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**SUPREME COURT**

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2024AP001424-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHARLES WILLIAMS,

Defendant-Appellant-Petitioner.

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PETITION FOR REVIEW

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## ISSUES PRESENTED

1. Does harmless error apply to claims that a defendant did not validly waive their statutory right to be present in the courtroom when entering a plea?

The circuit court did not address this issue, instead finding that Mr. Williams validly waived his right to an in-person appearance for his plea hearing.

The court of appeals assumed Mr. Williams' waiver was invalid but found the error harmless.

2. If harmless error applies, what is the substantial right at issue and what does it mean for the error to be harmless?

The circuit court did not address this issue.

The court of appeals held that Mr. Williams' invalid waiver was harmless because he would have entered his plea had he been present in-person.<sup>1</sup>

3. Does the current harmless error jurisprudence conflict with the party presentation principle and lead to unjust results?

The circuit court did not address this issue.

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<sup>1</sup> While not meeting the criteria for review, the court of appeals impermissibly shifted the State's burden to show harmlessness onto Mr. Williams in multiple ways. Op., ¶¶37-42; (App.16-18). If review was granted, Mr. Williams will argue that even if harmless error applies, the State did not meet its burden.

The court of appeals found Mr. Williams would have entered his plea had he been present in-person while the State argued that the error was harmless because his plea was knowing, intelligent, and voluntary.<sup>2</sup>

### CRITERIA FOR REVIEW

Initially driven by necessity during the COVID-19 pandemic and continued out of convenience, videoconferencing continues to become increasingly commonplace in Wisconsin courts. While the use of this technology can be beneficial, courts must be careful to ensure the right to personal appearance is protected due to its “importan[ce] to the actual or perceived fairness of the criminal proceedings.” *State v. Soto*, 2012 WI 93, ¶40, 343 Wis. 2d 43, 817 N.W.2d 848. As such, this Court held waiver of the right is necessary—it cannot be forfeited. *Id.*

What this Court has not addressed is whether a violation of the right to be present can be harmless. As pointed out by the court of appeals, there is no “binding case law considering whether the harmless error rule applies to a violation of a defendant’s right to be present in the courtroom at his or her plea hearing.” Op., ¶29; (App.12). Given the increasing usage of videoconferencing at critical stages, the applicability of the harmless error rule presents a novel question

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<sup>2</sup> Mr. Williams argued the error was not harmless because he would not have maintained his plea, had he known about the invalid waiver claim.

whose resolution will have statewide impact. Wis. Stat. § 809.62(1r)(c)2.

Additionally, this Court has held that a defendant must be present for sentencing, and at no point suggested that such an error could be harmless. *State v. Koopmans*, 210 Wis. 2d 670, 679-80, 563 N.W.2d 528 (1997). The court of appeals only means of distinguishing *Koopmans* was to say no argument was made by the parties in that case that harmless error applied. Op., ¶34. The court of appeals ignored that harmless error “is an injunction on the courts, which, if applicable, the courts are required to address regardless of whether the parties do,” *State v. Harvey*, 2002 WI 93, ¶47 n.12, 254 Wis. 2d 442, 647 N.W.2d 189. Given the language in *Harvey*, the court of appeals’ decision conflicts with the decision in *Koopmans*, warranting review by this Court. Wis. Stat. § 809.62(d).

This case also raises the question of whether this Court’s prior decisions faithfully apply the harmless error doctrine to the plain language of the statute. Specifically, whether an error “affect[s] the substantial rights of the adverse party,” Wis. Stat. § 805.18(1), does not, on its face, equate to whether “the error contributed to the outcome of the action.” *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768. This Court should accept review to address whether the outcome-focused harmless error analysis is consistent with the plain language of the statute and should reexamine the Court’s prior decisions. Wis. Stat. § 809.62(1r)(e).

Review is also warranted for this Court to clarify—if harmless error applies—what the appropriate analysis is. As noted, there is no case law stating that harmless error applies, as such there is no guidance as to the appropriate analysis. Here, the State argued that it needed to show that Mr. Williams’ plea was knowing, intelligent, and voluntary. Resp. Br. at 17. Mr. Williams argued that the State needed to show that Mr. Williams would have maintained his plea had he been aware of the ability to withdraw it. Reply Br. at 8. The court of appeals instead analyzed whether the State proved that Mr. Williams would have entered his plea if he had appeared in person. Op., ¶36; (App.15). Given the inability for either party or the court of appeals to agree on the proper analysis, this Court should grant review to provide the necessary guidance. Wis. Stat. §§ 809.62(1r)(c)1.-3.

Finally, the confusion regarding the proper analysis for the harmless error issue also demonstrates the jurisprudential conflict between the harmless error rule and the party presentation principle. Appellate courts “do not step out of [their] neutral role to develop or construct arguments for parties, it is up to them to make their case.” *SEIU, Local 1 v. Vos*, 2020 WI 67, ¶24, 393 Wis. 2d 38, 946 N.W.2d 35. Despite this, courts are required to address harmless error, even if not raised by the parties and without benefitting from their briefing. *Harvey*, 254 Wis. 2d 442, ¶47 n.12. The conflict is worsened when considering that the beneficiary of the error must prove harmlessness beyond a reasonable doubt.

It is questionable how a party can meet the highest burden in our legal system without arguing the issue at all. The jurisprudence between party presentation and harmless error directly conflict, and review is warranted for this Court to address how the conflict should be handled. Wis. Stat. §§ 809.62(1r)(c)2.-3.<sup>3</sup>

### STATEMENT OF FACTS AND THE CASE

This case is an appeal from an order denying Mr. Williams postconviction relief. (R.173; App.20).<sup>4</sup> Mr. Williams entered a plea of no contest to one count of second-degree sexual assault of a child in October 2022 and was sentenced two months later. (R.103:3; App.32; R.117).

Mr. Williams was charged in July 2020 and held on a \$10,000 cash bond throughout these proceedings. (R.2; R.6; R.122). Counsel was eventually appointed and immediately raised competency. (R.10; 12). Mr. Williams was found to be incompetent and committed to the custody of DHS on April 7, 2021. (R.33). Mr. Williams was found competent on October 13, 2021. (R.127:2-3).

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<sup>3</sup> A similar issue regarding the language in *Harvey* has been presented in another petition pending before this Court, indicating the need to revisit the application of the doctrine. Petition for Review, *State v. A.M.N.*, No. 2024AP000440-CR, 11-13 (petition for review pending); (App.78-80).

<sup>4</sup> A second order denying another claim not raised on appeal was issued later. (R.184).

On January 3, 2022, trial counsel filed a plea questionnaire with the court. (R.57). At a hearing on January 10<sup>th</sup>, trial counsel noted the plea questionnaire and a waiver of right to personal appearance form<sup>5</sup> had been filed on October 28, 2021. (R.133:2; R.51; App.41). Mr. Williams appeared from the jail while all other parties were in-person. (R.133:2). The court noted that it did not “have any of this stuff” and went off the record to print the materials. (R.133:3).

The court asked: “Then, Mr. Williams, you previously indicated that you are waiving your right of personal appearance and are appearing via Zoom. Is that correct?” (R.133:4). Mr. Williams responded “Yeah.” (R.133:4). During the plea hearing Mr. Williams stated he wanted to plead not guilty and go to trial. (R.133:4-5). The court stopped the plea and scheduled a trial date. (R.133:5).

At a February 24<sup>th</sup> final pre-trial, the court asked trial counsel where Mr. Williams was, and counsel replied “[h]e’s in the Brown County Jail.” (R.132:2).<sup>6</sup> The court then seemed to acknowledge Mr. Williams on Zoom.<sup>7</sup>

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<sup>5</sup> Court form CR-295.

<sup>6</sup> All other parties appear to have been in-person.

<sup>7</sup> This is unclear, because the court said “All right. And is he appearing—all right.” The court would say: “Thank you, Mr. Williams” at the end of the hearing, but there was no other acknowledgement of him during the hearing.

On March 21, 2022, trial counsel filed a motion to withdraw. (R.67). At a hearing the next day, trial counsel described Mr. Williams' indecision regarding taking the plea deal and how he had gone back and forth several times. (R.145:3). To this, the court responded:

Well, here's—my proposal would be, Mr. Wingrove, that if you want, I will order a personal appearance. So[,] I'll have him brought from the jail to my courtroom. We'll have the plea questionnaire and the waiver-of-rights form that he's previously filed. You can confer with him, then I'll come out, and he'd be right here. We'll all be together in the same room, and then you can either have confidence that he wishes to proceed or I guess we can address it in a way that we'll all feel comfortable.

(R.145:3). The court then told Mr. Williams "I'm gonna order that you be transported from the jail so that you'll be here with . . . Mr. Wingrove, and then we can take care of this." (R.145:4).

Two days later, the parties, including Mr. Williams, appeared in-person. (R.144:2). At that time, the court ordered a competency examination. (R.144:3-4). The court would again find Mr. Williams competent on June 27, 2022. (R.140:24).

In the interim, at an April 22, 2022 hearing, Mr. Williams again appeared by Zoom from the jail. (R.143:2). Shortly after the hearing started, trial counsel noted "Mr. Williams just joined us," and followed up that "[t]here's a CR-295 on file." (R.143:2).

A similar interaction occurred at the next hearing on May 3, 2022 with counsel stating the CR-295 form was on file. (R.142:2).

At an August 9, 2022 hearing, Mr. Williams appeared in the courtroom. (R.139:2). At that hearing, when scheduling a final pre-trial, trial counsel said “I really would not want to call in[to] a final pretrial [for] something this big. I need to be there in person.” (R.139:4).

Before the final pretrial, Mr. Williams’ attorney filed a letter asking that a plea hearing be scheduled. (R.92). That hearing was scheduled for October 13, 2022, where Mr. Williams and trial counsel both appeared via Zoom. (R.103:2; App.31). Trial counsel again noted “there is a CR-295 on file. It’s document number 51 in the file. I reviewed that on October 22nd, 2021, with Mr. Williams. We did it through a COVID protocol.” (R.103:2; App.31).

Regarding his own Zoom appearance, trial counsel stated that he was positive for COVID-19 and would not be able to go to the courthouse for another six days. (R.103:3; App.32).<sup>8</sup>

After accepting Mr. Williams’ plea, the court “adjudge[d] him guilty of Count 2.” (R.103:7; App.36).

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<sup>8</sup> Counsel had submitted a letter on October 10, 2022 stating that he “was significantly exposed to an individual who has since tested positive for Covid” and asking the court to advise “whether I should wear a mask, appear remotely, or reschedule the hearing.” (R.96).

At the end of the hearing, while scheduling sentencing, the court asked: “And then do you wish this to be in person, Mr. Williams? Do you wanna be brought to the courthouse for this?” Mr. Williams responded “Yeah.” (R.103:8; App.37).

Six days after entering his plea, Mr. Williams, through counsel, filed a motion to withdraw his plea, asserting that he did not know he was waiving his right to a trial, did not understand the charge he was pleading to, and that counsel was ineffective. (R.99). This motion was addressed at a hearing on November 11, 2022 where counsel asked the court to “verify with Mr. Williams that he no longer wants to withdraw his plea.” (R.138:2). The court then asked Mr. Williams how he wished to proceed, and he said, “for sentencing.” (R.138:3). The court then confirmed that Mr. Williams wanted to “withdraw [his] request as it relates to the plea taken.” (R.138:3).

The court eventually sentenced Mr. Williams to 10 years of initial confinement and 6 years of extended supervision. (R.114; App.39-40).

Mr. Williams filed a postconviction motion arguing that he was entitled to plea withdrawal based on the court’s failure to inform him of his right to be personally present for his change-in-plea and for failing to adequately address whether Mr. Williams was waiving his in-person appearance knowingly, intelligently, and voluntarily. (R.154:9-15).<sup>9</sup>

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<sup>9</sup> Mr. Williams also asserted that he did not understand the maximum penalty he faced at the time he entered his plea;

The parties briefed the issues and the court held a hearing in January 2024. (R.154; R.164; R.165). At the hearing, the court denied Mr. Williams' personal appearance claim.<sup>10</sup> In doing so, the circuit court referenced the waiver of personal appearance form. (R.185:3-4; App.23-24; R.51; App.41). The court went on to say "I did address him at one point in the proceedings about whether he wished to be physically present." (R.185:3; App.23). The court further explained that due to the pandemic—which had been going on for nearly a year and a half at the time of the plea<sup>11</sup>—"defendants begged" to do remote plea hearings and it "had hundreds of cases that I am trying desperately to respond to the defendants' pleas to me about moving their cases." (R.185:3-4; App.23-24).

The court stated it would not "find that his plea taken that day, taken by my relying on his executing the—the form and my—my addressing him, was in

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thus, he was entitled to withdraw his plea because it was not made knowingly, voluntarily, and intelligently. (R.154:15-19). That issue was not raised on appeal.

<sup>10</sup> The latter half of the motion would later be denied following an evidentiary hearing in February 2024. (R.184).

<sup>11</sup> The World Health Organization first declared COVID-19 a pandemic on March 11, 2020. <https://www.cdc.gov/museum/timeline/covid19.html>. CDC Museum COVID-19 Timeline (last accessed Dec. 26, 2025). This Court originally suspended in-person court appearances on March 22, 2020. In re the Matter of Remote Hearings During the COVID-19 Pandemic, Issued March 22, 2020, <https://www.wicourts.gov/news/docs/remotehearings.pdf>.

any way defective or in violation of any statutory or constitutional right in the historical context.” (R.185:4; App.24).

Mr. Williams appealed, arguing that he did not waive his right to personal appearance and that the circuit court failed to ascertain whether any waiver was knowing, intelligent, and voluntary. App. Br. at 13-21. In addition to arguing that Mr. Williams waived his in-person appearance, the State argued that the error was harmless because his plea was knowing, intelligent, and voluntary. Resp. Br. at 17-19. Mr. Williams argued in his reply brief that harmless error did not apply and that the State’s analysis on the issue was flawed, regardless. Reply Br. at 6-8. Mr. Williams argued that the State needed to show that Mr. Williams would not have maintained his plea had he known about the inadequate waiver claim. Reply Br. at 8-10.

The court of appeals assumed without deciding that Mr. Williams did not validly waive his right to personal appearance for the plea hearing. Op., ¶2; (App.4).<sup>12</sup> Instead, the court of appeals found that

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<sup>12</sup> If review is granted, Mr. Williams believes the record is sufficient for the Court to find that his waiver was not valid, which it reviews as a matter of law. *Soto*, 343 Wis. 2d 43, ¶14. However, the court of appeals seemed to improperly shift the burden to Mr. Williams to prove that the videoconferencing was not working or that the plea would have happened differently had he appeared in-person. Op., ¶¶37-42 (focusing on what Mr. Williams failed to show, rather than how the State carried its burden); (App.16-18).

harmless error applied and analyzed “whether it is clear beyond a reasonable doubt that Williams would have entered the plea even if he had appeared in person.” Op., ¶13; (App.7).

Ultimately, the court of appeals found that any error was harmless and affirmed the circuit court. Op., ¶43; (App.18).

This petition follows.

## ARGUMENT

### **I. Harmless error should not apply to invalid waivers of the right to be present.**

Harmless error should not apply when a defendant does not validly waive their right to be present. This Court’s decision in *Koopmans* is instructive that the doctrine does not apply. Additionally, applying harmless error creates a right without a remedy.

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In essence, it was fundamentally unfair for the court of appeals to acknowledge there was no authority applying harmless error in this situation and then faulting Mr. Williams for not presenting evidence in the circuit court to rebut the State’s assertion of harmlessness on appeal. If that is the standard this Court adopts and is necessary to decide this appeal, Mr. Williams is entitled to present that evidence on remand.

- A. *Koopmans* is instructive that harmless error does not apply to waiver of the right to personal appearance.

There is no support for the claim that the harmless error rule applies to violations of the defendant's right to be present. *Koopmans*, 210 Wis. 2d 670, is an example of this Court not applying harmless error to a violation of a defendant's right to be present at sentencing under Wis. Stat. § 971.04. *Koopmans* dealt with a defendant who was not present at all for his sentencing hearing. *Id.* at 679-80. At no point did this Court entertain that the defendant's absence might be harmless.

The court of appeals distinguished *Koopmans* by relying on another case, *State v. Peterson*, 220 Wis. 2d 474, 584 N.W.2d 144, 150 (Ct. App. 1998). *Peterson* dealt exclusively with a defendant's right to be present when a court interacts with a jury. *Id.* at 487. Here, the court of appeals relied on *Peterson's* statement that “[n]o argument was made’ before the *Koopmans* court that the circuit court’s ‘error in treating the defendant’s voluntary absence as a waiver was harmless, and the court explicitly did not consider the issue.’” Op., ¶34 (quoting *Peterson*, 220 Wis. 2d at 487); (App.14).

Ironically, in distinguishing *Koopmans*, the court of appeals in both this case and *Peterson* ignored that harmless error is supposedly “an injunction on the courts,” so if it did apply, presumably this Court

would have addressed it.<sup>13</sup> Thus, *Koopmans* stands for the proposition that harmless error does not apply to violations of an individual's statutory right to be present.

*Soto* distinguished *Koopmans* on the issue of whether the statutory right to be present under Wis. Stat. § 971.04 was subject to waiver. 343 Wis. 2d 43, ¶¶41-44. However, this Court has never addressed whether *Koopmans* not applying harmless error stands for the proposition that it does not apply to violations of Wis. Stat. § 971.04(1). The only published decision that Mr. Williams is aware of addressing the issue is *Anderson*, which assumed without deciding that harmless error applied. 374 Wis. 2d 372, ¶56. Review is warranted to clarify the applicability of the harmless error doctrine to cases where individuals' personal appearance rights are violated.

B. Applying harmless error to violations of the right to be present creates a right without a remedy.

Applying harmless error to situations where defendants do not validly waive their right to appear in-person invalidates the right entirely. It has been

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<sup>13</sup> While *Peterson* was decided before *Harvey*, the court of appeals in this case did not try to square the conflicting principles. The court of appeals ignoring this principle when it comes to *Koopmans* and implicitly relying on it in making arguments on behalf of the State, *infra* at 22-26, further suggests the need for clarification by this Court on the issues presented in this petition.

long recognized that “a right without a remedy ceases to be a right at all.” *State Bank of West Pullman v. Pease*, 153 Wis. 9, 139 N.W.767, 768 (1913); *see also Nekoosa-Edward Paper Co. v. News Pub. Co.*, 174 Wis. 107, 182 N.W. 919, 923 (1921) (“The conferring of a right without a remedy is but an empty gift.”); *Jones v. Costigan*, 12 Wis. 677, 681 (1860) (“For it is the boast of the law that there is no right without a remedy.”).

Without the ability to obtain relief from a circuit court’s failure to comply with the colloquy mandated in *Soto*, there is no ability for defendants to effectuate their right to personal appearance when entering a plea. The primary issue with the application of the harmless error test envisioned by the court of appeals is that no defendant will ever be able to show the error was harmless.

Specifically, no court would hold that the defendant would not have entered their plea had they been present in-person. Courts are universally averse to defendants withdrawing guilty or no contest pleas. *See State v. Bentley*, 201 Wis. 2d 303, 316, 548 N.W.2d 50 (1996) (holding that “self-serving” claims that a defendant would not have pled guilty are insufficient to warrant plea withdrawal). A defendant simply stating that they would not have entered their plea had they been present will never suffice.

Mr. Williams cannot envision a reasonable argument as to why a defendant who appeared remotely would not have entered their plea had they

been present in-person. The most reasonable argument Mr. Williams can construct is that due to some failure of the technology, a defendant might not fully hear what is happening in the hearing and therefore misunderstand some aspect of the plea agreement or plea colloquy. *See Op.*, ¶38; (App.16). However, this would be a plea withdrawal claim based on not knowingly, intelligently, and voluntarily entering a plea. *See State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Any claim that a defendant's plea was impacted by faulty technology is just evidence to support the lack of a knowing, intelligent, and voluntary plea.

The decisions in *Soto* and *Anderson* both make clear that a circuit court's failure to engage in a proper colloquy and ensure a knowing, intelligent, and voluntary waiver of the right to in-person appearance results in a manifest injustice and is a standalone claim for relief. *Soto*, 343 Wis. 2d 43, ¶¶40, 46; *Anderson*, 374 Wis. 2d 372, ¶¶29, 59. Grafting the harmless error doctrine onto these claims and having the harm relate to whether the defendant was able to understand the plea converts all right to in-person appearance claims into standard plea withdrawal claims. As such, defendants lose their right to an in-person plea hearing because there is no remedy when the plea colloquy does not suggest the technology was not working.

If harmless error applies to violations of the right to an in-person appearance, this Court's mandate of a colloquy in *Soto* will become little more

than a suggestion that circuit courts are free to disregard. Removing the remedy by applying harmless error eviscerates the right entirely—eroding the actual or perceived fairness of proceedings the Legislature has deemed important enough to protect the right to personal appearance for.

**II. If harmless error applies, the analysis is whether the defendant would have chosen to be present for the hearing, had the court done the proper colloquy.**

If the Court finds that harmless error applies, it still needs to clarify the proper analysis, as neither party nor the court of appeals agreed to the standard. Determining the proper harmless error analysis requires interpreting the harmless error statute. Statutory interpretation is a question this Court reviews *de novo*. *Sowell v. City of Wausau*, 2013 WI 88, ¶19, 351 Wis. 2d 1, 838 N.W.2d 852. “[S]tatutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.” *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (internal quotation omitted).

The lack of agreement below regarding the analysis demonstrates the need to clarify the doctrine, if it does apply. The State argued that it needed to show that Mr. Williams’ plea was knowing, intelligent, and voluntary. Resp. Br. at 17. Mr. Williams argued that the State needed to show that Mr. Williams would have maintained his plea had he been aware of the

ability to withdraw it. Reply Br. at 8.<sup>14</sup> The court of appeals instead analyzed whether the State proved that Mr. Williams would have entered his plea if he had appeared in the courtroom. Op., ¶36; (App.15).

As a threshold matter, Mr. Williams addresses the Court's interpretation of the harmless error doctrine (relied upon by the court of appeals, Op., ¶¶27-28; (App.11-12)) and why it should be reconsidered. The Court's current interpretation of the doctrine is contrary to the plain language of the statute.

The harmless error doctrine has been codified into statutes. The statute reads: "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party." Wis. Stat. § 805.18(1). The language of the statute makes clear that an error must only "affect the substantial right" of the adverse party.

Despite the plain language, this Court has interpreted this language to be outcome determinative. *See, e.g. Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶28, 246 Wis. 2d 1, 629 N.W.2d 768 ("For an error to affect the substantial rights of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue.").

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<sup>14</sup> This was based on the decision in *Anderson*. 374 Wis. 2d 372, ¶58.

An outcome-focused harmless error analysis does not address the circuit court's failure and how it affects Mr. Williams' right to be in-person. The statute focuses on whether a substantial right is affected, not whether the outcome would be different absent the error. Wis. Stat. § 805.18(1). Thus, the analysis involves two inquiries. First, is a substantial right at issue? "Substantial" modifies "right," suggesting that certain rights are more important than others and violations of not substantial rights can be overlooked. Second, was the substantial right affected—either hindered or denied entirely?<sup>15</sup> This analysis focuses only on the questions raised by the statute. There is nothing in the statute focusing on the outcome of a proceeding. This Court should revisit and overturn its decisions to the contrary.

Applying the analysis here, this Court implicitly determined that the right to be present is a substantial right. *Soto*, 343 Wis. 2d 43, ¶40 ("We conclude that a defendant's right to be present in the same courtroom as the presiding judge at the proceedings listed in Wis. Stat. § 971.04(1)(g) is particularly important to the actual or perceived fairness of the criminal proceedings.").

The proper question is not whether Mr. Williams' remote appearance affected his decision to plea, but whether the lack of a colloquy affected his

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<sup>15</sup> Use of the term "adverse party" and reference to "harmless error" indicate some negative effect on the substantial right at issue. Wis. Stat. § 805.18.

right to be in-person. This is further supported by the analysis above as focusing on the outcome erases the right entirely. *Supra* at 16-19.

Additionally, if the reason the right is important enough to require waiver is “the actual or perceived fairness of the criminal proceedings,” *Soto*, 343 Wis. 2d 43, ¶40, then the focus should be on whether a deficient waiver resulted in the appearance of an unfair hearing—*i.e.* a defendant being denied their right to appear in-person. Applying harmless error essentially creates a different test divorced from the original error.

When asked whether he wanted to appear in-person for sentencing, Mr. Williams said he did, (R.103:8; App.37), and the hearing was held in-person. (R.103:8; App.37; 117:1). This is more than sufficient to show that had Mr. Williams been informed of his right to be in-person for his plea hearing, he would have requested to do so. This Court should clarify that the harmless error analysis addresses whether the defendant would have chosen to appear in-person and hold that the lack of waiver was not harmless, vacate Mr. Williams’ conviction, and allow him to withdraw his plea.

**III. Courts addressing harmless error without input from the parties conflicts with the party presentation principle and denies parties an opportunity to be heard.**

The court of appeals analyzed the harmless error doctrine in a way not argued by either party,

depriving Mr. Williams of an opportunity to address the analysis employed by the court of appeals. This Court's prior case law opens the door for courts to step outside their neutral role and argue on behalf of one party—a deeply unfair and untenable outcome.

Appellate courts “do not step out of [their] neutral role to develop or construct arguments for parties, it is up to them to make their case.” *SEIU*, 393 Wis. 2d 38, ¶24. Yet, the court of appeals did exactly that when it applied a harmless error analysis different from the one advocated for by the State. *Compare Op.*, ¶36 (“we must ask . . . whether it is clear beyond a reasonable doubt that Williams would have entered the plea even if he had appeared in person”); (App.15), *with Resp. Br.* at 17 (“the State must show that Williams’s plea was knowing, intelligent, and voluntary”).

The State’s argument was focused entirely on the adequacy of the plea colloquy and indications that Mr. Williams’ was properly entering his plea. *Resp. Br.* at 17-19. The court of appeals’ opinion discussed whether the videoconferencing worked, that Mr. Williams did not allege he did not understand his plea, that he withdrew his motion to withdraw his plea, and that he did not make a showing why the hearing would have been different had he been in-person. *Op.*, ¶¶37-42; (App.16-18).

The court of appeals ignored entirely the arguments by the State and still found that the State carried its burden to prove harmlessness beyond a

reasonable doubt. The party presentation principle should have prevented the court of appeals from developing the State's argument for it, and the court should have ignored the argument entirely for improperly stating the law. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (1992). If the court of appeals believed that because the issue of whether harmless error applied was unsettled and believed the analysis it later adopted was proper, it should have asked the parties for supplemental briefing under that framework.

While not cited by the court of appeals, the only ability for it to step outside its neutral role and develop the State's argument for it (and deny Mr. Williams an opportunity to respond) was to follow this Court's decision in *Harvey* where the Court held that "[t]he harmless error rule [] is an injunction on the courts, which, if applicable, the courts are required to address regardless of whether the parties do." 254 Wis. 2d 442, ¶47 n.12. This view of the harmless error rule is antithetical to the party presentation principle and leads to unjust results.

Here, Mr. Williams attempted to respond to the State's harmless error argument by relying on the court of appeals' prior analysis in *Anderson*. Reply Br. at 8. Specifically, *Anderson* noted that it could not find the error harmless in that case because Anderson would not have reaffirmed his plea during sentencing had he known of a legal basis for withdrawing his plea. 374 Wis. 2d 372, ¶¶56-58. There was no discussion of

what would have happened at the plea hearing had Anderson been present in-person.

The court of appeals' response was to fault Mr. Williams for relying on *Anderson* while misrepresenting the analysis in that case. Op., ¶36 n.6; (App.15).<sup>16</sup> Furthering the appearance of partiality, the court of appeals made no mention of the State's incorrect legal analysis.

*Harvey's* statement that harmless error is to be addressed by court's even if not addressed by the parties requires courts to abandon neutrality. It requires courts to essentially take on the highest burden our system creates on behalf of one party. It does this while not giving the opposing party an opportunity to respond. The procedure reeks of unfairness.

The appearance of partiality to one party is heightened given the reality of when the independent analysis is invoked—when the court believes the error is harmless. By only invoking the doctrine selectively when “applicable,” *Harvey*, 254 Wis. 2d 442, ¶47 n.12, the result is a seemingly arbitrary application showing

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<sup>16</sup> The court of appeals asserted: “[a]ssuming the harmless error rule applied, we then considered whether it was clear beyond a reasonable doubt that the defendant would have pled guilty even if he had appeared in person.” Op., ¶36 n.6; (App.15). This was not the analysis in *Anderson*. 374 Wis. 2d 372, ¶¶56-57.

favorability to one party.<sup>17</sup> The application of harmless error in this way erodes confidence in the independence of the judiciary by forcing courts to act as advocate for one party without giving the other a chance to respond.

The language in *Harvey* is so damaging to the party presentation principle that the State relies on it to argue that this Court should accept a case for review because the lower courts did not conduct the harmless error analysis that the State never raised. *See* Petition for Review, *State v. John R. Phelan*, 2024AP000777-CR, 22-25 (petition for review pending); (App.63-66). There is no reason the harmless error doctrine cannot coexist with the party presentation principle and forfeiture doctrines. Beneficiaries of errors cannot expect courts to argue for them when they bear the burden of proving harmlessness beyond a reasonable doubt.

Rather than encouraging courts to act as advocate, this Court should grant review, overrule the language from *Harvey* that conflicts with the party presentation principle, and hold that harmless error analysis is limited to arguments presented by the parties.

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<sup>17</sup> It is also unknowable whether courts question harmlessness in every case and only include the analysis when they believe the error harmless, or, more concerningly, if whether to apply or not apply harmless error is based on the potential outcome.

## CONCLUSION

This case presents numerous important issues related to the harmless error doctrine that warrant clarification and/or reconsideration.

This Court should grant review and reverse.

Dated this 30th day of December, 2025.

Respectfully submitted,

*Electronically signed by Lucas Swank*

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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 5,445 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 30th day of December, 2025.

Signed:

*Electronically signed by Lucas Swank*

LUCAS SWANK

Assistant State Public Defender