stat. § 970.032(1) places limits on this jurisdiction, specifying that it cannot persist beyond the preliminary hearing stage in the absence of a specific probable cause finding tied to one or more of the qualifying offenses. Together, §§ 938.183 and 970.032(1) provide for special statutory jurisdiction that rests on a narrow foundation. Absent that foundation, any subsequent judgment is without support.

1. The subject matter jurisdiction conferred upon the circuit courts by our constitution is expansive but not infinite, and its contours may be articulated by statute.

As an initial matter, a circuit court's subject matter jurisdiction has no inherent existence; it is a legal construct conferred on a court solely by the constitution and statutes of the State. *In re Carlson*, 147 Wis. 2d at 635. Its finite nature is underscored by certain presumptions, such as that when the Legislature has enumerated specific grounds of judicial jurisdiction, it has also implied its intent to withhold jurisdiction in cases which are not so enumerated. *Id.* (*citing City of West Allis v. Wis. Employment Relations Comm'n*, 72 Wis. 2d 268, 274, 240 N.W.2d 416 (1976)).

In Wisconsin, circuit courts proceed on the basis that, "except as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within this state…" Wis. Const. art. VII,

§ 8. The broad nature of this constitutional provision has produced sweeping descriptions of circuit courts' subject matter jurisdiction. *See, e.g.*, *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶8, 273 Wis. 2d 76, 681 N.W.2d 190 (dictum) ("No circuit court is without subject matter jurisdiction to entertain actions of any nature whatsoever") (*quoting dictum in Mueller v. Brunn*, 105 Wis. 2d 171, 176, 313 N.W.2d 790 (1982)).

Obviously, such statements must be placed in context, for a court's subject matter jurisdiction is never limitless. Indeed, other decisions appropriately temper such statements, recognizing that circuit courts can, in fact, lack subject matter jurisdiction under certain conditions. *See In re Commitment of Bush*, 2005 WI 103, ¶17, 283 Wis. 2d 90, 699 N.W.2d 80 (Court of Appeals was correct to conclude that circuit court would be without subject matter jurisdiction if facial challenge to criminal statute were successful); *see also State v. Schroeder*, 224 Wis. 2d 706, 721, 593 N.W.2d 706 (Ct. App. 1999) (circuit court lacks criminal subject matter jurisdiction where the complaint does not charge an offense known to law).

This Court has acknowledged that "the jurisprudence concerning subject matter jurisdiction and a circuit court's competence to exercise its subject matter jurisdiction is murky at best." *In re Commitment of Bush*,

2005 WI 103, ¶16. But on this appeal there is no need to fully purify the waters. As discussed more fully in the following section, the question in this appeal is resolved by the capacity in which the Racine County Circuit Court was sitting when Toliver appeared before it.

2. Absent statutory authorization, a criminal court sitting as such has no subject matter jurisdiction over charges against a juvenile.

Since the reorganization of Wisconsin's court system in 1977, each circuit court may sit in any one of multiple capacities depending on the subject matter of the case before it. Properly speaking, a "juvenile court" means the circuit court adjudicating a case under the juvenile code, while "adult court" or "criminal court" means the circuit court adjudicating a case initiated with the filing of a criminal complaint. *See Schroeder*, 224 Wis. 2d at 721. Jurisdiction may reside in one or the other, but never in more than one at once. *See In re Vairin M.*, 2002 WI 96, ¶¶ 32-33, 255 Wis. 2d 137, 647 N.W.2d 208 (juvenile court cannot retain jurisdiction once criminal court assumes it).

Whether the juvenile court or the criminal court has original subject matter jurisdiction over a case is not addressed by the Wisconsin Constitution, but rather by statute. With respect to juveniles, the statutes

establish a status quo: the juvenile court (i.e., the circuit court sitting as a juvenile court) has exclusive jurisdiction over charges against juveniles 10 years of age or older. Wis. Stat. § 938.12. Ordinarily, then, charges could not be brought against a juvenile in a criminal court (i.e., a circuit court sitting as a criminal court), because a criminal court would have no subject matter jurisdiction over such charges. Conversely, a juvenile court would have no subject matter jurisdiction over criminal charges against an adult; the very idea defies logic.

At a minimum, then, it is clear that the Racine County Circuit Court – sitting as a criminal court – would not have had subject matter jurisdiction over a criminal complaint against Toliver, a juvenile, absent statutory authorization.

3. In select cases, the Legislature has granted circuit courts "exclusive original jurisdiction" over criminal charges against juveniles, but this subject matter jurisdiction exists only if, when, and so long as certain requirements are met.

The status quo described above was established by statute and thus may be altered by statute. In select cases, our Legislature has done just that. For example, where the State files a delinquency petition concerning a juvenile, the juvenile court may waive its subject matter jurisdiction at the

State's request, thereby vesting the criminal court with subject matter jurisdiction it would not have otherwise had. Wis. Stat. § 938.18. Or, as relevant here, Wis. Stat. § 938.183 (as limited by Wis. Stat. § 970.032) grants "exclusive original jurisdiction" over criminal charges against juveniles where particularly serious crimes are alleged.

Again, however, such jurisdiction is a deviation from the status quo: it is not inherent, but a creature of statute, and exists only under the conditions specified by the authorizing statute. Here, the "exclusive original jurisdiction" contemplated by § 938.183 is triggered only where the State's complaint alleges that a juvenile has committed one or more of the qualifying offenses enumerated in § 938.183(1).

More importantly, even where the court's § 938.183 jurisdiction is properly triggered by such allegations, it is not absolute. Rather, it is limited by Wis. Stat. § 970.032, and cannot persist in the absence of the specific probable cause required by that statute. Indeed, the entire purpose of the special preliminary hearing required by § 970.032 is to ensure that there is a continuing basis for the "exclusive original jurisdiction" specified in § 938.183. If the court makes that finding, it might be said that its § 938.183 jurisdiction "attaches," such that the criminal trial may ensue.

But if it does not make that finding, the criminal court loses its jurisdiction, and the text of the statute makes clear that the juvenile must be discharged. Further proceedings, if any, must be brought in juvenile court – a restoration of the jurisdictional status quo where special criminal jurisdiction under § 938.183 has been lost.

B. Here, the circuit court's failure to make the required finding caused it to lose subject matter jurisdiction.

The consequence of the circuit court's failure to comply with the requirements of Wis. Stat. § 970.032 is established by the statute itself and affirmed by this Court's decision in *Kleser*. Here, Toliver should have been discharged because the circuit court did not do as § 970.032 requires, causing it to lose the "exclusive original jurisdiction" initially conferred by § 938.183. This being so, a second judge's subsequent, revisionist reading of the record could not and did not alter this conclusion. Any action by the court after the preliminary hearing should never have occurred and can have no legal effect. As such, Toliver's conviction is void for lack of subject matter jurisdiction.

1. This Court's decision in *Kleser* recognizes the jurisdictional significance of a failure to make the finding required by § 970.032(1).

This Court has taken pains to emphasize the significance of the specific probable cause finding required by Wis. Stat. § 970.032(1), and to distinguish the purpose of a preliminary hearing brought under that statute from that of the generic probable cause hearing permitted for adult defendants under Wis. Stat. § 970.03. The latter statute only requires a finding of probable cause that *some* felony has been committed. In contrast, as explained by this Court:

> Under § 970.032(1), the court must determine whether there is probable cause to believe that the juvenile has committed '*the* violation' of which he or she is accused in the criminal complaint. This finding is required not only to protect the juvenile from hasty, improvident, or malicious prosecution, but also to assure that the criminal court has 'exclusive original jurisdiction' of the juvenile by virtue of the juvenile's probable violation of one of the offenses enumerated in Wis. Stat. §§ 938.183(1)(a), (am), (ar), (b), or (c).

Kleser, 2010 WI 88 at ¶57 (emphasis in original).

Furthermore, "The latter [jurisdictional] purpose is the more important purpose under this statute because '[i]f the court does not make *that finding*, the court *shall* order that the juvenile be discharged,' although proceedings may be brought regarding the juvenile under Chapter 938." *Id.* (emphasis in original). Such discharge is mandatory because a court that

fails to make an offense-specific probable cause finding (or that makes one in the negative) shall "lose jurisdiction." *Id.* at ¶62.

Here, Wis. Stat. § 970.032(2) required the circuit court to make a specific finding of probable cause that Toliver, a 16-year-old boy, attempted to commit first-degree intentional homicide – and to make that finding before doing anything else. In the absence of such a finding (and there was none), Toliver should have been discharged.

2. The State conceded on appeal, and the Court of Appeals noted, that the circuit court did not make the specific probable cause finding required by Wis. Stat. § 970.032(1).

There can be little question that the trial court failed to make the threshold determination required of it under § 970.032(1). The court found only that "there is probable cause to believe a felony has been committed," a finding which failed to comply with the requirements of § 970.032(1) and was indistinguishable from the generic probable cause determination permitted for adults. A-Pt 024.

In its response brief in the Court of Appeals, the State conceded this deficiency in the preliminary hearing. There, it noted:

> The court did not state on the record that it found probable cause to believe Toliver had committed the crime of attempted first-degree intentional homicide.

A-Pt 192.[4] The State reiterated this position in its response in opposition to Toliver's petition for review:

> [I]t is true – as the State pointed out in its brief in the court of appeals – that at the preliminary hearing on May 7, 2009, the court [...] did not expressly state it found probable cause Toliver committed the two felonies set forth in the complaint.

A-Pt 289. And the Court of Appeals confirmed this deficiency as a matter of record, citing the law which the finding failed to satisfy:

> The record shows that the court determined at the preliminary examination that 'there is probable cause to believe *a felony* has been committed,' […] but the court did not explicitly determine that there was probable cause to believe that Toliver committed first-degree homicide *or any other qualifying offense*. *See* § 970.032(1) and (2).

A-Pt 012 (first emphasis in original). Thus there cannot be any real dispute over what the circuit court did (and did not) find at the preliminary hearing. The circuit court simply did not comply with Wis. Stat. § 970.032(1).

3. The second judge's interpretation of the record, six months after the first judge's deficient preliminary hearing, did not restore subject matter jurisdiction.

In a novel approach, the State has proposed to paper over this clear blemish on the face of the record. Before trial and in its response brief in the Court of Appeals, the State claimed a circuit court can remedy such a

[4] The circuit court also did not state on the record that it found probable cause to believe Toliver possessed a dangerous weapon under the age of 18, the only other crime with which he was charged, and in any event this charge would not give rise to § 938.183 jurisdiction.

failure *after* the preliminary hearing and thereby "cover any perceived weakness in the finding." A-Pt 033; A-Pt 192 n.2. On this theory, the circuit court could retain (or, more accurately, regain) jurisdiction by doing the following: at Time 1 (i.e., the preliminary hearing), find probable cause that *some* felony was committed; then, at Time 2 (here, six months later), find that probable cause as to the *specific* felony had in fact been found at Time 1. That is just what the second judge attempted here. A-Pt 035-036.

Of course, that approach runs contrary to the plain meaning of the statutory language. The statute leaves no room for after-the-fact corrections to the record, effective retroactively, where the court fails to make the expressly required finding in the first instance. Rather, the statute provides that the court either must (1) find that probable cause of the specific felony exists or (2) discharge the case. Since no such probable cause was found at the preliminary hearing, the court lost jurisdiction then and there. As such, the circuit court necessarily lacked the power to somehow modify its earlier finding in a way that would now benefit the State. Any suggestion to the contrary is inconsistent with the view of this Court in *Kleser*, not to mention nonsensical in the context of a statute that mandates discharge in the absence of a probable cause finding at the preliminary hearing.

Moreover, it is not at all "clear," as the State claimed in opposition to Toliver's petition, that the circuit court in fact observed the requirements of Wis. Stat. § 970.032(1). A-Pt 289. The transcript of the preliminary hearing contains no mention of the fact that Toliver was a juvenile, no indication that the court was conducting the special hearing required by § 970.032(1) or was even aware of its statutory obligation to do so, and no specific probable cause finding remotely resembling the heightened finding required by that statute. In all respects, Toliver's preliminary hearing is indistinguishable from that used for adults – for all we know, the first judge believed that Toliver was an adult, subject to the generic probable cause requirement of § 970.03. As such, the second judge's after-the-fact specific probable cause "finding" is not only procedurally impossible as a general matter, but also factually suspect in this particular case.

C. The Legislature did not create (and Toliver does not propose) a "magic words" requirement; rather, it established key procedural safeguards for juveniles standing at the threshold of Wisconsin's criminal justice system.

Toliver does not seek to add a non-existent "magic words" requirement to Wis. Stat. § 970.032(1) or impose such a requirement upon the lower courts. Any such attempt to re-characterize his argument suffers

from at least three flaws. First, the specific probable cause requirement in Wis. Stat. § 970.032(1) requires a probable cause finding that is specific. Toliver simply seeks to enforce this requirement as written. Second, setting aside any invocation of a "magic words" requirement, adequate specificity is still necessary to ensure uniformity of process and to enable effective appellate review. This is particularly true where juveniles are concerned. Third and most important, the deficiencies in Toliver's preliminary hearing go well beyond the circuit court's failure to utter particular words. By all appearances, the circuit court simply conducted the wrong type of preliminary hearing.

1. Toliver seeks to enforce Wis. Stat. § 970.032 as written, not alter or amend it.

The "magic words" argument misses the mark for multiple reasons, but perhaps the simplest is this: there is no need to hold the circuit court to a strict magic words standard because Toliver's argument tracks Wis. Stat. § 970.032 as currently drafted. That is, the statute as enacted already contains the only two elements necessary to show that Toliver's preliminary hearing was deficient: (1) a requirement of an offense-specific probable cause finding (which the circuit court did not make here), and (2) a mandatory discharge where such a finding is not made.

Quite plainly, § 970.032 does not prescribe a scripted finding or require the circuit court to utter any particular words lest it lose jurisdiction. Nor does Toliver claim that it should. Toliver is not arguing for judicial perfection; he would settle for mere adequacy of the record. Adequacy of the record is sufficient to accomplish the purpose of § 970.032 – that is, to ensure that the criminal court is properly vested with subject matter jurisdiction over the action, and to provide the juvenile defendant (and reviewing courts) with clear evidence of statutory compliance. To dismiss this requirement and its purposes as a mere "magic words" requirement would be to eviscerate any distinction between § 970.03 and § 970.032, thereby undermining the intent of the Legislature and trivializing the protections of procedural due process owed to all defendants.

2. Where words have legal effect, insisting upon specificity is a matter of substance – particularly where juveniles are concerned.

Even as Toliver rejects a magic words requirement, he is justified in arguing for specificity at the preliminary hearing stage. *See Seifert v. Sch. Dist. of Sheboygan Falls*, 2007 WI App 207, ¶42, 305 Wis. 2d 582, 740 N.W.2d 177 (rejecting open records request as inadequately specific)

("While magic words are unnecessary, some requirement for specificity makes sense").[5]

This Court has recognized the importance of reasonably detailed findings in the context of criminal sentencing. *See State v. Gallion*, 2004 WI 42, ¶49, 270 Wis. 2d 535, 678 N.W.2d 197 (on-the-record explanation is not intended to be a call for more "magic words," but rather to ensure that judicial decisions have a "rational and explainable basis" and to assist appellate courts in their review). *See also State v. Gary M.B.*, 2004 WI 33, ¶¶ 62-65, 270 Wis. 2d 62, 676 N.W.2d 475 (Abrahamson, C.J., dissenting) (court's failure to use magic words not dispositive; real flaw was that one-sentence ruling did not demonstrate that court considered relevant factors); *I.N.S. v. St. Cyr*, 533 U.S. 289, 334-35, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (Scalia, J., dissenting) (majority's "magic words" approach was not necessary where "clear statement" requirement sufficed; statutes preserved state sovereign immunity "not because there was no explicit reference to the Eleventh Amendment, but because the statutory intent to eliminate state sovereign immunity *was not clear*") (emphasis in original).

[5] Indeed, on occasion this Court has all but required circuit courts to use express language where, as here, lower court confusion persisted despite clear guidance from the Court. *See, e.g., Wambolt v. West Bend Mut. Ins. Co.*, 2007 WI 35, ¶¶ 44-46, 299 Wis. 2d 723, 728 N.W.2d 670 (concerning finality of judgment for purposes of appeal).

If specificity is important in the context of criminal sentencing, it is all the more critical where the defendant is a juvenile – as this Court has also recognized. *See In re Michael S.*, 2005 WI 82, ¶44, 282 Wis. 2d 1, 698 N.W.2d 673 (while court is not required to utter "magic words" in order to extend dispositional order in juvenile matter, record must reflect court's awareness of the applicable statutory framework). For a juvenile to cross the threshold into criminal court is no small matter, and the Legislature has directed courts to guard this threshold with care. To argue that courts should be anything other than exacting at this critical moment invites a carelessness that cannot be justified under the circumstances.

3. The circuit court's probable cause finding must be understood in the context of the entire preliminary hearing, which was deficient in several key respects.

A "magic words" characterization is faulty for a third, more fundamental reason: Toliver's preliminary hearing simply contained *no* indicia that the circuit court complied with Wis. Stat. § 970.032.

First, and dispositively, the court's probable cause finding was not specific, as required by Wis. Stat. § 970.032. The court only addressed probable cause after the State moved for bindover, and then almost as an afterthought:

STATE: State moves for bindover.

DEFENSE: Object to bindover.

COURT: I would note, there is probable cause to believe a felony has been committed. The testimony we have is from the victim. You have identification. You have a shooting. Bindover is ordered.

A-Pt 024. This is the court's probable cause finding in its entirety. So stated, it is indistinguishable from the generic probable cause finding permitted for adults under Wis. Stat. § 970.03. Indeed, it could describe any of several offenses, several of which would not constitute grounds for criminal prosecution of a juvenile.[6] And even if the specific charges could be inferred from the criminal complaint,[7] the court's finding makes it impossible to tell which standard it applied. The most obvious conclusion is that the court found only generic probable cause, since that is what it said it found. This cannot satisfy § 970.032.

Second, the transcript of the preliminary hearing reveals no objective indicia that might enable a reviewing court to reasonably conclude that the circuit court's ambiguous probable cause finding was in fact the offense-

[6] For instance, the four elements present in the court's finding—(1) a victim, (2) identification, (3) a shooting, and (4) a crime that constitutes a felony—could describe second degree reckless homicide (Wis. Stat. § 940.06), homicide by negligent handling of a dangerous weapon, explosives, or fire (§ 940.08), or homicide by intoxicated use of a vehicle or firearm (§ 940.09), none of which would trigger criminal jurisdiction over a juvenile under § 938.183.

[7] Toliver does not concede that Wis. Stat. § 970.032 permits such an inference.

specific finding required by § 970.032. The transcript contains no indication that Toliver was a juvenile or that the circuit court was aware of that fact. The presiding judge may or may not have taken note of Toliver's date of birth, and may or may not have mentally calculated Toliver's age based on his date of birth, but this is all guesswork. Given the gravity of the hearing, one would expect some mention – any mention – of the fact that the State was seeking to try Toliver, a juvenile, as an adult.

Similarly, the record does not indicate any awareness on the court's part that this was a special preliminary hearing under Wis. Stat. § 970.032(1), as opposed to the generic probable cause hearing applicable to adults per Wis. Stat. § 970.03(1). Again, given the gravity of the hearing, one would expect some mention – any mention – of the applicable statutory framework and the court's cognizance that this was no routine probable cause hearing.

The notion of "magic words" may have some relevance in a close case, where the court's use of particular terms offers the only clue upon review. But as the foregoing discussion demonstrates, this is not a close case. Reading the transcript of Toliver's preliminary hearing in its entirety, it is simply impossible to determine whether the circuit court was

conducting a hearing under § 970.032 or § 970.03 – that is, whether it was dealing with a juvenile or an adult.

Where the Legislature has mandated such distinct treatment for juvenile and adult criminal defendants, a transcript like this one reveals a true problem. That the transcript of Toliver's preliminary hearing gives no indication that the court is acting within a juvenile-specific procedural framework is telling, but alone does not violate Wis. Stat. § 970.032. That the court did not even note that Toliver was a juvenile is also telling, but (again) does not violate § 970.032 in its own right. But in making a probable cause finding that did not meet the statute's express requirement that the finding be specific to the charged offense, the Racine County Circuit Court – sitting as a criminal court – lost subject matter jurisdiction to take any further action and should have discharged Toliver then and there. Its failure to do so violated Wis. Stat. § 970.032 and necessitates that Toliver's conviction be vacated. That is no "magic words" requirement. It is the law.

CONCLUSION

Like individuals, courts are bound by laws. A juvenile is expected to obey the law, and may even be tried as an adult when he does not. But

this is a momentous step, and our Legislature has insisted that a juvenile and an adult cannot arrive at criminal court via the same path. When the record shows that a juvenile defendant's preliminary hearing is indistinguishable from that of an adult defendant, the procedure required by our Legislature has failed.

This Court plays a key institutional role in upholding the will of our Legislature by ensuring that Wisconsin's circuit courts are doing the same. In this case, that means Toliver's conviction should finally be declared void, as it has been all along.

Respectfully submitted this 16th day of January, 2014.

JEFFREY O. DAVIS,
State Bar No. 1011425

MATTHEW C. VOGEL,
State Bar No. 1066227

JAMES E. GOLDSCHMIDT,
State Bar No. 1090060

QUARLES & BRADY LLP
411 East Wisconsin Avenue, Suite 2350
Milwaukee, WI 53202-4426
(414) 277-5000

Attorneys for Defendant-Appellant-Petitioner Cortez Lorenzo Toliver

RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,509 words.

Signed:

James E. Goldschmidt

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I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of this brief.

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James E. Goldschmidt

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I hereby certify that the content of the electronic copy of the appendix filed with this brief is identical to the content of the paper copy of the appendix filed with this brief.

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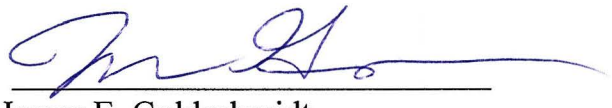

James E. Goldschmidt

RULE 809.19(2)(b) CERTIFICATION

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 s. 809.12(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) 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 the 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 portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Signed:

James E. Goldschmidt

CERTIFICATE OF MAILING

I hereby certify, pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 16th day of January, 2014, I caused 22 copies of the Brief and Appendix of Defendant-Appellant-Petitioner to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

Signed:

James E. Goldschmidt