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

REPLY 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Statutes, and Acts

ARGUMENT

This appeal concerns a specific statute that confers subject matter jurisdiction under specific conditions – conditions that were not met here, rendering the judgment against Toliver void. That conclusion is based on the plain language of Wis. Stat. § 970.032 and *State v. Kleser*, 2010 WI 88.

The State's response seeks to introduce and resolve issues well beyond the question of whether Toliver's preliminary hearing failed to satisfy the requirements of Wis. Stat. § 970.032, such that Toliver should have been discharged. The Court can answer that narrow but important question without resolving all the theoretical particulars of competency, subject matter jurisdiction, and the Juvenile Justice Code. Indeed, the State's discussion of competency is inapposite: the relevant statutes and *Kleser* refer to jurisdiction, not competency. That these statutes can and do restrict circuit courts' subject matter jurisdiction is consistent with the plain language of our Constitution and a century of case law.

I. When an argument invokes subject matter jurisdiction, as Toliver's did, a reviewing court must reach its merits.

The State claims the question at the heart of this appeal is foreclosed under the reply brief rule because Toliver is wrong on the merits of that question: because the error identified by Toliver does not *actually* concern

subject matter jurisdiction, says the State, the Court of Appeals was justified in declining to address it. R-Br. at 6. But that puts the cart before the horse. Ultimate conclusions about the merits of an argument have no place in the threshold analysis of whether the argument itself was waived. A-Br. at 14. Before it could determine Toliver was wrong on the merits, the Court of Appeals would have had to *reach* the merits, which it declined to do. A-Br. at 6-7. What matters for purposes of the reply brief rule is whether Toliver's argument raised a question concerning the circuit court's subject matter jurisdiction – which it did. A-Br. at 14; A-Pt 220-27. The Court of Appeals therefore should have addressed it, and this Court should do so now.

II. Toliver's probable cause hearing did not comply with Wis. Stat. § 970.032—not even substantially.

The circuit court did not make the specific probable cause finding required by Wis. Stat. § 970.032, and the State cannot show that it did. So the State argues instead that the court *must have* made this finding because (1) the court made *some* probable cause finding, (2) the facts presented at the hearing *could* support the required finding, and (3) the court did not discharge Toliver. R-Br. at 12-16. But this combination of conjecture and *post hoc* rationalization cannot replace the finding the statute requires.

More importantly, these facts do not indicate – individually or collectively – whether the court was even aware Toliver was a juvenile, much less whether its probable cause finding was offense-specific.

Yet the State insists Toliver's hearing substantially complied with § 970.032, suggesting Toliver is overly concerned with the court's failure to state expressly on the record what it 'in fact' found. R-Br. at 12-16. Of course, a finding not evident from the face of the record is no finding at all. *See, e.g.*, *Kroner v. Oneida Seven Generations Corp.*, 2012 WI 88, ¶ 5, 342 Wis. 2d 626, 819 N.W.2d 264. Substantial compliance may be acceptable where an ambiguous finding is paired with clear indicators that the court is aware of the defendant's juvenile status and the nature of the proceeding. But as Toliver has already pointed out, that is not this case. A-Br. 30-33.

Two more of the State's arguments regarding § 970.032 call for a response. First, the State describes § 970.032(1) as mandating discharge *only* when the court expressly finds probable cause lacking. R-Br. at 15. That is incorrect. The statute's plain language says that "if the court *does not make* that finding" – i.e., the affirmative, offense-specific probable cause finding required by the statute – "the court shall order that the juvenile be discharged." Wis. Stat. § 970.032(1) (emphasis added).

Second, the State claims – citing *Kleser* – that a preliminary hearing under Wis. Stat. § 970.032(1) is merely an opportunity for the juvenile to seek a charge reduction. R-Br. at 9, 16. The implication is that if Toliver had this opportunity, the statute's purpose was satisfied; the court's actual finding matters little. *Id.* But that is not what the statute and *Kleser* say. The special purpose of a preliminary hearing under § 970.032(1), supervening the generic purpose of a standard preliminary hearing, is "to assure that the criminal court has 'exclusive original jurisdiction'" arising out of one of the specific offenses which trigger that jurisdiction per § 938.183. 2010 WI 88, ¶ 57. Because a successful attack on the specific offense charged would require the State to amend its pleading or would "negate the exclusive original jurisdiction of the criminal court," a defendant may try such an attack. *Id.* at ¶¶ 60-65. But this strategy is a consequence of the statute's purpose, not the purpose itself. And this strategy would not even be possible unless the court were able to "lose jurisdiction," as *Kleser* confirms it can. *Id.* at ¶ 62.

III. The defect here is one of subject matter jurisdiction, and the State's authorities do not establish otherwise.

The State devotes the remainder of its response to its characterization of the circuit court's error as one of competency, not

subject matter jurisdiction. R-Br. at 17-30. This position is undermined by the plain language of Wis. Stat. § 938.183 and § 970.032 as well as *Kleser*, and the decisions the State cites for support are distinguishable on the basis of the actual issues presented in each.

A. Both the relevant statutes and *Kleser* speak of jurisdiction, not competency, and both confirm jurisdiction can be lost.

In matters of statutory interpretation, this Court presumes the Legislature chose its terms carefully and precisely to express its meaning. *Ball v. Dist. No. 4, Area Bd. of Vocational, Technical & Adult Educ.*, 117 Wis. 2d 529, 539, 345 N.W.2d 389 (1984); *see also Bahr v. State Inv. Bd.*, 186 Wis. 2d 379, 394, 521 N.W.2d 152 (Ct. App. 1994) ("We presume that the legislature means what it says").

The Legislature chose to say "jurisdiction," not "competency," in both Wis. Stat. § 938.183 and § 970.032. The Court should heed this choice. *See Kett v. Cmty. Credit Plan, Inc.*, 222 Wis. 2d 117, 129, 586 N.W.2d 68 (Ct. App. 1998) (judgment was void where statute's plain meaning deprived circuit court of jurisdiction). Moreover, "competency" is used elsewhere in the Wisconsin Statutes (including in laws on juvenile, child, and criminal proceedings), suggesting the Legislature knows the

difference between the two.[1] The State would have the Court assume otherwise, but does not explain why the Legislature – in two separate statutes – would have said "jurisdiction" when it meant "competency."

Likewise, interpreting Wis. Stat. § 938.183 and § 970.032, the *Kleser* court – that is, this Court – spoke of "jurisdiction," not "competency." Indeed, between *Kleser*'s majority opinion and partial concurrence and dissent, this Court used the term "jurisdiction" some ninety times, while never once referring to competency. The Court is undoubtedly aware that "competency" and "subject matter jurisdiction" refer to different concepts. Yet it consistently chose "jurisdiction" in *Kleser*, and rightly so: that is what the relevant statutes say.

The State argues that each of the times this Court referred to "jurisdiction" in *Kleser*, it must have meant something other than what it said. R-Br. at 22 ("jurisdiction" in *Kleser* "did not refer to the circuit court's subject matter jurisdiction"). But it does not say what the Court must have meant instead. *Id.* It merely lists a number of decisions discussing the distinction between subject matter jurisdiction and

[1] *See* Wis. Stat. § 938.25 (Juvenile Justice Code) (competency to act on petition initiating juvenile proceedings); § 48.315 (Children's Code) (distinguishing subject matter jurisdiction and competency); § 980.038 (Criminal Procedure) (same).

competency, then concludes that competency must also be the applicable concept here. *Id.* at 22-26. However, as explained below, none of those decisions is relevant to the statutory question presented in this case.

Finally, both Wis. Stat. § 970.032 and *Kleser* contemplate that the "exclusive original jurisdiction" initially conferred by § 938.183 can be lost. The discharge mandated by § 970.032 when an offense-specific probable cause finding is not made, coupled with the caveat that proceedings may be brought against the juvenile in juvenile court, create a functional model in which (1) the criminal court begins with subject matter jurisdiction over certain juvenile offenses, (2) a preliminary hearing confirms whether the criminal court retains or loses that jurisdiction, and (3) the juvenile court may have jurisdiction where the preliminary hearing reveals that the criminal court does not. *Kleser* affirms this straightforward interpretation, noting the criminal court may be "deprive[d]" of its exclusive original jurisdiction, "lose" that jurisdiction, and see it "negate[d]."[2] 2010 WI 88 at ¶¶ 60, 62, 65.

[2] This interpretation is bolstered by § 970.032(2), which speaks of "transferring jurisdiction" and "retaining jurisdiction;" both references would be meaningless if the criminal court can never lose jurisdiction, as the State asserts.

B. The competency decisions cited by the State are off point: they do not concern statutes addressing jurisdiction.

The State cites multiple decisions, most from the Court of Appeals, for the proposition that Wis. Stat. § 938.183 and § 970.032 must mean "competency" despite the fact that they say "jurisdiction." R-Br. at 22-26. But with one exception, the statutes addressed in those decisions contain no reference to "jurisdiction," as § 938.183 and. § 970.032 do here.

In Interest of B.J.N., 162 Wis. 2d 635, 469 N.W.2d 845 (1991), R-Br. at 22, addressed timing requirements contained within certain provisions of the Children's Code concerning delays, continuances, and extensions of orders. At the time, those provisions (namely, Wis. Stat. § 48.315 and § 48.365) contained no reference to jurisdiction.[3]

State v. Schroeder, 224 Wis. 2d 706, 539 N.W.2d 76 (Ct. App. 1999), which the State spends two pages discussing, R-Br. at 23-25, is a lower court decision that did not even involve statutory interpretation. Instead, *Schroeder* concerned whether a trial court lost subject matter jurisdiction when it failed to scrutinize the State's reasons for delaying prosecution of a juvenile, as this Court directed trial courts to do in *State v.*

[3] Ten years later, § 48.315 was amended to expressly incorporate *B.J.N.*'s holding; § 48.315(3) now refers to both subject matter jurisdiction and competency. 2001 Wis. Act 109, § 101k; *see also* n. 2, *supra*.

Becker, 74 Wis. 2d 675, 247 N.W.2d 495 (1976). The *Schroeder* court appropriately concluded that a *Becker* hearing is intended to ensure due process, and has nothing to do with subject matter jurisdiction.

In Interest of Michael J.L., 174 Wis. 2d 131, 496 N.W.2d 758 (Ct. App. 1993), R-Br. at 25, another lower court decision, addressed a now-repealed Children's Code provision, Wis. Stat. § 48.12. At the time, § 48.12 referred to a juvenile court's "exclusive jurisdiction" over delinquency proceedings against children twelve years of age or older. *Id.* at 137. The *Michael J.L.* court reasoned that because a circuit court always has subject matter jurisdiction arising from our Constitution, any statute purporting to confer "jurisdiction" must relate to either "statutory jurisdiction" or "competence," both of which are "lesser powers of a circuit court." *Id.* This logic is flawed (*see* § IV, *infra*) and does not bind this Court.

Finally, in *State v. Phillips*, 2014 WI App 3 (publication pending), R-Br. at 25, the Court of Appeals noted that a juvenile's age on the date of the alleged offense "mandates whether the juvenile court has competency to consider waiver" into adult court under Wis. Stat. § 938.18. *Id.* at ¶ 6. That statute places conditions upon when a waiver petition "may be filed." The Court of Appeals concluded – and Toliver does not disagree – that this

statutory restriction upon when a waiver petition may be filed does not implicate the court's subject matter jurisdiction, which is conferred by § 938.12, not § 938.18, and would be a prerequisite for the underlying proceeding, not for particular filings or decisions within that proceeding.

In short, while the State's authorities on competency may have relevance in other contexts, the State has not shown why they are relevant here, where both the applicable statutes and this Court's decision in *Kleser* refer exclusively to "jurisdiction."

IV. Our Constitution negates the State's notion of absolute subject matter jurisdiction, and must also temper the broadest statements cited by the State.

Over and above its irrelevance to this appeal, the State's view of the distinction between subject matter jurisdiction and competency is troubling: it would deny the Legislature a power granted by the Constitution.

A. The plain language of the Wisconsin Constitution expressly permits the Legislature to limit circuit courts' subject matter jurisdiction, as it has done here.

Any analysis of circuit courts' subject matter jurisdiction must begin with article VII, section 8 of the Wisconsin Constitution, the original source of that jurisdiction. It states:

> *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 (emphasis added). The first six words of this clause expressly contemplate that the contours of circuit courts' subject matter jurisdiction may be narrowed "by law," i.e., by legislative action.

On this basis,[4] a century of case law beginning in 1850 confirms the Legislature's ability to restrict circuit courts' subject matter jurisdiction:

> **1850:** *Oshoga v. State*, 3 Pin. 56, 59 (1850 WL 1739): It is obvious that the constitution has conferred upon the circuit courts a general jurisdiction over criminal matters, subject only to the restriction of that instrument *and constitutional legislative prohibition*.
>
> **1871:** *McNab v. Noonan*, 28 Wis. 434, 444: There can be no question that the legislature has the power, under this section [art. VII, § 8], to restrict the original jurisdiction of the circuit courts.
>
> **1886:** *Bookhout v. State*, 66 Wis. 415, 419, 28 N.W. 179: The constitution confers upon the legislature power to restrict the original jurisdiction of the circuit courts, (article 7, § 8).
>
> **1895:** *Am. Loan & Trust Co. v. Bond*, 91 Wis. 204, 206, 64 N.W. 854: [T]he Legislature are thus expressly authorized to cut down the original jurisdiction of the circuits, or any of them.
>
> **1908:** *Goyke v. State*, 136 Wis. 557, 561-62, 117 N.W. 1027: [T]he general jurisdiction of circuit courts is by implication "prohibited by law" within the meaning of the Constitution, when jurisdiction has been in terms or by necessary implication conferred upon some other court.
>
> **1945:** *Clintonville Transfer Line v. Pub. Serv. Comm'n*, 248 Wis. 59, 75, 21 N.W.2d 5: [Pursuant to art. VII, § 8], [t]he legislature may […] confer jurisdiction upon the circuit court […] *and prescribe its extent*.

[4] Intervening constitutional amendments did not materially alter the applicable language. *See State v. Williams*, 2012 WI 59, ¶ 88 n.16, 341 Wis. 2d 191, 814 N.W.2d 460 (concurrence) (comparing post-1978 text to previous text).

See also State v. Krause, 260 Wis. 313, 320, 50 N.W.2d 439 (1951) (*quoting Bookhout* with approval); *State ex rel. Steeps v. Hanson*, 274 Wis. 544, 547, 80 N.W.2d 812 (1957) (*quoting American Loan* with approval).

The more recent discussion of competency cited by the State adds ambiguity to what was once a clear relationship between jurisprudence and constitutional text. Whatever its merit in other contexts, its application in this case would depart from straightforward application of plain statutory language, which is what Toliver advocates here.

B. The broadest statements of circuit court subject matter jurisdiction must mean less than the State asserts, or they would conflict with our Constitution.

Certain extreme statements quoted in the State's response brief demonstrate what happens when the plain language of the Constitution is disregarded. *See, e.g.*, R-Br. at 20 ("a circuit court in Wisconsin is *never* without subject matter jurisdiction"); *id.* at 22 ("A circuit court *always* has subject matter jurisdiction") (emphasis added); *id.* at 20 (arguing that the Legislature is unable to affect circuit courts' subject matter jurisdiction). Taken literally, these statements would read "Except as otherwise provided by law" right out of the constitutional text. True, such statements echo dicta in decisions like *Schroeder*, *supra*, and *Village of Trempealeau v.*

Mikrut, 2004 WI 79, 273 Wis. 2d 76, 681 N.W.2d 190 (R-Br. at 19, 20, 27). But such sweeping statements cannot be read so broadly that they fail to account for – or even contradict – the plain language of our Constitution.

That plain language contemplates that the Legislature may enact laws narrowing circuit courts' subject matter jurisdiction. Thus Toliver does not need to argue, as the State suggests, that Wis. Stat. § 938.183 confers some sort of "special" or "statutory" jurisdiction upon circuit courts. R-Br. at 10-12. Sections 938.183 and 970.032 refer to subject matter jurisdiction. In the excerpts discussed by the State, Toliver merely emphasized that because the contours of the circuit courts' subject matter jurisdiction may be determined by statute, it is possible for one statute (here, § 938.183) to carve out an exception to the broader contours defined by another statute (here, § 938.12).

Finally, the State cites certain decisions which refute arguments Toliver is not making here. For instance, Toliver does not claim that circuit courts' subject matter jurisdiction "*depend[s]* on legislative authorization." *In Interest of L.M.C.*, 146 Wis. 2d 377, 390, 432 N.W.2d 588 (Ct. App. 1988) (emphasis added), R-Br. at 17. The Legislature need not authorize what the Constitution has already granted. Similarly, Toliver does not

contend the circuit court only has such jurisdiction as the Legislature has conferred on it by statute. *Matter of Guardianship of Eberhardy*, 102 Wis. 2d 539, 548-51, 307 N.W.2d 881 (1981), R-Br. at 18-19. As a default matter, the circuit courts' jurisdiction is plenary by virtue of the Constitution, but the Legislature may define exceptions to that default, as it has done here.

CONCLUSION

For the foregoing reasons, Toliver requests that the judgment against him be vacated as void for lack of subject matter jurisdiction.

Respectfully submitted this 20th day of February, 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 reply brief produced with a proportional serif font. The length of this brief is 2,997 words.

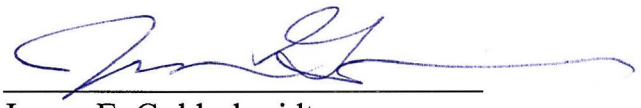
Signed:

James E. Goldschmidt

RULE 809.19(12)(f) CERTIFICATION

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.

Signed:



James E. Goldschmidt

CERTIFICATE OF MAILING

I hereby certify, pursuant to Wis. Stat. s. 809.80(4) that, on the 20th day of February, 2014, I caused 22 copies of the Reply Brief 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