STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2024AP440-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

A.M.N.,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUE PRESENTED

This ultimate issue in this case is whether the undisputed violation of Aiden's[1] statutory right to appear in person for his contested competency hearing was harmless. Given a contradiction in Wisconsin's harmless error doctrine, review is necessary and appropriate to address this issue. The issue presented for review is:

Whether, pursuant to *State v. Dyess*[2] *and State v. Mayo,*[3] the beneficiary of an error has the burden to establish that an error was harmless beyond a reasonable doubt, or whether, pursuant to Wis. Stat. § 805.18 and *State v. Harvey,*[4] a reviewing court is obligated to affirm, regardless of the position or

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[1] Pursuant to Wis. Stat. § (Rule) 809.109, A.M.N.'s appeal from a Wis. Stat. § 971.14 order is confidential and, as did the court of appeals, the petition refers to A.M.N. by the pseudonym "Aiden."

[2] *State v. Dyess*, 124 Wis. 2d 525, 545, n.11, 370 N.W.2d 222 (1985) ("In the context of trial court error, such as is present here, the burden of proof is on the beneficiary of the error, the state, to establish the error was not prejudicial.").

[3] *State v. Mayo*, 2007 WI 78, ¶47, 301 Wis. 2d 642, 734 N.W.2d 115.

[4] *State v. Harvey*, 2002 WI 93, ¶47, n.12, 254 Wis. 2d 442, 647 N.W.2d 189 (noting that the state never argued the error was harmless but stating that "[t]he harmless error rule, however, is an injunction on the courts, which, if applicable, the courts are required to address regardless of whether the parties do.").

arguments from the parties, if the reviewing court determines the error was harmless?

On appeal, the state conceded that Aiden's statutory right to appear was violated but argued that the statutory violation did not amount to a violation of Aiden's constitutional right to appear. While acknowledging the state "bears the burden of proving beyond a reasonable doubt that the error complained of" was harmless, the court affirmed, explaining that § 805.18 is a mandate on courts to *sua sponte* determine whether an error was harmless. *See State v. A.M.N.*, No. 2024AP440-CR, unpublished slip op. ¶¶20-21, n.11 (WI App Mar. 4, 2025) (Pet. App. 3-14).

This Court should accept review to provide guidance to lower courts regarding the application of the harmless error rule when the beneficiary of an error both concedes error and fails to sufficiently develop or otherwise meet its burden to prove beyond a reasonable doubt that the error was harmless.

CRITERIA SUPPORTING REVIEW

If the harmless error rule is in fact an "injunction" on the courts to *sua sponte* disregard any error the court determines to be harmless, then a decision from this Court is necessary to develop, clarify or harmonize the law. *See* Wis. Stat. § (Rule) 809.62(1r)(c)2. and 3. Such a rule is incompatible with clear language in the caselaw that places a burden on the beneficiary of the error to establish harmlessness beyond a reasonable doubt.

Moreover, a rule that, on its face, places a heavy burden on the beneficiary of an error, but simultaneously mandates reviewing courts to apply the rule regardless of input from the parties, unfairly places appellants in an untenable position. Where an appellant raises a claim of reversible error on direct appeal, must the appellant preemptively seek to rebut harmless error in their brief-in-chief? If the respondent fails to sufficiently raise harmless error in its respondent's brief, must the appellant nevertheless raise and seek to rebut harmless error on reply? And, as occurred in this case, if the court of appeals determines a conceded error was harmless *sua sponte*, is a motion to reconsider a sufficient means to protect the integrity of the adversarial process?

As will be further argued below, this Court should accept review and clarify (1) that the burden is on the beneficiary of an error to prove the error was harmless beyond a reasonable doubt and (2) that a beneficiary of an error may forfeit a harmless error defense by failing to raise or sufficiently develop the argument. While "[t]he ultimate decision regarding harmless error is the court's, [] a fundamental premise of our adversary system is that advocates will present useful information and argument that a court might not uncover." *State v. Harvey*, 254 Wis. 2d 442, ¶70 (Abrahamson, C.J., dissenting). In any case, guidance and clarity is necessary from this Court.

STATEMENT OF THE CASE AND FACTS

On October 24, 2023, the state charged Aiden with two misdemeanors. (2:1). At Aiden's initial bond hearing, the circuit court, *sua sponte*, entered an order for a competency evaluation. (6; 25:4). Pursuant to that order, Dr. Brandon Reintjes conducted a competency evaluation and submitted a report to the court. (10). Dr. Reintjes' report noted that Aiden exercised his right to not answer many questions related to his case and that he declined to participate in substantial portions of the examination. (10:3-6). The doctor relied on available records to conclude that Aiden "lacks substantial mental capacity to understand the proceedings and assist in his own defense but the attainment of competency is likely within the remaining commitment period." (10:6).

On November 29, 2023, the circuit court presided over a status conference to ensure that Aiden could obtain counsel. (23:2). Aiden appeared by videoconferencing. (23:2). Aiden told the court, "I don't approve of any type of Zoom conference as a day in court. It's not acceptable to me." (23:3). The court replied, "Okay. Well, it's acceptable – it's acceptable to the Court, so we're going to proceed by Zoom today." (23:3). The court scheduled a competency hearing and indicated it would contact the public defender's office to obtain counsel for Aiden. (23:4).

On December 19, 2023, Aiden appeared for his competency hearing by videoconferencing. (19:3). His recently appointed counsel and the prosecutor

appeared with the judge in the courtroom. (19:3). Aiden objected when the court asked whether he agreed with Dr. Reintjes' opinion that he was not competent to proceed. (19:4-5).

Then, the court asked "And so, you agree that you're asking the doctor to give testimony today because you disagree with what's in the report, correct?" (19:5). Aiden replied, "So, for – for testimony, I would like to be there in person because I believe I have the right to confront my witnesses in person." (19:5). The court responded, "[t]he Court's going to deny that request. You – you are able to appear via the videoconference, so I'm going to continue that." (19:5). Aiden then asked the court, "So, is this a trial?" (19:5). The court replied, "It's not a trial. . . . It's a hearing to determine the status of competency." (19:5).

With this explanation from the court, Aiden renewed his request to appear in person, citing his confrontation right. (19:6). Specifically, he said, "I believe it's a constitutional right to be able to confront my witness, so my constitutional rights are being violated with your denial of [his request to appear in person]." (19:6). The court asked Aiden's defense counsel to weigh-in on Aiden's confrontation argument. (19:6). Defense counsel stated that the right of confrontation was "a separate standard" from that which applies to Aiden's in-person appearance. (19:6; App. 15).

The circuit court then said to Aiden, "[Y]ou're appearing via the Zoom conference. You're going to be

able to hear and see all of the testimony from Dr. Reintjes. You're represented by [defense counsel]. [Defense counsel] will be able to cross-examine." (19:6). The court proceeded with the hearing. (19:6-7).

The first witness was Dr. Reintjes, who testified that he conducted an evaluation of Aiden. (19:7-11). Consistent with his report, he testified that he believed Aiden currently lacked substantial mental capacity to understand the proceedings and assist in his defense. (19:17-18).

During Dr. Reintjes's testimony, Aiden interjected, "Excuse me. I was disconnected from the conference. . . . I missed a lot of what the doctor said." (19:18). Aiden added, "This – this is a problem, and . . . I'm not content with having a Zoom conference as a court date. It's not appropriate." (19:18). The circuit court responded, "And, again, I've already entered my ruling on that, that we're proceeding with the Zoom conference." (19:18).

After Dr. Reintjes testified, neither the state nor Aiden presented any additional evidence. (19:27). After arguments from the parties, the court concluded "that the State has met its burden of proof . . . [and] I am going to find that the defendant is not competent but is likely to become competent within the statutory timeline. So, I – as a result of that, I will suspend the proceedings, and [Aiden] will be committed to the Department for treatment in an inpatient facility." (19:27-33). The court signed an order consistent with its oral ruling. (17).

On appeal, Aiden argued that his statutory right to appear at his contested competency hearing was violated when the circuit court denied his explicit and repeated requests to appear in person. (App. 3-4, 6). The state conceded error. (App. 9). However, the state argued that the statutory violation did not amount to violation of Aiden's constitutional right to appear because his hearing was "fair and just." (App. 9-10, 13). At no point did the state assert that the violation of Aiden's statutory right to appear was "harmless error."

In reply, Aiden argued that he is entitled to a remedy for the conceded violation of his statutory right to be present and that the issue was not moot. (*See* App. 10, 13-14).

The court of appeals agreed that Aiden's statutory right to appear was violated and that the issue was not moot. (App. 3-4, 8). However, the court concluded that "this error was harmless." (App. 3). In doing so the court noted that, "[a]s the beneficiary of the error, the State bears the burden of proving "beyond a reasonable doubt that the error complained of…" was harmless. (App. 12-13). In a footnote, the court recognized that the state "analyzed Aiden's argument as raising a constitutional issue rather than a statutory issue," and did not argue that the statutory violation was "harmless." (App. 13). The court, however, cited Wis. Stat. § 805.18(2), *State v. Harvey*, and *State v. Pinno*, 2014 WI 74, ¶130, 356 Wis. 2d 106, 850 N.W.2d 207 (Abrahamson, C.J., dissenting) for the proposition that "[a] statutory mandate serves as a

requirement on the courts themselves. The courts are obligated to obey those mandates, *sua sponte*, regardless of the parties' positions." (App. 13) (cleaned up).

Thereafter, the court concluded that the violation of Aiden's statutory right to appear was harmless because he nevertheless had a fair and just hearing and that the violation did not affect his substantial rights. (App. 13-14). In a concluding paragraph the court stated that its decision "should not be viewed as an invitation to the circuit courts to disregard parties' statutory rights. Any court that ignores a party's statutory right to be physically present runs the risk of failing to provide a litigant with a fair and just hearing and having its orders vacated." (App. 14).

Aiden moved the court of appeals to reconsider its decision for two reasons. (App. 15-21). First, because the state's failure to assert or argue for the application of harmless error should have been taken as a concession that the error was not harmless. (App. 16-17). Second, Aiden argued that the record does not support a conclusion that the error was harmless beyond a reasonable doubt. (App. 17-20). On April 1, 2025, after the court of appeals ordered the state to respond to Aiden's motion to reconsider, the court entered an order denying Aiden's motion for reconsideration. (App. 22-27).

This petition seeks review by this Court pursuant to Wis. Stat. § (Rule) 809.62(1r)(c)2. and 3.

ARGUMENT

This Court should accept review in order to provide guidance to the bench and bar regarding the application of the harmless error rule when the beneficiary of an error both concedes error and fails to sufficiently raise harmless error.

A. The harmless error dilemma.

The basic dilemma presented in this case is a lack of clarity regarding how litigants and courts should apply the harmless error rule when a beneficiary of an error fails to sufficiently develop an argument that the error was harmless beyond a reasonable doubt. On the one hand, the caselaw is clear that the beneficiary of the error, in this case the state, maintains the burden to prove the error was harmless beyond a reasonable doubt. *See State v. Dyess*, 124 Wis. 2d 525, 545, n.11, 370 N.W.2d 222 (1985); *State v. Mayo*, 2007 WI 78, ¶47, 301 Wis. 2d 642, 734 N.W.2d 115. On the other hand, *State v. Harvey*, 2002 WI 93, ¶47, n.12, 254 Wis. 2d 442, 647 N.W.2d 189 and *State v. Pinno*, 2014 WI 74, ¶130, 356 Wis. 2d 106, 850 N.W.2d 207, refer to Wis. Stat. § 805.18 as a mandate on the courts to *sua sponte* determine whether the error was harmless and to deny relief if the court determines, regardless of the position of the parties, the error was harmless.

Here, the state filed a response brief that conceded error, but argued that the statutory violation of Aiden's right to appear in person did not amount to

a constitutional violation. (App. 9-10, 13). To be fair, the state's constitutional analysis did involve an argument that Aiden's hearing was nevertheless "fair and just," but at no point did the state argue the error was harmless and the state failed to cite any relevant harmless error caselaw or Wis. Stat. § 805.18.

Tasked with filing a reply brief, Aiden addressed the arguments made by the state in its response brief. First, Aiden clarified that he had not argued that his constitutional right to appear was violated. (*See* App. 10). Aiden explained that the caselaw cited by the state was irrelevant to his statutory claim and argued that he was entitled to a remedy for the violation of his statutory right to be present. Second, Aiden replied to the state's argument that the issue was moot. (*See* App. 8). Aiden's reply brief included no harmless error argument because the state effectively conceded or forfeited the argument by not raising harmless error in its respondent's brief.

Even with the benefit of hindsight, it is not clear whether Aiden was required to proactively argue against the court of appeals potential application of the harmless error rule. Appellate practitioners are well aware that "[a]rguments not refuted are deemed admitted." *State v. Alexander*, 2005 WI App 231, ¶15, 287 Wis. 2d 645m 706 N.W.2d 191 (citing *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Practically, it is unreasonable to require litigants to reply to arguments not advanced by the opposing party.

Here, the state explicitly conceded error and mistakenly argued that the statutory violation did not amount to a constitutional violation. (*See* App. 10). Was Aiden required to treat the state's argument as an argument that the statutory violation was harmless because it did not amount to a constitutional violation? Where the burden clearly rested with the state to prove beyond a reasonable doubt that the error was harmless, did the state do enough to require a direct reply by Aiden? If Aiden had focused on Wis. Stat. § 805.18 or *State v. Harvey*, it's possible to question whether Aiden may have chosen to include a harmless error argument in his reply brief. However, it is inherently contrary to standard practice for an appellant to proactively reply to an argument the state failed to explicitly raise or sufficiently develop in a response brief.

The dilemma extends beyond litigants and reaches the reviewing court. Faced with a conceded error and no mention or harmless error, was the court of appeals permitted to deem Aiden's statutory claim conceded? Or, was the court of appeals bound by this Court's mandate in *State v. Harvey* that courts must *sua sponte*, regardless of the position of the parties, apply the harmless error rule prior to reversing a circuit court order? Alternatively, may or should the court of appeals flag the issue and order supplemental briefing if the parties have failed to address the rule?

These questions deserve consideration and lower courts and litigants would benefit from the clarity and guidance only this Court can provide.

B. The violation of Aiden's statutory right to appear in person for his contested competency hearing was not harmless.

If Aiden's petition for review is granted, this Court should reverse because the statutory violation of Aiden's right to be present in court for his contested competency hearing violated his substantial rights, and there is at least a reasonable probability that the outcome of the proceeding would have been different.

While it is impossible to know what would have happened had Aiden not appeared by video from a mental health institution for his competency hearing, the record reveals multiple reasons to conclude that there is a reasonable probability that Aiden would not have been found incompetent to proceed had he been able to appear in person.

First, by forcing Aiden to appear by video, the court physically separated Aiden from his recently appointed attorney. (13). Aiden's attorney was appointed on December 18, 2023, and the competency hearing took place on December 19, 2023. Aiden's attorney informed the court that he spoke with Aiden on December 18, 2023, and that Aiden "wishes to have evidence presented today from the doctor." (19:3). After Aiden confirmed that he objected to a finding that he was incompetent to proceed, he reasserted his right to appear in person and explained that he believed he had a right to confront "my witnesses in person." (19:4-5).

Thereafter, the record shows that throughout the hearing Aiden raised objections on his own, at least in part, because he was not sitting next to an attorney with whom he could effectively communicate with. (*See e.g.* 19:4-6, 10, 14, 16, 20). Further, after defense counsel argued that the state failed to present clear and convincing evidence that Aiden was not competent (19:28-29), Aiden offered his own response to the doctor's testimony and opinion that he was not competent (19:30-31). Aiden's physical separation from his attorney appears to have impacted Aiden's ability to effectively communicate with counsel and to substantively contest the evidence that he was not competent to proceed.

Second, a significant basis for Dr. Reintjes' opinion that Aiden was not competent to proceed was based on Aiden's choice to remain silent during his examination and to not answer many of the doctor's questions related to his case. (*See* 19:11-15, 17-20; 10:3-7). During the hearing, Aiden explained that he was "informed of my right to remain silent because things can be used against me in court, things I say can use -- be used against me." (19:30). He further explained that "I was in a bad I was in a worse, let's say, state of mind because I believe my civil and constitutional rights were being violated, still are clearly being violated, so that puts me in a difference of opinion." (19:30-31). The record is clear that at the time of the competency evaluation, and at the time of Dr. Reintjes' examination and report, Aiden was not represented by counsel and had not yet had the opportunity to speak with counsel about the

competency examination. (*See* 6; 12; 13; 24). In February 2024, less than two months later, Aiden was reevaluated and Dr. Griffith filed a report demonstrating that Aiden was competent to proceed. (36). The most significant difference between Dr. Reintjes' evaluation and Dr. Griffith's was that Aiden cooperated with Dr. Griffith's examination and he demonstrated by his responses to the doctor's questions that he was competent to proceed. (*See* 36:2-3, 8-9 *contra* 10:3-6).

Had Aiden been physically present in court on December 19, 2023, there is at least a reasonable probability that his attorney could have more thoroughly rebutted Dr. Reintjes' opinion or called Aiden to the stand to testify about his choice to remain mostly silent during Dr. Reintjes' examination. There is at least a reasonable probability that the court's denial of Aiden's repeated requests to appear in person affected the outcome of Aiden's competency hearing.

Third, the record reveals that Aiden was "disconnected from the conference" and that he "missed a lot of what [Dr. Reintjes] said. (19:18). The circuit court confirmed that Aiden was disconnected but then downplayed the scope of the issue by stating that Aiden "*may* have missed *part* of Dr. Reintjes' *last answer*." (19:18-19) (emphasis added). The record is unclear about how long Aiden was disconnected from the competency hearing and how much of Dr. Reintjes' testimony he missed. Had he been physically present, this would not have been an issue. Neither the state nor a reviewing court can conclude that Aiden's

disconnection from the "conference" did not impact the outcome of the proceeding.

CONCLUSION

For the reasons set forth above, Aiden respectfully asks this Court to grant review, resolve the harmless error dilemma presented in this case, reverse the court of appeals' decision, and remand this case with directions to vacate the order finding Aiden incompetent to proceed.

Dated this 1st day of May, 2025.

Respectfully submitted,

Electronically signed by Jeremy A. Newman
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 3,510 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules 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 or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of 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 1st day of May, 2025.

Signed:
Electronically signed by
Jeremy A. Newman
JEREMY A. NEWMAN
Assistant State Public Defender