STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT 1

Case No. 2013AP000127 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RAHEEM MOORE,

Defendant-Appellant.

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. 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 used numerous psychological techniques to induce his confession, was his statement voluntary?

The trial court ruled: The statement was voluntary.

II. 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 trial court ruled: In context, Raheem requested that the recorder be turned off, which constituted a "refusal" under Wis. Stat. § 938.31(3)(c)1. Therefore the unrecorded interrogation was justified and admissible

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Raheem would welcome oral argument. If the court decides the case based on the first issue, the decision will not warrant publication because it calls for application of well-established law to the facts of the case. A court decision on the second issue, however, would warrant publication because it requires interpretation of statutes that have not been discussed or interpreted by an appellate court in a published decision.

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).

After a series of evidentiary hearings, 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, alleging:

(1) Raheem did not knowingly, intelligently and voluntarily waive his right to remain silent, under the 5th and 14th amendments to the United States Constitution, and Article I, § 8 of the Wisconsin Constitution. (33:1)

(2) A 35-minute portion of the interrogation, during which Raheem made both oral and written statements to detectives, was not recorded, thus violating the mandate of ***In re Jerrell C.J.,*** 2005 WI 105, 283 Wis. 2d 145, 699 N.W. 2d 110, and Wis. Stat. § 938.195(2)(a). (33:8-13).

After several evidentiary hearings, the court denied both parts of the suppression motion. It ruled that "viewing the totality of the circumstances and in viewing all of the limitations that Mr. Moore has, I still believe that the confession was given voluntarily." (94:79; App. 104). With regard to the refusal, the court ruled that Raheem requested

that the recorder be turned off, and that constituted a "refusal" under Wis. Stat. § 938.31(3)(c)1. Therefore the unrecorded interrogation was justified. (92:4-16; App. 117).

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 a 11-year term of initial confinement and 9 years of extended supervision. (100:57).

Raheem Moore appeals from the judgment of conviction. (63; App. 101-2). Because his appeal is limited to the court's decisions regarding suppression of his statements to police, the following statement of facts focuses solely on facts relevant to that issue.

STATEMENT OF FACTS

Raheem Moore was arrested at 12:05 p.m. and taken to the crime investigation bureau office in Milwaukee on October 10, 2010, two days after the shooting. (40:2). He was 15 years old and in 8th grade. (101Ex6:9).[1]

[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.

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. (101Ex6:1).

Raheem told the detectives 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). He 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).

Detective Gastrow read ***Miranda*** rights from a card, and Raheem said he understood those rights. (101Ex6:15-16).

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.[2] (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 denied. 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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[2] 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 (sic) 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 (sic) 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. 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. 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. 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. (33:12).

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).

The detectives left, but Raheem remained in the interrogation room for nearly three hours, with the door open and a police officer observing him, until 8:28 p.m., when a second team of detectives arrived to question him. (33:2-3).

After restating the ***Miranda*** warnings, Detectives Paul Lough and David Salazar 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, comparing his own childhood in a poor neighborhood, saying Raheem's life "isn't all that different than mine was." 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).

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." 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. Okay. He asked about his ah his friend." (101Ex2:41).

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).

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." 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.

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).

Several times the detectives asked him if he was the one who shot the gun, and several times 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).

After the break, the detectives walked through details of the crime with Raheem. When Detective Salazar asked if he could take a few notes, Raheem asked: "What ah do you want ah like talk on there? (101Ex2:75). Detective Salazar asked if he wanted the recorder turned off. After a conversation described in more detail below, the recorder was turned off. (101Ex2:75-76).

The interrogation did not stop. At 11:20 p.m., Detective Salazar stated that Raheem had "suddenly admitted that he was the shooter" while the recorder was off. 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. He 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.

Facts Relevant to Turning Off the Recorder

When Raheem asked that the recorder be turned off before he identified the other person involved in the shooting, Detective Salazar had no difficulty deflecting 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.

A little while later, Detective Salazar actually introduced the topic of turning off the recorder. He asked if he could "take a few notes," and Raheem responded: "What ah do you want ah like talk on there? (101Ex2:75). Detective Salazar said:

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.

ARGUMENT

I. 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.

The constitutional right to protection from self-incrimination applies to juveniles as well as adults, and is protected by the Fourteenth Amendment of the U.S. Constitution and Article I, § 8 of the Wisconsin Constitution. ***In re Jerrell C.J.***, ***supra***, 2005 WI 105, ¶ 17.

When a juvenile waives that constitutional right, it is the state's burden to prove the voluntariness of a confession by the preponderance of the evidence. ***Id.,*** ¶ 17. 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, 308, 661 N.W. 2d 407; ***State v. Clappes***, 136 Wis. 2d 222, 236, 401 N.W. 2d 759 (1985).

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., supra,*** ¶ 16.

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

Custodial police interrogation entails "inherently compelling pressures." ***Miranda v. Arizona***, 384 U.S. 436, 467 (1966). Therefore, 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." ***Id.,*** 475.

"The pressure of custodial interrogation is so immense," the Court noted in ***J.D.B. v. North Carolina***, 131 S. Ct. 2394, 2401 (2011), "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." (citation omitted).

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, supra*** at ¶ 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. ***Id***. 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., supra,*** ¶ 25: "Courts have long recognized the importance of age in determining whether a juvenile confession is voluntary." In fact, like Haley, Raheem was at the "tender and difficult age" of 15 – just 40 days after his 15th birthday, when he was interrogated by Milwaukee detectives.

In ***Eddings v. Oklahoma***, 455 U.S. 104 (1982), the court held that "youth 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. ***Id***., 115-16, citing ***Bellotti v. Baird,*** 443 U.S. 622, 634 (1979).

In ***Jerrell C.J., supra,*** ¶ 26, the court held that Jerrell's age, 14, "was a strong factor weighing against the voluntariness of the confession." As the state pointed out in its brief, Jerrell was 62 days short of his 15th birthday, making him just 102 days older than Raheem. (Brief of Petitioner-Respondent at 7, ***In re Jerrell C.J., supra*** (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, supra***, the court held that a child's age must be taken into account in the objective determination of custodial status. ***J.D.B.*** cited ***Haley, Eddings, and Bellotti v. Baird,*** then quoted ***Gallegos v. Colorado***, 370 U.S. 49, 54 (1962) in its conclusion that "no matter how sophisticated,' a juvenile subject of police interrogation 'cannot be compared' to an adult subject." ***Id.,*** at 2403.

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

Jerrell C. J.'s eighth grade education and IQ of 84, indicating low average intelligence, were factors weighing against the voluntariness of his confession. ***Jerrell C.J., supra,*** ¶ 27. Like Jerrell, Raheem was in eighth grade. (101Ex6:9). He was less intelligent than Jerrell. Various IQ tests "very consistently" indicated that he functioned "at the low end of the borderline range of intelligence." 94:28.

Raheem's limited education and intelligence, therefore, also weigh against the voluntariness of his confession.

3. 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, supra*** at 476:

> 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.

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 – nearly 12 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 sat alone in the eight-by-eight foot interrogation room for nearly three more hours. At that point, like Jerrell, he was left wondering "if and when the inquisition would ever cease." ***Id.,*** ¶ 33, citing ***Woods v. Clusen***, 794 F. 2d 293, 298 (7th Cir. 1986).

Eight and one half hours after he was arrested, two "fresh" officers began another interrogation at 8:28 p.m. They handcuffed Raheem and placed him in a squad car for a trip to the scene of the crime, and continued their interrogation in the squad car. After return to the interrogation room, they 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 v. Ohio, supra*** (five hours), ***Gallegos v. Colorado***, ***supra*** (no "prolonged questioning"), and ***A.M. v. Butler, supra*** (two hours). 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. In addition to the actual questioning, Raheem was held incommunicado custody much longer than Jerrell J.: nearly three hours before the interrogation began and three hours between the two phases of the interrogation.

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

4. 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 v. Ohio, supra, 332 U.S. at 600.

In ***A.M. v. Butler, supra***, 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., supra***. 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." ***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, 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 he was allowed to call a parent, the detective replied, "he never asked to call a parent. So I wouldn't have offered for him to call a parent." (93:27-28).

Although the detectives did not specifically state a purpose of depriving Raheem of an opportunity to receive advice or counsel, that purpose is implied by Detective Gastrow's statement. There was no urgency to interrogate Raheem – it was already three hours after his arrest. The detective's explanation that he "wouldn't have offered" a call to a parent suggests a practice of not calling parents for juveniles subjected to interrogation. This is exactly what Chief Justice Abrahamson predicted in her concurrence in ***Jerrell C.J.:***

> . . . Wisconsin law enforcement officers have not heeded the warning this court issued 30 years ago in ***Theriault v. State*** [citation omitted], that law enforcement's failure to call a juvenile's parents would be viewed as "strong evidence that coercive tactics were used to elicit the

> incriminating statements." . . . . As the present case demonstrates, the long-time practice of Milwaukee police officers to exclude parents from the interrogation of juveniles has continued. . . .
>
> ***Theriault*** . . . obviously [has] not changed police practices, and there is no reason to think a second clarion call by this court reannouncing ***Theriault***'s totality of the circumstances rule will change police practices, especially when a leading police interrogation manual recommends that police interrogate suspects in privacy whenever possible.

Id., ¶¶ 97-98.

Therefore, 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.

5. Psychological techniques applied

In ***Jerrell C.J.,*** the court noted that the detectives' continually challenging 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" ***Id.***, ¶ 35.

Similarly, in ***A.M. v. Butler, supra***, 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." STEVEN DRIZIN & RICHARD LEO, *THE PROBLEM OF FALSE CONFESSIONS IN THE POST-DNA WORLD*, 82 N.C.L.Rev. 891, 1004 (March, 2004).

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 ever 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 Raheem would get no "mercy" in juvenile 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 DA 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 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 psychological techniques on Raheem weighs against the voluntariness of his confession.

6. Understanding of ***Miranda*** warnings

Detective Gastrow read Raheem the standard ***Miranda*** warnings, and Raheem said he understood them. (101Ex6:15-16). While Raheem believed that he understood his rights, subsequent testing showed that he "had a very, very poor understanding of how the right to silence applies to an interrogation situation." (94:32).

Raheem's poor understanding of the right to silence weighs against the voluntariness of his confession.

7. 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, supra***, 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." ***Id.,*** ¶ 59.

When Raheem's young age and limited education and intelligence are weighed against the totality of the pressures imposed by law enforcement, including long-term isolation, lengthy questioning, failure to call parents, and psychological tactics, it becomes apparent that his inculpatory statement was "the result of a conspicuously unequal confrontation in which the pressures brought to bear on the [Raheem] by representatives of the State exceeded [his] ability to resist." ***Id.***

Raheem's inculpatory statement was "not the product of a free and unconstrained will." ***Hoppe, supra*** at ¶ 36. Therefore, it must be suppressed.

II. Evidence of Raheem's Unrecorded Statements and the "Sew-Up" Confession That Followed, Were Not Admissible Because Raheem Did Not "Refuse to Respond or Cooperate" With Recording.

A. Introduction and standard of review

In ***Jerrell C.J., supra,*** ¶ 59, the court exercised its supervisory power "to require that all custodial interrogation of juveniles in future cases be electronically recorded . . .

without exception when questioning occurs at a place of detention."

The ***Jerrell C.J.*** recording requirement was codified by the legislature in Wis. Stat. § 938.195(2)(a):

> 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.

The question in this case is whether Raheem "refused to respond or cooperate" if the interrogation was recorded. It requires interpretation of Wis. Stat. § 938.31(3)(c)1. This is a question of law determined *de novo* by the court of appeals. ***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.

There is no dispute about the facts relevant to Detective Salazar's decision to turn off the recorder, because those facts are recorded. The question, therefore, is whether those facts establish that Raheem "refused" to respond or cooperate.

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. ***Id.,*** ¶ 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 an unwillingness to continue the interrogation. He never showed by his behavior that he was unwilling to continue. Earlier he had asked to have the recorder turned off, (101Ex2:42), but he did not repeat the request a second time.

In fact, Raheem did not even raise the topic of turning off the recorder – Detective Salazar did.

When 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). Presumably, Raheem was indicating the recorder when he asked.

Detective Salazar could have simply answered the question directly, telling Raheem that he did not have to talk any differently than he had been. He could have clarified that he was just asking permission to write some notes on a notepad.

Instead, Detective Salazar raised the topic of turning off the recorder, saying: "You want me to turn that off?" Raheem had not said that, but in response to the direct question, he said yes. Detective Salazar asked a few questions about why, eliciting the response that Raheem

wouldn't feel safe, and that Raheem was afraid of Raynard. (101Ex2:75-76).

Again, Detective Salazar had choices about how to respond. Earlier, when Raheem expressed his fear of Raynard's brother, Ronald, Detective Salazar reassured Raheem:

> We can protect you. . . . I've been doing this for a long time. I haven't lost one person. Okay. Not a witness. Not a co-defendant. Nothing. . . . And if you're scared I can understand that but we have to get past that.

101Ex2:41-42.

Detective Salazar could have assured him, as he had earlier, that he would not play the recording for Raynard, and he could have reminded him of the purposes of recording. (101Ex2:42).[3]

Instead, Detective Salazar went back to the topic of turning off the recorder, asking leading questions to get Raheem to agree that the police were neither asking nor encouraging him to turn it off. He clarified that the "only reason you want us to turn it off is because it's your own choice. Is that right? Yes or no?" Then he turned it off. (101Ex2:76).

Nowhere in this exchange did Raheem indicate that he was unwilling to continue to speak if the detective did not

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[3] Detective Salazar's explanation of the purposes of recording was woefully incomplete. He said it was only for police protection for false allegations of mistreatment. Raheem was not informed of the advantage to him – safeguarding his constitutional rights by making it possible for him to challenge misleading police testimony. ***Jerrell C.J.,*** supra, ¶ 55.

turn off the recorder. Given the choice, he expressed a preference that it be turned off, but his expressions went no further than that.

An interpretation of Wis. Stat. § 938.31(3)(c)1. construing "refused" so broadly that it includes instances, such as this one, where a juvenile is given a choice by police detectives whether to have a recorder on or off and chooses "off," is contrary not only to the plain language of § 938.31(c)1., but also to legislative intent.

Wisconsin Statute § 938.31(c)1. was enacted in 2005 Act 60 to implement the court's decision in ***Jerrell C.J.*** "to require that all custodial interrogation of juveniles in future cases be electronically recorded . . ." ***Id.***, ¶ 59. The ***Jerrell C.J.*** decision recognized that "adopting the rule proposed by Jerrell will be met with some hesitation," no doubt referring to objections of law enforcement officers. However, the court agreed with the court of appeals 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." The court found that an electronic recording requirement "is a means to that end." ***Id.,*** ¶ 57.

Thus the leading idea was to record all juvenile interrogations. Accordingly, the legislature drafted and enacted only specific and narrow exceptions. It required "refusal," not "preference" or "choice." 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.

Therefore, Detective Salazar was not authorized to turn off the recorder pursuant to Wis. Stat. § 938.195. Pursant to Wis. Stat. § 938.31(3)(b), the court erred by

denying Raheem's motion to suppress his unrecorded statements.

C. Raheem's subsequent recorded statements "sewing up" the unrecorded 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. Raheem's statements must be suppressed.

A portion of the argument in the circuit court was addressed to the correct remedy, if it were determined that Detective Gastrow did not have legal justification to turn off the recorder.

The rule requiring that all custodial interrogations of juveniles be recorded in ***Jerrell C.J.***, was grounded in the court's authority to "adopt rules governing the admissibility of evidence." ***Id.***, ¶ 48. It pointed out that it was not regulating law enforcement practice, but was focused on court procedures:

> 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.

Jerrell C.J., ¶ 48.

The remedy envisioned by the Wisconsin Supreme Court, therefore, was suppression of unrecorded confessions.

However, when the legislature attempted to codify ***Jerrell C.J,*** it overlooked cases in which juveniles are tried in adult court, rather than juvenile court. Wis. Stat. § 938.195 codifies the requirement that all custodial juvenile interrogations be recorded. Wis. Stat. § 938.31(3)(b) provides that an unrecorded statement "is not admissible in evidence against the juvenile in any court proceeding alleging the juvenile to be delinquent." It does not say what should happen in a court proceeding in which a juvenile is charged with a crime in adult court.

Wisconsin Statute § 972.115 provides if a "statement made by a defendant during a custodial interrogation is

admitted into evidence in a trial for a felony before a jury," the defendant can request and receive an instruction to the jury that it may consider the absence of a recording in evaluating the evidence of the interrogation and statement. If that statute is interpreted to be applicable to juvenile defendants, it violates the mandate of the Wisconsin Supreme Court.

Given the clear mandate of the Wisconsin Supreme Court, which did not distinguish between juveniles tried in juvenile or adult court, and the clear intent of the legislature to codify the ***Jerrell C.J.*** decision, the appropriate remedy in this case is suppression of Raheem Moore's statement to police.

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 10th day of June, 2013.

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 7,685 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 10th day of June, 2013.

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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 10th day of June, 2013.

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