STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP1416-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MATTHEW C. HINKLE,

Defendant-Appellant-Petitioner.

ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION FOR POSTCONVICTION RELIEF, ENTERED IN FOND DU LAC COUNTY CIRCUIT COURT, THE HONORABLE ROBERT J. WIRTZ, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Did Wis. Stat. § 938.183(1)(b) give the circuit court original adult-court jurisdiction over Defendant-Appellant Matthew C. Hinkle because the Milwaukee County Circuit Court had previously waived Hinkle into adult court?

The circuit court and the court of appeals answered yes.

This Court should answer yes.

2. Has Hinkle failed to prove that his trial counsel was ineffective for not arguing that the circuit court did not have adult-court jurisdiction?

The circuit court and the court of appeals answered yes.

This Court should answer yes.

3. Did Hinkle forfeit his claims by failing to contemporaneously object, by entering his no contest and *Alford* pleas, or both?

The circuit court and the court of appeals did not address this issue.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with any case this Court has accepted for review, oral argument and publication are appropriate.

INTRODUCTION

This case involves a dispute over the meaning of Wis. Stat. § 938.183(1)(b). The statute gives circuit courts original adult-court jurisdiction over crimes committed by juveniles

who have been previously waived into adult court if those prior proceedings are still pending or resulted in conviction.[1] Hinkle claims that the prior waiver must have happened in the same county as the new charges. The State argues, and the court of appeals agreed, that the waiver can occur in any Wisconsin circuit court.

In Hinkle's case, the Fond du Lac County Circuit Court concluded that it had original adult-court jurisdiction after the Milwaukee County Circuit Court waived Hinkle into adult court. Hinkle claims that this decision violated Wis. Stat. § 938.183(1)(b) as he interprets it. Hinkle also argues that his trial counsel was ineffective for not making this argument before he entered an *Alford* and no contest pleas to the charges.

This Court should reject Hinkle's claims and affirm the court of appeals. The courts below correctly interpreted Wis. Stat. § 938.183(1)(b) when they concluded that the Milwaukee County waiver gave Fond du Lac County original adult-court jurisdiction over Hinkle's case. And Hinkle cannot show that his counsel was ineffective because any objection based on his interpretation of section 938.183(1)(b) would have failed.

In addition, this Court should conclude that Hinkle forfeited his claims, either by not objecting to the court's jurisdiction determination, by his no contest and *Alford*

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[1] Chapter 938 often calls a circuit court's authority to act in juvenile justice matters "jurisdiction" when it "is more accurately characterized as 'competency.'" *State v. Hinkle*, 2018 WI App 67, ¶ 1 n.2, 384 Wis. 2d 612, 921 N.W.2d 219. Following the statutes and the court of appeals—and abandoning its approach in the court of appeals—the State uses the term "jurisdiction" in this brief to refer to the court's authority.

pleas, or both. The State acknowledges that this Court is likely to rule on the merits of Hinkle's claims given the underlying statutory interpretation issue. But the application of the forfeiture rule here presents a novel and important issue that this Court should address.

STATEMENT OF THE CASE

The delinquency petitions against Hinkle, his waiver into adult court, and his no contest and Alford pleas

Hinkle stole a car in Milwaukee and drove it to Fond du Lac, where he led police on a high-speed chase after they tried to arrest him. (R. 2:2–4.) Hinkle hit other cars and eventually crashed the one he had stolen. (R. 2:2–3.) He then fled police on foot; they eventually caught him with the help of a dog. (R. 2:3.) Hinkle was 16 years old at the time. (R. 2:1.)

The State filed delinquency petitions against Hinkle in both Milwaukee and Fond du Lac Counties. (R. 57, Exs. 3, 6.) The State also filed petitions in each county to waive Hinkle into adult court. (R. 57, Exs. 4, 7.) In addition, the State charged Hinkle in Fond du Lac County with one count of fleeing a traffic officer and three counts of hit and run. (R. 2.) The circuit court had original adult-court jurisdiction over these traffic charges. (R. 2.) *See* Wis. Stat. § 938.17.

The Milwaukee County Circuit Court waived Hinkle into adult court. (R. 57, Ex. 5.) The State refiled the charges against him there in a criminal complaint. (R. 61:2.)

The Fond du Lac County Circuit Court concluded that, as a result of the Milwaukee County waiver, Wis. Stat. § 938.183(1)(b) required the juvenile case against Hinkle to

be moved to adult court (R. 61:2–3; 64.)[2] The court reasoned that since the Milwaukee County juvenile court had waived its jurisdiction over Hinkle's violations there, the criminal proceedings on those violations were now "pending" in Milwaukee County. (R. 61:2–3; 64:2–3.) It further explained that because those charges were now pending, the adult court had original jurisdiction over any charges against Hinkle:

> And the Court certainly is aware of reference in the Bench Book once waived always waived, and that's section 938.183(1)(b). It indicates that if a juvenile has been waived into adult court and convicted, then he is forever deemed waived for criminal proceedings. The second half of subsection (b) talks about if the juvenile is before the Court on a potential criminal proceedings, and he has previously been waived in another court and that matter is pending, then he is deemed to be subject to the original jurisdiction of the criminal court.

(R. 64:3.)

Hinkle's attorney told the court that she agreed with the court's reading of the statute. (R. 64:5.) And when the court asked her if Hinkle was contesting the court's determination, counsel said, "[W]e are not really taking a position on it. It's my understanding that it's pretty much automatic, but he is not agreeing to the waiver and such." (R. 61:3.)

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[2] Document 64 is not numbered. In addition, the court held hearings on this issue over two consecutive days. (R. 61; 64.) It adjourned the first hearing so the State could obtain proof that the criminal charges had been filed in Milwaukee County. (R. 64:6–7.) The State's recitation of the facts combines the events of the two hearings.

The circuit court then issued an order waiving juvenile jurisdiction. (R. 57, Ex. 8.) The court checked a box on the form next to a statement that says, "The petition for waiver was not contested. The juvenile's decision to not contest is a knowing, intelligent, and voluntary decision." (R. 57, Ex. 8.)

The State filed an amended information. (R. 10.) It contained the four traffic charges from the complaint, seven counts of second-degree recklessly endangering safety, one count of taking and operating a vehicle without the owner's consent, three counts of obstructing an officer, and three counts of criminal damage to property. (R. 10.)

Hinkle and the State reached an agreement for Hinkle to plead to two counts of criminal damage to property and one count each of fleeing an officer, hit and run, second-degree recklessly endangering safety, operating without consent, and obstructing. (R. 81:5.) The remaining counts were dismissed and read in. (R. 81:5–6.) Hinkle entered no contest pleas to all the charges except the operating without consent charge, to which he entered an *Alford* plea. (R. 81:20–21.)

Hinkle's postconviction motion and appeal

Hinkle filed a postconviction motion seeking to withdraw his pleas and to transfer the non-traffic charges to juvenile court. (R. 59.) He argued that the non-traffic charges were never properly in adult court. (R. 59:6–11.) Specifically, he claimed that the court's order waiving the charges was improper because the court never held a waiver hearing or followed the procedures in Wis. Stat. § 938.18. (R. 59:6–8.) Hinkle also maintained that the court did not have original adult-court jurisdiction under Wis. Stat. § 938.183(1)(b) because, he said, the statute required the previous waiver to have happened in the same county. (R. 59:8–12.) Thus, according to Hinkle, the Milwaukee

County waiver was insufficient to give Fond du Lac County original adult-court jurisdiction. (R. 59:8–12.) Hinkle also argued that his trial counsel was ineffective for not making these arguments. (R. 59:12–13.)

The circuit court held a hearing on Hinkle's motion. (R. 85.) Trial counsel testified that she did not challenge the transfer of the charges into adult court based on the Milwaukee County waiver because she did not think it was a valid argument. (R. 85:5–6.) Counsel said she had read the statute and consulted with the appellate office of the State Public Defender in reaching this decision. (R. 85:9, 12–13.) She also testified that she would not have challenged the waiver order because "the ultimate resolution would be that he would be in adult court." (R. 85:9.)

Hinkle testified that his attorney told him that "since I was waived in Milwaukee County, that it was automatic. I was automatically waived in Fond du Lac County." (R. 85:15.) He said he would not have accepted the plea bargain if he had known that the non-traffic offenses were not properly in adult court. (R. 85:15.)

The circuit court rejected Hinkle's interpretation of Wis. Stat. § 938.183(1)(b) and denied his motion. (R. 69; 85:29–31.) He appealed.

The court of appeals affirmed the circuit court. *Hinkle*, 384 Wis. 2d 612. The court determined that, under the plain language of Wis. Stat. § 938.183(1)(b), once Milwaukee County waived Hinkle, Fond du Lac County had original jurisdiction over him. *Id*. ¶¶ 18–23. It also rejected Hinkle's challenge to the circuit court's order waiving him into adult court, saying his "arguments are no longer pertinent" given the court's interpretation of section 938.183(1)(b). *Id*. ¶ 22 n.8. Finally, the court denied Hinkle relief on his ineffective-assistance claim, explaining that it failed because it

depended on his now-rejected interpretation of Wis. Stat. § 938.183(1)(b). *Id*. ¶ 24.

Judge Reilly dissented. *Hinkle*, 384 Wis. 2d 612, ¶¶ 25–30. He interpreted the statute to require a county-by-county waiver decision. *Id*. Counties, he said, were in better positions than Department of Corrections to assess and provide services to juvenile offenders. *Id*. ¶¶ 28–29. He also criticized the majority's interpretation of the statute as a "one-size-fits-all" philosophy that was inconsistent with the court's obligation to assess each juvenile individually. *Id*. ¶ 30.

STANDARDS OF REVIEW

Hinkle's argument about the application of Wis. Stat. §§ 938.18 and 938.183(1)(b) involves statutory interpretation, "a question of law that this court reviews de novo." *State v. Buchanan*, 2013 WI 31, ¶ 12, 346 Wis. 2d 735, 828 N.W.2d 847.

Claims of ineffective assistance of counsel are mixed questions of law and fact. *State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). Under this standard of review, the trial court's findings of fact will not be disturbed "unless they are clearly erroneous." *Id*. The ultimate issue of whether counsel was ineffective based on these facts is subject to de novo review. *State v. Balliette*, 2011 WI 79, ¶¶ 18–19, 336 Wis. 2d 358, 805 N.W.2d 334.

Whether a defendant has properly preserved a claim for appellate review is a question of law that this Court reviews de novo. *See State v. Corey J.G.*, 215 Wis. 2d 395, 405, 572 N.W.2d 845 (1998).

ARGUMENT

I. Hinkle is not entitled to withdraw his pleas because the circuit court had original adult-court jurisdiction under Wis. Stat. § 938.183(1)(b), and waiver proceedings under Wis. Stat. § 938.18 were not necessary.

This Court should reject Hinkle's interpretation of section 938.183(1)(b) and his argument that he needed to be waived into adult court. His argument is contrary to the plain language of Wis. Stat. § 938.183(1)(b), which granted the Fond du Lac County Circuit Court original adult-court jurisdiction over Hinkle on the basis of Milwaukee County's waiver. The statute's language shows the Legislature's intent to confer original adult-court jurisdiction over juveniles when a court has previously waived the juvenile into criminal court and the criminal proceedings are still pending. And because the Milwaukee County waiver gave the circuit court original adult-court jurisdiction over Hinkle, it did not need to conduct waiver proceedings under Wis. Stat. § 938.18 to put Hinkle into adult court.

A. The plain language of Wis. Stat. § 938.183(1)(b) demonstrates that the circuit court had original adult-court jurisdiction over Hinkle.

Section 938.183(1)(b) provides:

> (1) JUVENILES UNDER ADULT COURT JURISDICTION. Notwithstanding ss. 938.12(1) and 938.18, courts of criminal jurisdiction have exclusive original jurisdiction over all of the following:
>
> . . . .
>
> (b) 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.

Whether this statute gave the circuit court original adult-court jurisdiction over Hinkle's case is a matter of statutory construction. Statutory construction begins with the statute's language, and if the language is unambiguous, a court applies the plain language to the facts of the case. *See State v. Hemp,* 2014 WI 129, ¶ 13, 359 Wis. 2d 320, 856 N.W.2d 811. Statutory language is examined in the context it is used. *Id*. Language is given its "common, ordinary, and accepted meaning," though technical or specifically defined words are given their technical or defined meanings. *State v. Hanson*, 2012 WI 4, ¶ 16, 338 Wis. 2d 243, 808 N.W.2d 390.

Further, "words are given meaning to avoid absurd, unreasonable, or implausible results and results that are clearly at odds with the legislature's purpose." *Hemp*, 359 Wis. 2d 320, ¶ 13 (quoting *State v. Matasek*, 2014 WI 27, ¶ 12, 353 Wis. 2d 601, 846 N.W.2d 811). "[Courts] favor an interpretation that fulfills the statute's purpose." *Hanson*, 338 Wis. 2d 243, ¶ 17. "Context and purpose are important in discerning the plain meaning of a statute." *Id*. (alteration omitted).

Under Wis. Stat. § 938.183(1)(b), Milwaukee County's waiver of Hinkle into adult court gave the circuit court original adult-court jurisdiction over Hinkle's Fond du Lac County case. The statute's plain language gives courts criminal adult-court jurisdiction over charges against juveniles in two situations. The first is when a juvenile has previously been waived into adult court by a juvenile court and convicted of a crime. The second is when a juvenile court

has waived a juvenile into adult court and those criminal proceedings are still pending.

The second situation applies here, and the Fond du Lac County Circuit Court properly had original adult-court jurisdiction over Hinkle's crimes. A juvenile court in Milwaukee County waived Hinkle into adult court. That court was "the court assigned to exercise jurisdiction" under chapter 938 within the meaning of Wis. Stat. § 938.183(1)(b). *Hinkle*, 384 Wis. 2d 612, ¶ 20. The State then filed criminal charges against Hinkle in Milwaukee County, which meant that those charges were "pending." Because the charges were "still pending" in Milwaukee County, the Fond du Lac County Circuit Court, a "court[] of criminal jurisdiction" under Wis. Stat. § 938.183(1), had "exclusive original jurisdiction" over the violations alleged against Hinkle in Fond du Lac County. The statute's plain language gave the circuit court original adult-court jurisdiction over Hinkle's crimes.

The legislature's intent is shown not only by section 938.183(1)(b) but also by the subsection that follows it, section 938.183(1)(c). Both of these subsections show that the legislature intended that once a juvenile is in adult court for one offense, the adult court will have original jurisdiction over all subsequent offenses that the juvenile commits.

As explained, under subsection (1)(b), a criminal court has original jurisdiction over violations committed by a juvenile if the juvenile had been previously waived into adult court and either is convicted in those proceedings or the proceedings are still pending. Under subsection (1)(c), a criminal court has original jurisdiction over violations committed by a juvenile if the juvenile previously committed an offense over which the adult court had original jurisdiction, and the juvenile has either been convicted or those proceedings are still pending. The plain language of

these subjections demonstrates that the Legislature intended to ensure that, once a juvenile is placed into adult court, all subsequent offenses involving the juvenile will start out in adult court. Or as the circuit court put it, "once waived always waived." (R. 64:3.)

Further, as the court of appeals noted in its decision, the history of chapter 938 confirms this interpretation of the statute. *Hinkle*, 384 Wis. 2d 612, ¶ 23. Courts can "consult legislative history to confirm [a] statute's plain meaning." *Id.* (citing *State v. Moreno-Acosta*, 2014 WI App 122, ¶ 14, 359 Wis. 2d 233, 857 N.W.2d 908).

Chapter 938 "arose from the recommendations of the Juvenile Justice Study Committee, created by the legislature in 1994 in response to rising juvenile crime." *Hinkle*, 384 Wis. 2d 612, ¶ 23 (citing *State v. Kleser*, 2010 WI 88, ¶ 40, 328 Wis. 2d 42, 786 N.W.2d 144). "The committee's report . . . *Juvenile Justice: A Wisconsin Blueprint for Change* 14–15 (January 1995) [*Juvenile Justice*], recommended that the legislature '[g]rant original court jurisdiction based on "once waived, always waived,"' believing 'that once adult court jurisdiction has been exercised regarding a juvenile, subsequent violations should not require new waiver hearings.'" *Id.* The provisions discussed in the report became Wis. Stat. § 938.183(1)(b) and (1)(c). *See Juvenile Justice* at 14–15.

This history further confirms the State's interpretation of section 938.183(1)(b). It shows the legislature intended to grant courts original adult-court jurisdiction over juveniles once they have already been waived into the adult system. And importantly, this history does not limit the "once waived, always waived" principle to require the previous waiver to have happened in the same county as the later charges.

In sum, this Court should conclude that the plain language of Wis. Stat. § 938.183(1)(b) establishes that the circuit court had original adult-court jurisdiction over Hinkle based on his waiver into adult court in Milwaukee County.

B. Hinkle's interpretation of Wis. Stat. § 938.183(1)(b) is wrong.

Hinkle argues that the Fond du Lac County Circuit Court did not have original adult-court jurisdiction over him because the previous waiver of jurisdiction was in Milwaukee County. (Hinkle's Br. 15–24.) He interprets Wis. Stat. § 938.183(1)(b) to require that the previous waiver occur in the same county as the new charges for the adult court to have original jurisdiction. (Hinkle's Br. 17–23.) Hinkle also makes what are, essentially, policy arguments supporting his interpretation. Finally, Hinkle asserts that the rule of lenity should lead this Court to accept his interpretation if it concludes that the statute is ambiguous. (Hinkle's Br. 23–24.)

This Court should reject these arguments. Hinkle's statutory interpretation fails. His policy arguments are not relevant to the interpretation analysis and do not support his reading of the statute. And the rule of lenity does not apply because the Wis. Stat. § 938.183(1)(b) is not a penal statute or ambiguous.

1. Hinkle's statutory-interpretation argument is incorrect.

Hinkle focuses his statutory-interpretation argument on the phrase "the court assigned to exercise jurisdiction under this chapter." (Hinkle's Br. 17 (emphasis omitted).) He claims that it refers to "one specific county's juvenile court." (Hinkle's Br. 17.) In support, he points out that when using the phrase "court assigned to exercise jurisdiction," in other

parts of chapter 938, the Legislature preceded the phrase with "a court," "any court," "any other court," and "each court." (Hinkle's Br. 17–19.) Hinkle contends that if the Legislature intended for any waiver throughout the State to confer original adult-court jurisdiction, it would have used one of these phrases instead of "the court." (Hinkle's Br. 17–19.)

Hinkle is wrong. The Legislature's use of these other phrases makes sense when viewed in context.

For example, some of the statutes Hinkle points to (Wis. Stat. §§ 938.35(1), 938.35(1)(b), 938.396(2g)(gm), and 938.396(2m)(b)1) address when juvenile courts may consider dispositions and records from a different court's juvenile proceedings. (Hinkle's Br. 17–18.) In those situations, it makes sense to distinguish the juvenile court that entered the disposition or generated the records from a different juvenile court that might consider the disposition or records in the future.

Hinkle also notes the use of the phrase "a court assigned to exercise jurisdiction" in Wis. Stat. §§ 938.028(3) and 938.37(1). (Hinkle's Br. 18–19.) These statutes place limitations on juvenile courts, prohibiting them from imposing costs in certain cases and limiting things they can consider in Indian Child Welfare Act cases. He further cites Wis. Stat. § 938.341, which also uses "a court" when requiring courts to tell juveniles adjudicated of felonies that they are prohibited from possessing firearms. (Hinkle's Br. 19.) Hinkle again argues that these statutes show the Legislature would have one of these phrases if it meant to refer to juvenile courts in general in Wis. Stat. § 938.183(1)(b). (Hinkle's Br. 19.)

These arguments are not persuasive. It makes sense for the Legislature to use the phrase "a court" when limiting

or imposing requirements on all courts exercising juvenile jurisdiction. In contrast, as the court of appeals explained, the use of "the court" in section 938.183(1)(b) "refers to a specific juvenile court—the one that had previously waived its jurisdiction." *Hinkle* 384 Wis. 2d 612, ¶ 20. So, again, in context, the Legislature's use of different phrases to modify "court assigned to exercise jurisdiction" makes perfect sense.

Hinkle also points to the use of "each court assigned to exercise jurisdiction under chs. 48 and 938" in Wis. Stat. § 51.14(2). (Hinkle's Br. 19.) The use of "each" in section 51.14(2) is easily explained. The statute requires juvenile courts to have a mental health review officer. In context, it makes sense for the Legislature to say that each court must have such a person.

Hinkle's arguments about the other sections of chapter 938 also ignore the definition of "Court" in Wis. Stat. § 938.02(2m). The court of appeals found that this definition was consistent with its interpretation of Wis. Stat. § 938.183(1)(b) and that it lent no support to Hinkle's argument. *Hinkle*, 384 Wis. 2d 812, ¶ 20 n.7. The definition in Wis. Stat. § 938.02(2m) states:

> "Court," when used without further qualification, means the court assigned to exercise jurisdiction under this chapter and ch. 48 or, when used with reference to a juvenile who is subject to s. 938.183, a court of criminal jurisdiction or, when used with reference to a juvenile who is subject to s. 938.17 (2), a municipal court.

Section 938.183(1)(b) uses the same language from part of this definition—"the court assigned to exercise jurisdiction under this chapter." Thus, section 938.183(1)(b) does not qualify the use of "court." In contrast, "any," "any other," and "a" are all qualifiers, which, as the State has explained, are used to distinguish juvenile courts that are generating records and dispositions from other juvenile

courts that might consider those things later. The qualified usages of "court" that Hinkle highlights distinguish between the various courts presiding over juvenile matters throughout Wisconsin. The unqualified usage of "court" in Wis. Stat. § 938.183(1)(b) does not. Thus, the unqualified definition of "court" means any juvenile court in the State, not one in a specific county.

Next, Hinkle challenges the court of appeals' decision, describing it as holding that "the court assigned to exercise jurisdiction" in Wis. Stat. § 938.183(1)(b) "cannot be the juvenile court in the new county where the new charges will be filed following a prior waiver." (Hinkle's Br. 20.) This misrepresents the court's decision. The court did not say that "the court" referenced in the statute cannot be the juvenile court in the same county. What the court of appeals held is that "the court," as used in the statute, is not limited to that particular court. Instead, it includes a court exercising juvenile jurisdiction anywhere in Wisconsin that has previously waived its jurisdiction over the juvenile. *Hinkle*, 384 Wis. 2d 612, ¶¶ 18–22.

Hinkle further challenges the court's decision by pointing to two sections of Wis. Stat. § 938.17 allowing municipal and traffic courts to refer juveniles to the juvenile court system under certain circumstances. (Hinkle's Br. 20–21.) These statutes call the juvenile court "the court assigned to exercise jurisdiction." Wis. Stat. §§ 938.17(1)(c); 938.17(2)(a)3.c. Hinkle argues that these statutes undercut the court of appeals' analysis because they show that the phrase "the court assigned to exercise jurisdiction" means the juvenile court in the same county. (Hinkle's Br. 20–21.)

It appears that Hinkle is correct that these statutes refer to the juvenile court in the same county as the municipal and traffic court. But again, context gives the explanation. Section 938.17(1)(c) requires courts that order

incarceration for a traffic violation to refer the case to the juvenile court to order a disposition to carry out the sentence. Thus, it makes sense that the juvenile court ordering this disposition would be in the same county as the conviction.[3] Likewise, Wis. Stat. § 938.17(2)(a)3.c. allows municipal court to refer ordinance violations to juvenile courts for the possibility of a delinquency petition. Again, it makes sense that the referral would be within the county. Delinquency proceedings for ordinance violations are venued in "the county where the violation occurred." Wis. Stat. § 938.185(1)(c). The municipal court referring the violation would be in the same county. So, again, in context, the legislature's language is explainable, and it does not support Hinkle's interpretation.

2. Hinkle's policy arguments are irrelevant and unpersuasive.

Next, Hinkle argues that his interpretation of the statute is consistent with the purposes of the juvenile justice code. (Hinkle's Br. 21–23.) But these are essentially policy arguments, which do not give this Court a basis for overlooking the statute's plain language. As the court of appeals' majority correctly explained when discussing Judge Reilly's dissent, such arguments are more appropriately aimed at the Legislature. *Hinkle*, 384 Wis. 2d 612, ¶ 23 n.9

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[3] Under Wis. Stat. § 938.185(1)(c), once a juvenile is found delinquent, the case can be transferred from the county of the violation to the county where the juvenile resides for disposition. If this section allows a different county to impose the disposition under Wis. Stat. § 938.17(1)(c)—which occurs not after a delinquency finding, but a conviction—this only supports the State's argument that "the court assigned to exercise jurisdiction" in Chapter 938 is not limited to juvenile courts in the same county.

(citing *A. & A.P. v. Racine County*, 119 Wis. 2d 349, 354–55, & n.4, 349 N.W.2d 743 (Ct. App. 1984)).

In addition, Hinkle's arguments do not favor his interpretation of the statute. He notes, correctly, that the juvenile system is meant to give individualized attention to juveniles and their treatment, care, and best interests. (Hinkle's Br. 22 (citing Wis. Stat. §§ 938.01(2)(c) and (2)(f)).) Hinkle also points out that one of the criteria for waiving a juvenile into adult court is the adequacy of available juvenile services. (Hinkle's Br. 21 (citing Wis. Stat. § 938.18(5)(c)).) Those services, he says, are primarily funded at the county level, and different counties have different interests about how they use those services. (Hinkle's Br. 20–22.) Thus, he concludes, one county should not be able to remove another county's ability to use its resources to treat a juvenile in the juvenile system. (Hinkle's Br. 22–23.) But, he claims, the State's interpretation of Wis. Stat. § 938.183(1)(b) does just that. (Hinkle's Br. 22–23.)

Hinkle is incorrect. It is true that a juvenile's waiver in one county will result in original adult-court criminal jurisdiction over the juvenile for subsequent crimes in a different county. But this does not mean the case will necessarily remain in criminal court.

A juvenile subject to the original adult-court jurisdiction, including under Wis. Stat. § 938.183(1)(b), is subject to the specific preliminary-hearing procedures of Wis. Stat. § 970.032. Under this statute, a circuit court can place a juvenile under its original jurisdiction into the juvenile system under two circumstances. The first is if the court concludes that there is not probable cause to believe that the juvenile committed the crime charged. *See* Wis. Stat. § 970.032(1); *State v. Toliver*, 2014 WI 85, ¶¶ 9–11, 356 Wis. 2d 642, 851 N.W.2d 251. The second is if the defendant shows "by a preponderance of the evidence" at a

reverse-waiver hearing that the case should be in the juvenile system. *State v. Kleser*, 2010 WI 88, ¶ 128, 328 Wis. 2d 42, 786 N.W.2d 144; s*ee* Wis. Stat. § 970.032(2).

Thus, Hinkle is wrong that the State's interpretation of Wis. Stat. § 938.183(1)(b) removes a county's ability to place a juvenile in the juvenile system after another county's waiver. Counties are still able to place juveniles who enter adult courts through original jurisdiction back into the juvenile system. Hinkle's policy arguments do not support his reading of the statute.

3. The rule of lenity does not apply.

Hinkle last argues that the rule of lenity should lead this Court to adopt his interpretation of Wis. Stat. § 938.183(1)(b). (Hinkle's Br. 23–24.) The rule provides that ambiguous penal statutes should be interpreted in the defendant's favor. *State v. Villamil*, 2017 WI 74, ¶ 27, 377 Wis. 2d 1, 898 N.W.2d 482. But to invoke the rule, the Court must conclude that the statute is ambiguous and be unable to clarify the legislature's intent by referring to legislative history. *Id.*

The rule does not apply here for three reasons. First, Wis. Stat. § 938.183(1)(b) is a procedural statute, not a penal statute. It gives circuit courts original adult-court jurisdiction over juveniles who have been previously waived into adult court. It does not create a crime or a punishment. *See State v. Gantt*, 201 Wis. 2d 206, 210, 548 N.W.2d 134 (Ct. App. 1996) (statute establishing state's general jurisdiction over crimes, Wis. Stat. § 939.03, is a procedural, not a penal statute).

Second, the rule of lenity is inapplicable because Wis. Stat. § 938.183(1)(b) is not ambiguous. A statute is ambiguous only if it "can support two reasonable interpretations." *State v. Williams*, 198 Wis. 2d 479, 487, 544

N.W.2d 400 (1996). The State's interpretation of the statute is the only reasonable one. Hinkle's reading is unreasonable because it requires a parsing of the various articles and words modifying "court assigned to exercise jurisdiction" throughout chapter 938 to avoid the statute's plain language. Had the legislature meant for a county-by-county application of the section 938.183(1)(b), it presumably would have made its intentions clearer instead of leaving what are, at best, ambiguous hints throughout the rest of the chapter.

Third, and finally, the rule does not apply because the legislative history clarifies that the Legislature intended that once a juvenile is waived into adult court, all future criminal proceedings against the juvenile will begin in adult criminal court. As explained, the committee's report enacting chapter 938 explains that the legislature intended that criminal courts have original jurisdiction over previously waived juveniles based on the principle of "once waived, always waived." *Juvenile Justice* at 14–15.

Hinkle contends that the report does not "speak to how far-reaching" "once waived, always waived" is. (Hinkle's Br. 24.) Perhaps. But the report also contains nothing to support Hinkle's county-by-county interpretation of Wis. Stat. § 938.183(1)(b). The lack of any limitations on the report's use of "once waived, always waived" suggests that the Legislature intended the State's interpretation of the statute, not Hinkle's.

In sum, Hinkle has not shown that his interpretation of Wis. Stat. § 938.183(1)(b) is correct. This Court should conclude that the circuit court had original adult-court jurisdiction over Hinkle.

C. No Wis. Stat. § 938.18 waiver proceeding was necessary because the circuit court had original adult-court jurisdiction.

Hinkle also argues that the circuit court issued the order waiving him into adult court in error. (Hinkle's Br. 14–15.) He claims that the order contradicts the court's oral ruling and incorrectly states that he did not contest waiver. (Hinkle's Br. 14–15.) And, Hinkle argues, the court never actually held a waiver hearing, so he was never validly ordered into adult court. (Hinkle's Br. 15.)

None of these arguments should matter to the outcome of this case. As the court of appeals held, "these arguments are no longer pertinent" because the circuit court had original adult-court jurisdiction. *Hinkle*, 384 Wis. 2d 612, ¶ 22 n.8. A waiver hearing or a written order were not necessary given this holding. *Id.* And any error by the court in the written order was of no consequence to the case and harmless. *Id.* (citing *State v. Nieves*, 2017 WI 69, ¶ 17, 376 Wis. 2d 300, 897 N.W.2d 363). Hinkle's challenges to the court's order or lack of a waiver hearing should fail.

II. Hinkle has not shown that his attorney was ineffective for failing to object to the circuit court's exercise of original jurisdiction or to the lack of a waiver into adult court.

This Court should also reject Hinkle's claim that his attorney should have objected to the circuit court's conclusion it had original jurisdiction and its failure to hold a waiver hearing. (Hinkle's Br. 28–30.)

To prove ineffective assistance of counsel, Hinkle must establish both that trial "counsel's performance was deficient" and that this performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To demonstrate deficient performance, a defendant must establish that his or her counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

To satisfy the prejudice prong, the defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. To establish prejudice when a defendant alleges that counsel's deficiencies led him to plead guilty or no contest, the defendant must show that "there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty [or no contest] and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Hinkle's claim fails on both *Strickland* prongs. To show deficient performance, Hinkle has to prove that his counsel could have successfully objected to the circuit court's determination that it had original adult-court jurisdiction and to its failure to hold a waiver hearing. To satisfy this burden, Hinkle's interpretation of Wis. Stat. § 938.183(1)(b) must be correct. As the State has shown, Hinkle's interpretation is wrong. Counsel is not deficient for not making an objection that would have failed. *See State v. Wheat*, 2002 WI App 153, ¶ 14, 256 Wis. 2d 270, 647 N.W.2d 441.

Further, if the State is wrong and Hinkle's interpretation of the statute is correct, his ineffective assistance claim still fails. At the time counsel did not object, there was no case law definitively interpreting Wis. Stat. § 938.183(1)(b). Whether a previous waiver had to come from the same county or whether a waiver from a different county was sufficient was, at best, an unresolved issue. An attorney is not deficient for failing to raise an argument premised on

an unsettled legal question. *See State v. Lemberger*, 2017 WI 39, ¶ 33, 374 Wis. 2d 617, 893 N.W.2d 232.

Moreover, counsel was hardly deficient for how she handled this unresolved issue. She read the statute and consulted with the SPD's appellate office before advising Hinkle that it provided for original adult-court jurisdiction. (R. 85:9, 12–13, 15.) She also said that her reading of the statute led her not to challenge the court's waiver order because "the ultimate resolution would be that he would be in adult court." (R. 85:9.) Counsel adequately researched the statute's meaning. She advised Hinkle of her conclusions and acted on them. Counsel did what a reasonable lawyer would do, so she was not deficient.

Hinkle also cannot show prejudice. He asserts that he would not have even been able to accept the State's plea bargain had counsel moved to dismiss the charges. (Hinkle's Br. 29–30.) Hinkle acknowledges that had counsel successfully moved to dismiss, the charges might still have wound up back in adult court if the State successfully sought a waiver. (Hinkle's Br. 29–30.) But, he claims, the issue is whether he would have accepted the specific plea bargain that he ultimately wound up taking. (Hinkle's Br. 29–30.)

This argument fails because it is speculative. *State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999). Hinkle cannot show that the outcome of his case would have been any different had counsel successfully moved to dismiss the charges. It is true that any number of things could have occurred had the charges gone back to juvenile court. But Hinkle has to prove what would have most likely occurred and how it was different from what actually happened. He cannot do this, and thus, he has not proven prejudice.

III. Hinkle forfeited his direct challenges to the circuit court's having adult-court jurisdiction by not contemporaneously objecting and all of his claims by entering his no-contest pleas.

This Court should also conclude that Hinkle forfeited his claims. His claim that the court did not have original adult-court jurisdiction is forfeited by his *Alford* and no contest pleas and by his failure to object to the court's jurisdiction before he entered those pleas. Hinkle's ineffective assistance claim is forfeited by his no contest pleas.[4] And even though this Court is going to address the merits of Hinkle's claims given their importance, it should also address the State's forfeiture argument because it likewise presents a significant issue.

A. A defendant forfeits non-jurisdictional claims by not making a contemporaneous objection in the circuit court and by entering no contest and *Alford* pleas.

To preserve a claim for appellate review, a party must raise it in the circuit court. *State v. Nelis*, 2007 WI 58, ¶ 31, 300 Wis. 2d 415, 733 N.W.2d 619. This preservation requirement includes challenges to the circuit court's ability to hear a case involving a juvenile in adult court. *See State v. Sanders*, 2018 WI 51, ¶¶ 19–24, 381 Wis. 2d 522, 912 N.W.2d 16. An objection must be contemporaneous to the error alleged. *State v. Delgado*, 2002 WI App 38, ¶ 12, 250 Wis. 2d 689, 641 N.W.2d 490. It also must state the specific grounds it is based on. *Nelis*, 300 Wis. 2d 415, ¶ 31. Claims

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[4] The State uses "forfeiture" in this brief when referring to Hinkle's loss of appellate rights based on his pleas, though courts most commonly use "waiver" instead *See State v. Kelty*, 2006 WI 101, ¶ 18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886.

not so preserved are forfeited, and this Court is not required to address them. *In re Guardianship of Willa L.*, 2011 WI App 160, ¶ 27, 338 Wis. 2d 114, 808 N.W.2d 155.

In addition, "a guilty, no contest, or *Alford* plea '[forfeits] all nonjurisdictional defects, including constitutional claims[.]'" *State v. Bembenek*, 2006 WI App 198, ¶ 16, 296 Wis. 2d 422, 724 N.W.2d 685 (footnote omitted). That is so because a guilty plea is "a break in the chain of events [that] preceded it in the criminal process." *Tollet v. Henderson*, 411 U.S. 258, 267 (1973). When a defendant has admitted guilt in court, he cannot raise claims that his constitutional rights were violated before the plea. He can attack only "the voluntary and intelligent" nature of the plea. *Id.*

B. Hinkle's direct challenge to the circuit court's jurisdiction is forfeited by his failure to contemporaneously object and by his pleas.

This Court should conclude that Hinkle's forfeited his claim that the circuit court incorrectly determined that it had original adult-court jurisdiction[5] by both his failure to object to the court's ruling and by his decision to later enter his *Alford* and no contest pleas.

Hinkle never objected when the court determined that it had original jurisdiction over the charges. Instead, his counsel agreed with the court's interpretation of the statute and said it was her "understanding that it's pretty much automatic." (R. 61:3.) Hinkle's complaints that the court

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[5] Again, Hinkle's claim is actually a challenge to the court's competency, not its jurisdiction, so it is subject to forfeiture. *Sanders*, 381 Wis. 2d 522, ¶ 19.

erred, after his pleas and now on appeal, come too late. *See Sanders*, 381 Wis. 2d 522, ¶ 24.

Hinkle's related argument that he needed to be waived into adult court under Wis. Stat. § 938.18 is also forfeited by his failure to object. Hinkle did not argue that he was improperly waived until after his conviction. If Hinkle thought the court erred, he needed to tell the court as soon as he learned of the supposed mistake. But all Hinkle did was tell the court that he was not agreeing to a waiver. (R. 61:3.) That statement was not an objection to a supposedly improper waiver decision or to the later-completed written order waiving him into adult court.

In addition, Hinkle's arguments that the circuit court erred in applying Wis. Stat. §§ 938.18 and 938.183(1)(b) are barred by his no contest and *Alford* pleas. The guilty-plea-forfeiture rule applies to errors in juvenile waiver proceedings. *See State v. Kraemer*, 156 Wis. 2d 761, 764–65, 457 N.W.2d 562 (Ct. App. 1990). And again, because Hinkle's asserted errors relate to competency, not jurisdiction, they are subject to forfeiture, both generally and under the guilty-plea-forfeiture rule. *See Sanders*, 381 Wis. 2d 522, ¶ 19; *Bembenek*, 296 Wis. 2d 422, ¶ 16.

Hinkle contends that his no contest pleas were to a "legal impossibility" that made them unknowing, unintelligent, and involuntary. (Hinkle's Br. 24–28.) And it is true that an illegal provision "produces a plea that is as a matter of law . . . neither knowing nor voluntary," *State v. Dawson*, 2004 WI App 173, ¶ 11, 276 Wis. 2d 418, 688 N.W.2d 12 (citation and internal quotation marks omitted), which could arguably be a way around the guilty plea forfeiture rule.

But there is no basis to overlook Hinkle's forfeiture here because Hinkle's plea did not involve a legal

impossibility for two reasons. First, Hinkle's claim that his pleas were a legal impossibility depends on his interpretation of Wis. Stat. § 938.183(1)(b) being correct. As argued, Hinkle is wrong about the statute, so he cannot withdraw his pleas or overcome his forfeiture.

Second, Hinkle did not plead to anything legally impossible. It was not impossible for the circuit court to have adult-court jurisdiction over Hinkle. Even if the court did not have original adult-court jurisdiction based on Hinkle's previous waiver, that fact did not guarantee that the case would be resolved in juvenile court. The State could have sought a waiver of Hinkle into adult court, if necessary, and the circuit court could have granted one. *See* Wis. Stat. § 938.18. Thus, Hinkle is wrong when he argues that the court's supposed lack of original adult-court jurisdiction amounts to a legal impossibility.

Further, the cases that Hinkle relies on are distinguishable because they all involve actual legally impossible promises by the State that induced the defendants' pleas. Because those benefits were illusory, the defendants had to be allowed to withdraw their pleas.

In *Riekkoff*, the parties' plea agreement agreed to allow the defendant to appeal an evidentiary ruling in contravention of the guilty-plea-waiver rule. *State v. Riekkoff*, 12 Wis. 2d 119, 127–28, 332 N.W.2d 744 (1983). This Court concluded that the parties and the circuit court could not agree to overlook the rule. *Id.*

Likewise, in *State v. Dawson*, the State promised in the plea agreement to reopen and amend the charges "if Dawson successfully completed probation." *Dawson*, 276 Wis. 2d 418, ¶ 2. The court of appeals held that the law did not allow the State to reopen and amend the charges. *Id.* ¶¶ 14, 21, 25.

Finally, in *State v. Woods*, the plea agreement called for the court to make a criminal sentence consecutive to a juvenile disposition. 173 Wis. 2d 129, 133, 496 N.W.2d 144 (Ct. App. 1992). The court said that the law did not permit this. *Id*. at 137–38.

Thus, in all of these cases, the defendants' pleas were the result of the State's legally impossible promises in the plea agreement. Here, in contrast, there was nothing impermissible in the plea agreement that caused Hinkle to enter his pleas. The only error, if there was one, was that the circuit court mistakenly thought it had original adult-court jurisdiction over Hinkle. But the court's having adult-court jurisdiction was not a legal impossibility because the court could have obtained that jurisdiction over Hinkle in other ways. Thus, the error did not affect the validity of Hinkle's pleas, and his claim should be subject to the guilty-plea-forfeiture rule.

C. Hinkle forfeited his ineffective assistance claim by his *Alford* and no contest pleas.

This Court should also conclude that Hinkle's pleas forfeited his ineffective assistance claim because the errors he alleges did not affect whether his pleas were knowing, voluntary, or intelligent.

Wisconsin courts have usually treated ineffective assistance claims as an exception to the guilty-plea-forfeiture rule, and thus, as a way to address otherwise forfeited claims. *See Sanders*, 381 Wis. 2d 522, ¶ 24; *State v. Milanes*, 2006 WI App 259, ¶ 13, 297 Wis. 2d 684, 727 N.W.2d 94.

But in *State v. Villegas*, 2018 WI App 9, 380 Wis. 2d 246, 908 N.W.2d 198, the court of appeals held that Villegas's guilty pleas had forfeited his claim that counsel was ineffective during a Wis. Stat. § 938.18 juvenile waiver

hearing. *Villegas*, 380 Wis. 2d 246, ¶ 47. The court explained that the ineffective-assistance exception "is applied not as a general matter, but when the alleged ineffectiveness is put forward as a grounds for plea withdrawal." *Id*. It does not give the defendant "an independent ground to challenge the effectiveness of counsel during preplea proceedings outside of an attack on the defendant's plea." *Id*. Thus, the court explained, claims that counsel was ineffective during juvenile waiver proceedings can be forfeited by a later plea. *Id*.

This Court should apply *Villegas* and conclude that Hinkle forfeited his ineffective assistance claim by entering his *Alford* and no contest pleas. Hinkle claims that his counsel should have moved to dismiss charges that were moved into adult court after the Milwaukee County waiver. Thus, counsel's error, if there was one, was during the preplea proceedings. It does not affect whether Hinkle's pleas are knowing, voluntary, and intelligent, and thus, his claim should be subject to forfeiture.

Hinkle makes arguments that tie counsel's error to his plea. He maintains that he would not have accepted the plea bargain had counsel told him that the charges were not properly in adult court. (Hinkle's Br. 29.) Hinkle also contends that he was prejudiced because had counsel convinced the court to send the charges back to juvenile court, he would have never entered pleas to the adult charges. (Hinkle's Br. 29–30.) And he further claims that had counsel moved to dismiss, the would not have even had the opportunity to enter his pleas because the case would have moved to juvenile court. (Hinkle's Br. 29–30.)

These arguments should not let Hinkle avoid the guilty-plea-forfeiture rule. Hinkle's real complaint is that counsel did not argue that the circuit court did not have adult-court jurisdiction under Wis. Stat. § 938.183(1)(b).

This is something counsel would have needed to argue before Hinkle's pleas. Counsel's failure did not directly affect Hinkle's decision to resolve his case in the plea bargain.

Further, Hinkle is essentially speculating that he would have not entered his pleas had counsel moved to dismiss. As explained in section II of this brief, even had counsel successfully got the charges moved to juvenile court, there is no guarantee that they would have stayed there. The connection between counsel's performance and Hinkle's ultimate decision to plea is thus tenuous and unclear. This Court should conclude that Hinkle's ineffective assistance claim is subject to the guilty-plea-forfeiture rule.

D. This Court should rule on the State's forfeiture argument even though it will likely also address the merits of Hinkle's claims.

"Forfeiture is a rule of judicial administration" that this Court has the discretion to overlook. *State v. Kaczmarski*, 2009 WI App 117, ¶ 7, 320 Wis. 2d 811, 772 N.W.2d 702; *Riekkoff*, 112 Wis. 2d at 124.

The State acknowledges that this Court is likely to reach the merits of Hinkle's claims given the importance of the statutory-interpretation issue. Nonetheless, this Court should still also decide whether Hinkle forfeited his claims. The State's forfeiture arguments—particularly on Hinkle's ineffective assistance claim—are novel and present important issues of law. Like Hinkle's statutory interpretation argument, they warrant this Court's consideration and resolution.

CONCLUSION

This Court should affirm the court of appeals' decision.

Dated June 19, 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8005 words.

Dated this 19th day of June 2019.

_____
AARON R. O'NEIL
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 19th day of June 2019.

_____
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