STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2018AP1897-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

MORGAN E. GEYSER,
Defendant-Appellant-Petitioner.

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

PETITION FOR REVIEW

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First Issue: Jurisdiction

As a child, Morgan E. Geyser was charged with attempted first-degree intentional homicide. That prosecutorial decision automatically conferred adult-court jurisdiction.

At her preliminary hearing and consistent with applicable law, Geyser sought to defeat adult court jurisdiction. She presented evidence establishing that her homicidal act was motivated by her belief that she had to kill or be killed. 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.

The circuit court found 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 because it found that she also acted for reasons other than self-defense, which the court concluded amounted to an adult court offense.

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. The court of appeals affirmed. This Court should reverse.

Second Issue: Constitutionality of Statement

After her arrest, Geyser made multiple custodial statements to law enforcement. Some of her statements occurred before she was given *Miranda* warnings, and some followed.

Shortly after Geyser's statements to police, she was deemed incompetent to stand trial. Her incompetence was based on her age, her unfamiliarity with the legal system and attendant rights, and her severe mental illness. Geyser did not understand the basic elements of her legal rights to even know how an attorney might help her. It took five months of education about the legal system for Geyser to understand 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. The court of appeals did not decide the constitutionality of Geyser's statement, instead affirming because she had entered a plea and the court deemed any error harmless. This Court should reverse.

STATEMENT OF CRITERIA FOR REVIEW

In two previous cases, this Court recognized that a juvenile's adult court preliminary hearing provides an opportunity for the juvenile to defeat adult court jurisdiction. However, those cases did not resolve the scope of proof necessary to accomplish that task.

Consistent with this Court's precedent, Geyser undertook at her preliminary hearing to prove that her case belonged in juvenile court. She successfully convinced the court that she may have committed a crime over which the adult court did not have jurisdiction. But, the adult court nonetheless retained jurisdiction and bound Geyser over for trial because it concluded that her crime may *also* have been one conferring adult court jurisdiction.

The court of appeals concluded that adult court jurisdiction could attach because the circuit court was not convinced that Geyser may have committed *only* a juvenile jurisdiction offense. This Court should review Geyser's case to explain how a circuit court is to test adult court jurisdiction at a juvenile's preliminary hearing, including what proof is necessary for a juvenile to successfully defeat adult court jurisdiction. Wis. Stat. § (Rule) 809.62(1r)(c)3.

Review is additionally appropriate because, as the court of appeals noted in its decision, "the bench, bar and public could benefit from a clear and definitive articulation from [this] Court as to the proper standard to use in situations where harmless error is asserted in the context of a defendant having entered a plea." *State v. Geyser*, No. 2018AP1897-CR, slip op. ¶41 n.8 (Wis. Ct. App. Aug. 12, 2020); (P-Ap. 20).

Prior Wisconsin cases have applied different tests to discern harmless error after a guilty plea. The applicable law is thus unclear and needs clarification from this Court. Wis. Stat. § (Rule) 809.62(1r)(c)(3). Additionally, the United States Supreme Court has previously declined to apply the harmless error test following a guilty plea in circumstances like those in Geyser's case. None of Wisconsin's prior harmless error cases have addressed that precedent. Review is appropriate to resolve that conflict. Wis. Stat. § (Rule) 809.62(1r)(d).

STATEMENT OF THE CASE

Twelve-year-old Morgan Geyser tried to kill her best friend because she believed that a fictitious entity named Slender Man would kill her if she did not. (R.326:168.) At the time, Geyser was mentally ill. (R.331:27.) The combination of Geyser's mental illness and introduction to the Slender Man legend resulted in her forming two dangerous and nearly fatal ideas.

First, she wanted to become a member of Slender Man's followers. (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 kill to join his group—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 another girl to kill their victim. (R.329:40-41.) Fortunately, the victim survived the girls' attack. (*Id.*:23, 32-33.) Both Geyser and her coconspirator were arrested shortly afterward. (R.344:12.)

Geyser was interviewed by police after her arrest. (*Id.*:16-19, 74-75.) At no point was she allowed to see or speak with her parents. (*Id.*:83, 96-97.) The interviewing detective read Geyser her *Miranda* warnings from the standard form, which Geyser initialed and signed. (R.344:74-75; R.208.) 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.)

As would later come out during competency proceedings, Geyser did not fully understand the legal

system or how it applied to her. (R.322:52.) She had no prior experience with the criminal justice system and lacked the "developmental maturity" to "*truly understand* . . . how [an attorney] might be of assistance to her." (*Id.*:55, 76 (emphasis added).) When she gave her statement, Geyser 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.) When Geyser was questioned by police, she was "impaired" by her "mental illness." (R.331:24-25.)

After her arrest, Geyser's "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.) 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.)

After Geyser's confession, the State charged her with attempted first-degree intentional homicide. (R.1.) Despite her age, Wisconsin law required the State to file such charges in adult court. Wis. Stat. § 938.183(1) (am).

At Geyser's two-day preliminary hearing, the State presented evidence from only law enforcement officers. (*See* R.326.:2-3.) The officer who had taken the victim's statement explained the victim's identification of her assailants and the circumstances of the stabbing. (*Id.*:17, 23-36.) The officer who found the victim testified about her injuries. (*Id.*:77-80.) Finally, the detectives who had interviewed Geyser and her coconspirator 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.) "[T]he crux" of Geyser's explanation regarding what had happened with the victim was that she "was motivated to do the bid[d]ing of Slenderman," which she would do at "any cost to her." (R.327:22, 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; P-Ap 67-69.) It found that sometime in "December of 2013 or January [of] 2014," Geyser and her coconspirator developed a "plot to kill [the victim]" so that they could "ingratiate [themselves] with Slenderman." (*Id*:40; P-Ap 67.) "[E]ach [girl] believed in Slenderman's existence;" he had appeared to "[b]oth [girls] at various times . . . in dreams or [in] visions." (*Id.*:40-41; P-Ap 67-68.) The girls "concluded that killing someone permitted them to become proxies of Slenderman," as well as "prove to the skeptics that [he] existed." (*Id.*:40; P-Ap 67.) Additionally, the girls "believed that Slenderman would kill their families if they did not kill [the victim]." (*Id.*:41; P-Ap 68.)

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; P-Ap 68 (emphasis added).) Given those factual findings, the court was "concerned with the existence of the mitigating circumstances in the affirmative defenses." (*Id.*:42; P-Ap 69.) 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; P-Ap 69-70.)

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 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; P-Ap 102-03.) It reasoned that she had knowingly, intelligently, and voluntarily waived her constitutional rights prior to speaking to police. (R.218, R.345:28; P-Ap 103, 113.)

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; P-Ap 27.)

Geyser appealed, raising the same two issues that she raises in this petition: (1) the circuit court erroneously kept the case in adult court following Geyser's preliminary hearing and (2) her statement was unconstitutionally obtained.

In a decision recommended for publication, the court of appeals affirmed. *Geyser*, 2018AP1897, ¶¶2-3; (P-Ap 2). The court of appeals concluded that the circuit court rightly maintained adult court jurisdiction. *Id.* ¶38; (P-Ap 18). It reasoned that, even though the circuit court's factual findings establish that Geyser committed a juvenile court offense, bindover to adult court was appropriate because the circuit court also found "probable cause to believe Geyser committed [an adult court offense]." *Id.*

As for the constitutionality of Geyser's statement, the court of appeals passed on that issue. *Id.* ¶40; (P-Ap 19). Instead of deciding whether Geyser's rights had been violated, the court of appeals concluded that any error would be harmless. *Id.*

Importantly to this petition, the court of appeals admittedly struggled to discern the applicable harmless error test. *Id.* ¶41 n.8; (P-Ap 20). After noting that "Wisconsin's appellate courts at times have utilized differing terminology when considering harmless error in the context of a plea," the court of appeals adopted and applied the harmless error test that the parties had articulated. *Id.* Nonetheless, the court of appeals explicitly noted that "a clear and definitive articulation from [this] Court as to the proper standard to use in situations where harmless error is asserted in the context of a defendant having entered a plea" would be beneficial. *Id.*

This petition follows.

ARGUMENT

I. Review is warranted to clarify the scope of this Court's precedent governing a juvenile's right to test adult court jurisdiction at a preliminary hearing and the interaction thereof with the juvenile preliminary hearing statute.

When a juvenile defendant is charged with a crime, the case ultimately ends up in one of two places: juvenile court or adult court. Wis. Stat. §§ 983.12(1), 938.183(1); *State v. Toliver*, 2014 WI 85, ¶26, 356 Wis. 2d 642, 851 N.W.2d 251. In the ordinary case, juvenile courts adjudicate cases against juvenile criminal defendants. *Toliver*, 2014 WI 85, ¶26. But adult courts have "exclusive original jurisdiction" over a set of enumerated crimes. *Id*.

When a juvenile is charged with one of the enumerated offenses, the case starts in adult court. *Id.* ¶¶26-28; *see* Wis. Stat. §§ 938.183(1), 970.032. And just as an adult charged with a felony has the right to a preliminary hearing, so too does a juvenile who is initially charged in adult court. *State v. Kleser*, 2010 WI 88, ¶54, 328 Wis. 2d 42, 786 N.W.2d 144; Wis. Stat. § 970.032(1).

But the statutes prescribe different sorts of preliminary hearings for adult and juvenile offenders. *See id.* In *Kleser* and *Toliver* this Court addressed the differences between these hearings. *Kleser*, 2010 WI 88, ¶¶40-66, *Toliver*, 2014 WI 85, ¶¶25-30. The scope of an adult offender's preliminary hearing is relatively straightforward: the State must prove that "there is probable cause to believe that a felony has been committed by the defendant." Wis. Stat. § 970.03; *see, e.g.*, *Kleser*, 2010 WI 88, ¶ 56.

A juvenile's preliminary hearing in adult court is much different. *Toliver*, 2014 WI 85, ¶¶27-30; *Kleser*, 2010

WI 88, ¶¶55, 65. In addition to making sure that the State's case is grounded in probable cause, the "manifest purpose" of a juvenile's preliminary hearing is deciding whether the adult court has jurisdiction over the juvenile by reference to one of the specifically enumerated offenses. *Toliver*, 2014 WI 85, ¶28; *see also Kleser*, 2010 WI 88, ¶¶ 55-57.

The two potential crimes at issue in Geyser's preliminary hearing were attempted first-degree intentional homicide, *see* Wis. Stat. § 940.01, and attempted second-degree intentional homicide. *See* Wis. Stat. § 940.05. The former is an enumerated crime under the adult jurisdiction statute, while the latter is confined to the juvenile court. *See* Wis. Stat. § 938.183(1)(am).

To this point, all of this seems simple. The juvenile, much like the adult, is entitled to a preliminary hearing. And because of the limited jurisdiction of adult courts over juvenile offenses, a juvenile's preliminary hearing involves a more particularized inquiry than the adult's hearing. As applied, the Geyser, the issue at the preliminary hearing was thus whether the case can remain in adult court on the attempted first-degree intentional homicide charge or whether it must be transferred to the juvenile court as an attempted second-degree intentional homicide charge.

So far, so good.

But here's the rub. Geyser presented unrefuted evidence that, and the circuit court made factual findings of support of, a mitigation defense—specifically, imperfect self-defense. *See* Wis. Stat. § 940.01(2)(b).

This brings us to the legal question in need of clarification from this Court: what happens when, during a preliminary hearing, a juvenile defendant presents an affirmative defense mitigating the charged

offense from a violation that would place the defendant in the adult court jurisdiction, down to one that would be adjudicated in juvenile court? Does the case stay in adult court or does the mitigation defense deprive the adult court of jurisdiction?

The statutes do not directly answer this question. And this court has never handed down a decision to that effect either. But *Kleser* and *Toliver* come extremely close.

In *Kleser*, a 15-year-old was charged in adult court with first-degree intentional homicide. *Kleser*, 2010 WI 88, ¶2. The defendant waived his right to a preliminary examination. *Id.* The pertinent jurisdictional issue in *Kleser* was the law governing the "reverse waiver procedure set out in Wis. Stat. § 970.032(2)." *Id.* ¶67.

When explaining and contextualizing the issue presented in *Kleser*, this Court had opportunity to explain the scope and purpose of juvenile's preliminary hearing in adult court. *Id.* ¶¶40-66. As pertinent here, this Court explained:

> Section § 938.183(1)(am) includes a juvenile "who is alleged to have attempted or committed a violation of s. 940.01." Significantly, Wis. Stat. § 940.01(2) spells out mitigating circumstances. These are affirmative defenses "which mitigate the offense to 2nd-degree intentional homicide under § 940.05." Wis. Stat. § 940.01(2). Paragraph (am) also applies to juveniles who allegedly commit a violation of Wis. Stat. § 940.02 (first-degree reckless homicide) or a violation of § 940.05 (second-degree intentional homicide).
>
> The problem for the state is that if the court must find probable cause for the specific offense charged in the complaint, the defendant has a strong incentive and should have the right to attempt to negate that specific offense during the preliminary examination—to prevent the state from prevailing on the specific offense charged, or possibly, to deprive the criminal court of its "exclusive original jurisdiction."
>
> Two examples will illustrate the point. In this case, the State charged Kleser with a violation of § 940.01(1), first-degree

> intentional homicide. Kleser waived his preliminary examination. *If he had not waived his preliminary examination, he might have tried to introduce evidence of mitigating circumstances to move the charge from a violation of § 940.01(1) to a violation of § 940.05.*
>
> In a preliminary examination under Wis. Stat. § 970.032(1), a defendant should be able to introduce evidence in an effort to get the charge reduced. Correspondingly, the state should be able to amend the complaint to reflect the evidence adduced, if it desires to do so, rather than lose jurisdiction because it has failed to establish probable cause of "the violation" charged. *See* Wis. Stat. § 971.29(1).
>
> . . .
>
> The point is that because the preliminary examination under Wis. Stat. § 970.032(1) is quite different from the preliminary examination under § 970.03, *the defendant must be given some latitude in attacking the specific offense charged if a successful attack would alter the crime charged or negate the exclusive original jurisdiction of the criminal court.*

Id. ¶¶59-64 (emphasis added). The above quote is a long walk, but it is necessary to contextualize the emphasized text.

Four years later, in *Toliver*, this Court was again confronted with an adult court jurisdiction issue involving a juvenile. 2014 WI 85, ¶7. This time, the dispute was whether the circuit court made the particularized probable cause finding required by the juvenile preliminary hearing statute, Wis. Stat. § 970.32(1). *Id*.

As in *Kleser*, this Court again suggested that mitigating evidence can deprive the adult criminal court of jurisdiction it would otherwise have, but for the mitigating evidence:

> *This might be a different case if Toliver had introduced evidence of mitigating circumstances to support a charge that was not consistent with the exclusive original jurisdiction of the adult court.* Toliver had a right and "a strong incentive" to offer evidence "to negate that specific offense during the preliminary examination." *Kleser*, 328 Wis.2d 42, ¶60, 786

> N.W.2d 144. He also had the right to request a specific probable cause finding or discharge of the juvenile. Had he done any of these things, it would be difficult to say that Judge Constantine found probable cause for attempted first-degree intentional homicide without saying more. This would be a different case if the judge had specifically stated that he did not find probable cause to believe Toliver committed attempted first-degree intentional homicide. However, in the absence of any mitigating evidence or finding of lack of probable cause, we conclude that the circuit court's probable cause determination related to the felony charged and that the court's finding complied with WIS. STAT. § 970.032.

Id. ¶34 (emphasis added).

In her briefing to the court of appeals, Geyser relied extensively on both *Kleser* and *Toliver*. Her brief argued that the language and logical consequence of the principles that this Court explained in *Kleser* and *Toliver* meant that mitigating evidence presented during a juvenile's preliminary hearing in adult court can deny the adult court of jurisdiction.

The court of appeals was not persuaded. *Geyser*, 2018AP1897, ¶¶20-39; (P-Ap 9-19). It concluded that once the circuit court determines that probable cause exists that a juvenile defendant has committed one of the enumerated offenses, the adult court retains jurisdiction over the case. *Id.* According to the court of appeals, mitigating evidence presented during the preliminary hearing simply does not factor into this analysis. *See, e.g.*, *id.* ¶26; (P-Ap 11-12).

Notwithstanding the court of appeals decision, Geyser maintains that a consequence of *Kleser* and *Toliver* is that mitigating evidence presented during a preliminary hearing can deprive the adult court of jurisdiction when such evidence knocks the charge down from one of the enumerated offenses in Wis. Stat. § 970.032(1) to a lesser offense. In its decision, the court of appeals either dismissed or ignored the key language

from *Kleser* and *Toliver* quoted above. Insofar as the court of appeals failed to apply the reasoning of *Kleser* and *Toliver*, its decision conflicts with multiple decision from this Court and warrants review. *See* Wis. Stat. § (Rule) 809.62(1r)(d).

What is more, to the extent that either *Kleser* or *Toliver* leave room for doubt about the import and proper procedure when mitigating evidence is presented during a juvenile's preliminary hearing in adult court, a decision from this Court is needed to resolve that ambiguity. *See* Wis. Stat. § (Rule) 809.62(1r)(c) . Specifically, if the court of appeals decision were to stand unclarified, its rationale raises an important question: what exactly is the purpose of presenting mitigating evidence at a juvenile's preliminary hearing, if, as the court of appeals concluded in Geyser's case, the State need only establish the existence of probable cause for an enumerated crime? Mitigation is only ever relevant when the State can prove, at the very least, that probable cause exists for the underlying predicate offense. A juvenile defendant is only going to introduce mitigation evidence when probable cause exists for the underlying offense. Otherwise, the case would simply be dismissed altogether for lack of proof.

The court of appeals' decision in Geyser's case creates a rule that mitigation evidence does not matter at a juvenile's preliminary hearing once probable cause exists that would otherwise necessitate introduction of mitigation evidence. But, as explained above, that is not what *Kleser* and *Toliver* said. *See Kleser*, 2010 WI 88, ¶¶59-64, *Toliver*, 2014 WI 85, ¶34. The court of appeals decision has no place for mitigation evidence at all. And, it raises the obvious question: if mitigation evidence does not matter, then why did *Kleser* and *Toliver* bring up the subject at all?

Finally, it is worth reemphasizing that this case presents a clean factual vehicle for the Court's review. Geyser offered extensive unrefuted mitigating evidence, and the circuit court made corresponding factual findings in Geyser's favor. That makes the resolution of the underlying jurisdictional issue a matter of pure law, devoid of factual ambiguities that might otherwise muddy the waters. *See* Wis. Stat. § (Rule) 809.62(1r)(c)3.

In short, the court of appeals opinion effectively nullifies entire sections of both *Kleser* and *Toliver*, creating a conflict with this Court's precedent. And to the extent that this Court might conclude that there is no conflict, review is otherwise warranted to clarify the scope of *Kleser* and *Toliver* and their interaction with the juvenile preliminary hearing statute. Geyser respectfully requests that the Court grant review to address this issue.

II. Reviewing Geyser's case will give this Court the opportunity to clarify if and how the harmless error standard should be applied to constitutional errors that precede a defendant's guilty plea.

The court of appeals rejected Geyser's constitutional challenge to her statement not because it lacked merit, but rather because the court decided that any error would be harmless. *Geyser*, 2018AP1897, ¶40; (P-Ap 19). In reaching that decision, the court of appeals relied on *State v. Armstrong*, 223 Wis. 2d 331, 588 N.W.2d 606 (1999), for the proposition that the harmless error test can be applied to a *Miranda* violation following a guilty plea. *Id.* ¶¶40-41 n.7 & n.8; (P-Ap 19-20). But there is an important caveat to *Armstrong* that needs revisiting: it got wrong the test for deciding whether a federal constitutional error was harmless.

When talking about the United States Supreme Court's harmless error test, *Armstrong* explained that the Court had "set forth the harmless error test in *Strickland*

v. Washington, 466 U.S. 668 . . . (1984)." 223 Wis. 2d at 368-69, 588 N.W.2d 606. According to *Armstrong*, the Supreme Court's test for harmless error is whether "'there is a reasonable probability that, but for . . . [the] errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 694-95). *Armstrong* then noted that "[t]his Court [had] adopted *Strickland*'s harmless error test in *State v. Dyess*, 124 Wis. 2d 525, 544-45, 370 N.W.2d 222 (1985)," and accordingly assessed harmlessness as whether a "reasonable possibility [of] a different result" existed. *Id.* at 370.

But the adoption of *Strickland* prejudice as the test for harmless error was wrongly done. The United States Supreme Court has before noted that *Strickland* prejudice is not harmless error. *See Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 (1993) (distinguishing question of harmless error from *Strickland* prejudice), *Lafler v. Cooper*, 566 U.S. 156, 178 n.1 (2012) (Scalia, J., dissenting) (same); *see also* John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating* Bagley *Materiality*, Strickland *Prejudice*, *and Cumulative Harmless Error*, 95 J. Crim. L. & Criminology 1153, 1165-67 & n.39 (2005) (*Strickland* "reject[ed] harmless-error and newly-discovered-evidence prejudice standards"). Indeed, there is a difference between harmless error and prejudice. Harmless error requires the State to disprove the error's contribution to the outcome of the proceeding. *Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988). Prejudice necessitates a defendant's proof of a reasonable probability of a different result but for the error. *Strickland*, 466 U.S. at 694. That is a distinction with a difference: the tests not only burden different parties with proof, but they also require proof of different things.

Indeed, "[t]he Supreme Court has reinforced . . . over and over" that proving an error harmless necessitates that the State prove "'"beyond a reasonable doubt that the error complained of did not contribute to the'"" outcome of the proceeding. *Jensen v. Clements*, 800

F.3d 892, 902 (7th Cir. 2015) (quoting *Satterwhite*, 486 U.S. at 258-59 (quoting *Chapman v. California*, 386 U.S.18, 24 (1967))). The "harmlessness standard" requires the reviewing court to "'be able to declare a belief that [the error] was harmless *beyond a reasonable doubt*.'" *Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015) (quoting *Chapman*, 386 U.S. at 24) (emphasis and alteration added).

Insofar as *Armstrong* applied a harmless error test inconsistent with the one clearly established by well-established Supreme Court law, its reasoning is infirm, and this Court should accept review of Geyser's case to address that infirmity. Wis. Stat. § (Rule) 809.62(1r)(d).

The court of appeals in Geyser also pointed to two other cases dealing with harmlessness following a defendant's guilty plea: *State v. Semrau*, 2000 WI App 54, ¶¶21-22, 233 Wis. 2d 508, 608 N.W.2d 376, and *State v. Rockette*, 2005 WI App 205, ¶25, 287 Wis. 2d 257, 704 N.W.2d 382. *Geyser*, 2018AP1897-CR, ¶¶40, 41 n.7 & n.8; (P-Ap 19-20). Those cases offer different articulations of the applicable harmless error test.

Semrau quoted and followed *Armstrong* and *Dyess*: "The test for harmless error is 'whether there is a reasonable possibility that the error contributed to the conviction.'" 2000 WI App 54, ¶21 (quoting *Dyess,* 124 Wis. 2d at 543, 370 N.W.2d 222). *Rockette*, however, expressly broke with *Semrau*'s "reasonable possibility" standard, and instead followed this Court's articulation of the "harmless error rule for constitutional error" occurring outside of the plea context. 2005 WI App 205, ¶26 (*citing State v. Hale,* 2005 WI 7, 277 Wis. 2d 593, 691 N.W.2d 637). *Hale* was a trial case not a plea case, and in those circumstances this Court assessed harmlessness based on the well-established *Chapman* test: "An error is harmless if the beneficiary of the error proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Hale*, 2005 WI 7, ¶¶9, 60 (quoting *Chapman*, 386 U.S. at 24).

Because of the discrepancy between the harmless error test articulated in *Semrau* and *Rockette*, the court of appeals in Geyser's case noted that deciding harmless error following a guilty plea "is an area of the law . . . in which the bench, bar and public could benefit from a clear and definitive articulation from [this] Court." This Court should review Geyser's case and provide that clarity. *Geyser*, 2018AP1897, ¶41 n.8; (P-Ap 20). Review is thus appropriate to clarify which test is the controlling one. Wis. Stat. § (Rule) 809.62(1r)(c)3.

In addition to clarifying whether the *Armstrong/Semrau* or *Chapman/Hale/Rockette* harmless error test is the correct one to apply following a guilty plea, this Court's review should also assess whether the harmless error test applies at all. The United States Supreme Court has before "rejected" application of the *Chapman* harmless error test under the very circumstances present in Geyser's case. *See Berkemer v. McCarty,* 468 U.S. 420, 444 (1984). *Berkemer* recognized that a guilty plea following the denial of suppression motion creates "a procedural posture that makes the use of harmless-error analysis especially difficult." *Id.* A guilty plea deprives the court of "a complete record of a trial and the parties' contentions regarding the relative importance of each portion of the evidence presented." *Id.* "Without the benefit of such a record," *Berkemer* "decline[d] to rule that the trial court's refusal to suppress [the defendant]'s postarrest statements 'was harmless beyond a reasonable doubt.'" *Id.* at 444-45 (quoting *Chapman*, 386 U.S. at 24).

The court of appeals decision in Geyser's case did not address or even mention *Berkemer*. Nor did *Semrau* or *Rockette*. *See Semrau*, 2000 WI App 54, ¶¶21-26, *Rockette*, 2005 WI App 205, ¶¶ 25-33. Interestingly, this Court mentioned *Berkemer* in a footnote in *Armstrong*, did so for a proposition unrelated to harmless error. 223 Wis. 2d at 348 n.20. When asked on reconsideration in *Armstrong* not to break with its own precedent and apply harmless

error after a guilty plea, this Court omitted any mention of *Berkemer*. *See State v. Armstrong*, 225 Wis. 2d 121, 591 N.W.2d 604 (1999). However, *Berkemer* constitutes extant precedent, which this Court should analyze when deciding the harmless error question. Wis. Stat. § (Rule) 809.62(1r)(d).

Review of Geyser's case is thus appropriate to provide clarity regarding how and whether to apply the harmless error test to constitutional errors that precede a defendant's guilt plea.

CONCLUSION

For the aforementioned reasons, Geyser respectfully requests that this Court grant this petition and docket her case for review.

Dated this 11th day of September, 2020.

PINIX LAW, LLC
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CERTIFICATION

I certify that this petition conforms to the rules contained in Section 809.19(8)(b) and (c) for a petition 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 petition is 5,390 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this petition, excluding the appendix, if any,

which complies with the requirements of Section 809.19(12).

I further certify that this electronic petition is identical in content and format to the printed form of the petition filed as of this date. A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 11th day of September, 2020.

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Attorneys for Petitioner Morgan E. Geyser

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CERTIFICATION OF APPENDIX CONTENT

I hereby certify that filed with this petition, either as a separate document or as a part of this petition, 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 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 11th day of September, 2020.

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