STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2018AP1897-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

MORGAN E. GEYSER,
Defendant-Appellant.

ON APPEAL FROM THE FEBRUARY 1, 2018, ORDER OF COMMITMENT, FILED IN THE WAUKESHA COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL O. BOHREN, PRESIDING.
WAUKESHA COUNTY CASE NO. 2014CF596

DEFENDANT-APPELLANT'S BRIEF AND SHORT APPENDIX

Respectfully submitted by:

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STATEMENT OF THE ISSUES

First Issue: Jurisdiction

Morgan E. Geyser was barely twelve-years-old when she and a friend attempted to kill another young girl. Geyser undertook that attempted killing in part to protect her and her family from what the circuit court found was her clear fear of death. The State of Wisconsin charged her with attempted first-degree intentional homicide, which automatically conferred adult-court jurisdiction. The matter thus proceeded in adult court.

At a subsequent preliminary hearing, Geyser argued that she did not commit attempted *first*-degree intentional homicide, but rather attempted *second*-degree intentional homicide. The latter crime cannot be prosecuted in adult court when committed by a child. Consistent with the rules governing preliminary hearings for children originally in adult court, Geyser adduced physical evidence and witness testimony establishing that her homicidal act was motivated by her belief that she had to kill lest she or her family be killed.

The circuit court found as a matter of fact that Geyser acted under the actual belief that she was protecting herself and her family from death. In other words, the circuit court found facts establishing the affirmative defense that mitigates first-degree intentional homicide to second-degree. Nonetheless, the circuit court bound her over for trial in adult court because it found that she also acted for reasons other than self-defense.

Statement of the issue

Whether the circuit court erred in binding Geyser over for trial in adult court when it concluded as a matter of fact that she had established the affirmative mitigation defense to attempted first-degree intentional homicide

and adult courts do not have original jurisdiction over attempted second-degree intentional homicide offenses?

The circuit court answered no.

Second Issue: Constitutionality of Statement

Geyser was arrested shortly after her crime. Over the next seven and a half hours, she made multiple custodial statements to law enforcement. Some of her statements occurred before she was given *Miranda* warnings, and some followed. At no point before police finished interrogating her did they allow her to talk with her parents, even though they had come to the station to check on her.

Three weeks after Geyser's statements to police, she was deemed incompetent to stand trial by two evaluators. Her incompetence was based on her age, her unfamiliarity with the legal system and attendant rights, and her severe mental illness. As those evaluators explained, she simply did not understand the basic elements of her legal rights to even know how an attorney might help her. It was not until five months after Geyser's custodial statements—during which time she was purposefully educated as to the legal system and her rights within it—that Geyser could understand the basics of her rights.

Statement of the issue

Whether a barely twelve-year-old, severely mentally ill person who is disallowed parental support during a custodial interrogation, suffering from active delusions, and hours earlier attempted to kill under the true belief that it would protect her from a fictitious character can knowingly, intelligently, and voluntarily waive the constitutional rights to which she is entitled in a criminal proceeding when, still three weeks later, she is found not to understand those basic rights?

The circuit court answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Geyser's case presents unique facts and infrequently occurring legal questions. Oral argument and publication are both appropriate, and she requests them.

STATEMENT OF THE CASE

Twelve-year-old Morgan Geyser tried to kill her best friend because she believed that, if she did not, Slender Man would kill her or her family. (R.326:168.)

Slender Man is a fictional character born to the internet during a 2009 contest calling for the creation of paranormal images.[1] *Slender Man*, Wikipedia, https://en.wikipedia.org/wiki/Slender_Man (last visit Dec. 17, 2018). A participant in that contest uploaded two images of children that included "a tall, thin, spectral figure wearing a black suit." *Id.* Fake quotes referencing killing and the kidnapping of children accompanied those pictures and named the character. *Id.* In less than a year, what had been a single person's contribution to a photoshop contest became a canon of artistic creation from numerous sources comprised of written stories, images, memes, and even a YouTube channel. *Id.*; *see also* Marble Hornets, https://www.youtube.com/user/MarbleHornets (last visit Dec. 17, 2018).

Four years later, eleven-year-old Anissa Weier would introduce Geyser to the Slender Man legend. (R.327:37, R.326:95.) Geyser, too, was eleven-years-old.

[1] The name of that fictional character is stylized throughout the record as both "Slender Man" and "Slenderman." In quotation to the record, no alteration is made. However, in original text, this brief uses "Slender Man," consistent with the character's original appellation.

(*See* R.327:37.) And, she was suffering from an early onset psychotic disorder. (R.331:27.)

When Geyser was a toddler, she thought that a man bearing some similarity to Slender Man's character had visited her. (R.43:5.) When she "saw the Slender Man silhouette, . . . she recognized that as [the] man who had visited her throughout the years [since] she was three or four." (R.355:180-81.) Of course, Slender Man had never actually visited Geyser; the interactions were a hallucination and a byproduct of her mental illness. (R.43:3.) But Geyser's mental illness was then unknown, undiagnosed, and untreated. (R.331:42-43.) Her hallucinations persisted throughout her youth, and Geyser came to accept them as reality. (R.331:38-39.) She thus was ill-equipped for her first encounter with the Slender Man legend and unable to understand the character as fictional. (R.327:27.) To Geyser, Slender Man was real. (*Id.*) Her continuing encounters with the legend's various internet iterations did nothing to stifle that belief. (*See id.*) After all, much of the internet lore about Slender Man takes the form of first-person accounts and found footage detailing real-life experiences with Slender Man. *See, e.g.,* Marble Hornets, *Entry # 1*, (available at https://www.youtube.com/watch?v=Bn59FJ4HrmU) (last visit Dec. 17, 2018).

Geyser became obsessed with Slender Man. (R.326:21-22.) She talked about him constantly. (*Id.*:53, 66-67.) She printed out articles and pictures and showed them to people to try to convince them of his existence. (*Id.*:67.) She drew the Slender Man symbol on her Barbies. (R.327:84-86, R.75.) She kept entire notebooks at home and at school devoted to the subject. (R.326:39, 52, R.327:88-91, R.77-R.83.) She secreted away frightening, self-made Slender Man art. (R.327:91-102, R.62-R.68, R.83-R.93.) And, she came to possess two dangerous and nearly fatal ideas.

First, she wanted to become Slender Man's proxy, which is like a member of his group. (R.329:40.) To accomplish that, Geyser would have to murder someone. (*Id.*) Second, Geyser believed that if she did not do what Slender Man wanted—namely to kill to become his proxy—he would, in turn, kill her or her family. (*Id.*:40-41.) If she displeased him, he could kill her and her family almost instantaneously; he could kill you in as little as three seconds. (R.326:113.)

Motivated by those two beliefs, Geyser conspired with Weier to kill PL. (R.329:40-41.) Geyser first met PL in the fourth grade, and the two became close friends. (R.326:20, 180.) In sixth grade, Geyser introduced PL to Weier, with whom Geyser had become friends. (*Id.*:22.) The day after the three girls had celebrated Geyser's twelfth birthday party, Geyser and Weier took PL to some nearby woods where they repeatedly stabbed her with a kitchen knife. (*Id.*:23, 32-33.) Afterward, Geyser and Weier set off on a trek to find and join Slender Man, intending to abandon their families for a life in the north woods. (*Id.*:98.) Their plan—which underscored the severity of Geyser's mental illness—was to hike more than three hundred miles to the Nicolet National Forest to find Slender Man and join him in his mansion. (*See id.*) The two girls did not know precisely where they would find the mansion, but the finer points of their plan became irrelevant when sheriff's deputies found them hiding in some tall grass near the freeway and arrested them. (R.344:12.) It was 2:15 in the afternoon. (*Id.*:49-50.)

At the officers' direction, the two girls came out of the tall grass and surrendered. (*Id.*:13.) They were immediately taken into custody. (*See id.*:13-14.) A uniformed officer handcuffed Geyser and took her to the back of his squad car. (*Id.*:14-16, 29, 36.) After a few questions, the officer "read [Geyser] her *Miranda* warning" from a standard issue departmental form. (*Id.*:16-17; *see also* R.204.) When the officer asked whether Geyser understood her rights, "she replied, Uh-huh."

(R.344:17.) Her response was "more of a grunt" than an actual answer, and so the officer pressed her: "Do you understand your rights; I need a yes or no, not just an utterance." (*Id.*:17-18.) After the fully-uniformed, armed officer who towered over Geyser and held her handcuffed by the side of the road ordered her to do better with her answers, she answered "yes" each time he asked whether she understood her rights. (*Id.*:14, 17-18, 36.) On subsequent questioning, Geyser told the officer that "[she] and another girl had stabbed a girl and they were forced to stab her." (*Id.*:19.) The officer then put Geyser in his squad car and drove her to the police department. (*Id.*:21.) She made no additional statements to that officer, but "she made utterances," including one about "going to the Kettle Moraine Forest to live with . . . Slender Man." (*Id.*:21-22.) At no time did Geyser ask for an attorney or for her parents to be present. (*Id.*:57-58.) According to the officer, "[s]he was 100 percent cooperative." (*Id.*)

At 4:05 p.m.—nearly two hours after her arrest and transport to the police department—Geyser was taken to "a very bare," "ten feet by ten feet" room with nothing in it other than "a table and two chairs." (*Id.*:69-70.) Geyser would ultimately remain in that barren room for another "five and a half hours." (*Id.*:82.) In the beginning, a police officer "stood by with her." (*Id.*:70-71.) But, for about "two and a half hours of dead time[,] . . . she was sitting there by herself." (*Id.*:83, 96-97.)

Not once within the seven and a half hours between her arrest and completed confession was Geyser allowed to talk with her parents. (*Id.*:83, 96-97.) In fact, police never even offered her that opportunity. (R.326:186-87.) According to the interrogating detective, it simply "wasn't an option;" no such offer would ever be made. (R.326:186-87.) Of course, Geyser's parents were worried. (*Id.*:187.) They came to the station during her interrogation. (R.344:91-92.) But the interrogating detective came out and told them merely "that [his] goal

was to get [Geyser] some help." (R.326:186-87, R.344:91-92.). He failed to mention that he was interrogating their daughter to prove that she tried to kill PL. (*See id.*)

Back in the interview room, the detective read Geyser her *Miranda* warnings from the standard form. (R.344:74-75; R.208.) The form includes a line that reads, "Understanding the above rights, are you willing to speak with me?" (R.208.) Geyser initialed next to that statement and signed below it. (*Id.*) But she was hesitant to do so; "[s]he wanted to know why she had to sign." (R.344:76.) The detective told her that her signature would show people that she "sort of understood it." (R.362 NERI at 34:13-34:43.)[2] It would be proof that they had "talked about" the form and "couldn't switch anything or change anything later." (R.344:76, NERI at 34:13-34:43.) By signing it, he said, she would be "acknowledging, 'Yeah this is what [he] said to [her] and this is what [she] underst[oo]d." (NERI at 34:13-34:43.) He did not tell her that signing the form would indicate that she understood her rights and was knowingly, intelligently, and voluntarily giving them up. (R.344:76.) For her part, Geyser did not question the detective about any of her rights; her twelve-year-old friend Weier had told her about them before. (NERI at 33:53-34:09.) According to the detective, Geyser "was willing to waive [her] rights and speak to [him]," and so the interrogation commenced. (R.344:76.)

As would later come out during competency proceedings, Geyser did not fully understand the legal system or how it applied to her even three weeks *after* she signed the *Miranda* form. (R.322:52.) "Within the moments" of her competency evaluation's commencement, "Geyser evidenced poor insight into her mental health *as well as into her legal situation*." (*Id.*:62

[2] The recording of Geyser's statement was transmitted by the circuit court as a Non-Electronic Record Item (NERI) and not assigned a record number. (R.362.) It is hereinafter cited to as (NERI at HH:MM:SS).

(emphasis added).) She had no prior experience with the criminal justice system. (*Id.*:55.) She was "seemingly not understanding the severity of the situation that she [was] in." (*Id.*) She knew generally about the court, the prosecutor, and the defense attorney, but she needed a "tutorial and discussions" to "grasp *at a basic level* what factually those various concepts *might mean and how they might apply*" to her. (*Id.*:52-53 (emphasis added).) Even though Geyser could be tutored to understand "several discreet legal concepts," she nonetheless was not—even three weeks after her custodial interviews—"spontaneously familiar with many of the concepts that [the interviewer] asked her about." (*Id.*:55, 72.) Geyser lacked the "developmental maturity" to "*truly understand* . . . how [an attorney] might be of assistance to her." (*Id.*:76 (emphasis added).)

Geyser's "cognitive and emotional immaturity," as well as "her lack of familiarity and contact with the legal system" rendered her "not competent to proceed." (*Id.*:62, 84.) In other words, she was too young, too inexperienced with the criminal justice system, and too unfamiliar with applicable legal concepts to even "know how [an] attorney might help her in her case." (R.22-7.) She "lack[ed] substantial mental capacity to rationally and factually understand her charge and be of meaningful assistance in her defense." (R.322:62.) Geyser could become competent, but to get there she needed to close the "gaps in her fundamental knowledge of court procedures," including "how those various concepts might apply in her case." (*Id.*:79.)

Further impeding Geyser's competency was her "early onset psychotic disorder." (R.331:27.) When Geyser was questioned by police, she was "impaired" by her "mental illness" but "not consumed" by it. (*Id.*:24-25.) A psychologist who met with Geyser days after she was charged noted that she "appear[ed] distracted" and would "look[] about the room as if listening to something," despite the fact that "there [wa]s no sound."

(*Id.*:37.) Geyser routinely hallucinated that fictional characters were talking to her wherever she went. (*Id.*:38-39.)

That same mental illness allowed Geyser's belief in Slender Man, and soon after her statement to police she told one evaluator "that [Slender Man] is a person who she has a strong bond with, that she idolizes and believes to be real." (R.322:59.) Days after Geyser's statement to police, a psychiatrist noted that her "primary concern was" not her own legal self-interests, but instead "her relationship with Slender Man" and not "angering" him because, "if she somehow upsets Slender Man, not only hers, but her family's lives could be in danger." (R.322:96-97.) That psychiatrist found that Geyser's Slender Man beliefs so impugned her ability to work in her own self-interest that they prevented her from being able "to work effectively with an attorney to defend her own interests." (*Id.*:96.) Her primary motivation was to appease Slender Man rather than to protect herself from any adverse legal consequences—of which she knew little. (*Id.*:96-97.) Furthermore, she did not understand what it would mean to serve time in prison, thinking that it would not be any big deal. (*Id.*) Those thought processes—a part of her mental illness—caused her to underappreciate the serious trouble that she was in, even as she was locked in jail. (*Id.*)

It took three months of targeted education for Geyser to understand the legal system, the proceedings, and how to assist in her defense. (R.43:3, 10.) By then, five months had passed since Geyser's statements to police. (*See id.*:10, R.1:1, 4-5.)

But, back on the day of her statements, the interviewing detective saw no problem asking Geyser incriminating questions. (R.344:74.) He thought she was "a very intelligent girl" and that "she'd be able to willingly and knowingly either invoke [her] rights or waive [them]." (*Id.*) At no point did he "observe anything

about [Geyser] that caused [him] to hesitate in going any further." (*Id.*:77.)

The detective started his interview by questioning Geyser regarding innocuous things like the approaching last day of school and her upcoming sixth-grade graduation. (NREI at 29:00-29:04, 29:10-29:18, 29:38-29:40.) Without any mention of the fact that Geyser would surely be kept in custody if she admitted to attempted murder, he asked whether she would graduate and noted that school would be over in a couple of weeks. (*Id.*) At one point, Geyser asked whether her statement would get her arrested, which the detective did not answer. (*Id.* at 45:55-46:09.) She was obviously unaware that she was *already under arrest* and that a criminal case was *already being developed* against her. (*See id.*)

Immediately after the detective did not answer her question about possibly being arrested, Geyser accepted his instruction that what was "important here [wa]s to tell the truth." (*Id.* at 46:11-46:18.) She "kn[e]w that it's important to tell the truth," she explained, because she had once been suspended for taking a mallet to school. (*Id.* at 46:19-46:29.) She seemed to equate the discipline that she received for that incident with the anticipated punitive consequences that may befall her for the incident with PL, and thus justify her talking to police. (*See id.*) On the heels of that equivalence, Geyser launched in to a seemingly uninhibited telling of the stabbing story. (*See, e.g., id.* at 48:42-56:29.)

After completely recounting what occurred, Geyser asked the detective whether she would later "regret giving [him] th[e] information." (*Id.* at 58:20-58:22.) In response, the detective assured her that his "goal" was simply "to try to get [her] some help," to quit her having to re-live PL's agonized screams, and to be sure that she would not "have to worry about hurting anybody anymore." (*Id.* at 58:22-58:33.) To that

explanation, Geyser answered, "OK," and the interrogation continued. (*Id.*) The detective failed to mention that, in addition to the reasons he did give, Geyser's statement would also be used as evidence to prove her commission of one of the most serious felonies in Wisconsin. (*See id.*) When Geyser later apologized to the detective for "putting [him] through all this trouble," he dismissed her concern: "I think that you need some help, somebody to talk to, and trying to sort out some of these things that you've got going on." (*Id.* at 2:59:58-3:00:09.)

After Geyser's confession, the State charged both she and Weier in adult court with attempted first-degree intentional homicide. (R.1.) Despite the girls' age, Wisconsin law required the State to file such charges in adult court. Wis. Stat. § 938.183(1)(am). The girls' cases tracked together, and the court held a joint a preliminary hearing. (R.326.)

At the two-day preliminary hearing, the State presented evidence from only law enforcement officers. (*See id.*:2-3.) The officer who had taken the victim's statement parroted it into the record, relevantly explaining the victim's identification of Geyser and Weier as her assailants and the circumstances of the stabbing. (*Id.*:17, 23-36.) The officer who found the victim after the stabbing testified about that and the victim's injuries. (*Id.*:77-80.) Then, the detectives who had interviewed Geyser and Weier testified as to the girls' individual confessions. (*Id.*:84-117, 148-76.) With that, the State rested. (*Id.*:220.)

On cross-examination and during her own case, Geyser presented evidence establishing her belief in Slender Man, as well as his dangerousness and inescapability. She wanted to prove that she had acted in imperfect self-defense, and thus that her case should be discharged from adult court. (*See* R.97:1.) To that end, she showed that, aside from the incident with PL, she had no

"other history of violence." (R.326:58, 180.) A forensic psychologist testified that Geyser had "an enduring predominant belief in . . . the reality of Slenderman" that was "unyielding to rational information." (R.327:17-18, 20.) "[T]he crux" of Geyser's explanation regarding what had happened with PL was that she "was motivated to do the bid[d]ing of Slenderman," which she would do at "any cost to her." (*Id.*:22, 27-28.) Geyser showed her "clear and settled . . . perspective that had she not acted on behalf of Slenderman, he could have very well killed her or her family and that she didn't want to die." (*Id.*:23.)

The State offered no rebuttal and never presented any expert testimony challenging Geyser's mental illness or her Slender Man beliefs. (*See id.*:115.)

Following the preliminary hearing, the circuit court made specific findings of fact, which is required when a child is originally in adult court. (R.329:40-42; A-Ap.) It found that sometime in "December of 2013 or January [of] 2014," Geyser, with Weier, developed a "plot to kill P.L." so that they could "ingratiate [themselves] with Slenderman." (*Id*:40; A-Ap 41.) "[E]ach [girl] believed in Slenderman's existence," thinking him to be "a tall, pale, faceless person, somewhere between six feet and 14 feet tall, [with] tendrils coming from his back [who] preyed upon small children." (*Id.*:40-41; A-Ap 42-43.) Slender Man had appeared to "[b]oth [girls] at various times . . . in dreams or [in] visions." (*Id.*:41; A-Ap 42.) Geyser and Weier "concluded that killing someone permitted them to become proxies of Slenderman," as well as "prove to the skeptics that [he] existed." (*Id.*:40; A-Ap 41.) Additionally, Geyser and Weier "believed that Slenderman would kill their families if they did not kill P.L." (*Id.*:41; A-Ap 42.) As of the date of the preliminary hearing, "Geyser continue[d] to believe that Slenderman exist[ed]." (*Id.*)

The circuit court expressly found "four parts to [Geyser's] Slenderman belief concept:" (1) "[b]elief in

Slenderman;" (2) "a need to kill to become a proxy to be with Slenderman;" (3) "a need to kill to prove [to] the skeptics that Slenderman exists;" and (4) "*a need to kill to protect self and protect the family from Slenderman*." (*Id.*:41 (emphasis added).) Given those factual findings, the court was "concerned with the existence of the mitigating circumstances in the affirmative defenses." (*Id.*:42;; A-Ap 43.) It was "also concerned with the interplay between those four components," wondering, "What was the motivating factor for the killing or the attempted homicide[?]" (*Id.*) Ultimately, the court concluded that Geyser was motivated both by fear "for [her] li[fe] and the lives of [her] family"—which it called "the most dramatic part"—but also by "the other portions of the belief system," which the court found were "as present in more greater terms than the statements with regard to protect the family." (*Id.*)

Based on those factual findings, the circuit court could not conclude "that the mitigating circumstances exist[ed]" showing attempted second-degree intentional homicide. (*Id.*) The court thus found probable cause that Geyser had attempted first-degree intentional homicide and bound her over for trial. (*Id.*:42-43; A-Ap 43-44.)

Geyser later filed a motion challenging the constitutionality of her custodial statements. (R.190.) She argued that she had not knowingly, intelligently, and voluntarily waived her constitutional rights prior to confessing. (*Id.*:15-20.) The circuit court held a hearing at which two law enforcement officers testified about the circumstances of Geyser's statement. (*See* R.344:2.) Additionally, on the parties' agreement, the recording of Geyser's statement was entered into evidence. (*Id.*:6-7, 64.) The circuit court denied Geyser's motion in its entirety based upon both the testimony at the hearing and the content of her recorded statement. (R.345:27-28; A-Ap 76-77.) It reasoned that she had knowingly, intelligently, and voluntarily waived her constitutional

rights prior to speaking to police. (R.218, R.345:28; A-Ap 77, 87.)

Ultimately, Geyser pleaded guilty to attempted first-degree intentional homicide. (R.279, R.353:19.) The parties asked the court to find that Geyser, though guilty, was not responsible by virtue of her mental illness, which it did. (R.353:3, 39.) At sentencing, the court ordered that Geyser be committed to the Department of Health Services for forty years. (R.355:185, R.296; A-Ap 1.)

This appeal follows. (R.298, R.312.)

ARGUMENT

Geyser herein asserts two grounds for relief. First, she argues that the adult court lost jurisdiction after the preliminary hearing when the circuit court concluded as a matter of fact that the State had not rebutted her proof that she acted in imperfect self-defense. *See* Wis. Stat. § 970.032(1) ("court shall order juvenile be discharged" unless State proves crime over which adult court has "original jurisdiction"). Second, she contends that the circuit court erred in refusing to suppress her custodial statements. *See State v. Jerrell C.J.*, 2005 WI 105, ¶ 17, 283 Wis. 2d 145, 699 N.W.2d 110.

As a threshold matter, Geyser notes that those errors are reviewable despite her guilty plea. *See State v. Riekkoff*, 112 Wis. 2d 119, 123-24, 332 N.W.2d 744, 746-47 (1983); Wis. Stat. § 971.31(10). Wisconsin has long recognized that a guilty plea does not waive jurisdictional defects, *State v. Oakley*, 2001 WI 103, ¶ 23, 245 Wis. 2d 447, 629 N.W.2d 200, and does not disallow appellate challenge to the admissibility of the defendant's statement, Section 971.31(10). The issues she presents are properly before this Court for review.

I. THE ADULT COURT LOST JURISDICTION OVER GEYSER WHEN THE STATE FAILED AT THE PRELIMINARY HEARING TO DISPROVE THAT SHE ACTED IN IMPERFECT SELF-DEFENSE.

In what follows, Geyser does not contest the circuit court's factual findings. The circuit court made numerous findings of fact when deciding whether to bind her over, and those findings must be upheld unless clearly erroneous. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711, 714 (1985). Instead, Geyser argues that, on the found facts, the circuit court erred in binding her over. This Court owes no deference to the lower court's ultimate bindover decision. *State v. Toliver*, 2014 WI 85, ¶ 24, 356 Wis. 2d 642, 851 N.W.2d 251. Instead, "the question of whether there is sufficient evidence to support a bindover is a question of law subject to de novo review." *Id.*

In short, Geyser argues that the circuit court reached an erroneous legal conclusion when it refused to mitigate her crime based on self-defense. The court accepted that Geyser acted in self-defense, but not only in self-defense. The court then refused to recognize Geyser's affirmative mitigation defense because she had dual motivations for her homicidal act. It is Geyser's position that, because Wisconsin law does not require that self-defense be the sole motivation for a person's action before qualifying for the defense, the circuit court erred as a matter of law in binding her over in adult court.

A. Wisconsin's adult courts have limited original jurisdiction over child offenders.

In 1995, the Wisconsin legislature substantially revised the body of statutory law dealing with children who break the law. 1995 Wis. Act 77; *see State v. Klesser*, 2010 WI 88, ¶¶ 40-42, 328 Wis. 2d 42, 786 N.W.2d 144. Naming the revised statutes the "The Juvenile Justice Code," our legislature ensured that most children who

commit crimes do not enter the adult court system, but instead are held accountable for their crimes in a separate juvenile court system. Wis. Stat. § 938.01(1). To keep Wisconsin's children from adult court, our legislature imbued the juvenile court system with "*exclusive* jurisdiction" over most child offenders. *See* Wis. Stat. § 938.12(1) (emphasis added). Children who, without the Juvenile Justice Code, would otherwise be criminally prosecuted in adult court are instead subject to a special court system purposed on "equip[ping] juvenile offenders with competencies to live responsibly and productively." Wis. Stat. § 938.01(2); *see also* Wis. Stat. § 753.03 (adult courts have general jurisdiction over "all . . . criminal actions . . . unless exclusive jurisdiction is *given to some other court*" (emphasis added)). However, the exclusive jurisdiction of Wisconsin's juvenile court system is not without limit. Wis. Stat. §§ 938.183(1), 970.032(1).

For child offenders who are believed to have committed certain, specific crimes, the legislature gave "exclusive original jurisdiction" to "courts of criminal jurisdiction." Wis. Stat. § 938.183(1)(a)-(c). One such crime is attempted first-degree intentional homicide. Wis. Stat. § 938.183(1)(am). Another is second-degree intentional homicide. *Id.*

Thus, if a child intentionally tries but fails to kill another person, jurisdiction lies with adult court (that's *attempted* first-degree intentional homicide). Wis. Stat. §§ 938.183(1)(am), 939.32, 940.01(1)(a). Likewise, if a child intentionally kills another person under certain mitigating circumstances, then adult court jurisdiction also applies (that's second-degree intentional homicide). Wis. Stat. §§ 938.183(1)(am), 940.01(2)(b), 940.05. However—as will be important in what follows—original adult court jurisdiction does not apply to a child who intentionally *tries but fails* to kill another person under certain mitigating circumstances (that's *attempted* second-degree intentional homicide). *See id.*, Wis. Stat. §

939.32. In short, adult court jurisdiction exists over a child offender who either *attempts* to kill without mitigation or *actually* kills with mitigation.[3] On the other hand, the juvenile court has exclusive jurisdiction over a child whose *attempt* to kill *was mitigated*.

To discern what court has proper jurisdiction, the Juvenile Justice Code provides a preliminary hearing procedure for children in adult court that is "different from" the one afforded to adult defendants. *State v. Kleser*, 2010 WI 88, ¶ 55, *Toliver*, 2014 WI 85, ¶ 10, Wis. Stat. § 970.032(1).

B. Wisconsin's unique preliminary hearing procedure for children in adult court tests the court's jurisdiction.

Every person who is originally prosecuted in adult court is entitled to a preliminary hearing. *See* Wis. Stat. §§ 970.03, 970.032. For adult offenders, a preliminary hearing is the first time the factual sufficiency of the State's case is tested in an adversarial hearing. *State v. Schaefer*, 2008 WI 25, ¶ 32, 308 Wis. 2d 279, 746 N.W.2d 457. Such hearings provide an "independent screening function" and "a check on the prosecutorial power of the executive branch." *Id.* ¶ 33. At any such hearing, the State is required to prove that "there is probable cause to believe *a felony* has been committed by the defendant." Wis. Stat. § 970.03 (emphasis added). While an adult offender's preliminary hearing checks prosecutorial power, it "is not a mini-trial on the facts; its purpose is merely to determine whether there is sufficient evidence that charges against a defendant should go forward." *Schaefer*, 2008 WI 25, ¶ 34; *State v. Dunn*, 121 Wis. 2d 389, 398, 359 N.W.2d 151, 155 (1984). "[T]he court need not find probable cause as to the *specific* felony charged in the complaint as long as the state presents enough evidence

[3] Obviously, the Juvenile Justice Code enumerates other grounds for original adult court jurisdiction. However, none applies here, and discussion is purposefully limited to the relevant provisions.

to establish probable cause to believe that *some* felony has been committed by the defendant and that the defendant should be bound over for trial." *Kleser*, 2010 WI 88, ¶ 56 (emphasis in original).

But, when it comes to children whose cases are originally in adult court, preliminary hearings are "different." *Id.* ¶ 55. Whereas the State must prove only the commission of *some* felony at an adult's preliminary hearing, it must prove the commission of a *specific* felony at a child's preliminary hearing. *Id.* ¶¶ 56-57; *compare* Wis. Stat. § 970.03 *with* Wis. Stat. § 970.032. "The principal purpose of the specific probable cause finding is to ensure that the adult court has exclusive original jurisdiction over the juvenile." *Toliver*, 2014 WI 85, ¶ 10.

Indeed, the "manifest purpose" of a child's adult-court preliminary hearing goes "beyond assuring that the prosecution against a juvenile is well grounded," and instead "determine[s] whether the adult court has exclusive original jurisdiction." *Id.* ¶ 28. "[T]o assure that the criminal court has 'exclusive original jurisdiction'" over a child offender, the court "must determine whether there is probable cause to believe that the juvenile has committed '*the* violation' of which he or she is accused in the criminal complaint." *Klesser*, 2010 WI 88, ¶ 57 (quoting Wis. Stat. § 970.032(1)) (emphasis in original). "'If the court does not make *that finding*, the court *shall* order that the juvenile be discharged'" from adult court, "although proceedings may be brought" in juvenile court. *Id.* (quoting Wis. Stat. § 970.032(1)) (emphasis in original) (some alteration omitted). Importantly, in the absence of such a finding, the adult court cannot "retain exclusive original jurisdiction of the juvenile." *Toliver*, 2014 WI 85, ¶ 3.

C. At Geyser's preliminary hearing, the State failed to prove that she committed an offense conferring original adult court jurisdiction; the adult court thus lost jurisdiction.

The State brought Geyer's case in adult court on the allegation that she had committed attempted first-degree intentional homicide. At the preliminary hearing, however, Geyser presented evidence and argument that there was probable cause showing only attempted second-degree intentional homicide. As was earlier discussed, an adult court can retain jurisdiction over a child for whom probable cause exists showing attempted first-degree intentional homicide. Wis. Stat. §§ 938.12(1), 938.183. But such jurisdiction cannot be retained when probable cause exists to show only attempted second-degree intentional homicide. *Id.*

1. Imperfect self-defense mitigates first-degree intentional homicide to second-degree intentional homicide.

"Intentional homicides are divided into two categories, first-degree and second-degree." *State v. Head*, 2002 WI 99, ¶ 60, 255 Wis. 2d 194, 648 N.W.2d 413. Our supreme court has explained that "[t]he difference between the two degrees of homicide is the presence or absence of mitigating circumstances." *Id.* ¶ 62. As is relevant to Geyser's case, imperfect self-defense is one mitigating factor the presence of which turns first-degree homicide into second-degree homicide. *Id.* ¶ 85, Wis. Stat. §§ 940.01(2) & (3).

Imperfect self-defense is an "affirmative mitigation defense." *Head*, 2002 WI 99, ¶ 89. It exists whenever a person acts with both "an *actual* belief that the person is in imminent danger of death or great bodily harm, and an *actual* belief that the use of deadly force is necessary to defend herself" or others. *Id.* ¶ 88 (emphasis in original), Wis. Stat. § 940.01(2)(b). The defense exists

so long as the person actually believed both things, regardless of whether those beliefs were in fact reasonable. *Id.*

The initial burden is on the defendant to produce "'some' evidence supporting the defense." *Head*, 2002 WI 99, ¶¶ 111-12 (quoting *State v. Felton*, 110 Wis. 2d 485, 507, 329 N.W.2d 161 (1983)). Thereafter, to disprove mitigation and defeat the defense, the State must be able to prove "that the defendant did not have an *actual* belief in one or both elements." *Id.* ¶ 89 (emphasis in original). When deciding whether mitigation applies, the reasonableness of the defendant's beliefs is irrelevant; all that matters is what the defendant *actually* believed. *Id.* ¶¶ 103-04. If the State fails to prove that the defendant (1) did not actually believe that death or great bodily harm was imminent or (2) did not actually believe that deadly force was necessary, then the State cannot avoid mitigation from first- to second-degree intentional homicide. Wis. Stat. § 940.01(2)(b), *Head*, 2002 WI 99, ¶¶ 89-90, 103; *see* Wis. JI-Criminal 1014.

2. Proof of imperfect self-defense at a child's adult-court preliminary hearing can defeat the court's jurisdiction.

A child originally in adult court "has a strong incentive and should have the right to attempt to negate" at her preliminary hearing the specific offense with which she is charged so as "*to deprive the criminal court of its 'exclusive original jurisdiction.'*" *Kleser*, 2010 WI 88, ¶ 60 (emphasis added), *Toliver*, 2014 WI 85, ¶ 29. To that end, a child whose case is originally in adult court is "able to introduce evidence" at the preliminary hearing "in an effort to get the charge reduced." *Klesser*, 2010 WI 88, ¶ 62. A child "defendant *must* be given some latitude in attacking the specific offense charged if a successful attack would . . . negate the exclusive original jurisdiction of the criminal court." *Id.* ¶ 65 (emphasis in original); *see*

also Toliver, 2014 WI 88, ¶ 32 (upholding bindover because defendant "did not introduce any evidence to support a reduced charge").

As detailed above, establishing an imperfect self-defense claim mitigates attempted first-degree intentional homicide to attempted second-degree intentional homicide. Wis. Stat. § 940.01(2)(b). Whereas the latter crime is one over which the juvenile court has exclusive jurisdiction, successfully establishing an imperfect self-defense claim at a child's adult-court preliminary hearing "negate[s] the exclusive original jurisdiction of the criminal court." *See Kleser*, 2010 WI 88, ¶ 65, Wis. Stat. §§ 938.12(1), 938.183(1)(am). In *Toliver*, the supreme court upheld the adult-court bindover of a child charged with attempted first-degree intentional homicide specifically because he "did not introduce any evidence to support a reduced charge" at his preliminary hearing. 2014 WI 85, ¶ 32. *Toliver* pointedly cautioned that its outcome may have been "different" if the child "had introduced *evidence of mitigating circumstances* to support a charge that was *not consistent with* the exclusive original jurisdiction of the adult court." *Id.* ¶ 34 (emphasis added). If Toliver had asserted a mitigation defense, wrote the court, "it would be difficult" to affirm the bindover. *Id.*

Geyser thus had "a strong incentive" to aver her imperfect self-defense claim at her preliminary hearing and require the State to disprove it, which she did. *Kleser*, 2010 WI 88, ¶ 60. Unlike the defendant in *Toliver*, Geyser placed her imperfect self-defense in issue by testimony and exhibits, thereby triggering the State's burden prove otherwise. *Toliver*, 2014 WI 85, ¶ 32; *see Head*, 2002 WI 99, ¶¶ 111-12. Given that Geyser's imperfect self-defense was proffered in the context of a preliminary hearing, the State bore the burden to disprove it by probable cause. Wis. Stat § 970.032(1). In other words, the State needed to show probable cause for the court to believe that Geyser

"did not have an *actual* belief in one or both elements." *See Head*, 2002 WI 99, ¶ 89.

3. The court found sufficient facts establishing that Geyser acted in imperfect self-defense; the juvenile court thus had exclusive jurisdiction, and her case should have been discharged.

The circuit court found that Geyser believed in Slender Man when she tried to kill PL and continued to believe in him at the time of her preliminary hearing. The court also found that Geyser believed that killing PL would both prove Slender Man's existence and allow her to become a proxy. Additionally—and most important to the issue before the Court—Geyser "believed that Slenderman would kill [her] famil[y] if [she] did not kill P.L." (R.329:41.) According to the circuit court, Geyser's "belief concept" had four components: (1) "[b]elief in Slenderman;" (2) "a need to kill to become a proxy to be with Slenderman;" (3) "a need to kill to prove [to] the skeptics that Slenderman exists;" and (4) "*a need to kill to protect self and protect the family from Slenderman*." (*Id.* (emphasis added).)

The circuit court's factual findings thus make clear its recognition that Geyser had multiple motivations for her crime. On the one hand, she acted in defense of herself and of others based on the fear that if she did not kill, Slender Man would kill her or her family. (*Id.*) On the other hand, she acted to become Slender Man's proxy and prove his existence. (*Id.*) Both motivations were equally "present," but the latter was there in "more greater terms." (*Id.*)

Despite finding that Geyser had acted in defense of others based on her actual belief in Slender Man and his threat to her and her family, the court nonetheless concluded that she had not established "the mitigating circumstances" constituting imperfect self-defense. (*Id.*)

The court reasoned that Geyser was not entitled to mitigate her crime based on imperfect self-defense because other things motivated her crime in addition to self-defense. (*Id.*)

But the law does not require that a person act *only* in defense of self or others to qualify for mitigation. *See* Wis. Stat. § 940.01(2)(b); *see also* Wis. JI-Criminal 1014. Instead, mitigation applies whenever "[d]eath was caused because the actor believed he or she or another was in imminent danger of death or great bodily harm and that the force used was necessary to defend the endangered person, if either belief was unreasonable." *Id.* Nothing in the plain language of the mitigation statute exempts situations in which a person causes a death *both* in self-defense *and* for some additional reason. *Id.* There is no sole-motivation requirement in the statute. *Id.* But that is precisely what the circuit court concluded in Geyser's case: because she acted in self-defense *and* for other reasons, she was not entitled to mitigation.

"One of the maxims of statutory construction is that courts should not add words to a statute to give it a certain meaning." *Fond du Lac County v. Town of Rosendale*, 149 Wis. 2d 326, 334, 440 N.W.2d 818, 821 (Ct. App. 1989). The circuit court's reasoning violates that maxim; it reads into the mitigation statute a sole-motivation requirement where none exists. It has been "'stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'" *State ex rel. Kalal v. Cir. Ct. Dane Cty.*, 2004 WI 58, ¶ 39, 271 Wis. 2d 633, 681 N.W.2d 110 (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). Courts are "not at liberty to disregard the plain, clear words of [a] statute," but instead must act in accordance with "'what the lawgiver promulgated.'" *Id.* ¶¶ 46, 52 (quoting Antonin Scalia, *A Matter of Interpretation* 17 (Princeton University Press 1997)). Neither the circuit court nor this Court should read a sole-motivation requirement into the affirmative

mitigation defense statute when the legislature saw fit not to include one.

Even Wisconsin's specific self-defense statute supports the proposition that there is no sole-motivation requirement known to Wisconsin's self-defense law. *See* Wis. Stat. § 939.48; *see Kalal*, 2004 WI 58, ¶ 46 (looking to that statue appropriate because "[c]ontext is important to meaning," including the language of "closely-related statues.") Nowhere does the self-defense statute's language constrain the defense to situations in which a person is motivated *only* by defense of self or others. *Id.* The existence of secondary motivations is not a recognized impediment to the defense. *Id.* Instead, so long as a person can show that they acted in defense of self or others, the legal defense applies. *Id.* Thus, the presence of secondary motivations for a homicidal act does not defeat a person's ability to avoid criminal liability on self-defense grounds. Surely, if the State can prove that some secondary motivation was the person's *only* motivation, then the State can disprove self-defense. But it is incumbent on the State to disprove that the person was motivated by defense of self or others. Proof that the person acted for additional reasons does not disprove that the act was also done in self-defense.

The circuit court thus reached an erroneous legal conclusion when it denied Geyser's affirmative mitigation defense because there were multiple motivations for her homicidal act, one of which was self-defense. Merely because Geyser's homicidal acts may have had secondary motivations in addition to defending herself and her family does not defeat her imperfect self-defense claim. It must be recognized that the circuit court *did not* conclude that the State *had disproven* Geyser's imperfect self-defense claim. Instead, the court found that she acted both in imperfect self-defense *and* to advance her own self-interests. Insofar as the law does not require Geyser to have acted *only* in self-defense to qualify for mitigation, the State's failure to

disprove her imperfect self-defense claim deprived the adult court of original jurisdiction. By statute, Geyser's case should have been discharged following the preliminary hearing with the State having the option to commence proceedings in juvenile court.

II. GEYSER DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVE HER CONSTITUTIONAL RIGHTS PRIOR TO HER CUSTODIAL STATEMENTS; THOSE STATEMENTS SHOULD HAVE BEEN SUPPRESSED.

The Supreme Court has long recognized that "[a] confession is like no other evidence, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against [her].'" *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (quoting *Bruton v. United States*, 391 U.S. 123, 139-40 (1968) (White, J. dissenting)).

Statements made by a person during custodial interrogation cannot be admitted into evidence unless they were obtained by "the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The government's use of statements otherwise obtained violates the constitutional guarantee of due process. *State v. Hoppe*, 2003 WI 43, ¶ 36, 261 Wis. 2d 294, 661 N.W.2d 407; U.S. Const. Amend. XIV, Wis. Const. Art. 1, § 8. To safeguard against improperly obtained confessions, the law requires that police inform a person of certain constitutional rights before questioning. *Miranda*, 384 U.S. at 444. Specifically, a person must be told that "[s]he has the right to remain silent, that anything [s]he says can be used against h[er] in a court of law, that [s]he has the right to the presence of an attorney, and that if [s]he cannot afford an attorney one will be appointed." *Id.* at 479; *See* U.S. Const. Amends. V & VI. If a person thereafter chooses to waive effectuation of those rights, the interrogation may proceed, and any

ensuing statements can be used against the person in court. *Id.* However, the person's waiver of those rights must be "intelligent and knowing as well as voluntary." *State v. Lee*, 175 Wis. 2d 348, 357, 499 N.W.2d 250, 254 (Ct. App. 1993). Otherwise, the waiver is invalid and the statements thereafter obtained must be suppressed. *Miranda*, 384 U.S. at 479.

Thus, "[w]hen the State seeks to admit statements made during custodial questioning, it must make two separate showings: it must establish that the suspect was informed of [her] *Miranda* rights, understood them, and knowingly and intelligently waived them; *and* it must establish that the statement was voluntary." *State v. Hindsley*, 2000 WI App 130, ¶ 21, 237 Wis. 2d 358, 614 N.W.2d 48 (emphasis added). The failure to establish either showing is grounds for suppression. *Id.*

When deciding whether a person's statement should have been suppressed, appellate courts "examine the application of constitutional principles to historical facts." *Jerrell C.J.*, 2005 WI 105, ¶ 16. In so doing, the circuit court's factual findings are upheld unless clearly erroneous; the ultimate constitutional question is reviewed independently. *Id.* Thus, this Court owes no deference to the circuit court's legal conclusions regarding the admissibility of Geyser's statement.

A. Geyser did not knowingly and intelligently waive her constitutional rights; her post-*Miranda* custodial statements should be suppressed.

There is no doubt that Geyser was twice told about her constitutional rights and twice elected to proceed without their invocation. However, "[t]he police are not absolved of responsibility by merely reading a defendant his or her *Miranda* rights." *State v. Mitchell,* 167 Wis. 2d 672, 694, 482 N.W.2d 364, 373 (1992). Instead, a valid waiver of one's constitutional rights necessitates "'an

intentional relinquishment or abandonment of a known right or privilege.' In other words, the accused must 'kno[w] what he is doing' so that 'his choice is made with eyes open.'" *Patterson v. Illinois*, 487 U.S. 285, 292 (1988) (quoting *Johnson v. Zerbst*, 208 U.S. 458, 464 (1938) and *Adams v. United States ex rel. McCann,* 317 U. S. 269, 279 (1942)). The person giving up her rights must have "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine,* 475 U. S. 412, 421 (1986). "An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver." *North Carolina v. Butler,* 441 U.S. 369, 373 (1979).

Instead, deciding whether a person validly waived her constitutional rights requires consideration of "the particular circumstances involved, including the education, experience and conduct of the accused." *Lee*, 175 Wis. 2d at 364, 499 N.W.2d at 257. After all, "a mentally ill person may 'confess' at length quite without external compulsion but not intelligently and knowingly, while a perfectly rational person on the torture rack may confess intelligently and knowingly but without free will." *People v. Bernasco*, 562 N.E.2d 958, 962 (Ill. 1990) (decision heavily relied upon in *Lee*, 175 Wis. 2d at 356-57, 364-65, 499 N.W.2d at 257).

At the time that Geyser twice expressed a willingness to waive her rights, she was an extremely mentally ill, barely twelve-year-old girl with no prior experience in the criminal justice system. She had not been given an opportunity to talk with her parents before or during her statements. She did not appreciate the seriousness of the legal consequences that might befall her if she gave up her rights. Her delusional devotion to Slender Man clouded her judgment. She was more interested in serving Slender Man's bidding than in helping herself. Even three weeks *after* her statements,

Geyser still did not understand various legal concepts involved with a criminal prosecution or even how her attorney could help her. It is worth noting that, at the time of her competency evaluations, Geyser knew what an attorney was—she had by then met and been to court with *her own attorney* several times. But even then, Geyser still had no idea of what use her defense attorney might be to her. It took three months of targeted education for Geyser to gain sufficient knowledge such that she understood the legal system and her constitutional rights, including her right to counsel.

To suggest that Geyser, under those circumstances, could knowingly and intelligently waive her constitutional rights is a mockery of those words.

> If intelligent knowledge in the *Miranda* context means anything, it means the ability to understand the very words used in the warnings. It need not mean the ability to understand far-reaching legal and strategic effects of waiving one's rights, or to appreciate how widely or deeply an interrogation may probe, or to withstand the influence of stress or fancy; but to waive rights intelligently and knowingly, one must at least understand *basically* what those rights encompass and *minimally* what their waiver will entail.

Bernasco, 562 N.E.2d at 964 (emphasis added). During her competency evaluations, Geyser had to be tutored to "grasp *at a basic level* what factually those various concepts *might mean and how they might apply*" to her. (R.322:52-53 (emphasis added).) Given her ignorance of the criminal justice system, she was not "spontaneously familiar" with the legal concepts involved in a criminal prosecution, including her constitutional rights. (*Id.*:55, 72.) Geyser was simply too young, too inexperienced, and too mentally ill to "*truly understand* . . . how [an attorney] might be of assistance to her." (*Id.*:76 (emphasis added)); *see also* Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights—An Empirical Analysis,* 68 Cal. L. Rev. 1134, 1161 (1980) (children younger than fourteen

cannot constitutionally waive their rights to silence and legal counsel).

Thus, when Geyser agreed to waive her rights, she did not do so knowingly and intelligently. *Bernasco*, 562 N.E.2d at 964. "Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them." *Haley v. Ohio*, 332 U.S. 596, 601 (1948). The record clearly demonstrates that Geyser lacked the resources to "understand *basically* what [her] rights encompass[ed] and *minimally* what their waiver w[ould] entail." *Bernasco*, 562 N.E.2d at 964 (emphasis added). Geyser's custodial statements should therefore have been suppressed, regardless of their voluntariness. *Lee*, 175 Wis. 2d at 361, at 499 N.W.2d at 255-56.

B. Geyser's custodial interrogations were involuntary; her statements should have been suppressed.

Even if this Court concludes that Geyser validly waived her constitutional rights, her custodial statements should nonetheless be suppressed because they were involuntarily made.

> [T]he Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will," and because of "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."

Jackson v. Denno, 378 U.S. 368, 385-86 (1964) (citations omitted). "[W]hen a suspect is in police custody, there is a heightened risk of obtaining statements that 'are not the

product of the suspect's free choice.'" *State v. Kilgore*, 2016 WI App 47, ¶ 17, 370 Wis. 2d 198, 882 N.W.2d 493 (quoting *J.D.B. v. North Carolina*, 564 U.S. 261, 268-69 (2011)). The voluntariness of a confession turns on whether the person "made an independent and informed choice of his own free will, possessing the capability to do so, his will not being over-borne by the pressures and circumstances swirling around him." *United States v. Castaneda-Castaneda*, 729 F.2d 1360, 1362 (7th Cir. 1984) (citation omitted); *see also Hoppe*, 2003 WI 43, ¶¶ 34-36. It depends on the totality of the circumstances and must be evaluated on a case-by-case basis. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *Etherly v. Davis,* 619 F.3d 654, 661 (7th Cir. 2010) (stating that the *Schneckloth* test applies to juveniles, but that their confessions must be examined with "special care"). This includes an evaluation of individual characteristics, such as "age, experience, education, background, and intelligence" and "whether [the person] has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Fare v. Michael C.,* 442 U.S. 707, 725 (1979).

"The Supreme Court in the past has spoken of the need to exercise 'special caution' when assessing the voluntariness of a juvenile confession, particularly when there is prolonged or repeated questioning or when the interrogation occurs in the absence of a parent, lawyer, or other friendly adult." *Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir. 2002) (citing *In re Gault*, 387 U.S. 1, 45 (1967); *Gallegos*, 370 U.S. at 53-55; *Haley*, 332 U.S. at 599-601). The court in *Hoppe* explained the test for voluntariness as follows:

> The relevant personal characteristics of the defendant include the defendant's age, education and intelligence, physical and emotional condition, and prior experience with law enforcement. The personal characteristics are balanced against the police pressures and tactics which were used to

> induce the statements, such as: the length of the questioning, any delay in arraignment, the general conditions under which the statements took place, any excessive physical or psychological pressure brought to bear on the defendant, any inducements, threats, methods or strategies used by the police to compel a response, and whether the defendant was informed of the right to counsel and right against self-incrimination.

261 Wis. 2d 294, ¶ 39 (internal citations omitted). "[I]t is the totality of the circumstances underlying a juvenile confession, rather than the presence or absence of a single circumstance, that determines whether or not the confession should be deemed voluntary." *Gilbert v. Merchant,* 488 F.3d 780, 793 (7th Cir. 2007). Ultimately, the court must consider whether the confession arose from "excessive coercion or intimidation." *Etherly,* 619 F.3d at 661 (quoting *Hardaway,* 302 F.3d at 765). Admission of an involuntary confession violates an individual's Fifth Amendment right to remain silent. *Colorado v. Connelly,* 479 U.S. 157, 167 (1986).

Geyser's unique situation made her custodial statements involuntarily. Although "coercive or improper police conduct" is a "necessary prerequisite" for involuntariness, the conduct "need not be egregious or outrageous in order to be coercive." *Jerrell C.J.*, 2005 WI 105, ¶ 19. Even "subtle pressures are considered to be coercive if they exceeded the defendant's ability to resist." *Id.* "When the allegedly coercive police conduct includes subtle forms of psychological persuasion, the mental condition of the defendant becomes a more significant factor in the 'voluntariness' calculus." *Hoppe*, 2003 WI 43, ¶ 40.

Geyser's age and mental illness left her unable to resist even the slightest coercion. "[T]he condition of being a child renders one 'uncommonly susceptible to police pressures.'" *Jerrell C.J.*, 2005 WI 105, ¶ 26 (quoting *Hoppe*, 2003 WI 43, ¶ 46). At the time of her interview, Geyser was twelve-years-old. Our supreme court has

before noted that the "young age of 14 [is] a strong factor weighing against the voluntariness of [a child's] confession." *Id.* Geyser was two years younger than that.

As for education, Geyser was in sixth grade. Although she was a smart child, she lacked a basic knowledge of the legal system to understand how it applied to her. She seemingly equated the punitive consequences of bringing a mallet to school with those she might face for having killed someone, and thus thought it was important to tell the truth of what she had done. Despite being under arrest and held in custody for several hours, she asked the interrogating detective whether her statement would get her arrested. She had no comprehension of what consequences might befall her, asking the detective if she would regret confessing her crime and whether it might cause her to go to prison. Her severe mental illness caused her to conflate fiction with reality. She cared more about serving Slender Man than she did about acting in her own self-interests. She lacked "a realistic understanding of what it might mean to spend a long time in prison." (R.322:97-98.)

During her statement, Geyser's description of stabbing her close friend goes on at length with a little change in mood. (*See, e.g., id.* at 1:08:22-1:08:40.) She flatly describes the horrific occurrences of her crime—repeatedly calling it necessary—and similarly mentions being sent to prison—which she called "a weird place." (*Id.* at 1:05:10-1:05:13.) All of that seems to have no impact on Geyser's mood. But then, when she was asked about a rumor that she set a fire in her basement, she reacted with surprise; her cats lived in the basement and she "would never hurt them; [she] loved [her] cats; [her] cats [we]re important." (*Id.* at 1:11:53-1:12:00.) Here is child who is confessing to a serious crime that could possibly imprison her for decades and her most significant concern is the well-being of her cats.

Finally, Geyser had no prior experience with law enforcement. "In cases where courts have found that prior experience weighs in favor of a finding of voluntariness, the juvenile's contacts with police *have been extensive*." *Id.* ¶ 28 (citing *Hardaway,* 302 F.3d at 767, *Fare,* 442 U.S. at 710) (emphasis added). Geyser's total unfamiliarity with police and the circumstances of custodial interrogation weigh against a finding of voluntariness. *Id.*

Against those personal characteristics must be balanced the police pressures applied to Geyser. First, "[t]he length of [Geyser's] custody is also an important factor" demonstrating the coercive nature of her interrogation. *Id.* ¶ 32. It is well-established that "lengthy interrogation or incommunicado incarceration c[an] be strong evidence of coercion." *Id.* In *Jerrell C.J.*, the "duration of [the child]'s custody and interrogation was longer than the *five hours* at issue in *Haley*, 332 U.S. 596," and "significantly longer than most interrogations." *Id.* ¶ 33 (emphasis added). Similarly, Geyser was in custody and interrogated longer than the child in *Haley*: seven and a half hours. Thus, her "lengthy custody and interrogation is . . . evidence of coercive conduct." *Id.*

Second, Geyser was not allowed to talk with her parents. Wisconsin has long held that, when police "'fail to call [a child's] parents for the purpose of depriving the juvenile of the opportunity to receive advice and counsel,'" it is "'strong evidence that coercive tactics were used to elicit the incriminating statements.'" *Id.* ¶ 30 (quoting *Theriault v. State*, 66 Wis. 2d 33, 48, 223 N.W.2d 850 (1974)). Although Geyser did not ask to speak with her parents, the opportunity was never offered to her. And, the interrogating detective admitted that he would not have permitted such contact even if she had asked. Certainly, the police are not at all required to inform a juvenile's parents that the juvenile is being questioned or honor a juvenile's request that a parent or other adult (other than a lawyer) be present during

questioning, *Hardaway,* 302 F.3d at 765. However, "'[i]t is easier to overbear the will of a juvenile than of a parent or attorney, . . . in marginal cases—when it appears the officer or agent has attempted to take advantage of the suspect's youth or mental shortcomings—lack of parental or legal advice could tip the balance against admission.'" *United States v. Bruce,* 550 F.3d 668, 673 (7th Cir. 2008) (quoting *United States v. Wilderness,* 160 F.3d 1173, 1176 (7th Cir. 1998)). In Geyser's case, the purposeful deprivation of parental contact was coercive; the police would not even have allowed her to talk with her parents it she had requested it.

Finally, the psychological techniques applied to Geyser show that her statement was involuntary. When Geyser questioned the need to sign the *Miranda* form, the detective did not detail her constitutional rights or explain that her signature would later be used as proof that she was giving them up. Instead, he told her that her signature would show people that she "*sort of understood* it." (NERI at 34:18-34:29 (emphasis added).) It would also be proof that she and the detective were "talking about the same thing" so that later he could not "switch something and say" that he "asked [her] something different." (*Id.* at 34:18-34:45.) Her signature would just be her "acknowledging, 'Yeah this is what [he] said to [her] and this is what [she] underst[oo]d." (*Id.*) In no way does that exchange convey the significance of what Geyser was doing in giving up her constitutional rights. Quite to the contrary, it minimizes those rights and the effect of Geyser's waiver so as to ensure that she would sign the form and confess.

The interviewing detective's minimization of her rights is entirely consistent with his ongoing minimization of the seriousness of her situation, as well as his mischaracterizations of the purpose of his interrogation. The detective began the conversation with grooming questions intended to make her feel more comfortable and open. Those questions minimized the

seriousness and importance of the interrogation by both their tone and content. While discussing Geyser's schooling, the detective asked questions suggesting that—despite her crime—Geyser would still be attending.

When Geyser asked whether she would regret talking to the police, the detective told him that the reason he was questioning her has merely "to get [her] some help so [she] d[id]n't have to hear [PL's] screams and d[id]n't have to worry about hurting anybody anymore." (NERI at 58:22-58:33.) When she asked whether her statement would "put [her] in prison" to "rot and die," the detective assured her that he "d[id]n't think" that she was "going to prison" or that she would "rot and die there." Instead, the police needed just "somebody talk to [her] and try to figure out what the best circumstances" would be for her. (*Id.* at 2:22:46). When Geyser apologized for the "trouble" she was causing the detective, he dismissed her concern on the ground that she "need[ed] some help, somebody to talk to, and trying to work out some of these things that [she had] going on." (*Id.* at 3:00:00).

The clear message to Geyser in the detective's responses is that her incriminating statements will be used to help her, not to send her to prison or accomplish anything that would make her regret making these statements. These tactics are problematic when dealing with an adult suspect of sound mind. But, Geyser was not that sort of suspect. She "[wa]s vulnerable. She [wa]s withdrawn from reality and . . . ma[d]e[] choices against her own best interest." (R.334:13.) As one psychologist observed, she "[wa]s particularly vulnerable to what goes on in her head and to what—and she's withdrawn from reality and her contact with her—or her appreciation of it is impaired. Morgan will make choices that are against her legal self-interest." (R.331:66.) That same psychologist also testified that Geyser "ha[d]n't developed skills for navigating adult life or even

approximating navigating stressors in adult life, and she's got the added stressor of a mental illness." (R.331:69.) Her serious mental illness was neither diagnosed nor treated at the time of her custodial statements.

Admittedly, the tactics police used with Geyser may have passed muster with a fully-functional adult, but Geyser was far from that. She was a twelve-year-old, mentally ill child with no prior police contact or experience in the criminal justice system who was held in custody for seven-and-a-half hours. She was questioned without being allowed to talk to her parents or even have them present. She did not understand her legal rights, including what an attorney could do for her. The interviewing detective repeatedly minimized the seriousness of her crime and the effect of confessing to it. On balance, the tactics police used on Geyser were coercive and most certainly overwhelmed whatever minimal ability she had to resist. Under those circumstances, none of her custodial statements can be labelled as "voluntary" under any meaningful definition of the term. They should have been suppressed.

CONCLUSION

Morgan Geyser was twelve-years-old when she tried to kill her close friend because of her unreasonable belief in the imminent danger that a fictional character posed to her and her family. The juvenile court, not the adult court, had exclusive original jurisdiction over her crime, and the circuit court should have discharged her adult-court case following her preliminary hearing. The State could still have prosecuted Geyser; it merely would have had to do so in juvenile court. Geyser asks this Court to reach the same conclusion and to remand her case to the circuit court with directions that it be discharged pursuant to Wis. Stat. § 970.032(1).

Furthermore, Geyser asks this Court to conclude that her statements were obtained in violation of her constitutional rights. If the Court does not hold that the circuit court lost jurisdiction, then she asks that her case be remanded to the circuit court for further proceedings consistent with the determination that her statements should have been suppressed.

Dated this 3rd day of January, 2019.

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CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 10,470 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 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 3rd day of January, 2019.

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CERTIFICATION OF APPENDIX CONTENT

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 Section 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues. I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency. I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 3rd day of January, 2019.

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