STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP001416-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW C. HINKLE,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Wisconsin Court of Appeals, District II, Affirming a Judgment of Conviction and Order Denying Postconviction Relief Entered in the Fond du Lac County Circuit Court, the Honorable Robert J. Wirtz Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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1. Did the Fond du Lac County criminal court lack competency under § 938.183(1)(b) to proceed on Hinkle's non-traffic counts, when competency was based solely on Milwaukee County juvenile court's previous waiver, thus entitling Hinkle to plea withdrawal?

   Both the circuit court and the court of appeals held that the Fond du Lac County adult court had original jurisdiction over Hinkle under § 938.183(1)(b) as a result of Milwaukee County juvenile court's previous waiver of jurisdiction. (85:29-31; App. 120-22). *State v. Matthew C. Hinkle*, 2018 WI App 67, ¶ 1, 384 Wis. 2d 612, 921 N.W.2d 219. (App. 102-03).

2. Did trial counsel provide ineffective assistance by failing to object to the addition of the non-traffic counts in adult court, for failing to object to the Fond du Lac County juvenile court order waiving jurisdiction, and for affirmatively misinforming Hinkle that the Milwaukee County waiver would automatically place him in adult court in Fond du Lac?

   Both the circuit court and the court of appeals held that trial counsel interpreted the law correctly and therefore her performance was not deficient. *Hinkle*, 2018 WI App 67, ¶ 24 (App. 113) (85:31; App. 122).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court's decision to grant review suggests both oral argument and publication are warranted.

STATEMENT OF THE CASE AND FACTS

The criminal complaint in Fond du Lac County case 15-CF-418 alleged that in July 2015, when Hinkle was 16 years old, the police found Hinkle driving a car in Fond du Lac County that had been reported stolen from Milwaukee. (2;10;56). The complaint alleged that after officers approached the vehicle, Hinkle led police on a high-speed chase in which he hit other cars, lost control, fled on foot, and was ultimately detained after a K-9 was deployed. (2:2-4).

This series of events led to two Milwaukee County cases (adult court case number 15-CF-5011 and juvenile court case number 15-JV-248B) and two Fond du Lac County cases (adult court case number 15-CF-418 and juvenile court case number 15-JV-89).

Milwaukee County Cases

In Milwaukee County, the state filed a delinquency petition on July 17, 2015 in case number 15-JV-248B, along with a petition for waiver of juvenile jurisdiction. (57). On October 28, 2015, the Milwaukee County juvenile court held a waiver hearing pursuant to Wis. Stat. § 938.18. (57). At that hearing, the juvenile court waived its jurisdiction over Hinkle, thus giving the Milwaukee County criminal court exclusive jurisdiction over the matter. Wis. Stat. § 938.18(6). (56:2-3;57). On November 19, 2015, the state filed a criminal complaint in Milwaukee County case number 15-CF-5011, charging Hinkle with two of the counts waived by the Milwaukee County juvenile court: robbery with use of force, and take and drive vehicle without consent. Wis. Stat. §§ 932.32(1)(a) & 943.23(2). (56:1).

Fond du Lac County Cases

Fond du Lac County adult court case number 15-CF-418 was commenced on July 28, 2015 when the state filed a criminal complaint in adult court alleging four traffic-related counts, consisting of one count of Attempt Flee or

Elude a Traffic Officer, contrary to Wis. Stat. § 346.04(3) and three counts of hit and run – attended vehicle, contrary to Wis. Stat. § 346.67(1). (2:1). The adult criminal court had jurisdiction over these counts pursuant to Wis. Stat. § 938.17, as they were traffic-related offenses contained within chapters 341 to 351. (2:1).

The state also filed a delinquency petition in Fond du Lac County juvenile court case number 15-JV-89 asserting fourteen non-traffic counts that did not qualify for adult court under Wis. Stat. § 938.17.[1] (57). Along with the delinquency petition, the state filed a petition for waiver of juvenile jurisdiction. (57). On August 26, 2015, the Fond du Lac juvenile court held a hearing on the State's petition for waiver. (62). At that hearing, trial counsel stated that Hinkle will contest the waiver and asked the court to schedule a contested waiver hearing. (62:3).

The Fond du Lac juvenile court held another hearing on November 18, 2015. (64). At that hearing, the court stated that on November 17th the court received a copy of a Milwaukee County order waiving juvenile jurisdiction. (64:2). The court then directed the parties to Wis. Stat. § 938.183(1)(b), which allows for exclusive original adult court jurisdiction if the court assigned to exercise jurisdiction under chapters 48 and 938 has waived its jurisdiction over the juvenile for a previous violation and criminal proceedings on that previous violation are still pending. (64:3).

The parties anticipated that the Fond du Lac adult court would attain jurisdiction pursuant to Wis. Stat. § 938.183(1)(b) as soon as the Milwaukee County charges were formally transferred to adult court. (64:2-8). The Fond du Lac juvenile court adjourned the hearing until after it received proof that the Milwaukee complaint was filed. (64).

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[1] The non-traffic counts consisted of seven counts of 2nd Degree Recklessly Endangering Safety, one count of Operating Motor Vehicle without Consent, three counts of Resisting or Obstructing an Officer, and three counts of Criminal Damage to Property. (57).

On November 19, 2015, the Fond du Lac juvenile court received a certified copy of the Milwaukee criminal complaint, and the parties reconvened. (61:2). When asked whether Hinkle was contesting waiver, trial counsel stated she believed adult court jurisdiction would now be automatic (pursuant to § 938.183), and added that Hinkle was not agreeing to a waiver (pursuant to § 938.18). (61:3; App. 125). The court determined that as a result of the Milwaukee County waiver and pending criminal proceeding, the Fond du Lac adult criminal court would have exclusive original jurisdiction over this matter pursuant to Wis. Stat. § 938.183(1)(b), in lieu of the formal waiver process under § 938.18. (61:2-3; App. 124-25).

Even though the juvenile court orally decided that Hinkle was subject to the exclusive original jurisdiction of the criminal court under § 938.183(1)(b), it nevertheless signed a written order on that same date waiving juvenile jurisdiction under § 938.18. (61:2-3; App. 124-25; 57; App. 135). The order states that a waiver hearing was held on November 19, 2015, and a box is checked, stating: "The petition for waiver was not contested. The juvenile's decision to not contest is a knowing, intelligent and voluntary decision." (57; App. 135).

The state then filed an amended information in Fond du Lac County criminal case number 15-CF-418. (10). The amended information contained the original four traffic-related counts, but also added the fourteen non-traffic counts that were previously filed in juvenile court (which appear as counts 5-18 on the amended information). (10).

Hinkle subsequently entered no contest pleas to counts 1, 2, 5, 13, 16, and 17, an Alford plea to count 12, and the remaining counts were dismissed and read in. (25; App. 127-34). On counts 1, 5, and 12, the court sentenced Hinkle to a total of 9 years imprisonment (6 in, 3 out). (25; App. 127-34). On counts 2, 13, 16 and 17, the court withheld sentence and ordered two years probation. (25; App. 127-34).

Postconviction Proceedings

Hinkle filed a postconviction motion arguing that the adult court lacked competency to proceed on counts 5-18, that the waiver order was not valid, and that trial counsel provided ineffective assistance for failing to object to the addition of those counts. (44).

A hearing on the motion was held on July 6, 2017. (85). Hinkle called trial counsel and Hinkle to testify. (85). Regarding § 938.18 waiver, trial counsel testified that Hinkle was never waived into adult court and the waiver order does not reflect what actually happened. (85:7). Regarding § 938.183, trial counsel testified that she never filed a motion arguing that the Milwaukee County waiver was not sufficient to give the Fond du Lac County adult court original jurisdiction over counts 5-18, because she did not believe the argument had legal grounds. (85:5-6,9). When asked whether she specifically considered that argument and rejected it, or whether she did not consider it at all, she responded that she never considered filing a motion because she believed that a juvenile is always waived after any prior waiver. (85:9).

Hinkle testified that he never told the juvenile court that he agreed to waive jurisdiction. (85:15). He also testified that he did not know counts 5-18 belonged in juvenile court and that, if he had known that, he would have wanted his attorney to file a motion fighting those counts and would not have accepted the plea bargain. (85:15).

The court denied the motion. (85:29; App. 120). Regarding the § 938.183 claim, the court found that the statute does not specifically say it must be the same county, and that the court assigned to exercise jurisdiction under chs. 48 and 938 is any court that handles juvenile matters. (85:30-31; App. 121-22). Regarding the ineffective assistance of counsel claim, the court found that trial counsel correctly interpreted the law and was therefore not ineffective. (85:31; App. 122).

Court of Appeals

In a published opinion dated October 31, 2018, the court of appeals affirmed the circuit court's decision. *State v. Hinkle*, 2018 WI App 67, 384 Wis. 2d 612, 921 N.W.2d 219. (App. 101-117). The court of appeals held, over dissent, that when a juvenile court waives a juvenile into adult court, that waiver binds *all* future courts – not just the court that waived the juvenile. *Id.* ¶ 1 (App. 102). The majority reached this conclusion mainly on linguistic grounds, concluding that "the court" refers to the specific court that previously waived the juvenile – not the court of the county where the new charges are to be filed. *Id*. ¶ 19-20. (App. 109-11). The majority reasoned that the court in the current county would not be "assigned to exercise jurisdiction" if it already waived the juvenile for a previous violation. *Id*. ¶ 19. (App. 109-10).

The dissent agreed with Hinkle's reading of the statute. The dissent noted that if the legislature intended for one juvenile court's waiver to bind all future courts in all counties, then it would have used the term "any court" instead of "the court." *Id*. ¶ 27 (App. 115). It noted that this interpretation is consistent with the core purpose of the juvenile justice system. *Id*. ¶¶ 26, 30. (App. 114, 117). The dissent argued that this interpretation is also better policy; each county runs its own juvenile system and this would keep intact each county's discretion to consider whether it has the resources to invest in a juvenile. *Id*. ¶¶ 28-29. (App. 115-117).

Hinkle filed a petition for review that this Court granted on April 9, 2019.

ARGUMENT

I. The Fond du Lac County adult court lacked competency to proceed on the non-traffic counts, as neither Wis. Stat. §§ 938.18 nor 938.183 entitled the Fond du Lac adult court to attain jurisdiction over those counts. Hinkle is entitled to withdraw his plea because it was not knowing, intelligent, or voluntary.

A. General principles of juvenile law

The juvenile court generally has exclusive jurisdiction over any juvenile 10 years of age or older who is alleged to be delinquent. However, there are three statutory exceptions that allow a juvenile to be charged in adult court. Those exceptions are provided in Wis. Stat. §§ 938.17, 938.18, and 938.183.

Wis. Stat. § 938.17 provides that courts of criminal jurisdiction have exclusive jurisdiction in proceedings against juveniles 16 years of age or older for certain traffic-related violations, including those in chapters 341 to 351.

Wis. Stat. § 938.18 provides a process for the juvenile court – although it has original jurisdiction – to waive its jurisdiction and send a juvenile offender to adult court. If the defendant contests the petition for waiver of juvenile jurisdiction, then a hearing is held at which the district attorney must present relevant testimony and the juvenile has the right to present testimony on his behalf. Wis. Stat. §§ 938.18(3)(b) & (4)(b). If the defendant does not contest the waiver, then the court must conduct a colloquy with the defendant to ensure that the decision to not contest is made knowingly, intelligently and voluntarily. Wis. Stat. § 938.18(4)(c). After the appropriate process is complete, the court then must base its decision whether to waiver jurisdiction on the criteria specified in Wis. Stat. § 938.18(5).

If, after following the above procedure, the juvenile court determines by clear and convincing evidence that waiver into adult court is appropriate, then the juvenile

court will sign an order waiving juvenile court jurisdiction (Wisconsin Circuit Court Form JD-1723) and the matter is referred to the district attorney for appropriate criminal proceedings. Wis. Stat. § 938.18(6).

Finally, Wis. Stat. § 938.183 specifies exceptions in which the adult criminal court has original jurisdiction over a juvenile for certain crimes and certain conditions. One such exception is provided in § 938.183(1)(b) – the statute at issue in this appeal – which states:

> Notwithstanding ss. 938.12(1) and 938.18, courts of criminal jurisdiction have exclusive original jurisdiction over … a juvenile who is alleged to have violated any state criminal law if the juvenile has been convicted of a previous violation following waiver of jurisdiction under s. 48.18, 1993 stats., or s. 938.18 by *the court assigned to exercise jurisdiction under this chapter* and ch. 48 or if *the court assigned to exercise jurisdiction under this chapter* and ch. 48 has waived its jurisdiction over the juvenile for a previous violation and criminal proceedings on that previous violation are still pending.

Wis. Stat. § 938.183(1)(b) (emphasis added).

B. Hinkle was not properly waived into Fond du Lac County adult court under Wis. Stat. § 938.18.

The Fond du Lac County order waiving juvenile court jurisdiction was clearly signed in error, as it directly contradicts what actually happened at the hearing, including the court's oral ruling. The whole point of adjourning the November 18, 2015 hearing was to allow time for the Milwaukee County adult case to formally be "pending" so they could proceed under Wis. Stat. § 938.183(1)(b) instead of § 938.18. At the November 19th hearing, the court unambiguously stated that "as a consequence" of the Milwaukee waiver, "under Section…938.183(1)(b), the … criminal court would have exclusive original jurisdiction over this matter in lieu of the formal waiver process." (61:2-3; App. 124-25). When a conflict exists between a court's oral pronouncement and a

written order, the oral pronouncement controls. *State v. Perry*, 136 Wis. 2d 92, 114, 401 N.W.2d 748 (1987).

Furthermore, the boxes checked on the order contradict the events at the hearings and Hinkle's position on waiver. Even though trial counsel explicitly stated that Hinkle was not agreeing to a waiver, and even though no colloquy was performed, the order nevertheless states: "The petition for waiver was not contested. The juvenile's decision to not contest is a knowing, intelligent and voluntary decision." (57; App. 135).

The November 19, 2015 hearing was not a waiver hearing. There was no testimony taken, no colloquy performed, and the court did not consider the statutory criteria in § 938.18(5) as required for a waiver hearing. (See 61). Based on the parties' discussions on November 18th and 19th, as well as the court's unambiguous pronouncement, counts 5-18 were clearly intended to arrive in adult court solely through § 918.183, not § 938.18. The juvenile court erroneously exercised its discretion in signing the order and it should not be valid or hinder Hinkle from obtaining relief if this Court agrees with his interpretation of § 938.183(1)(b).

C. The non-traffic counts were not properly in adult court under Wis. Stat. § 938.183. The plain language of Wis. Stat. § 938.183(1)(b) permits original adult court jurisdiction over a juvenile only if the juvenile court in the county where the new charges are to be filed had waived jurisdiction over the juvenile for a previous violation. Because Fond du Lac juvenile court had not waived jurisdiction over Hinkle for a previous violation, the Fond du Lac adult court did not have competency to proceed on counts 5-18.

Statutory interpretation is a question of law subject to de novo review. *State v. Peters*, 2003 WI 88, ¶ 13, 263 Wis. 2d 475, 665 N.W.2d 171.

Statutory interpretation begins with the plain language of the statute. *State ex rel. Kalal v. Circuit Court*,

2004 WI 58, ¶ 45, 271 Wis. 2d 633, 663, 681 N.W.2d 110. Statutory language is given its common, ordinary and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning. *Bruno v. Milwaukee County*, 2003 WI 28, ¶¶ 8, 20, 260 Wis. 2d 633, 660 N.W.2d 656. *Kalal*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110.

Context is important to meaning. *Kalal*, 2004 WI 58, ¶ 46. Therefore, statutory language is interpreted in the context in which it is used – not in isolation but as part of a whole, in relation to the language of surrounding or closely-related statutes, and reasonably, to avoid absurd or unreasonable results. *Id*.

"[S]cope, context, and purpose are relevant to a plain-meaning interpretation of an unambiguous statute as long as the scope, context, and purpose are ascertainable from the text and structure of the statute itself, rather than extrinsic sources, such as legislative history." *Id.* ¶ 48.

If this process of analyzing statutory language yields a plain, clear statutory meaning, then the court ordinarily stops the inquiry and applies the plain meaning. *Bruno*, 2003 WI 28, ¶ 20; *Kalal*, 2004 WI 58, ¶¶ 45, 51 ("We have repeatedly emphasized that 'traditionally, resort to legislative history is not appropriate in the absence of a finding of ambiguity.' … [T]he rule prevents the use of extrinsic sources of interpretation to vary or contradict the plain meaning of a statute…")(citing *Seider v. O'Connell*, 2000 WI 76, ¶ 50, 236 Wis. 2d 211, 235-236, 612 N.W.2d 659).

However, if the plain language proves ambiguous, courts look beyond the statute. *State v. Floyd*, 2000 WI 14, ¶ 12, 232 Wis. 2d 767, 773, 606 N.W.2d 155. A statute is ambiguous if it is capable of being understood in two or more ways by reasonably well-informed persons. *State v. Villamil*, 2017 WI 74, ¶ 20, 371 Wis. 2d 519, 885 N.W.2d 381, 487. When a statute is ambiguous, a reviewing court may consult legislative history as part of its statutory analysis. *Id.*

Further, "when there is doubt as to the meaning of a criminal statute, a court should apply the rule of lenity and interpret the statute in favor of the accused." *State v. Cole*, 2003 WI 59, ¶ 13, 262 Wis. 2d 167, 174, 663 N.W.2d 700, 703. As Justice Scalia has stated, the rule of lenity "vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed." *United States* v. *Santos*, 553 U.S. 507, 514, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008)(plurality opinion, superseded by statute, Fraud Enforcement and Recovery Act of 2009, 18 U.S.C.A § 1956(c)(9), Pub.L. No. 111-21, § 2(f)(1), 123 Stat. 1617).

Wis. Stat. § 938.183 requires exclusive adult court jurisdiction over a juvenile "who is alleged to have violated any state criminal law … if *the court assigned to exercise jurisdiction under this chapter* and ch. 48 has waived its jurisdiction over the juvenile for a previous violation and criminal proceedings on that previous violation are still pending." Wis. Stat. § 938.183(1)(b)(emphasis added).

"[T]he court assigned to exercise jurisdiction under this chapter and ch. 48" refers to one specific county's juvenile court. Throughout chapter 938, the legislature distinguishes between "the court" and each of the following: "any court," "a court," "any other court" and "each court" assigned to exercise jurisdiction under chapters 48 and 938.

For instance, Wis. Stat. § 938.35(1) differentiates between "the court" and "any court." This section states that "the court" shall enter a judgment setting forth the court's finding and disposition in the proceeding. It continues to state that, while juvenile records are normally not admissible as evidence against the juvenile, they are admissible in a proceeding in "any court" assigned to exercise jurisdiction under chapters 48 and 938. Wis. Stat. § 938.35(1)(b).

"The court" in Wis. Stat. § 938.35(1) refers to the specific court that enters the judgment in the instant case and the instant county, whereas "any court" in § 938.35(1)(b) is meant to broadly encompass any county's juvenile court throughout Wisconsin.

Another example appears in Wis. Stat. § 938.396(2g)(gm), which states that upon request of "*any* court assigned to exercise jurisdiction under this chapter and ch. 48, … to review court records for the purpose of any proceeding in *that court*," … "*the* court assigned to exercise jurisdiction under this chapter and ch. 48 … shall open for inspection by any authorized representative of the requester its records relating to any juvenile who has been the subject of a proceeding under this chapter." "Any court" refers to any juvenile court from any county throughout the state, whereas "the court" refers to the specific juvenile court that is the custodian of the needed record.

In Wis. Stat. § 938.396(2m)(b)1, the legislature distinguishes between "the court" and "any other court." This section requires the court assigned to exercise jurisdiction under chs. 48 and 938 to make electronic records of the court available to "any other court assigned to exercise jurisdiction under this chapter and ch. 48…". Again, "the court" refers to the specific juvenile court that is custodian of the needed record, and "any other court" refers to any of the other counties whose juvenile courts need – but would not otherwise have access to – that record.

The legislature also uses the term "a court assigned to exercise jurisdiction" under chapters 48 and 938. For example, Wis. Stat. § 938.37(1) states: "A court assigned to exercise jurisdiction" under chapters 48 and 938 may not impose costs, fees, or surcharges under chapter 814 against a juvenile under 14 years of age. Under § 938.028(3), "a court assigned to exercise jurisdiction" under chapters 48 and 938 may not determine whether this section and the federal Indian Child Welfare Act apply to an Indian juvenile custody proceeding based on whether the Indian juvenile is part of an existing Indian family.

Under 938.341, "[w]henever a court adjudicates a juvenile delinquent for an act that if committed by an adult in this state would be a felony, the court shall inform the juvenile of the requirements and penalties under s. 941.29." "A court" broadly refers to any court that adjudicates a juvenile delinquent.

The legislature also includes language about "each court assigned to exercise jurisdiction under chs. 48 and 938." Under Wis. Stat. § 51.14(2), when review of a minor's outpatient mental health treatment is needed, "[e]ach court assigned to exercise jurisdiction under chs. 48 and 938 shall designate a mental health review officer to review petitions filed under sub. (3)." The use of the term "each court assigned" to exercise juvenile jurisdiction means that the term "the court" cannot broadly refer to the whole juvenile court system in general; the "each" necessarily implies that each court is just one single unit that is part of a greater group made up of other such units.

Thus, there are occasions when the legislature saw fit to include "any court," "a court," and "any other court" to broadly encompass juvenile courts statewide, but § 938.183(1)(b) is not one of them.

Given that the legislature differentiates between these terms, if the legislature wanted § 938.183(1)(b) to include the waiver of any court throughout the state that had previously been assigned to exercise juvenile jurisdiction in another county, it would have stated that a juvenile belongs in adult court if "any court" or "a court" assigned to exercise jurisdiction under this chapter has waived its jurisdiction over the juvenile for a previous violation. Instead, the legislature chose to use "the court," which refers to the specific juvenile court in the county in which the new charges are to be filed in the instant case.

The court of appeals agreed with Hinkle that "the court assigned to exercise jurisdiction under this chapter and ch. 48" refers to a specific court, but held that the language refers to the court that previously waived jurisdiction. *Hinkle*, 2018 WI App 67, ¶¶ 19-22 (App. 101-

113). It found that "the court" referenced by § 938.183(1)(b) cannot be the juvenile court in the county where the new charges will be filed following a prior waiver, because the State would file the complaint directly in adult criminal court, thus bypassing the juvenile court entirely; the juvenile court would therefore not be "assigned to exercise jurisdiction" under § 938.183(1)(b). *Id*. (App. 101-113).

However, other sections of the chapter belie the court of appeals' linguistic analysis and indicate that, when a juvenile is in adult or civil court, then "the court assigned to exercise jurisdiction" is the corresponding juvenile court in the same county as the criminal or civil court that currently has jurisdiction over the matter – even though the juvenile court is not actively exercising jurisdiction.

For example, under 938.17(2)(a)3.c., when a juvenile is alleged to have violated a municipal ordinance, the municipal court (with some exceptions) has the option, if it so wishes, to refer the juvenile to intake "for a determination whether a petition should be filed in the court assigned to exercise jurisdiction under this chapter and ch. 48 under s. 938.125." Even though no petition has been – or ever might be – filed in that juvenile court, the legislature refers to that court as "the court assigned to exercise jurisdiction" under chapters 48 and 938. This demonstrates that no petition needs to be filed to attain such status, and that "the court assigned to exercise jurisdiction" under chapter 938 is the corresponding juvenile court in the county where the municipal court is exercising its jurisdiction.

Another example is found in Wis. Stat. § 938.17(1)(c). Under § 938.17(1), when a juvenile 16 years or older commits certain traffic offenses, then the criminal or civil court has exclusive jurisdiction. When an eligible juvenile is charged in criminal court pursuant to § 938.17(1), the State files the complaint directly in adult criminal court, thus bypassing the juvenile court entirely – *just as in § 938.183(1)(b)*. Wis. Stat. § 938.17(1)(c) goes on to state that if the criminal or civil court orders the juvenile

to serve a period of incarceration of more than six months for that traffic violation, then that court shall "petition the court assigned to exercise jurisdiction under this chapter and ch. 48 to order one or more of the dispositions under s. 938.34…"

Again, even though the adult or civil court's jurisdiction is "automatic and starts straightaway in the criminal court," and even though a delinquency petition was never filed in juvenile court due to the exclusive jurisdiction of the adult court, the statute still refers to the corresponding juvenile court in the same county where the instant offense occurred as "the court assigned to exercise jurisdiction" under chapters 48 and 938. *Hinkle*, 2018 WI App 67, ¶ 19 (App. 109-10).

Consistent with these sections, the court assigned to exercise jurisdiction under chapters 48 and 938 is the juvenile court in the county where the instant case is handled.

While Hinkle agrees with the court of appeals majority that the "previous violation" and waiver are ones of the past in § 938.183(1)(b), he disagrees that this language requires the specific juvenile court to be the one from the past as well. See *Hinkle*, 2018 WI App 67, ¶ 20. (App. 110-11). While the legislature explicitly notes that the violation and waiver must have occurred in the past, there is no such qualifier for the court. See Wis. Stat. § 938.183(1)(b).

It makes sense that the legislature wanted the prior waiver consideration to be county specific. In deciding whether to waive a juvenile, one of the factors that the juvenile court must consider is the adequacy and suitability of facilities, services and procedures available in the juvenile system. Wis. Stat. § 938.18(5)(c). This analysis will differ from county to county, because individual counties are responsible for funding the majority of delinquency-related services that the juvenile receives in the juvenile system. See Wis. Stat. § 301.26.

Different counties have different interests about where they are allocating their resources. Just because one county has decided that it no longer wishes to expend county resources on a particular juvenile, it does not mean that the juvenile should be stripped of the right in all other counties to a § 938.18 waiver hearing in which the state carries the burden of clear and convincing evidence, and in which other counties would specifically consider whether they wish to invest their own resources in that juvenile under that standard. Wis. Stat. §§ 938.18(4)(b) & (6).

Hinkle's interpretation is consistent with the enumerated purposes of chapter 938. Specifically, it is consistent with the stated purpose in § 938.01(2)(f), which is "to respond to a juvenile offender's needs for care and treatment, consistent with the prevention of delinquency, each juvenile's best interest and protection of the public, by allowing the court to utilize the most effective dispositional option."

It is also consistent with the stated purpose in § 938.01(2)(c), which is "to provide an individualized assessment of each alleged and adjudicated delinquent juvenile, in order to prevent further delinquent behavior through the development of competency in the juvenile offender, so that he or she is more capable of living productively and responsibly in the community."

Interpreting § 938.183(1)(b) broadly as the court of appeals did is contrary to these purposes because it takes away all other counties' individualized assessments at a waiver hearing. The majority's interpretation permits Milwaukee County to eliminate Fond du Lac County's discretion – and every other county forevermore – to consider whether "the adequacy and suitability of facilities, services and procedures available" in their own county can meet the needs of the juvenile and society. The more discretion a juvenile court has over a juvenile in its county, the greater its ability to address the juvenile's and society's needs given the specific circumstances. If that juvenile court believes its county cannot address those needs after considering the factors in Wis. Stat. § 938.18(5), then it will

waive its jurisdiction and the matter will be addressed in adult court. But stripping every county's juvenile court of that assessment goes against the legislature's stated intent in Wis. Stat. §§ 938.01(2)(c) & (2)(f).

Interpreting § 938.183(1)(b) as the majority did also could allow one county's circuit court to essentially overrule another county's decision to keep the juvenile in their juvenile system. A hypothetical to illustrate: a juvenile has matters in two counties. County A holds a waiver hearing and, after a thorough analysis, decides it will *not* waive juvenile jurisdiction. The next day, County B holds a waiver hearing and decides it *will* waive jurisdiction, and a complaint is then filed in criminal court. The next week, County A was going to adjudicate this juvenile delinquent and impose the disposition it wanted. However, now it cannot do that because County B has waived the juvenile; therefore, County A has been forced to send the juvenile to County A's adult court, when it was ready, willing and able to invest County A's juvenile resources into the juvenile. This runs contrary to the stated purposes in Wis. Stat. §§ 938.01(2)(c) & (2)(f).

The analysis thus far takes into account the language, structure, context, and stated purposes that are ascertainable from the text itself. *See Kalal*, 2004 WI 58, ¶ 48. This process of analyzing the statutory language yields a plain, clear statutory meaning that "the court assigned to exercise jurisdiction under this chapter and ch. 48" refers to the juvenile court in the county where the new charges are to be filed, and this Court should apply that plain meaning. *See Bruno*, 2003 WI 28, ¶ 20; *Kalal*, 2004 WI 58, ¶¶ 45, 51.

However, if this Court determines that the statute is ambiguous, then under the rule of lenity, any ambiguity in the meaning of § 938.183 must be construed in favor of a county-specific interpretation.

The rule of lenity applies when (1) a criminal statute is ambiguous, and (2) the reviewing court is unable to clarify the intent of the legislature by resort to legislative

history. *State v. Cole*, 2003 WI 59 ¶ 67. If this Court determines that Wis. Stat. § 938.183(1)(b) is ambiguous, then prong one will have been met; § 938.183 governs whether a juvenile will be subject to criminal penalties or juvenile dispositions, thus satisfying the very purpose behind the rule of lenity – so a citizen is not "subjected to punishment that is not clearly prescribed." *United States* v. *Santos*, 553 U.S. 507, 514.

Regarding prong two, the legislative history does not clarify the rule. Absent "express legislative indication to the contrary," this Court should interpret any ambiguity in § 938.183(1)(b) in favor of criminal defendants. *See State v. Bohacheff*, 114 Wis. 2d 402, 417, 338 N.W.2d 466 (1983). The report of the Juvenile Justice Study Committee does not constitute "express legislative indication to the contrary." The report, which the court of appeals majority uses to confirm the statute's meaning, does not specify the exact scope of the rule. The report uses the passive voice and therefore does not speak to how far-reaching this rule is.

The text of the statute, the purpose of the juvenile justice code, the related statutes, and the rule of lenity all reflect a county-specific interpretation of Wis. Stat. § 938.183(1)(b). Here, the court assigned to exercise jurisdiction under the juvenile code was the Fond du Lac County juvenile court. Because a previous waiver had not occurred in the Fond du Lac juvenile court, the adult court lacked competency to proceed on counts 5-18 and Hinkle must be allowed to withdraw his plea.

D. Hinkle is entitled to withdraw his plea because he was not aware that he pled to a legal impossibility; as such, his plea was necessarily not knowing, intelligent or voluntary.

A defendant seeking plea withdrawal after sentencing must show by clear and convincing evidence that withdrawal of the plea is necessary to correct a manifest injustice. *State v. Dillard*, 2014 WI 123, ¶ 36, 358 Wis. 2d 543, 556, 859 N.W.2d 44, 56. Manifest injustice requires a showing of a serious flaw in the fundamental

integrity of the plea. *State v. Thomas*, 2000 WI 13, ¶ 16, 232 Wis. 2d 714, 726, 605 N.W.2d 836. There are several ways a defendant may demonstrate manifest injustice. *State v. Dillard*, 2014 WI 123, ¶ 83, 358 Wis. 2d 543, 556, 859 N.W.2d 44, 56. One way is to show that the defendant did not enter the plea knowingly, intelligently, and voluntarily. *Id*.; *State v. Brown*, 2006 WI 100, ¶ 19, 293 Wis. 2d 594, 716 N.W.2d 906.

Whether a plea was knowingly and voluntarily entered is a question of constitutional fact. *Brown,* 2006 WI 100, ¶ 19. In reviewing a question of constitutional fact, this Court accepts the circuit court's findings of evidentiary or historical fact unless they are clearly erroneous. *Id*. Whether the record facts demonstrate that the plea was knowing, intelligent and voluntary is a question of law reviewed de novo. *Id.* ¶ 21.

When a defendant enters a plea agreement that contains a legally impossible or unenforceable provision, and when the defendant is not aware of the impossibility or unenforceability of that provision, then the plea is necessarily uninformed and involuntary, entitling the defendant to plea withdrawal. *See, e.g., State v. Riekkoff*, 112 Wis. 2d 119, 128, 332 N.W.2d 744 (1983); *State v. Woods*, 173 Wis. 2d 129, 496 N.W.2d 144 (Ct. App. 1992); *State v. Dawson*, 2004 WI App 173, 276 Wis. 2d 418, 688 N.W.2d 12.

In *State v. Riekkoff*, 112 Wis. 2d 119, 332 N.W.2d 744 (1983), the defendant entered into a plea agreement that contained a provision allowing him to appeal an evidentiary ruling, contrary to the guilty-plea-waiver rule. The defense attorney, prosecutor, and the circuit court judge affirmatively approved of this provision and contributed to Riekkoff's belief that the evidentiary order could be appealed pursuant to the plea agreement. *Riekkoff*, 112 Wis. 2d 119, 128.

The Wisconsin Supreme Court concluded that the provision was legally unenforceable, reasoning that a defendant cannot circumvent the guilty-plea-waiver rule

by using a provision contrary to that in the plea agreement. *Id*. at 127-28. Because Riekkoff pled guilty believing, with the acquiescence of defense counsel, the prosecutor, and the judge, that he was entitled to appellate review of the reserved issue, the supreme court held that his plea was neither knowing nor voluntary, and he was therefore entitled to plea withdrawal. *Id*. at 128.

In *State v. Woods*, 173 Wis. 2d 129, 496 N.W.2d 144 (Ct. App. 1992), the defendant entered into a plea agreement that permitted the state to recommend an adult sentence that was consecutive to an existing juvenile disposition. Consistent with the recommendation, the court ordered Woods' adult sentence consecutive to the juvenile order. *Woods*, 173 Wis. 2d 129, 133. All parties were unaware that an adult court sentence cannot legally be consecutive to a juvenile court disposition. *Id.* at 139. Woods moved for plea withdrawal based on illegal provisions of the plea agreement. *Id*. at 136.

On appeal, the court of appeals held that "the plea agreement to a legal impossibility necessarily rendered the plea an uninformed one." *Id*. at 139. The court found that Woods, at least in part, made the decision to plead guilty based on inaccurate information provided to him by the lawyers and judge. *Id*. at 140. The court further held, citing *State v. Riekkoff*, 112 Wis. 2d 119, 128, 332 N.W.2d 744, 749 (1983), that when a defendant pleads guilty under a legal misunderstanding of the appellate effect of his plea, "as a matter of law his plea was neither knowing nor voluntary."[2] *Woods,* 173 Wis. 2d 129, 140. The court held that Woods' guilty plea was neither knowing nor voluntary and that he therefore demonstrated "manifest injustice." *Id*. at 140, 142.

In *State v. Dawson*, 2004 WI App 173, 276 Wis. 2d 418, 688 N.W.2d 12, the defendant entered a plea

[2] The court of appeals also found that the plea was not knowing and voluntary because Woods' attorney renegotiated another aspect of the plea agreement, agreeing to a 2-3 year recommendation rather than a 2 year recommendation, without Woods' knowledge or consent.

agreement containing a provision that the state would move to reopen the case and amend the charge if Dawson successfully completed probation. After sentencing, Dawson moved to withdraw his plea on the grounds that he was unaware that the reopen-and-amend provision in the plea agreement is not authorized by Wisconsin law. 2004 WI App 173, ¶ 4. The post-conviction court denied his motion. *Id*. The court of appeals reversed, holding that Dawson's plea was neither knowing nor voluntary because he had agreed to a legal impossibility. *Id*. ¶ 14.[3]

As in *Riekkoff*, *Woods*, and *Dawson*, Hinkle's plea agreement was to a legal impossibility. Specifically, the agreement required that Hinkle plead to counts 1, 2, 5, 12, 13, 16, and 17, when the adult court had no competency to proceed on the latter 5 of those counts. (17:4; App. 136-41; 81:5-6). As in *Riekkoff*, *Woods*, and *Dawson*, Hinkle entered his pleas under a misunderstanding of law. (85:14-15). As in those cases, Hinkle's attorney gave him incorrect information (i.e., that adult court jurisdiction should be automatic), and Hinkle relied on that misinformation when entering the plea agreement.[4] (85:15). As in those cases, the prosecutor, the juvenile court, and the adult court all acquiesced in Hinkle's misunderstanding of law. (61:2-4; App. 124-26; 81:5-21). Hinkle would not have accepted the plea bargain had he known that the adult court did not have competency to proceed on those five counts. (85:15).

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[3] *See also State v. Robinson*, 2002 WI 9, ¶¶ 53-54, 249 Wis. 2d 553, 576, 638 N.W.2d 564 (abrogated on other grounds by *State v. Kelty*, 2006 WI 101, 294 Wis. 2d 62, 716 N.W.2d 886) ("Both parties in the present case apparently believed that the terms of the plea agreement were constitutional, even though they were not. Both the State and defendant were thus acting under a mistake of law in negotiating the plea agreement… The general rule is that when both parties are mistaken about a basic assumption on which a contract was made and thee mistake has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party.")

[4] The actions of a trial attorney can be considered as part of an analysis as to whether a plea was knowing, intelligent and voluntary outside of an ineffective claim. *See State v. Brown*, 2004 WI App 179, 276 Wis. 2d 559, 687 N.W.2d 543.

Notably, in *Riekkoff*, *Woods*, and *Dawson*, the appellate courts granted plea withdrawal on the ground that the plea was not entered knowingly, intelligently, and voluntarily – not based on ineffective assistance of counsel.[5]

Hinkle's plea was not knowing, intelligent or voluntary because he entered his pleas without knowing that five of the seven counts to which he pled were not properly in adult court. (85:15). This constitutes a "serious flaw in the fundamental integrity of the plea" entitling Hinkle to plea withdrawal. *State v. Thomas*, 2000 WI 13, ¶ 16, 232 Wis. 2d 714, 726, 605 N.W.2d 836.

II. In the alternative, trial counsel provided ineffective assistance for failing to object to the addition of the non-traffic counts in adult court and the Fond du Lac county order waiving juvenile jurisdiction, for failing to file a motion to dismiss for lack of competency, and for affirmatively misinforming Hinkle that the Milwaukee County waiver would automatically place him in adult court in Fond du Lac.

Both the state and federal constitutions grant the criminal defendant the right to counsel. U.S. CONST. amend. VI, XIV; WIS. CONST. art. I, § 7. The effective assistance of counsel is a well-established part of the right to counsel. *State v. Johnson*, 133 Wis. 2d 207, 216, 395 N.W.2d 176 (1986). A defendant seeking to establish a claim of ineffective assistance of counsel "must show that counsel's performance was deficient and that it prejudiced the

[5] Ineffective assistance of counsel was not raised or addressed in *Riekkoff* or *Dawson*. *Woods* did allege ineffective assistance of counsel, but the court of appeals did not need to reach that argument because it granted plea withdrawal based on the defendant entering his plea unknowingly and involuntarily. The court found that Woods did not waive appellate review of his plea withdrawal argument because "the basis for the claim was not known to Woods, his attorney, the prosecutor, or even the judge, who all incorrectly assumed that a consecutive sentence could be ordered." *Id*. at 139. This was not a situation in which the defendant failed to object when the basis for the objection was known to him before he entered the plea, as in *State v. Smith*, 153 Wis. 2d 739, 741, 451 N.W.2d 794, 795 (Ct. App. 1989).

defense." *State v. Anderson*, 222 Wis. 2d 403, 408, 588 N.W.2d 75 (1998).

To show deficiency, a defendant must demonstrate that counsel's performance fell below an "objective standard of reasonableness." *Johnson*, 133 Wis. 2d at 217. Counsel's performance was deficient when she did not object to the addition of counts 5-18 and did not file a motion to dismiss for lack of court competency. Rather, counsel affirmative misinformed Hinkle that the charges initially filed in Fond du Lac juvenile court must automatically go to adult court pursuant to § 938.183(1)(b), due to the Milwaukee County waiver. (85:13-15). Here, in light of this reasonable, plain interpretation of the statute, counsel should have known to raise the issue of whether the Fond du Lac adult court had competency by the words of the statute themselves.

This deficiency was prejudicial. To show prejudice in the context of a request for plea withdrawal, a defendant must demonstrate that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty. *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50, 54; *see Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

To be clear, the proper focus is not whether Hinkle would have ultimately ended up in adult court after receiving his right to a waiver hearing, but rather whether he would have entered his plea to the criminal charges in adult court in the first place. *See id*. Thus, the prejudice is entering a plea to which he otherwise would not have. *See id*. If counsel had informed Hinkle that five of the counts of the plea bargain were not properly in adult court, then Hinkle would not have accepted the plea bargain. (85:15).

Indeed, if counsel had brought a motion identifying this issue, and if Hinkle's interpretation of 938.183(1)(b) ultimately proves correct, then Hinkle would not have even had the *opportunity* to enter his pleas to counts 5-18 in adult court because the court had no competency to proceed on those counts. The counts would have remained

in (or transferred back to) juvenile court, and Hinkle would have had his rightful contested waiver hearing, as he had planned on before the Milwaukee County waiver occurred. (62:3; 85:16). Because Hinkle entered a plea that he otherwise would not – and could not – have, he was prejudiced.

Additionally, defense counsel was ineffective for failing to object to the Fond du Lac court order waiving juvenile jurisdiction, as the order did not reflect the defendant's position on waiver or the court's oral pronouncements on November 18 and 19, 2015. If this Court remands to allow for plea withdrawal and transfer of the non-traffic counts, then the juvenile court also must vacate its faulty waiver order.

CONCLUSION

WHEREFORE, for the reasons stated above, Mr. Hinkle respectfully asks this court to reverse the court of appeals, remand with directions to permit Hinkle to withdraw his pleas, transfer counts 5-18 to the juvenile court, and for the juvenile court to vacate its faulty § 938.18 waiver order.

Dated this 5th day of May, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 7,667 words.

Dated this 5th day of May, 2019.

Signed:

_____

Christina C. Starner
Attorney for Defendant-Appellant-Petitioner

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in context and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 5th day of May, 2019.

Signed:

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Christina C. Starner
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CERTIFICATION AS TO MAILING

I hereby certify pursuant to Wis. Stat. § 809.80(4) that this brief was deposited in the United States mail for delivery by certified priority mail on May 6, 2019. Postage has been pre-paid. This brief is addressed to: Aaron R. O'Neil, P.O. Box 7857, Madison, WI 53707-7857 and Sheila Reiff, Clerk of the Supreme Court, P.O. Box 1688, Madison, WI 53701-1688.

Dated this 7th day of May, 2019.

Signed:

_____

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APPENDIX

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CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the trial court; (3) a copy of any unpublished opinion cited under § 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 trial 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 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 one or more initials or other appropriate pseudonym or designation instead of full names of person, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 5th day of May, 2019.

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