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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2013AP000127 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAHEEM MOORE,

Defendant-Appellant-Petitioner.

On Appeal from the Judgment of Conviction Entered
in Milwaukee County Circuit Court, the
Honorable David L. Borowski, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

I. Did the detective's decision to turn off the recorder violate the mandate of ***In re Jerrell C.J.*** and Wis. Stat. § 938.195, thus requiring suppression of Raheem's unrecorded statement?

The circuit court interpreted Raheem's colloquy with a detective as a "refusal" to cooperate with recording under Wis. Stat. § 938.31(3)(c)1. Therefore it denied the suppression motion.

The majority of the court of appeals held that although Raheem never expressly stated that he refused to talk if the recorder was left on, his words and actions constituted a refusal. The concurrence concluded that Raheem's verbal expression of discomfort with recording did not constitute a refusal.

II. When 15-year-old Raheem Moore gave an unrecorded inculpatory statement to a Milwaukee Police Detective eleven hours after he was arrested, held incommunicado and interrogated by two teams of detectives who did not call his parents and who used numerous psychological techniques to induce his confession, was his statement voluntary?

The trial court ruled: The statement was voluntary.

The court of appeals held: The statement was voluntary.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

In a case important enough to merit this court's review, oral argument and publication are warranted.

STATEMENT OF THE CASE

Fifteen-year-old Raheem Moore was charged with first degree reckless homicide, in violation of Wis. Stat. § 940.02(1). According to the complaint, James W. Parish was shot during the course of a robbery by Raynard Franklin and Raheem on October 8, 2008. (2). The court made a decision to retain jurisdiction pursuant to Wis. Stat. § 970.032(2). (88:70-83). Raheem did not appeal that decision.

Raheem's attorneys filed a motion to suppress his statements to police. (33). After several evidentiary hearings, the court denied both parts of the suppression motion. (94:79, 92:15; App. 130, 142).

The state subsequently filed an amended information charging Raheem with second degree reckless homicide as a party to the crime, contrary to Wis. Stat. §§ 940.06(1), 939.50(3)(d), and 939.05. (57). Raheem pled guilty to that charge. (99).

The court sentenced Raheem to 20 years in prison, with an 11-year term of initial confinement and a 9-year term of extended supervision. (100:57). He appealed from the judgment of conviction. (63). The court of appeals affirmed the conviction. ***State v. Moore,*** 2013AP127-CR (Slip op, ¶ 48; App. 124).

Because this appeal is limited to the decisions regarding suppression of his statements to police, the following statement of facts focuses solely on facts relevant to that issue.

STATEMENT OF FACTS

Background

Two days after the shooting, Raheem Moore was arrested at 12:05 p.m. and taken to the crime investigation bureau office in Milwaukee. (40:2). He was 15 years and 40 days old, and in 8th grade. (2; 101Ex6:9).[1] After booking, Raheem was placed in an eight-by-eight foot interrogation room furnished with a table and three chairs. (93:13). Detectives Scott Gastrow and Charles Mueller entered the room at 2:49 p.m. to begin his interrogation. (101Ex6:1).

Raheem's intelligence quotient (IQ) had been measured at 73, within the "borderline" range of intelligence. (82:67). Borderline scores "indicate pretty limited to marginal intellectual resources and suggest he's likely to have difficulty with abstract concepts, abstract reasoning, problem solving skills and anticipating the consequences of actions." (82:68).[2] Raheem's mother reported developmental delays in

[1] The record in the court of appeals includes a large envelope identified as Record 101. Three transcripts of the three different portions of Raheem's interrogation are enclosed, and are labeled exhibits 2, 3 and 6. Therefore, in referencing those transcripts, the record cite used in this brief is 101Ex2:page number; 101Ex3:page number and 101Ex6:page number.

[2] Borderline is between "low average" intelligence and mental retardation. (82:115). An IQ score of 69 is in the mental retardation range. (94:53). Raheem's IQ score places him in the bottom 3 percent of same-age peers. (43:7).

early childhood, and by the time he was four years old, he was being treated for attention deficit/hyperactivity disorder. He had failed fifth grade. (94:39; 43:5; 21:3-4). Raheem had a "long track record of . . . difficulty understanding and using language." (94:39).

Raheem struggled with depression and anxiety, and feelings of inadequacy and loneliness. Psychological testing showed him "needing and seeking acceptance, but lacking support and nurturance from the adults in his life," and that he had "difficulty interpreting social interactions and social cues." (82:116-117).

Parents

Raheem told Detectives Gastrow and Mueller that he was living with his father and his uncle. He gave them their names, address and telephone number. (101Ex6:2-4). The detectives did not ask Raheem if he wanted to call his father, and did not allow him to call his father because "[h]e didn't ask." (93:28). Raheem also told the detectives that his mother was at a specific drug treatment facility in Milwaukee. (101Ex6:3). Asked about a call to his mother, Detective Gastrow testified: "he never asked to call a parent. So I wouldn't have offered for him to call a parent." (93:27).

***Miranda* Rights**

Detective Gastrow read ***Miranda*** rights from a card, asking Raheem after each right if he understood. Each time, Raheem answered "Yeah." (101Ex6:15-16). When Detective Gastrow explained the right to have a lawyer present during questioning and asked Raheem to explain that right in his own words, Raheem's answer was non-responsive to the question.

> Detective G: If you decide to answer questions now without a lawyer present, you have the right to stop the questioning at any time you wish and the right to ask for and to have a lawyer at any time you wish, including during questioning. Do you understand that?
>
> Moore: Yeah.
>
> Detective G: What does that mean in your own words?
>
> Moore: That mean like, if I'm talking to you all, then I don't want to say no more, I can just, um, don't say nothing.

101Ex6:16.

Apparently neither detective noticed that he had not explained the right to counsel. They both told him he was right. (101Ex6:16).

Subsequent testing of Raheem's understanding of ***Miranda*** rights showed that he had difficulty with abstract language, and scored "very, very poorly" on "his understanding of how the right to silence works during an interrogation." (94:26, 32).

Initial Interrogation

Detective Gastrow told Raheem that the topic was the shooting of Mr. Parish, and that police had "talked to several people already." He asked Raheem to tell him "what happened that night." (101Ex6:16-17).

Raheem said he was sitting on a girl's porch when he heard a gunshot. When he named the girl, Detective Mueller said they had talked to that girl and others, and "you weren't on their porch when this happened." (101Ex6:17). When Raheem explained his whereabouts and actions that night in

more detail, one of the detectives contradicted him, saying that he knew Raheem was involved in the shooting.[3] (101Ex6:20-21).

Raheem denied involvement. (101Ex6:21). Detective Mueller asked if he was "afraid to tell us who did it?" (101Ex6:21). Raheem said he didn't know who did it. (101Ex6:21). Detective Gastrow countered, "you were one of the two boys out there and that's very good information, that's not nobody guessing. That's the truth okay. We want you to tell us the truth . . . ." (101Ex6:23).

Raheem again denied being involved, saying "I wasn't with nobody." (101Ex6:24). Detective Gastrow disagreed: "Yeah you were." (101Ex6. 24).

A detective said Ronald Franklin told them that Raheem was involved in the shooting. Raheem again denied involvement. (101Ex6:27). A detective replied, "He's in the next room!" (101Ex6:27). That was not true; Ronald Franklin was not in the next room, and was not even in police custody. (93:31). Detective Gastrow testified that the lie about Ronald Franklin was an interrogation "technique" used by police. (93:31-32).

Raheem denied involvement twice more. (101Ex6:27). A detective replied, "the best way to get through this is to be honest about it. . . ." (101Ex6:28). Five more times Raheem denied and five more times a detective disagreed. (101Ex6:28-29). The fifth time, the detective said:

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[3] Portions of this transcript do not identify which detective spoke. It just says: "Detective." The same designation is used in this fact statement.

> Not going to cut it. You think anybody is going to have mercy out for you out at the Children's Center with all those lies?

(101Ex6:29-30).

Raheem's denials and the detectives' insistence that he was involved continued, with both detectives joining in. (101Ex6:30-31). Detective Gastrow suggested a scenario of reduced culpability: "Maybe it started out something really simple and got somebody just did something stupid as opposed to maybe when I go to the DA, the DA will look at it like hey, those kids just wanted to murder." (101Ex6:31).

Detective Mueller joined in "Maybe they thought it was funny. Maybe those boys running away laughing thought that was a cool thing to do to run and shoot somebody." (101Ex6:32). Detective Gastrow suggested an alternative, describing accident scenarios. Both detectives spun various scenarios, contrasting intentional murder with accidents, exhorting Raheem to tell them "what's going on in your mind at the time." They brought up the DA again, saying it "could look like a cold blooded murder." (101Ex6:34).

Detective Gastrow acknowledged that the accident scenarios are a "minimizing" technique used by police. (93:32).

However, Raheem continued to deny, and a detective said:

> Detective: Sitting here, not telling the truth it's not going to help you out, okay. Cuz you're going to look like a liar and you're going to look like a cold hearted young man. You're going to look like a man that has no conscience. Do you know what a conscience is?

> Detective: It means that you don't care about anybody but themselves.
>
> Detective: It means you have no feelings for anybody. It means you don't care that that man is dead.

101Ex6:36.

Still Raheem denied. (101Ex6:36, 37, 38, 39, 40). A detective tried empathy: "Your mom's got, been hooked on drugs and cocaine and she probably wasn't always there for you like you would have liked growing up. Especially coming up now, your 15 years old. Your 12, 13, 14, and those are tough times for a young man. Lots of pressures on a young man." (101Ex6:40).

A detective showed him a picture of James Parrish. (101Ex6:42). He had a good family, the detective said. "Now this family is in grief. We're the ones that had to go over there and tell them what happened to him. Okay and they were besides themselves in grief." (101Ex6:43). The detective continued:

> . . . it goes a long way for somebody involved in something like to show some kind of sympathy for the family. To show that they have remorse and sadness for what they did because they made a mistake. We've seen it in court many, many times where the family actually forgives the people. I mean it does them a world of good, especially because they're a religious family, a Christian family like the dad said, and they, they know how to forgive somebody no matter what the circumstances. . . .

101Ex6:44.

Still Raheem denied involvement, until the detectives took a break at 4:02 p.m. (101Ex6:44, 51, 52, 53). They let Raheem use the bathroom, and fed him two bologna sandwiches, Doritos, and water. At 4:30, the interrogation resumed. (101Ex6:53). A detective said:

> You're a decent kid, I think you made a mistake but we think you deserve a second chance, okay. . . .
>
> You know why we think that? Because you've been respectful to us okay? . . . . It shows that you maybe just were with the wrong people, wrong people when this thing happened.

101Ex6:53-54.

At that point, Raheem admitted to some involvement, saying Jevonte approached him about a robbery. (101Ex6:55). Asked if they both were going to do a robbery, he said: "Naw, he was going to do it. I was just part of it." Asked how he was part of it, he said, "like party to a crime," and "I was just with him." (101Ex6:55).

For the rest of that part of the interrogation, which ended at 5:34 p.m., the detectives questioned Raheem about the details of the crime. (101Ex6:56-91).

The recorder stopped working before the interrogation ended, but Raheem does not claim that it had any impact on the admissibility of his statements. At the suppression hearing, the parties agreed "that malfunctions happen from time to time, it was not done purposefully and was not actually known until after the fact." (91:6).

Second Interrogation

Almost three hours later, a fresh team of detectives entered the interrogation room and restated the ***Miranda*** warnings at 8:28 p.m. Detectives Paul Lough and David Salazar then handcuffed Raheem and took him in a squad car to view the scene of the shooting. (101Ex2:2-8).

As he answered questions about the scene of the crime and order of events, Raheem described being a lookout for the robbery, which was committed by a guy named Jevonte. (101Ex2:15).

Still in the squad car, Detective Salazar confronted Raheem, saying nobody in the neighborhood knew Jevonte. (101Ex2:31). Detective Salazar then suggested that the shooter put Raheem in a difficult "situation," and "he got you in trouble. But at the same time I think you're kind of scared of him." (101Ex2:32). He talked about senseless murders, said he knew it was hard for Raheem, and "you're trying to do the right thing for the family too of the victim?" (101Ex2:33-34).

Detective Salazar again suggested Raheem was "scared of the other person," and warned him that "you're hurting yourself by not being completely honest." (101Ex2:34). He returned to the theme of Raheem having a hard life. He said Jevonte did not exist, and urged Raheem not to "make the mistake by lying" about the other person involved in the robbery. (101Ex2:34-35).

Back at the station, Raheem asked for a second time whether his cousin, nicknamed Squeak, was still in custody. Detective Salazar said he got arrested "cause he lied about some things." (101Ex2:37-38). He repeated that: "well your

guy lied about some things and got himself arrested." (101Ex2:38). Later, Detective Salazar brought up Squeak a third time, saying: "And since your friend got arrested he decided it was in his best interest to tell the whole truth. Okay. He asked about his ah his friend." (101Ex2:41).

Raheem also asked, at about 9:47 p.m.: "You think we're gonna be here all night?" The detective answered, "Hopefully not." (101Ex2:37). Detective Salazar again showed Raheem a picture of James Parish. (101Ex2:39). He again shifted blame to "the other guy," saying: "You're the only person that's being held responsible for this whole thing. Alright. And we know that you're not the person ultimately responsible." (101Ex2:41).

Request to Turn Off Recorder

When Detective Salazar asked why he was scared of the other person, Raheem said, "[c]ause he might try, he might try to kill me or something." (101Ex2:41). The detectives said they would protect him. When they asked for his "real name," Raheem asked, "Ah you mind take that thing off," referring to the recorder. Detective Salazar deflected the request.

Moore:	Ah you mind take that thing off.
Salazar:	What thing off?
Moore:	Ah what you call it?
Salazar:	The recorder? Well the reason why we don't want the recorder turned off because we don't want somebody to coming in here and saying that we beat you. Okay. You know what I mean? That we did anything, mis, any misconduct. You know what I'm

saying? You know how in the movies where they take the phone book out and they beat people. Okay. INAUDIBLE. You've seen movies right.

Lough: Are you worried that we would play that for him?

Moore: Hmmm

Lough: No. We don't do that. Okay.

Salazar. Okay. That recorder's there mainly for my protection and my partner's protection. Now if you want it turned off because you asked for it, I will turn it off. But I just wanted to explain to you why it's on.

Moore: Hmm.

Salazar: Okay. It's completely up to you. But that's why it's there. Okay. Who is the other person?

Moore: Can I see the pictures again?

101Ex2:42.

Raheem then identified Ronald Franklin's brother, Raynard, as the person involved in the armed robbery. (101Ex2:43).

When the detectives asked if Raheem had been threatened about identifying Raynard, he said his brother, Ronald had told him "don't tell or I'll kill you." He said he believed the threat. (101Ex2:47). Raheem said he and Raynard were the two people involved in the robbery, and Raynard had the gun. (101Ex2:48).

During the next approximately 10 minutes, detectives repeatedly asked Raheem if he was the one who shot the gun, and each time Raheem said he was not. (101Ex2:48, 49, 54). The detectives responded that Raynard said Raheem shot the gun. (101Ex2:49, 54). Then Detective Salazar went to talk to the "detective that's talking to Raynard right now," and they took a 13-minute break. (101Ex2:55).

Detectives Turn Off Recorder

After the break, the detectives again questioned Raheem for about 20 minutes about details of the crime. After a series of questions about the gun, Detective Salazar decided to take notes:

Salazar:	Okay. Alright. Let me see once. Okay. Take a few notes real quick.
Lough:	Yeah.
Salazar:	You mind if I just take a few notes.
Moore:	What ah do you want ah like talk on there?
Salazar:	You want me to turn that off?
Moore:	Yeah
Salazar:	Just tell me why you want me to turn this off?
Moore:	Cause I don't feel safe INAUDIBLE that.

Salazar: Okay, So you're asking me to turn it off. And you realize that we want to keep it on? Right? Yes, no? I need you to answer yes or no. How's that?

Moore: Yes

Salazar: Okay.

Lough: Who are you afraid of because of this? Us?

Moore: Uh huh.

Lough: Who then?

Moore: Raynard

Lough: Raynard? Okay

Salazar: So you realize that we're not asking to turn it off? Okay. And we're not encouraging you to turn it off? Is that right?

Moore: Mmm

Salazar: Yes or no?

Moore: Yes

Salazar: Okay. The only reason you want us to turn it off is because it's your own choice? Is that right? Yes or no?

Moore: Yes.

Salazar: Okay. Any other thing you need to put on this before I turn it off?

Lough:	No. We're gonna turn it off at 10:42 p.m.
Salazar:	And that's at his request. Is that true?
Moore:	Yes.

101Ex2:75-76.

The recorder was turned off.

Recorded Conclusion of Interrogation

The interrogation continued. At 11:20 p.m., Detective Salazar stated "about three minutes ago" while the recorder was off, Raheem had "suddenly admitted that he was the shooter." He said he had decided to turn the recorder back on and "keep it secreted because we want to be able to use this statement later on." (101Ex3:2).

For the next 24 minutes, Detective Salazar asked Raheem to repeat his unrecorded statement, and asked questions about details. Raheem said he fired the gun, because he was scared, and he did not mean to hit anyone. (101Ex3:3-4).

The interrogation ended at 11:44 p.m.

ARGUMENT

I. Evidence of Raheem's Unrecorded Statements and the Recorded Statements That Followed Were Not Admissible Because Raheem Did Not "Refuse to Respond or Cooperate" With Recording.

A. Introduction and standard of review.

In 2005, this court held that "it is time for Wisconsin to tackle the false confession issue" and "take appropriate action so that the youth of our state are protected from confessing to crimes they did not commit." ***In the Interest of Jerrell C.J.,*** 2005 WI 105, ¶ 59, 283 Wis. 2d 145, 699 N.W. 2d 110. The court determined that an electronic recording requirement is a "means to that end," and ordered: "All custodial interrogation of juveniles in future cases shall be electronically recorded where feasible, and without exception when questioning occurs at a place of detention." ***Id.,*** ¶ 57, 58.

A few months after ***Jerrell C.J.*** was decided, the legislature passed a bill that codified some aspects of the ***Jerrell C.J.*** decision. 2005 Wis. Act. 60, § 27 created § 938.195(2)(a), which states:

> A law enforcement agency shall make an audio or audio and visual recording of any custodial interrogation of a juvenile that is conducted at a place of detention unless a condition under s. 938.31(3)(c)1. to 5. applies.

The exception under § 938.31(3)(c) applicable to this case is 1.:

> The juvenile refused to respond or cooperate in the custodial interrogation if an audio or audio and visual recording was made of the interrogation so long as a law enforcement officer . . . made a contemporaneous . . . record of the juvenile's refusal.

Therefore, the question in this case is whether Raheem "refused to respond or cooperate" if the interrogation was recorded. There is no dispute about relevant facts, so the question requires an interpretation of Wis. Stat. § 938.31(3)(c)1 and its application to the facts of this case, a question of law determined *de novo* by this court. ***In re Lindsey A.F.,*** 2003 WI 63, ¶8, 262 Wis. 2d 200, 663 N.W. 2d 757.

B. The unrecorded statement must be suppressed because Raheem did not "refuse to respond or cooperate" if the interrogation was recorded.

The goal of statutory interpretation is to discern the intent of the legislature. The court looks to first to the language of the statute itself, using the plain meaning of the words. ***In re Lindsey A.F.,*** 262 Wis. 2d 200**,** ¶ 8.

"Refuse" is not specifically defined by the statute itself, but its plain meaning is defined as "to show or express a positive unwillingness to do or comply with." *Webster's Third New International Dictionary*, 1910 (unabr. 1993).

Raheem never expressed a "positive unwillingness" to proceed with a recorded interrogation. When he first raised the issue, he asked, "Ah you mind take that thing off." (101Ex2:43). In less than a minute, the detectives talked him out of it. When Raheem acknowledged he was fearful of his accomplice, the detectives assured him they would not play it

to Raynard. When told the decision was "completely up to you," he chose to proceed. (101Ex2:42).

The second time the issue was raised, Detective Salazar asked Raheem if he minded if he took notes. Raheem simply asked, "What ah do you want ah like talk on there?" (101Ex2:75). Although Raheem seemed to be asking whether that meant that he or the detective would speak into the recorder to create the notes, Detective Salazar apparently interpreted Raheem's response as a request to turn off the recorder. Detective Salazar asked "You want me to turn that off?" (101Ex2:75).

In the colloquy that followed, Raheem never stated that he would stop answering questions if the recorder were not turned off. As the Court of Appeals concurrence states: "Moore never asked directly that the recorder be turned off . . . rather, he just answered in the affirmative when the officers conducted a long series of leading questions about Moore's discomfort with the recording device. The obvious purpose of the questioning was to make a record that turning off the recorder was Moore's idea, not the officers'." (Slip op., ¶ 50; App. 126-27).

Using the plain language of Wis. Stat. § 938.31(3)(c)1., and the accepted definition of "refuse" as expressing a "positive unwillingness" to continue with a recorded interview, Raheem did not "refuse to respond or cooperate" with a recorded interview.

Additionally, construing "refused" so broadly that it would allow a police detective to transform a statement of discomfort with recording into a "refusal" through a series of leading questions, is contrary to the legislative intent of Wis. Stat. §§ 938.195 and 938.31.

In ***Jerrell C.J.,*** the court held that children are "uncommonly susceptible" to suggestive and coercive police interrogation techniques. 283 Wis. 2d 145, ¶ 26. It required recording as a means of protecting juveniles and safeguarding their rights "by making it possible for them to challenge misleading or false testimony." ***Id.,*** ¶ 55.

The legislative intent, therefore, was to require recording as a protection for children subjected to suggestive and coercive police questioning. Here, Raheem expressed discomfort with recording, but he did not refuse to cooperate. Detective Salazar used the very technique to which Raheem was uncommonly susceptible – leading and suggesting questioning – to obtain Raheem's forfeiture of the right to have his interrogation recorded.

An interpretation of Wis. Stat. § 938.31 that would allow juveniles to forfeit court-ordered protection and safeguarding of their rights by their response to suggestive and leading questions, would directly contravene the ***Jerrell C.J.*** decision and legislative intent.

Additionally, the leading idea of ***Jerrell C.J.*** was to record all juvenile interrogations. Accordingly, the legislature drafted and enacted only specific and narrow exceptions. It required "refusal," not "preference" or "choice." Its decision to require a showing of "positive unwillingness" to continue answering questions unless the recorder were turned off, is consistent with both the plain language and the intent of the legislation. An exception that allows an interrogating officer to simply give a juvenile a choice – "you want me to turn that [the recorder] off?" would swallow the rule.

Finally, interpreting the statute to require that the refusal to cooperate must be asserted unambiguously, is consistent with law governing assertion of ***Miranda*** rights in interrogation settings. A request to speak to counsel, or an assertion of the right to remain silent must be unambiguous. ***Davis v. United States***, 512 U.S. 452, 459-462 (1994); ***Berghuis v. Thompkins,*** 560 U.S. 370, 381 (2010).

As the court explained in ***Berghuis***, a requirement of an unambiguous invocation of ***Miranda*** rights "results in an objective inquiry that 'avoid[s] difficulties of proof and . . . provide[s] guidance to officers' on how to proceed in the face of ambiguity." ***Berghuis,*** 560 U.S. at 381-82. (quoting ***Davis,*** 512 U.S. at 458, 459). The same reasoning applies here. Interpreting Wis. Stat. § 938.195 to require a positive, unambiguous assertion that the suspect will refuse to cooperate with an interrogation until the recorder is turned off, will provide a clear, comprehensible rule to law enforcement and will solve practical problems of proof.

For these reasons, this court should hold that Detective Salazar was not authorized to turn off the recorder pursuant to Wis. Stat. § 938.195. The court erred by denying Raheem's motion to suppress his unrecorded statements.

C. Raheem's subsequent recorded statements must be suppressed.

In ***State v. Dionicia M.***, 2010 WI App 134, 329 Wis. 2d 524, 791 N.W. 2d 236, the court was presented with a situation identical to this one. Dionicia gave an unrecorded statement about a battery to a police officer in a squad car. He took her to an office where he turned on a recording device and continued questioning her about the battery. ***Id.,*** ¶ 3-4.

The court held:

> [W]e conclude *Jerrell C.J.* does not allow the admission of partially recorded interrogations of juveniles. As Dionicia points out, a major purpose of the *Jerrell C.J.* rule is to avoid involuntary, coerced confessions by documenting the circumstances in which a juvenile has been persuaded to give a statement. This purpose is not served by allowing an officer to turn on the recorder only after a juvenile has been convinced to confess.

Id., ¶ 16.

The court concluded that because the interrogation which began in the squad car and continued in the school office was not recorded in full, the court "should have suppressed the interrogation in its entirety." ***Id.***

Here, the portion of the interrogation which followed the unrecorded interrogation was directly linked to, and therefore part of, the unrecorded interrogation. As a result, it too must be suppressed.

D. The remedy for violating Wis. Stat. § 938.195 is inadmissibility in all court proceedings.

The state has argued that Detective Gastrow's violation of Wis. Stat. § 938.195 should not result in suppression of Raheem's statements under Wis. Stat. § 938.31(3) because § 938.31(3) establishes inadmissibility in delinquency proceedings, whereas Raheem was tried in criminal court.

In addition to codifying some aspects of the ***Jerrell C.J.*** decision, 2005 Wis. Act. 60 established a criminal procedure to record custodial interrogations of felony defendants at Wis. Stat. § 968.073, with exceptions

and enforcement provisions at Wis. Stat. § 972.115. The state argues that those provisions, rather than § 938.195 and 938.31(3), should apply to this case.

Such an interpretation would violate the Supreme Court's directive in ***Jerrell C.J.,*** 283 Wis. 2d 145, ¶ 48:

> This would not make it illegal for police to interrogate juveniles without a recording. Instead, it would render the unrecorded interrogations and any resultant written confession inadmissible as evidence in court.

"Juvenile" is defined at Wis. Stat. § 938.02(10m) for purposes of investigating or prosecuting a person alleged to have violated a criminal law, as a "person who has not attained 17 years of age."

The recording requirement in ***Jerrell C.J.*** was, as the court said, intended to protect the "youth of our state" from "confessing to crimes they did not commit." ***Id.,*** ¶ 59. The protection is aimed at the time of his interrogation, and at that time Raheem was a 15-year-old being investigated for a violation of criminal law. He was statutorily defined as a "juvenile." Subsequent decisions to charge him in adult court and deny his motion for "reverse waiver" to the juvenile court, did not transform 15-year-old Raheem into an "adult" at the time of his interrogation.

Federal cases recognizing the developmental immaturity and vulnerability of adolescents focus solely on age and relevant characteristics, not the court in which the child is tried. The 15-year-old "mere child – an easy victim of the law" in ***Haley v. Ohio,*** 332 U.S. 596 (1948), was not considered less vulnerable to coercive interrogation because he was tried in adult court. ***Id.,*** at 599. Similarly, the adolescents the Supreme Court found were protected from

death penalty and life sentences because of their youth, were all tried in adult court. ***Roper v. Simmons***, 543 U.S. 551 (2005), ***Graham v. Florida***, 560 U.S. 48 (2010); ***Miller v. Alabama***, __ U.S. __132 S. Ct. 2455 (2012).

The ***Jerrell C.J.*** protection, rendering "unrecorded interrogations and any resultant written confession inadmissible as evidence in court," therefore, was intended to apply to all interrogations of children under the age of 17 at the time of the interrogation. 283 Wis. 2d 145, ¶ 48. Although the legislature intended to codify the ***Jerrell C.J.*** holding, it fell short with regard to its remedy provisions, because legislators apparently did not consider that some juveniles would be tried in adult court.

Filling the gap in legislation by providing less protection to 15-year-olds tried in adult court than to 15-year-olds tried in juvenile court, would defy common sense, and would directly contravene the holding of ***Jerrell C.J.***

E. Denial of the suppression motion was not harmless error.

The state argued in the court of appeals that if the court erred by denying the suppression motion, the error was harmless because Raheem had earlier admitted to being party to the crime of armed robbery with "Jevonte." (101Ex6:55). Raheem will briefly address the issue here, although the burden remains on the state to prove "beyond a reasonable doubt that the error complained of did not contribute to the conviction." ***State v. Rockette,*** 2005 WI App 205, ¶ 26**,** 287 Wis. 2d 257, 704 N.W. 2d 382.

In ***State v. Armstrong***, 223 Wis. 2d 331, 588 N.W. 2d 606 (1999), the court concluded that the harmless error rule could be applied to suppression motion appeals pursuant to

§ 971.31(10) when other evidence in the record furnished strong evidence of guilt. In ***Armstrong***, a valid written confession essentially duplicated the defendant's inadmissible oral statements. ***Id.,*** ¶ 61. In ***State v. Semrau,*** 2000 WI App 54, 233 Wis. 2d 508, 608 N.W. 2d 376, the state had a "great deal of incriminating evidence," of sexual exploitation, including sexually explicit photographs, the child's identification of the defendant as the photographer, and an incriminating note that the defendant sent to the child. Suppression of his recorded confession was found harmless. ***Id.,*** ¶ 23. In ***Rockette,*** the state had two eyewitnesses, jail house confessions that were not suppressed, and the defendant's flight from police. 287 Wis. 2d 257, ¶¶ 27-29.

In contrast, the only evidence that Raheem was guilty of the charged offense, first degree reckless homicide, was his statement. No corroborating evidence was introduced at the preliminary hearing. (73:8-11).

Moreover, a "suspect who confesses—whether truthfully or falsely—will be treated more harshly at every stage of the criminal process. . . . When there is a confession, prosecutors tend to charge the defendant with the highest number and types of offenses and are far less likely to initiate or accept a plea bargain to a reduced charge." Steven A. Drizin and Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. Rev. 891, 911 (2004).

Here, if the contested statements were suppressed, prosecutors would have had only Raheem's confession to being a lookout for an armed robbery by "Jevonte," later identified as the older, more experienced, Raynard Franklin. (101Ex6:55; 101Ex2:15, 43). Mr. Franklin was two years older than Raheem, and had an extensive juvenile

delinquency record, including armed robbery, two counts of possessing a dangerous weapon, and a placement in juvenile corrections. (106:11). Yet his negotiated plea called for a more favorable state's sentence recommendation, of 15 years in prison, with a 10-year term of confinement. (106:5). Raheem's plea negotiation, in contrast, anticipated a state's sentencing recommendation of 25 years in prison. (100:4).

On this record, the state offers only speculation in support of its argument for harmless error. It has failed to prove beyond a reasonable doubt that the erroneous admission of Raheem's statement "did not contribute to the conviction." ***Rockette,*** 287 Wis. 2d 257, ¶ 26**.**

II. Fifteen-Year-Old Raheem Moore's Inculpatory Statement, Made Eleven Hours After He Was Arrested, Held Incommunicado, and Interrogated by Two Teams of Detectives, Was Not Voluntary.

A. Introduction and standard of review.

In 2005, this court agreed with a long line of United States Supreme Court cases holding that courts must use "special caution" when assessing the voluntariness of a juvenile confession. It unanimously concluded that under the totality of the circumstances of that case, 14-year-old Jerrell's confession was involuntary. ***Jerrell C.J.,*** 283 Wis. 2d 145, ¶ 21.

Six years later, the United States Supreme Court again expressed the importance of special caution when assessing a juvenile's waiver of constitutional rights. It noted that the pressure of custodial interrogation is so immense that it "can induce a frighteningly high percentage of people to confess to crimes they never committed. [citations omitted]. That risk is all the more troubling – and recent studies suggest, all the

more acute – when the subject of custodial interrogation is a juvenile." ***J.D.B. v. North Carolina,*** __ U.S. __ 131 S. Ct. 2394, 2401 (2011).

Because custodial police interrogation entails "inherently compelling pressures," when a person makes an inculpatory statement during police interrogation without the presence of an attorney, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." ***Miranda v. Arizona***, 384 U.S. 436, 467, 475. (1966).

The state must show that the statements at issue "are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." ***State v. Hoppe***, 2003 WI 43, ¶ 36, 261 Wis. 2d 294, 661 N.W. 2d 407; ***State v. Clappes***, 136 Wis. 2d 222, 236, 401 N.W. 2d 759 (1987).

On review, the appellate court gives deference to the trial court's findings of historical fact. However, the application of the constitutional principles to the facts is reviewed *de novo*. ***Jerrell C.J.,*** 283 Wis. 2d 145, ¶ 16.

B. Under the totality of the circumstances, Raheem's inculpatory statement did not result from a knowingly and voluntarily waiver of his rights.

While coercive police conduct is a prerequisite for a finding of involuntariness, the totality of the circumstances requires "a balancing of the personal characteristics of the

defendant against the pressures imposed upon the defendant by law enforcement officers." ***Hoppe,*** 261 Wis. 2d 294, ¶ 38. Further:

> [P]olice conduct does not need to be egregious or outrageous in order to be coercive. Rather, subtle pressures are considered to be coercive if they exceed the defendant's ability to resist. Accordingly, pressures that are not coercive in one set of circumstances may be coercive in another set of circumstances if the defendant's condition renders him or her uncommonly susceptible to police pressures.

Id. at ¶ 46.

The "condition" of being a child makes one "uncommonly susceptible" to suggestive and coercive police interrogation techniques. ***Jerrell C.J.,*** 283 Wis. 2d 145, ¶ 26. For that reason, among others, "the Supreme Court has consistently recognized that a confession or waiver of rights by a juvenile is not the same as a confession or waiver by an adult." ***A.M. v. Butler***, 360 F. 3d 787, 799 (7th Cir. 2004). The general principles were stated eloquently by the United States Supreme Court in 1948:

> [W]hen, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.

Haley v. Ohio, 332 U.S. 596, 599 (1948).

The totality of the circumstances must be considered "with the greatest care" in juvenile cases. ***In re Gault***, 387 U.S. 1, 55 (1967). It must include an evaluation of "the

juvenile's age, experience, education, background and intelligence, whether the questioning was repeated or prolonged, and the presence or absence of a friendly adult such as a parent or an attorney." ***A.M. v. Butler***, 360 F. 3d at 799 (citing ***Fare v. Michael C***., 442 U.S. 707, 725 (1979)).

In this legal and factual context, the circumstances of Raheem's interrogation, as well as his own personal characteristics, are discussed below.

1. Age.

As the Wisconsin Supreme Court recognized in ***Jerrell C.J.,*** 283 Wis. 2d 145**,** ¶ 25: "Courts have long recognized the importance of age in determining whether a juvenile confession is voluntary." Like the juvenile in ***Haley***, 332 U.S. at 599, Raheem was at the "tender and difficult age" of fifteen when he was interrogated by Milwaukee detectives.

"[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. . . . Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults." ***Eddings v. Oklahoma***, 455 U.S. 104, 115-16 (1982), (citing ***Bellotti v. Baird,*** 443 U.S. 622, 635 (1979)).

In ***Jerrell C.J.,*** 283 Wis. 2d 145**,** ¶ 26, the court held that Jerrell's age, 14, "was a strong factor weighing against the voluntariness of the confession." Jerrell was 62 days short of his 15th birthday, making him just 102 days younger than Raheem. (Brief of Petitioner-Respondent at 7, ***Jerrell C.J.,*** 283 Wis. 2d 145 (No. 02-3423)).

Decisions of the United States Supreme Court following ***Jerrell C.J.***, have only highlighted the significance of age in legal analysis. In ***J.D.B. v. North Carolina,*** 131 S. Ct. 2394, 2403 the court held that a child's age must be taken into account in the objective determination of custodial status, citing ***Haley,*** 332 U.S. at 599 and ***Gallegos v. Colorado***, 370 U.S. 49, 54 (1962), for its conclusion that "no matter how sophisticated,' a juvenile subject of police interrogation 'cannot be compared' to an adult subject."

Therefore, as in ***Jerrell C.J.***, Raheem's young age is a strong factor weighing against the voluntariness of his confession.

2. Education and intelligence.

The court of appeals held that Raheem's "education and intelligence . . . support a conclusion that his statements were voluntary." (Slip op., ¶ 32, App. 116). Raheem was in eighth grade. (101Ex6:9). His IQ had been measured at 73, "at the low end of the borderline range of intelligence," slightly above the mild mental retardation range. (82:67, 94:28, 94:53). This score placed him in the bottom 3 percent of same-age peers. (43:7).

In ***Jerrell C. J.,*** Jerrell's same eighth grade education and higher IQ of 84, were factors weighing against the voluntariness of his confession. 283 Wis. 2d 145, ¶ 27.

The evidence cited by the court of appeals for its holding that Raheem's eighth grade education and borderline intelligence weigh in favor of voluntarinesss, includes "evidence that Moore deliberately underperformed on some of these tests, and he was not diagnosed with mental retardation or a learning disorder." (Slip op., ¶ 32; App. 116).

The actual testimony was that Raheem told Dr. Deborah Collins that during one previous testing session, "he hadn't tried his best." (88:19). Nevertheless, Dr. Collins agreed that Raheem was in the borderline range of intelligence. (88:18). Another psychologist, Dr. David Thompson, testified that he had reviewed five psychological assessments of Raheem by four different psychologists, and that the various assessments, as well as his own, were consistent with borderline intelligence. (94:57-58; 43:5-6).

The court of appeals also justified its holding with the assertion that: "He had no mental health issues, and was merely thought to have a behavioral disorder in which the primary symptom was a propensity to 'act out in an unsocialized manner or contrary to authority.'" (Slip op., ¶ 32; App. 116). In fact, Raheem had been diagnosed by Dr. Suzanne Likowski with three mental health issues: Dysthymic Disorder, Attention Deficit-Hyperactivity Disorder, and Oppositional Defiant Disorder. (21:7). Dr. Collins testified that Raheem did not have a "psychotic disorder" or "major mental illness in that sense." (88:12). A "major" mental illness is not the same as a mental health issue, and Dr. Collins agreed that Raheem had ADHD and ODD. (88:23). Again, Dr. Thompson testified that the ADHD diagnosis was a long-standing and well-accepted diagnosis. (94:57-58; 43:5-6).

The court of appeals also cited Raheem's understanding of the concept of party-to-a-crime liability as evidence that he was "street smart." (Slip op., ¶ 32, App. 116). In context Raheem's use of the phrase, "party to a crime" suggests a misunderstanding of the concept -- that because he was just "party to a crime" he was less culpable, rather than equally as culpable as his codefendant. When police asked if he and Jevonte were "both going to do a

robbery," Raheem replied: "Naw, he was going to do it. I was just part of it." When police asked him to clarify, he said, "Yah like party to a crime." Asked what his "role" or "job" was, he said "I was just with him." (101Ex6:55). Raheem's answers suggest that he was just parroting words he had heard before. They are not indicative of legal sophistication or "street smarts."

Finally, the court of appeals cited Raheem's explanation of his ***Miranda*** rights "in his own words" as evidence of his intelligence. (Slip op., ¶ 32; App. 116). As will be explained below, Raheem did not correctly explain his ***Miranda*** rights to police.

When the evidence is viewed fairly and in context, Raheem's eighth-grade education and borderline intelligence weigh against the voluntariness of his confession.

3. Understanding of ***Miranda*** rights.

Detective Gastrow read ***Miranda*** rights from a card, asking Raheem after each right if he understood. Each time, Raheem answered "Yeah." (101Ex6:15-16). When Detective Gastrow explained the right to have a lawyer present during questioning, he asked Raheem to explain that right in his own words. Raheem's answer was non-responsive:

> Detective G: If you decide to answer questions now without a lawyer present, you have the right to stop the questioning at any time you wish and the right to ask for and to have a lawyer at any time you wish, including during questioning. Do you understand that?
>
> Moore: Yeah.
>
> Detective G: What does that mean in your own words?

> Moore: That mean like, if I'm talking to you all, then I don't want to say no more, I can just, um, don't say nothing.

101Ex6:16.

Raheem's statement does not indicate an accurate understanding of ***Miranda*** rights, for two reasons. First, he was asked to explain the right to have a lawyer present, and his explanation completely missed the mark. The evidence is that he did *not* understand that he could stop the questioning at any time and ask for a lawyer.

Second, his description of the right to remain silent shows that he did not understand that it is a right one can positively assert. His understanding, that he could "just, um, don't say nothing" describes an action which the Supreme Court has held is insufficient to invoke the right to remain silent. ***Berghuis,*** 560 U.S. at 382. His later question whether "we're gonna be here all night," is further evidence that he did not understand that he could actually stop the questioning by asserting his right to remain silent. (101Ex2:37).

Subsequent testing of Raheem's understanding of ***Miranda*** rights showed that he had difficulty with abstract language, and scored "very, very poorly" on "his understanding of how the right to silence works during an interrogation." (94:26, 32).

4. Prior experience with law enforcement.

The court of appeals held that Raheem's "prior experience with law enforcement supports the conclusion that his confession was voluntary." (Slip op., ¶ 34; App. 117). The court does not explain how Raheem's two prior arrests support its conclusion. In ***Jerrell C.J.,*** his two prior arrests

did not weigh in favor of a finding of voluntariness. 283 Wis. 2d 145, ¶¶ 28-29.

As the court explained in ***Jerrell C.J.***: "In cases in which courts have found that prior experience weighs in favor of a finding of voluntariness, the juvenile's contacts with police have been extensive." ***Id.,*** ¶ 28. It cited one case in which a juvenile had been arrested 19 times and another in which the juvenile had "several" previous offenses, had been on probation for four years, and had served a term in a youth corrections camp. ***Id.***

As in ***Jerrell C.J.,*** Raheem's two previous arrests, both resulting in misdemeanor delinquency findings, were not "extensive" and did not weigh in favor of voluntariness.

5. Length of custody and interrogation.

The length of custody and interrogation are important factors in the "totality of the circumstances" analysis. The court wrote in ***Miranda***:

> Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege.

384 U.S. at 476.

The importance of the length of custody and interrogation is especially pronounced in cases involving juveniles. A published study of false confessions showed,

"one of the most common reasons cited by teenage false confessors is the belief that by confessing, they would be able to go home." Drizin and Leo, *supra*, at 969.

In ***Jerrell C.J.,*** the court concluded that his "lengthy custody and interrogation" was evidence of coercive conduct. Jerrell had been held in custody for approximately 7 ½ hours, and interrogated for about 5 ½ hours.

Raheem was held in custody and in the interrogation room for an even longer period of time than Jerrell – more than 11 hours. He had been in custody for nearly three hours when the first interrogation began at 2:49 p.m., and that interrogation lasted more than 2 ½ hours, until 5:34 p.m. (101Ex6:1; 40:12). Then he was held in police custody for nearly three more hours. At 8:28 p.m., eight and one half hours after he was arrested, two fresh officers began another interrogation.

At about 9:50 p.m., nearly ten hours after he was taken into custody, Raheem asked if they would "be here all night." The detective answered "hopefully not." (101Ex2:37). At that point, Raheem was left wondering "if and when the inquisition would ever cease." ***Jerrell C.J.,*** 283 Wis. 2d 145**,** ¶ 33 (citing ***Woods v. Clusen***, 794 F. 2d 293, 298 (7th Cir. 1986)).

The interrogation continued until 11:20 p.m., when Detective Salazar said that "about three minutes ago while I was reviewing the story with him [Raheem] he suddenly admitted that he was the shooter. . . ." (101Ex3:2). The interrogation continued until 11:44 p.m., nearly 12 hours after Raheem had been arrested. (101Ex3:25).

The duration of the actual questioning of Raheem, 2 ½ hours in the afternoon and three hours in the evening, was about the same as that in ***Jerrell C.J.***, and longer than that in ***Haley*** (five hours), ***Gallegos*** (no "prolonged questioning"), and ***A.M. v. Butler*** (two hours) ***Jerrell C.J.***, 283 Wis. 2d 145, ¶ 33; ***Haley***, 332 U.S. at 599-600; ***Gallegos***, 370 U.S. at 54; ***A.M.***, 360 F. 3rd at 797. It was five times longer than the average interrogation. In *Inside the Interrogation Room,* 86 J. Crim. L. & Criminology 266, 279 (1996), Richard A. Leo reported that 70% of the interrogations he observed in his study lasted less than an hour; only 8% lasted more than two hours.

Therefore, the extraordinary length of Raheem's interrogation and incommunicado custody weighs strongly against the voluntariness of his confession.

6. Failure to call parents.

Parental or adult counsel and advice has been recognized as a crucial protection against coercion in interrogation. As long ago as 1948, the United States Supreme Court said:

> He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him. . . . No counsel or friend was called during the critical hours of questioning.

Haley, 332 U.S. at 600.

In ***A.M. v. Butler,*** 360 F. 3d. at 799, the Seventh Circuit named "the presence or absence of a friendly adult such as a parent or an attorney" as an important factor in the totality of the circumstances test.

Likewise, the Wisconsin Supreme Court recognized the "importance of parental presence in the totality of the circumstances analysis" in ***Jerrell C.J.,*** 283 U.S. 145, ¶ 30. It noted that thirty years earlier, the court had rejected a *per se* rule requiring parental presence, but ruled that "if police fail to call the parents for the purpose of depriving the juvenile of the opportunity to receive advice and counsel, that would be strong evidence that coercive tactics were used to elicit the incriminating statements." ***Id***., (quoting ***Theriault v. State,*** 66 Wis. 2d 33, 48, 223 N.W. 2d 850 (1974)).

Although the court declined to adopt a *per se* parental presence rule in ***Jerrell C.J.***, it did "reaffirm our warning in ***Theriault***." It also "remind[ed] law enforcement officials that Wisconsin law requires an 'immediate attempt' to notify the parent when a juvenile is taken into custody.'" ***Id.,*** ¶ 43, (citing Wis. Stat. § 938.19(2)).

Here, there was no urgency that justified not calling Raheem's parents before or during interrogation – interrogation began nearly three hours after his arrest, and broke for three hours before the fresh team of detectives began. However, there is no evidence that the police complied with Wis. Stat. § 938.19(2), even after Raheem gave the detectives complete information about his father's name, address and telephone number, and told them where his mother could be found.

Asked if Raheem was allowed to call a parent, Detective Gastrow testified, "he never asked to call a parent. So I wouldn't have offered for him to call a parent." (93:27-28). The purpose of depriving Raheem of an opportunity to receive advice or counsel is implied by that testimony.

Therefore, once again, this court should rule that failure to provide Raheem with an opportunity to call his parents is strong evidence that coercive tactics were used to elicit his statement.

7. Psychological techniques applied.

In ***Jerrell C.J.,*** the court noted that the detectives' continual challenges to Jerrell's denials of guilt, and their urging him to tell a different "truth," sometimes in a strong voice, were techniques that "applied to a juvenile like Jerrell over a prolonged period of time could result in an involuntary confession" 283 Wis. 2d 145, ¶ 35.

Similarly, in ***A.M. v. Butler,*** 360 F. 3d at 800, the court warned that the "detective's behavior of continually challenging the juvenile's statement and accusing him of lying" could "easily lead a young boy to 'confess' to anything."

Researchers who published a study on proven false confessions concluded that juvenile suspects are at "greater risk of falsely confessing when subjected to psychological interrogation techniques" because of their "eagerness to comply with adult authority figures, impulsivity, immature judgment, and inability to recognize and weigh risks in decision making." Drizin and Leo, *supra* at 1004.

The police psychological interrogation techniques described in that article include:

> Police interrogation involves the use of numerous psychological techniques, primary among them isolation, accusation . . . cutting off of denials, confrontation with true or false incriminating evidence, the use of "themes (so-called scenarios that recast the

> suspect's behavior so that he is no longer morally and/or legally culpable), and inducements.

Id., 911-912

All of the aforementioned techniques were used on Raheem. He was isolated and held in the interrogation room for hours. From the very beginning, Detective Gastrow cut off his denial of involvement, saying "you weren't on their porch when this happened." (101Ex6:17). Raheem denied again, and one of the detectives interrupted him, saying that he knew Raheem was involved in the shooting. (101Ex6:20-21).

Raheem continued to deny involvement, but was again cut off by a detective, saying: "you were one of the two boys out there and that's very good information, that's not nobody guessing. That's the truth okay." (101Ex6:23). Raheem denied his involvement at least twenty times during his first interrogation, and detectives countered every time.

Detectives also confronted him with true or false incriminating evidence. They told him that Ronald Franklin, a man he feared, was in the next room saying that Raheem was involved in the shooting. (101Ex6:27). Detective Gastrow acknowledged that was a lie, describing it as an interrogation "technique". (93:31-32).

Detectives Gastrow and Mueller used a minimization theme, weaving long "accident" or "mistake" scenarios, suggesting that Raheem didn't mean to hurt anyone. (101Ex6:31-4; 101Ex6:54). After Raheem had admitted involvement as a lookout, Detectives Salazar and Lough used another kind of minimization, describing a scenario in which

the main actor, the shooter had put Raheem in a difficult "situation," and "he got you in trouble. But at the same time I think you're kind of scared of him." (101Ex2:32).

Detectives Gastrow and Mueller contrasted their minimization examples with maximization, saying that if Raheem did not admit, he would get no "mercy" in court. To the district attorney, they suggested Raheem would "look like a cold hearted young man . . . . a man that has no conscience." (101Ex6:36). They suggested the district attorney would think, "those kids just wanted to murder," and "Maybe they thought it was funny. Maybe those boys running away laughing thought that was a cool thing to do to run and shoot somebody." (101Ex6:31-32).

The detectives did not stop with the primary psychological techniques described by Drizin and Leo. Detective Gastrow showed Raheem pictures of the victim, said he and his partner had to tell the victim's family, a nice religious family, what happened. They were "besides themselves in grief" and knew how to forgive. (101Ex6. 43-44)

Detectives Salazar and Lough also used Raheem's concern about his cousin, nicknamed Squeak, to teach Raheem a lesson. When Raheem asked if Squeak was still in custody, Detective Salazar said he got arrested "cause he lied about some things." He repeated that: "well your guy lied about some things and got himself arrested." (101Ex2:37-38). Later, Detective Salazar brought up Squeak a third time, saying: "And since your friend got arrested he decided it was in his best interest to tell the whole truth." (101Ex2:41).

The repeated use of these psychological techniques on Raheem weighs against the voluntariness of his confession.

8. Totality of the circumstances.

The totality of the circumstances test requires that the court consider the cumulative effect of these factors:

> Any one of these facts, standing alone, might be insufficient. But that is not the test we apply. We look to the totality of the facts taken together. The building blocks of fact accumulate. And as they accumulate, reasonable inferences about the cumulative effect can be drawn. In essence, a point is reached where the sum of the whole is greater than the sum of its individual parts.

State v. Waldner, 206 Wis. 2d 51, 58, 556 N.W. 2d 681 (1996).

In ***Hoppe,*** the courts "did not identify a single act by the police that was egregious," but when "put together, the actions of the police and the personal characteristics of Hoppe indicate that Hoppe's statements were involuntary." 261 Wis. 2d 294**,** ¶ 59.

Raheem was only 102 days older than Jerrell C.J., he had the same level of education, less intelligence, the same prior experience with police, and a demonstrated lack of understanding of his ***Miranda*** rights. Like Jerrell, he was not given an opportunity to call his parents. He was questioned for about 5 ½ hours, and he was held in custodial isolation for a longer period of time than Jerrell. Detectives repeatedly used a whole series of psychological tactics to pressure him into confessing. Under the totality of the circumstances, his inculpatory statement was "the result of a conspicuously unequal confrontation in which the pressures brought to bear on the [defendant] by representatives of the State exceeded [his] ability to resist." ***Hoppe,*** 261 Wis. 2d 294 ¶ 36.

Raheem's inculpatory statement was "not the product of a free and unconstrained will." ***Id.,*** ¶ 36. Therefore, it was involuntary and was inadmissible against him at all court proceedings. ***State v. Peebles,*** 2010 WI App 156, ¶ 21, 330 Wis. 243, 792 N.W. 2d 212.

C. Denial of the suppression motion was not harmless error.

The state argued in the court of appeals that if the court erred by denying the suppression motion, the error was harmless because Raheem had earlier admitted to being party to the crime of armed robbery. Raheem addressed the harmless error argument earlier in this brief, at pages 23-25. For the reasons stated therein, the state has failed to prove beyond a reasonable doubt that the erroneous admission of Raheem's statement "did not contribute to the conviction." ***State v. Rockette,*** 287 Wis. 2d 257, ¶ 26**.**

CONCLUSION

For the reasons stated above, Raheem Moore respectfully requests that the court vacate his conviction and his plea, and remand the case to the circuit court with instructions to suppress evidence of his unrecorded statement and his subsequent recorded statements.

Dated this 19th day of June, 2014.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: 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 and maximum of 60 characters per line of body text. The length of the brief is 9,653 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 19th day of June, 2013.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 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 rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 19th day of June, 2013.

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