STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2014AP2187-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross-Appellant,
v.

KYLE LEE MONAHAN,

Defendant-Appellant-Cross-Respondent-Petitioner.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

On Appeal from an Order Entered in the Circuit Court for Lafayette County, the Honorable William D. Johnston, Presiding

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The Wisconsin Association of Criminal Defense Lawyers ("WACDL") submits this non-party brief in support of Kyle Lee Monahan, to address the oft-cited but likewise oft misunderstood and misapplied standards for assessing whether a given error may be excused as harmless.[1]

While WACDL takes no position regarding application of those standards to the particular facts, it is concerned about the state's attempt to use this appeal as a vehicle to institutionalize a radical theory of "harmlessness" that conflicts with controlling standards and undermines the right to trial by jury by resting the harmless error determination on the particular judge's subjective

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[1] While "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," ***Chapman v. California***, 386 U.S. 18, 23 & n.8 (1967) (citations omitted), this case does not involve that class of "structural errors" that "affect the 'framework within which the trial proceeds.'" ***United States v. Marcus***, 560 U.S. 258, 263 (2010) (citation and some internal marking omitted).

perception of the strength of the state's case rather than on objective standards.

At the same time, Monahan's particular expression of the standard, while properly recognizing an objective standard viewing the evidence most favorably to the defense, inadvertently suggests a more restrictive standard for harmlessness than is justified. The issue is not simply whether the evidence, viewed most favorably to the defense, raises a reasonable doubt, but whether the error impacted that determination.

ARGUMENT

I.

THE WHY AND THE WHAT OF HARMLESS ERROR

The Supreme Court has long recognized that "trial by jury in criminal cases is fundamental to the American scheme of justice." ***Duncan v. Louisiana***, 391 U.S. 145, 149 (1968). The "intended purpose" of a jury trial in a criminal case is to "mak[e] judicial or prosecutorial unfairness less likely;" "[p]roviding an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." ***Id.*** at 158, 156. *See also* ***United States v. Martin Linen Supply Co.***, 430 U.S. 564, 572 (1977) ("[Jurors'] overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction."). It is a defendant's right to "prefer[ ] the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge." ***Duncan***, 391 U.S. at 156.

The jury system also serves as "a fundamental reservation of power in our constitutional structure" for the people to

exercise "control in the judiciary." ***Blakely v. Washington***, 542 U.S. 296, 306 (2004). Hence, "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, regardless of how overwhelmingly the evidence may point in that direction." ***Martin Linen Supply Co.***, 430 U.S. at 572–73 (citations omitted).

The Sixth Amendment's guarantee of a jury trial allocates to actual jurors the exclusive responsibility to render criminal verdicts. Accordingly, such jurors must be the focus of harmless error analysis. ***Sullivan v. Louisiana***, 508 U.S. 275, 279 (1993). A standard that too easily excuses trial error encourages appellate judges to substitute their subjective views for a jury verdict. ***Id.*** at 280 ("The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal.").

During the Nineteenth Century, near automatic reversal based on trial errors was deemed necessary to "insure that the appellate court did not encroach upon the jury's fact finding function by discounting the improperly admitted evidence and sustaining the verdict on its belief that the remaining evidence established guilt." Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 26.6(a) (1984). "So great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained." ***Kotteakos v. United States***, 328 U.S. 750, 759 (1946).

In reaction to the perceived abuses, Congress adopted the federal harmless error rule, intended "to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict." ***Bruno v. United States***, 308 U.S. 287, 293 (1939); *see* 28 U.S.C. § 391 (1911). The states, including Wisconsin, followed

suite. *See, e.g.*, Wis. Stat. §971.26.

As is often the case, however, reaction to perceived abuses produced overreaction and abuses of it own. As the Supreme Court has recognized, "harmless-error rules can work very unfair and mischievous results" when misapplied. ***Chapman v. California***, 386 U.S. 18, 22 (1967). For instance, at issue in ***Chapman*** was California's rule deeming errors "harmless" whenever courts viewed the evidence as "overwhelming." ***Id.*** at 23 & n.7.

Faced with the extremes – on one side, an argument that constitutional errors can never be harmless, and on the other, the claim that errors are harmless whenever an appellate court views the evidence as sufficiently "overwhelming," – the ***Chapman*** Court chose a middle ground. The Court held that most constitutional errors are subject to harmless error review, but likewise rejected California's "overwhelming evidence" test.

Instead, the Court imposed the now-familiar ***Chapman*** standard, "requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ***Id.*** at 24. The Court rejected any suggestion that this constitutional standard is met merely because the remaining evidence untainted by the error could be deemed sufficient for conviction. ***Id.*** at 25-26 ("though the case in which this occurred presented a reasonably strong 'circumstantial web of evidence' against petitioners [citation omitted], it was also a case in which, absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts.").

For years, this Court "struggled" with finding "a coherent articulable philosophy" balancing the right to trial by jury and the recognition that many trial errors are, in fact, harmless. ***State***

v. Dyess, 124 Wis.2d 525, 540-41, 370 N.W.2d 222 (1985). In ***Wold v. State***, 57 Wis.2d 344, 356, 204 N.W.2d 482 (1973), for instance, it announced a sufficiency test for harmless error:

> The test of harmless error is not whether some harm has resulted, but, rather, whether the appellate court in its independent determination can conclude there is sufficient evidence, other than and uninfluenced by the inadmissible evidence, which would convict the defendant beyond a reasonable doubt.

Id. at 356.

In ***Dyess***, however, the Court firmly rejected the "sufficiency" standard and adopted the ***Chapman*** standard. 124 Wis.2d at 540-45. Regardless whether the error is constitutional, an error is not harmless unless the state meets its burden "to establish that there is no reasonable possibility that the error contributed to the conviction." ***Id.*** at 543. "The court determines whether the error is harmless by assessing the impact of the erroneously admitted evidence on the minds of an average jury, . . . that is, by assessing whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." ***State v. Poh***, 116 Wis.2d 510, 529, 343 N.W.2d 108 (1984) (citations and footnote omitted).

This Court's subsequent decisions reaffirm that the ***Chapman*** standard provides the proper balance between the right to a jury determination and avoiding unnecessary retrials. *E.g.*, ***State v. Martin***, 2012 WI 96, ¶45, 343 Wis.2d 278, 306, 816 N.W.2d 270, 285; ***State v. Weed***, 2003 WI 85, ¶¶28-29, 263 Wis.2d 434, 666 N.W.2d 485 (reaffirming rejection of "sufficiency of the untainted evidence" standard); ***State v. Harvey***, 2002 WI 93, 254 Wis.2d 442, 647 N.W.2d 189.

Yet, "[a]lthough the ***Chapman*** standard is easy to state, it has not always been easy to apply." ***State v. Hale***, 2005 WI 7

¶61, 277 Wis.2d 593, 691 N.W.2d 637. Though the task may be difficult, it nevertheless must be done. And while doing so, the Court must strive to keep the balance recognized in ***Chapman*** true by protecting the defendant's right to a jury determination of guilt following a fair trial unless the identified error is proved harmless beyond a reasonable doubt.

II.

THE STATE'S PROPOSED TRANSFORMATION OF HARMLESS ERROR ANALYSIS

The state's primary argument reprises the same "overwhelming evidence" theory of harmless error rejected by the Supreme Court in ***Chapman***. There, as the state does here, California argued that appellate determination the evidence was "overwhelming" alone rendered the error harmless. The ***Chapman*** Court rejected that theory. Rather, the relevant question is whether the state has proven beyond a reasonable doubt that the error had no impact on the verdict. *E.g.*, ***State v. Billings***, 110 Wis.2d 661, 668, 329 N.W.2d 192 (1983) ("The court cannot, as the United States Supreme Court has admonished, give too much emphasis to 'overwhelming evidence' of guilt. [citing ***Chapman].*** Emphasizing the sufficiency of untainted evidence independently of the erroneously admitted evidence creates a danger of substituting the court's judgment for the jury's. Rather, the court must inquire whether on the basis of all the evidence there is a 'reasonable possibility' that the constitutional error 'might have contributed to the conviction.'").

This is not to say that the strength of the state's case is irrelevant. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." ***Strickland v. Washington***, 466 U.S. 668, 696 (1984). So too, errors are less likely to have impacted the verdict where the evidence untainted by error is

truly "overwhelming" or undisputed.

However, the state's suggestion that a reviewing court's subjective perception of the evidence *alone* trumps the right to a jury verdict overlooks at least four critical facts. First, as the Supreme Court held in ***Chapman***, the reviewing court's perception of the evidence is not a substitute for the required finding beyond a reasonable doubt that the error had no impact on the verdict; it is merely one factor in making that ultimate determination. The focus is on the impact of the error on the *jury* not the reviewing court. *See also* ***State v. Jenkins***, 2014 WI 59, ¶¶50-65, 355 Wis.2d 180, 848 N.W.2d 786; ***id.***, ¶¶69-98 (Crooks, J. Concurring)

Second, harmless error presents a question of law, ***State v. Moore***, 2015 WI 54, ¶ 54, 363 Wis.2d 376, 864 N.W.2d 827, for which there necessarily is one objectively correct answer, not a factual or discretionary determination for which varying answers may be deemed acceptable based on the subjective views of the particular decision-maker. *Cf.* ***Strickland***, 466 U.S. at 695 (Assessment of prejudice "should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency"). Just as with appellate review of challenges to evidentiary sufficiency, an objective standard is necessary for harmless error so that reviewing judges do not succumb to the temptation to substitute their subjective views on the evidence for the views of a jury. *See* Edwards, Harry T., *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated*? 70 N.Y.U. L. Rev. 1167, 1170 (1996); *cf.* ***State v. Hanks***, 252 Wis. 414, 416, 31 N.W.2d 596 (1948).

Third, the state overlooks the Supreme Court's recognition in ***Holmes v. South Carolina***, 547 U.S. 319, 330 (2006), that, "[j]ust because the prosecution's evidence, *if credited,* would provide

strong support for a guilty verdict, it does not follow that" other evidence could have no impact. "[W]here the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact." ***Id.***

More to the point, the state's argument overlooks the fact that, "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." ***Id.*** at 331; ***United States v. Wolf***, 787 F.2d 1094, 1098-99 (7th Cir. 1986) (although evidence overwhelming if prosecution witness is believed, improprieties which negatively affected defendant's credibility were prejudicial where jury had reason to doubt prosecution witness).

Finally, the state's proposal that a reviewing court assume that its own subjective views of the evidence necessarily equal those of a jury also overlooks the practical problems with such an approach. As the Seventh Circuit has recognized:

> It is always perilous to speculate on what the effect of evidence improperly admitted was on a jury, or what the effect of evidence improperly excluded would have been. *See* Teitelbaum, Sutton-Barbere & Johnson, *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 Wis.L.Rev. 1147. The lay mind evaluates evidence differently from the legal mind, and while many appellate judges have substantial experience with juries and perhaps great insight into the thinking process of juries, others do not. This is a reason to be wary about invoking the doctrine of harmless error . . . with regard to evidentiary rulings in jury cases.

United States v. Cerro, 775 F.2d 908, 915-16 (7th Cir. 1985) (citations omitted). At the very least, a reviewing court must

account for the fact that a reasonable jury will not necessarily view the evidence the same as the court does.

In an attempt to overcome this defect in its argument, the state tethers its faulty "overwhelming evidence" theory to an equally invalid assertion that, in assessing whether an error is harmless, it is not necessary to assess the evidence most favorably to the defendant. State's Brief at 32-37. Once again, the state's position overlooks both logic and controlling law. *See, e.g.*, Wis. J.I.–Crim. 190 ("The weight of evidence does not depend on the number of witnesses on each side. You may find that the testimony of one witness is entitled to greater weight than that of another witness or even of several other witnesses").

Given the state's burden of proving harmlessness beyond a reasonable doubt, it necessarily follows that the evidence and impact of the trial error must be viewed most favorably to the defense. If a reasonable juror, based on the evidence untainted by the error, could have a reasonable doubt that he or she did not have at the original, defective trial, then the state necessarily has not proven harmlessness beyond a reasonable doubt. And, in assessing whether a reasonable juror reasonably could reach a particular result, it is necessary to view the evidence most favorably to that result. *E.g.*, ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752 (1990).

It therefore is not surprising that controlling authority likewise requires that, in assessing harmlessness or resulting prejudice, the evidence must be viewed most favorably to the defense. In ***Neder v. United States***, 527 U.S. 1, 19 (1999), for instance, the Supreme Court rejected the state's theory here that the reviewing court should act effectively as a "second jury" when assessing harmlessness. Instead, the Court held that, where the defendant contested the issue affected by the error, and the evidence viewed most favorably to the defendant

supports his theory, it is for the jury to determine whether to believe it. ***Id.*** ("where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding [the court] should not find the error harmless").

This Court's decisions recognize the same basic principle. *See, e.g.*, ***Jenkins***, 2014 WI 59, ¶¶50-65; ***id.***, ¶¶69-98 (Crooks, J. concurring); ***State v. Wilson***, 149 Wis.2d 878, 898-901, 440 N.W.2d 534 (1989) (failure to instruct on lesser-included offense is reversible error where evidence, viewed "in the most favorable light it will reasonably admit from the standpoint of the accused," provides reasonable grounds for acquittal on greater charge and conviction on lesser).[2]

III.

MONAHAN'S SUMMARY OF THE CONTROLLING STANDARD

Compared to the state's attempt to radically transform harmless error analysis, Monahan's error is minor. He asserts that "the question is whether the evidence permits any set of reasonable inferences consistent with reasonable doubt—when viewed in the light most favorable to the defendant." Monahan's Brief at 25. As such, he inadvertently omits the *impact of the error* from his statement of the standard.

As Monahan notes elsewhere, Monhana's Brief at 24, the issue is whether *the error* is harmless beyond a reasonable doubt, not simply whether a hypothetical jury could have acquitted based on the evidence presented. After all, whatever doubts a reasonable jury might have had based on the evidence presented

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[2] The state's suggestion, State's Brief at 32-33, that evidence must be viewed most favorably to the defense when deciding whether the trial court erred by denying a lesser-included offense instruction but not when assessing whether that error was harmless makes no sense. It understandably cites no authority for that position.

at trial, Monahan's jury convicted him based on that evidence. The question is whether the state can meet its burden of proving that the identified error did not contribute to that verdict.

A more accurate statement of the issue thus is whether it is clear beyond a reasonable doubt that no reasonable juror, viewing all of the evidence most favorably to the defense in light of the erroneously excluded evidence, would have reasonable doubt regarding the state's evidence beyond reasons available at the original trial. Alternatively, has the state proven beyond a reasonable doubt that no reasonable juror could find that the erroneously excluded evidence, viewed most favorably to the defendant, either raised any new reasons to doubt the state's evidence or strengthened any reasons to doubt that already existed given the original evidence? Unless the state has met that burden, then the error is not harmless and Monahan is entitled to a new trial.

CONCLUSION

WACDL therefore asks that the Court reject the state's novel interpretation of harmless error analysis. Harmlessness must be based on objective standards rather than a particular judge's or court's subjective views of the supposed strength of the state's case.

Dated at Milwaukee, Wisconsin, February 12, 2018.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

This brief conforms to the rules contained in Rule 809.19(8)(b) & (c) for a non-party brief produced with a proportional serif font. The length of this brief is 3,000 words.

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Robert R. Henak

RULE 809.19(12)(f) CERTIFICATION

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

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Robert R. Henak

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 12th day of February, 2018, I caused 22 copies of the Nonparty Brief of Wisconsin Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

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Robert R. Henak

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