STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4

Appeal No. 2015AP160 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JEANETTE M. JANUSIAK, Defendant-Appellant

APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE, ENTERED IN THE SAUK COUNTY CIRCUIT COURT, THE HONORABLE PATRICK J. TAGGART PRESIDING.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

ZALESKI LAW FIRM
Steven W. Zaleski
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone), Zaleski@Ticon.net
Attorney for Defendant-Appellant

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ISSUE PRESENTED

Were inculpatory statements by Janusiak to law enforcement officers free from coercion and improper pressures and therefore voluntarily made?

The trial court answered: yes.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Counsel would welcome oral argument should this Court determine that such argument would be helpful in addressing the issues presented in this brief.

Counsel believes that publication will be warranted as this appeal involves the issue of voluntariness of a confession in the specific context of threats or promises made to a defendant regarding her children. Although courts from other jurisdiction have specifically examined the issue, Janusiak does not believe any Wisconsin courts have done so.

STATEMENT OF THE CASE

The State charged Janusiak with first degree intentional homicide. A-Ap.100-101. The case originated from the death of an infant, P.S., DOB 3/27/2011, for whom Janusiak was a babysitter. A-Ap.102. The criminal complaint, A-Ap.100-101, contains the specific allegations made by the State.

Prior to trial, the State filed a motion seeking a pre-trial ruling as to the admissibility of certain statements which Janusiak made to law enforcement. A-Ap.102-114. The defense challenged the admissibility of such statements on grounds that Janusiak did not make them voluntarily. A-Ap.116-118. After briefing by both parties, the trial court entered a memorandum decision concluding that Janusiak's statements were voluntary. A-Ap.119-125.

The case proceeded to a ten day jury trial wherein the jury found Janusiak guilty. A-Ap.126. At sentencing, the trial court sentenced Janusiak to life imprisonment and found her eligible for extended supervision after 40 years. A-Ap.126. Janusiak timely filed a notice of intent to pursue postconviction relief pursuant to which the State Public Defender appointed

the undersigned counsel. These proceedings follow Janusiak's notice of appeal. 106.

STATEMENT OF FACTS

Police Officer Mark Eberle

City of Reedsburg Police Officer Eberle testified on behalf of the State at the suppression hearing. 27:8. While on duty on August 18, 2014, Eberle received an ambulance page for an infant not breathing at 150 North Freedom in the City of Reedsburg, Wisconsin. 27:9. Eberle responded and arrived at the location at 2:24 a.m. 27:9. After knocking on the front door, Eberle heard a voice which told him to come in. 27:10. Eberle entered the house and met a young female who directed him toward the back bedroom. 27:10. In the room, Eberle found Janusiak, who was on the phone with the 911 operator, and an infant who did not appear to be breathing. 27:10-11. Eberle provided care to P.S. until the paramedics arrived. 27:11. Janusiak was crying and visibly upset. 27:11. Eberle spoke with Janusiak for about ten minutes. 27:15. Eberle asked Janusiak questions to find out who the child's mother was and then contacted the mother. 27:15. After calling

and speaking with the mother for about five minutes, Eberle returned to talk with Janusiak. 27:16. Janusiak was calmer. 27:23. Eberle questioned Janusiak further about what had happened that night. 27:17. Eberle did not arrest Janusiak and did not provide her with the "Miranda" warnings. 27:18. Eberle finished speaking with Janusiak at about the same time emergency medical services workers placed P.S. in the ambulance. 27:17. Eberle then left after spending about one hour at the residence. 27:18.

Lieutenant Gary Zellmer

Lieutenant Zellmer of the Reedsburg Police Department also testified for the State. At around 12:30 p.m. on August 18, Zellemer went to Janusiak's residence. 27:29. Zellmer asked Janusiak if she would come down to the Reedsburg Police Department so he could talk with her in regards to the P.S. incident. 27:31. The purpose was to ask Janusiak more questions. 27:35. Zellmer had contact with Janusiak for about twenty minutes at the residence. 27:31. Janusiak agreed to come to the police department. 27:32. An officer placed Janusiak in handcuffs and transported her to the station. 27:32. Janusiak appeared fine, cooperative and willing to come down to the department. 27:32. At the police department, Zellmer met

with Janusiak in an interview room for about an hour. 27:37. A Detective Stetler was the main "interviewer" but Chief of Police Becker also participated in the meeting with Janusiak 27:34. Police removed the handcuffs from Janusiak before talking with her. 27:37.

Detective Andrew Stelter

Detective Stelter of the Reedsburg Police Department also testified. Stelter went to Janusiak's house to meet Eberle and an Officer Knuth who were already there. 27:40. Stelter arrived around 4:00 a.m. and met with Janusiak for at least an hour. 27:41, 54. Janusiak did not look tired but around 5:00 a.m., she exhibited some yawns. 27:43. Janusiak was pleasant, helpful and concerned. 27:43. Janusiak showed Stelter the bedroom, 27:43, and "what happened." 27:44. After leaving the house, Stelter next saw Janusiak at 12:36 p.m. at the police department. 27:45.

At the police department, it was Stelter's intention to "formally interview" Janusiak regarding what had happened to P.S. 27:45. Stelter specifically wanted to get an explanation for what had happened. 27:55. The meeting took place in a room about ten foot by eight foot. 27:45. There was a small table with two chairs facing each other, a telephone, and a corner table.

27:45. The room had one door which opened to the booking area. 27:46. The room included recording equipment which recorded the "interview" and Stelter informed Janusiak that the meeting would be recorded. 27:46. Prior to asking questions, Stelter read Janusiak the "Miranda" warnings and obtained Janusiak's signature on a written "Miranda" waiver form. 27:47. The "interview" lasted about seven hours. 27:48. During those seven hours, there were three breaks. 27:48. Stelter needed the breaks to talk with Zellmer and Becker about the case and what information the doctors had to provide. 27:48. Janusiak used the breaks to smoke outside or use the bathroom. 27:48. An officer always accompanied Janusiak outside. 27:49. Janusiak was not under arrest but she was not free to leave. 27:49. Janusiak had some soda during the "interview" but no food. 27:49. Stelter did not ask Janusiak if she had received any sleep since he last saw her at the house. 27:54.

Janusiak's interrogation[1]

The interrogation was recorded on DVD in two segments. 12. The first segment covers the start of the interrogation and continues to approximately

[1] Janusiak only challenged the statements made during the interrogation at the police station and this appeal only involves those statements.

4 hours and 27 minutes into the interrogation. 12. The second segment covers the last 2 hours and 32 minutes of the interrogation.[2] 12. Throughout the first four and a half hours of the interrogation, Janusiak repeatedly denies knowing what caused P.S.'s injuries and/or that she had anything to do with such injuries. 111:129, 133, 136, 140, 142, 143, 144, 145, 150, 151, 152, 154, 157, 159, 165, 169, 184, 185, 186, 187, 188, 189, 190, 191, 194, 195, 196, 198.[3]

At about the 3:14:39 mark, Stelter posits various accidental scenarios that could possibly explain P.S.'s injuries, for example that P.S. fell or that Janusiak dropped P.S. 111:153. Stelter informs Janusiak that "those are accidents, those aren't intentional things, you know, it's not what people go to, get in trouble for…" 111:153.

At about 3:55:06, a Ms. Hazel Coppernoll, the Supervisor of the Sauk County Human Services Department enters the room and advises Janusiak that she "really need(s) to tell us what's going on." 111:176. At 3:58:38, Coppernoll tells Janusiak "at this point, I'm not taking them into custody,

[2] The time references correspond to channel 01 on the DVD.
[3] Approximate corresponding DVD references are as follows: 12 at 2:46:25, 2.52:21, 2.55:54, 3.00:29, 3:02:56, 3:04:25, 3:04:55, 3:05:08, 3:06:02, 3:11:44, 3:12:39, 3:13:30, 3:13:36, 3:14:23, 3:15:15, 3:19:14, 3:22:23, 3:24:37, 3:24:42, 3:29:53, 3:37:39, 4:07:16, 4:08:32, 4:10:12, 4:10:25, 4:12:15, 4:12:46, 4:12:50, 4:14:07, 4:14:54, 4:16:28, 4:23:28, 4:22:39, 4:24:19, 4:06 (second segment).

umm, I'm obviously very concerned about your own children if this happened at your home, umm, I want you to be aware of that then, you know, I'm looking into that very closely." 111:178. Coppernoll remains in the room until about 4:04:19 when she exists and advises Janusiak to "be as cooperative as you possibly can." 111:183.

At five minutes into the second segment Stelter informs Janusiak that based on the medical evidence, whatever happened to P.S. happened while she was in Janusiak's care. 111:199; 12 at 4:53. Janusiak continues to deny knowing what caused P.S.'s injuries and/or that she had anything to do with such injuries: 111:200, 201, 202, 203, 204, 205, 206, 207, 209, 210, 211, 212, 213, 214.[4]

At 24:19, Stelter informs Janusiak that she was going to be charged with homicide. 111:214. At such point, Janusiak begins sobbing and responds, "What? Are you serious? I, are you kidding me? (Unintelligible) homicide really? Cause she's at my house? And I didn't do anything. Oh my God. Oh my God. (Unintelligible). I wish I. (Unintelligible) homicide," 111:214, 24:19, "what did I do I didn't do anything." 111:214; 12 at 25:31.

[4] Approximate corresponding DVD references are as follows: 12 at 6:54, 7:04, 9:04, 9:35, 10:10, 11:11, 11:22, 11:29, 11:33, 11:53, 12:12, 12:20, 13:16, 13:30, 14:17, 15:50, 18:07, 18:18, 18:51, 19:48, 20:02, 20:06, 2:13, 20:59, 21:35, 22:29, 23:10, 23:23.

Janusiak continues to deny doing anything to harm P.S. 111:215, 217; 12 at 26:19, 28:34. At this point, Chief of Police Becker enters the room. Becker asks Janusiak to consider whether a judge would be less inclined or more inclined to incarcerate her if she were to take responsibility. 111:218, 219; 12 at 29:23 to 30:25. Janusiak again denies doing anything to P.S. 111:219; 12 at 30:27. From 31:24 to 31:42, the following dialogue takes place:

Becker: *We don't want you to go to jail*, we want to find out what happened. Italics added.

Janusiak: I don't want to go to jail.

Becker: We want to find out.

Stelter: *I want to send you home with your kids, that's what I want.* Italics added.

Becker: *But you're not giving us anything to work with here*. Italics added.

Janusiak: There is nothing else I can think of that (unintelligible) happened to her though. That's, I'm try, you know what I mean, I'm trying to tell you.

Stelter: There, there's got to be something, there's got be some….111:220; 12 at 31:24 to 31:42.

At 32:01, Becker tells Janusiak, "There's, there's an officer waiting outside the door to transport you." 111:221. Between 32:30 and 32:40, Becker tells Janusiak, "(t)his is it, this is the end of the line," "it's time to tell us." 111:221. Janusiak responds, "I didn't do anything to (unintelligible) (P.S.), you know what I mean? I didn't, (unintelligible) how could I hit her, I didn't drop her, you know what I mean? I didn't trip, I didn't fall, (unintelligible), you know I would have hurt myself if I would have done that, I got pregnant stomach, you know what I mean (unintelligible) possible to fall." 111:221; 12 at 32:40. At 33:33, Janusiak states, "No, but I, I would, I would never hit her or do anything like that. Never. (Unintelligible), you know. (Unintelligible) hit her head." 111:223. Becker then tells Janusiak, "Think back, walk yourself through every second of that moment, while you're with (P.S.) to tell us what could have caused this injury. 111:223; 12 at 33:48. At about 40:37 to 41:26, the following dialogue takes place:

Janusiak: I didn't do anything wrong I would have (unintelligible) tell you.

Stelter: I just want an explanation for it (unintelligible).

Janusiak: (Unintelligible) seriously, so you're telling me that it couldn't have happened from a fall, but then you guys, like, it's like, you know what I mean, telling me…

Stelter: To fall, (unintelligible) a roll off the bed, no it's not like that.

Janusiak: (Unintelligible).

Stelter: Not going to do this, a lot higher.

Janusiak: Like what?

Stelter: I don't know.

Janusiak: (Unintelligible) this. I mean, (unintelligible) I didn't hit her, I did not hit her.

Stelter: I'm not saying you did hit her.

Janusiak: Then what are you saying?

Stelter: I don't know, what, what happened (unintelligible) hit her.

Janusiak: (Unintelligible) maybe she could have fallen.

Stelter: Why do you think that?

Becker: Did she fall?

Janusiak: Huh?

Becker: Did she fall?

Janusiak: Maybe, (unintelligible).

Becker: (Unintelligible) did she fall?

Janusiak: She fell of my bed, it was off my bed.

Becker: What else happened?

Janusiak: That's it.

Becker: That's all that happened?

Janusiak: That's it.

Becker: That's all that happened?

Janusiak: Yes. 111:224-225.

Stelter and Becker reject that P.S. fell off the bed, "There's got to be more to it," 111:227; 43.48, and continue to press Janusiak. From 41:26 to approximately 1:06, Janusiak insists that P.S. fell off the bed while she was not in the room. 111:225-244.

At about 1:06:26, Becker tells Janusiak, "I feel, I feel terrible for you, but you're kind of, this is the way you want this to go down and that's, that's totally up to you, I understand, if you have reason that you want to go to jail I guess that's that's fine." "But we're talking about jail, no kids." 111:244; 12 at 1:06:35. "No family." 111:244; 12 at 1:06:36.

At about 1:08:24 to 1:09:25, Janusiak adds that P.S. hit an open drawer on a table next to the bed as she fell. 111:246.

Stelter then says, " There's more to it, I know that. Why don't you want to tell me everything that happened to (P.S.). 111:247; 12 at 1:10:36. Janusiak then indicates, "Cause I don't know." 111:148; 12 at 1:10:44. Stelter tells Janusiak, "You can take a child and roll them down a flight of stairs and they'll be fine. No brain injuries, nothing." 111:249; 12 at 1:12:50. "Uh, I just went to class on this, I, I, studied all about it. A fall off the bed onto the table and hitting the floor is not going to do anything. You're talking about two drops at two feet maybe ok? Boom, boom. Is that going to kill a child?" 111:249; 12 at 1:12-1:13:08. Janusiak indicates she does not know what happened to P.S. because, she was not in the room and that P.S. was on the bed with her three kids. 111:250; 12 at 1:14:45. Janusiak then suggests that perhaps one of the kids could have dropped P.S. while playing rough. 111:252; 12 at 1:16:58. Janusiak indicates that she went into the room when she heard the baby crying and found her on the floor by the head of the bead and the table. 111:253; 12 at 1:17:48. Stelter responds, "That, Jeannette, ok. Let, let's stop, stop with the whole falling off the bed thing." 111:254; 12 at 1:18:09. Janusiak insists that she does

not know what happened because she was not in the room. 111:254, 261, 262; 12 at 1:18:21, 1:31:49, 132:37.

At 1:34:05, Stelter suggests that perhaps Janusiak dropped P.S. onto the bed and then she fell to the floor:

> Stelter: You kind of drop him on the bed then he rolls off the bed, I mean, I could see something like that happening.
>
> Janusiak: I never did that. I'm here (unintelligible) and insinuate that I did something like that, that never, I'm not going to tell you a lie, so that. 111:263; 12 at 1:34:16

At 1:42:05, Becker tells Stelter to handcuff Janusiak and take her out to the car for transport. 111:270. Janusiak replies, "Are you serious?" 111:270; 12 at 142:08. Becker states, "Yep, absolutely, you had your chance." 111:270; 12 at 1:42:10. Janusiak then asks, "What else do you want to know?" 111:270; 12 at 1:42:14. Janusiak then proceeds to say that she placed (P.S.) too close to the edge of the bed and that she fell off and hit the table. 111:271-272.

At about 1:58:28, Stelter informs Janusiak the she's going to be charged with first degree intentional homicide and that she is going to jail. 111:283. At 2:02:14, Janusiak says that she tossed (P.S.) on the bed and that (P.S.)

fell off and hit the table and floor. 111:288; 294; 12 at 2:02:14, 2:08.12. The interrogation ends at 2:32:19.

Trial court's findings and conclusions

The trial court issued a memorandum decision wherein it found that "there were no improper police practices or coercion used against the Defendant to obtain the statements" and concluded that the statements were voluntary. A-Ap.123,125.

ARGUMENT

Trial court erred in admitting Janusiak's statements to law enforcement because such statements were not voluntary.

A. Standard of review

The question of voluntariness involves the application of constitutional principles to historical facts. We give deference to the circuit court's findings regarding the factual circumstances that surround the making of the statements. **State v. Hoppe**, 2003 WI 43, ¶34, 261 Wis.2d 294, 661 N.W.2d 407 citing **Arizona v. Fulminante**, 499 U.S. 279, 287, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1990); **State v. Clappes**, 136 Wis.2d 222, 235, 401

N.W.2d 759 (1985). However, the application of the constitutional principles to those facts is subject to *de novo* review. **State v. Hoppe,** 2003 WI 43 at ¶34; **State v. Santiago**, 206 Wis.2d 3, 18, 556 N.W.2d 687 (1996). In this case, Janusiak challenges the ultimate finding by the trial court that her statements were voluntary and not the product of coercion or improper influence. Janusiak also contends that the trial court clearly erred by failing to consider certain historical or evidentiary facts, specifically, Coppernoll's presence in the interrogation and her statements to Janusiak.

B. Wisconsin and federal law regarding voluntariness

If a defendant's statements are not voluntary, their admission violates due process under the Fourteenth Amendment of the U.S. Constitution and Article I, Section 8 of the Wisconsin Constitution. **State v. Hoppe**, 2003 WI 43 at ¶36. A defendant's statements are voluntary if they 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 pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist. **Id**. The pertinent inquiry is whether the statements were coerced or the product of improper pressures

exercised by the person or persons conducting the interrogation. **Id**. Coercive or improper police conduct is a necessary prerequisite for a finding of involuntariness. **Id**.

We apply a totality of the circumstances standard to determine whether a defendant's statements are voluntary. **Id**. The totality of the circumstances analysis involves a balancing of the personal characteristics of the defendant against the pressures imposed upon the defendant by law enforcement officers. **Id.** at ¶38. The relevant personal characteristics of the defendant include the defendant's age, education and intelligence, physical and emotional condition, and prior experience with law enforcement. **Id**. at ¶39. The personal characteristics are balanced against the police pressures and tactics which were used to induce the statements such as: the length of the questioning, any delay in arraignment, the excessive physical or psychological pressure brought to bear on the defendant, any inducements, threats, methods or strategies used by police to compel a response, and whether the defendant was informed of the right to counsel and right against self-incrimination. **Id**. When the allegedly coercive police conduct includes subtle forms of psychological persuasion, the mental condition of the defendant becomes more a significant factor in

the "voluntariness" calculus. **Id**. at ¶40. Police conduct does not need to be egregious or outrageous in order to be coercive. **Id.** at ¶46. Rather, subtle pressures are considered coercive if they exceed the defendant's ability to resist. **Id**. 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**. It is the State's burden to prove by a preponderance of the evidence that the statements were voluntary. **Id**. at ¶40.

C. Tactics by law enforcement which prey upon a parent's fundamental interest in the relationship with his or her children in order to obtain an inculpatory statement are improper and coercive, and render a statement involuntary.

The Fifth Amendment is founded on principles of humanity and civil liberty secured only after years of struggle. **Malloy v. Hogan**, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth. **Id**. at 8. "(C)ertain interrogation techniques," the United States Supreme Court has held, "either in isolation or as applied to the unique characteristics of a particular suspect, are so

offensive to a civilized society that they must be condemned." **Miller v. Fenton**, 474 U.S. 104, 109, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985). This condemnation arises not only because we are concerned that the enforcers of the law themselves respect the law, but as importantly because we are concerned that the fundamental fairness guaranteed criminal defendants by the Due Process Clause of the Fourteenth Amendment to the United States Constitution not be undermined by confessions extracted from them against their will. See **Jackson v. Denno**, 378 U.S. 368, 376, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964); **Culombe v. Connecticut**, 367 U.S. 568, 584, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961).

In **Lynumn v. Illinois**, 372 U.S. 528, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963), the Supreme Court considered a confession by a mother of two young children who "confessed" only after police told her that her children would be taken from her and that state financial aid for her infant would be cut off if she did not "cooperate." In analyzing the police tactics brought upon the mother, the Supreme Court concluded as follows:

> It is thus abundantly clear that the petitioner's oral confession was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not "cooperate." These threats were made while she was encircled in her apartment by three police officers and a twice convicted felon who had purportedly "set her up." There was no friend or adviser to whom she might turn. She had had no previous experience with criminal law, and had no reason not to believe

that the police had ample power to carry out their threats. We think it clear that a confession made under such circumstances must be deemed not voluntary, but coerced. That is the teaching of our cases. We have said that the question in each case is whether the defendant's will was overborne at the time he confessed. **Lynumn v. Illinois**, 372 U.S. 528 at 534.

In contemplating what it called the "deceptive practice" employed by the police in **Lynumn**, the Seventh Circuit Court of Appeals in **Holland v. McGinnis**, 963 F.2d 1044 (7th Cir. 1992), recognized that the practice "did more than affect the suspect's beliefs regarding her actual guilt or innocence, and judgments regarding the evidence connecting her to the crime. It also distorted the suspect's rational choice (i.e., is it wise or morally right to confess given the aforementioned beliefs and judgments?) by introducing a completely extrinsic consideration: an empty but plausible threat to take away something to which she and her children would otherwise be entitled…This extrinsic consideration not only impaired free choice, but cast doubt upon the reliability of the resulting confession, for one can easily imagine that a concerned parent, even if actually innocent, would confess and risk prison to avoid losing custody of her children and their welfare benefits." **Holland v. McGinnis**, 963 F.2d at 1052.

In **United States v. Tingle**, 658 F.2d 1332 (9th Cir. 1981), the Ninth Circuit reached a similar conclusion in evaluating a "confession" obtained from a

mother only after police told her that "she would not see (her) child for awhile if she went to prison." **Id**. at 1334. The interrogation took place in the back seat of a police car and lasted approximately one hour. **Id**. at 1333. At the beginning of the interrogation, police determined that Tingle was the mother of a two year old child. **Id**. at 1334. In an effort to obtain a confession, an officer recited the maximum penalties for the crimes of which Tingle was suspected, and told her that she would not or might not see the child for a while if she went to prison. **Id**. The officer's purpose was to make it clear to her that she had "a lot at stake." **Id**. Tingle gave an incriminating statement. **Id**. In evaluating the voluntariness of the "confession," the Ninth Circuit stated that a confession "must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." **Id**. at 1335 quoting **Bram v. United States**, 168 U.S. 532, 542-43, 18 S.Ct. 183, 42 L.Ed. 568 (1897). The **Tingle** court further stated, "A confession is involuntary whether coerced by physical intimidation or psychological pressure…. Law enforcement conduct which renders a confession involuntary does not consist only of express threats so as to bludgeon a defendant into failure of the will. Subtle psychological coercion

suffices as well, and at times more effectively, to over bear 'a rational intellect and free will.'" **United States v. Tingle**, 658 F.2d at 1335. "As the Supreme Court noted in **Malloy**, '(w)e have held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed.'" **United States v. Tingle**, 658 F.2d at 1335 citing **Malloy v. Hogan**, 378 U.S. at 8 and **Haynes v. Washington**, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963). With respect to the specific confession at issue in **Tingle**, the court concluded as follows:

> We think it clear that the purpose and objective of the interrogation was to cause Tingle to fear that, if she failed to cooperate, she would not see her young child for a long time. We think it equally clear that such would be the conclusion which Tingle could reasonably be expected to draw from the agent's use of this technique. *The relationship between parent and child embodies a primordial and fundamental value in our society. When law enforcement officers deliberately prey upon the maternal instinct and inculcate fear in a mother that she will not see her child in order to elicit "cooperation," they exert the "improper influence*" proscribed by **Malloy**. The warnings that a lengthy prison term could be imposed, that Tingle had a lot at stake, that her cooperation would be communicated to the prosecutor, that her failure to cooperate would similarly be communicated, and that she might not see her two-year old child for a while must be read together, as they were intended to be, and as they would reasonably be understood. Viewed in that light, (the officer's) statements were patently coercive. **United States v. Tingle,** 658 F.2d at 1336. Italics added.

In **Stanton v. Commonwealth**, 349 S.W.3d 914 (Ky. 2011), the Kentucky Supreme Court embraced similar logic to that set forth by the Ninth Circuit in **Tingle**:

…when law enforcement personnel deliberately prey upon parental instincts by conjuring up dire scenarios in which a suspect's children are lost and by insinuating that the suspect's "cooperation" is the only way to prevent such consequences, the officers run a grave risk of overreaching. So powerful can parental emotions be that the deliberate manipulation of them clearly has the potential to "overbear" the suspect's will and to "critically impair" his or her capacity for "self-determination." **Id**. at 920.

In **People v. Medina**, 25 P.3d 1216 (Colo. 2001), the Colorado Supreme Court en banc held that a "confession" was rendered involuntary by police conduct that was calculated to cause a defendant to believe that a child would be removed from the family unless he confessed. In **Medina**, at issue were statements made by a police detective to a father while the detective was investigating a possible child abuse incident involving the father's ten week old child. The detective made statements to the father that the baby would be removed from the custody of the father and mother unless the father agreed to "cooperate" and "speak to him." **Id**. at 1219-1220.

In **People v. Richter**, 54 Mich. App. 598, 221 N.W.2d 429 (Mich. App. 1974), the Michigan Court of Appeals held that police threats to permanently remove a mother's child from her home if she did not confess her involvement in her cousin's escape from jail rendered the "confession,"

involuntary. **Id**. at 605. The Michigan Court specifically held that "We think the psychological coercion practiced here, the threat to permanently remove the defendant's child if she did not tell the truth, was no less devastating to the exercise of free will than physical torture, and no less excusable." **Id.**

In **State v. Brown**, 37 Kan. App.2d 726, 157 P.3d 655 (Kan. App. 2007), the Kansas Court of Appeals held that a father's statements to law enforcement officers confessing his involvement in causing injuries to his infant child were not freely and voluntarily made where the record showed that the father succumbed and confessed only after being subjected to persistent pressure from child protective services officials who warned that reintegration would not be considered unless parents "admitted" the cause of injuries to the child. **Id**. at 732. The Court emphasized "the underlying principle that the voluntariness of one's statements to law enforcement can be undermined when solicited under threat of another coercive option." **Id**. at 731. The Court in particular noted that "(w)hen a parent is essentially compelled to choose between confessing guilt in abusing his or her own

child or losing his parental rights, the choice is between two fundamental rights under the constitution." **Id**. at 732.

D. Janusiak's statements were the product of coercion brought about by 1) the threat to remove her children from the home unless she cooperated, 2)the promise that she could leave jail and return home to her children if she cooperated, 3)the length of the interrogation, and 4)the interrogation's custodial nature.

At about 3:55:06 into the interrogation, Coppernoll, the Supervisor of the Sauk County Human Services Department entered the interrogation room, joined Becker and Stelter, and advised Janusiak that "…I think the best, if I can give you any kind of advice you know you really need to tell us what's going on." 111:176. At 3:58:38, Coppernoll informed Janusiak "*at this point, I'm not taking them (Janusiak's children) into custody,* umm, I'm obviously very concerned about your own children if this happened at your home, umm, *I want you to be aware of that then*, *you know, I'm looking into that very closely*." 111:178. Coppernoll remained in the room until about 4:04:19 when she advised Janusiak to "*be as cooperative as you possibly can*," and then left. 111:183. Coppernoll's presence in the interrogation room and her statements to Janusiak about taking her kids into

custody had the intent and purpose of causing Janusiak to believe that unless she "cooperated," Coppernoll would remove Janusiak's children from the family's home and take them into state custody. Coppernoll's words expressly conveyed this precise message to Janusiak and it is hard, if not impossible, to reasonably interpret her words in another way. Further, Coppernoll introduced herself as the "supervisor" for Child Protective Services in Sauk County and as such plainly conveyed to Janusiak that she indeed had the power and authority to take Janusiak's children into custody. Any ordinary person who heard Coppernoll's words and understood Coppernoll's authority would have reasonably thought that his or her lack of "cooperation," would have the effect of causing his or her children to be taken away. In this regard, the threat communicated by Coppernoll's words and presence was more pronounced, immediate and legitimate, than the threats at issue in **Medina**, and **Richter**, where the threats of removal were made by police officers. If the threats by the officers in **Medina** and **Richter** were coercive, which they all were found to be, so too is the threat communicated by Coppernoll. As the Seventh Circuit recognized in **Holland**, supra, it is the interjection of this "extrinsic circumstance" which impairs a parent's free choice of whether to make a statement or not.

Holland v. McGinnis, 963 F.2d at 1052. As the **Holland** court discussed, rather then deciding whether to confess based on her belief as to her actual guilt or innocence, and her judgments regarding evidence connecting her to the crime, the suspect makes a decision to confess based on a "completely extrinsic consideration." **Id**. The **Holland** court was wise to recognize not only that such circumstance precludes the exercise of free will but that it also casts doubt on the reliability of the confession "for one can easily imagine that a concerned parent, even if actually innocent, would confess and risk prison to avoid losing custody of her children." **Id**. As discussed in **State v. Brown**, the parent's right against self-incrimination is placed in direct conflict with the parent's fundamental right to the care and custody of his or her children. **State v. Brown**, 37 Kan.App.2d at 731. Under such circumstance, the defendant may be "predisposed to falsify an admission of guilt." **Id**. Such is the case here. It is striking to note that Janusiak steadfastedly maintained her innocence and denied any knowledge of what happened to P.S. for over 5 hours of the interrogation, only to incriminate herself within 6o minutes of when Coppernoll left the room. Nonetheless, the trial court wholly failed to consider the presence of Coppernoll in the interrogation and as well as what Coppernoll told Janusiak about taking her

children into custody and cooperating. The trial court's failure in this regard constitutes clear error.

Of course, during those same 60 minutes, which comprise approximately 4:04:19 to 4:27:00 in the first segment, and 1:00 to 41:29 in the second segment, Stelter and Becker further preyed upon Janusiak's parental instincts by expressing to her that she would be able to leave jail and go back home to her children if she cooperated:

Becker: *We don't want you to go to jail*, we want to find out what happened. Italics added.

Janusiak: I don't want to go to jail.

Becker: We want to find out.

Stelter: *I want to send you home with your kids, that's what I want.* Italics added.

Becker: *But you're not giving us anything to work with here*. Italics added.

Janusiak: There is nothing else I can think of that (unintelligible) happened to her though. That's, I'm try, you know what I mean, I'm trying to tell you.

Stelter: There, there's got to be something, there's got be some…:111:220; 12 at 31:24 to 31:42.

Becker's words expressly communicated that he did not want Janusiak to go to jail and that he just "wanted to find out what happened." Stelter's words expressly communicated that he wanted to send Janusiak home to her children. Becker's words, "But you're not giving us anything to work with here," expressly communicated that if Janusiak did "give them something to work with," that Becker and Stelter would indeed release her from custody and return her to her children. Not surprisingly, with Coppernoll's threat of removing the children weighing upon her, and with the lure that after 5 and a half hours, she would finally be released and returned to her children, Janusiak took the bait and gave Becker and Stelter "something to work with." Janusiak indicated that P.S. had fallen off the bed. 111:225; 12 at 41:29. **Tingle** instructs that "a confession must not be extracted by any sort of threats or violence, nor obtained by any *direct or implied promise*, *however slight*, nor by the exertion of any improper influence." **United States v. Tingle**, 658 F.2d at 1335. Italics added. Becker's and Stelter's words can reasonably be viewed as an express promise that if Janusiak cooperated and gave them "something to work with," they would release her and allow her to return to her children. At a minimum, such words constituted an implied promise. Either way, the

purpose and objective of the words was to cause Janusiak to believe that if she cooperated she would be released from custody and returned to her children, and that if she did not cooperate, she would not be released nor returned to her children. Becker's and Stelter's words similarly conveyed that she would not see her children for quite awhile. After all, by this point in the interrogation, Stelter had already told Janusiak that she was being charged with homicide. 111:214; 12 at 24:19.

Of course, Becker and Stelter were not satisfied with Janusiak's statement that P.S. had fallen off the bed and continued to press her. In doing so, Becker again preyed upon Janusiak's maternal instincts in order to extract more incriminating statements from her. At about 1:06:26 into the second segment, or about 5 hours and 35 minutes into the interrogation, Becker told Janusiak, "I feel, I feel terrible for you, but you're kind of, this is the way you want this to go down and that's, that's totally up to you, I understand, *if you have reason that you want to go to jail I guess that's that's fine*." "*But we're talking about jail, no kids*." 111:244; 12 at 1:06:35. "*No family*." 111:244; 12 at 1:06:36. Italics added. Becker's words are significant in two respects. First, they again imply that Janusiak could, despite the homicide charge, avoid jail by "cooperating" further.

Second, they expressly prey upon Janusiak's maternal instincts. Not surprisingly, Becker's words induced Janusiak to further "cooperate" and Janusiak provided the additional incriminating statement that P.S. hit the nightstand table after falling off the bed. 111:246; 12 at 1:08:24. Following this statement, Becker and Stelter continued to press Janusiak who ultimately adopted a theory posited to her by Stelter, at 1:34:05, 111:263, that she dropped P.S. onto the bed and then P.S. fell to the floor, hitting the table on the way down. 111:294, 12 at 2:08:12.

Significantly, the tactics employed by Becker and Stelter are not only prohibited by the case law cited earlier in this brief, but by principles espoused by some of the most notable authors in the area of criminal interrogations and confessions. Criminal Interrogation and Confessions, Fourth Edition,[5] touts itself as the "classic text for the Reid Technique of interviewing and interrogation."[6] The authors write:

> Similarly, *an interrogator's promise to a suspect that if he confesses he will go free* or receive only a lenient penalty *will nullify the confession because such a promise may induce an innocent person to confess rather than risk criminal prosecution or severe punishment.* This may occur in the case of an innocent suspect caught in a strong web of circumstantial evidence, or one who has been mistakenly identified by several witnesses

[5] Inbau, Fred. E, John E., Buckley, Joseph P., & Jayne, Brian C., Criminal Interrogation and Confessions, (4th Ed. 2004).
[6] Id., back cover.

as being the criminal offender. Under such circumstances, the promise of freedom, or of a light sentence, may be an appealing alternative, even to an innocent person.[7]

The Fifth Edition[8] is even more instructive:

As a guideline, tactics that are considered impermissible as topics entail threats or promises during interrogation that address *real consequences*. Real consequences affect the suspect's physical or emotional health, personal freedom (i.e., arrest, jail, or prison) or financial status (i.e., losing a job or paying large fines). It should be emphasized that merely discussing real consequences during an interrogation does not constitute coercion. It is only when the investigator uses real consequences as leverage to induce a confession through the use of threats or promises that coercion may be claimed. Our long-standing position has been that interrogation incentives that are apt to cause an innocent person to confess are improper.[9] Italics added.

The authors additionally clarify what "permissible" incentives an investigator may offer a suspect:

There are a number of possible benefits an investigator can offer a suspect during an interrogation for telling the truth that, in no way, address the real consequences the suspect faces, and therefore would not be apt to cause an innocent person to confess. These include:

-The suspect will experience internal relief by reducing feelings of guilt associated with committing the crime.

-The suspect will be respected by others for having the courage to face the truth.

-By telling the truth, the suspect will learn from his mistake and not commit more severe crimes in the future.

[7] Id. at 481.
[8] Inbau, Fred. E, John E., Buckley, Joseph P., & Jayne, Brian C., Criminal Interrogation and Confessions, (5th Ed. 2013).
[9] Id. at 344.

-By telling the truth, others will not believe things about the suspect, or his crime, that are not true (e.g., that the crime is typical of the suspect or that he is a greedy or hurtful person).[10]

In this case, the promise by Becker and Stelter that Janusiak would be freed and sent home to her children if she cooperated, in the words of Inbau and Reid, "nullified" the confession. The lure of Janusiak being released from custody and sent home to her children was plainly a "real consequence" that was used to leverage her confession not once but twice. Coppernoll's statements regarding taking Janusiak's children into custody similarly involved "real consequences" that were again leveraged by the State to gain Janusiak's "cooperation." It is striking to note that throughout the interrogation neither Stelter nor Becker employed any of the "permissible" incentives contemplated by Inbau and Reid. It is easy to see that just as Janusiak was worn down by the long interrogation process, Stelter and Becker were similarly exasperated with Janusiak's denials and lack of information, and in their desperation to gain a confession employed tactics that are well-established as being impermissible.

Indeed, there can be no serious dispute that in addition to the impermissible statements by Becker, Stelter and Coppernoll, as examined above, the

[10] Id. at 345.

length of Janusiak's interrogation contributed to its coercive nature. Janusiak's interrogation was, as even the trial court noted, A-Ap.123, quite "lengthy," approximately seven hours in duration. As such, Janusiak's interrogation was easily longer than most interrogations. In this regard, the Wisconsin Supreme Court has recognized scientific research demonstrating that 70% of interrogations last less than an hour, and only 8% last more than two hours. See **In Re Jerrell, C.J**., 2005 WI 105, ¶33, 283 Wis.2d 145, 699 N.W.2d 110 citing Leo, Richard A., *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266, 279 (1996), wherein Leo documented the lengths of 153 interrogations sampled. Leo and co-authors have similarly written that

> [o]bservational studies in the U.S. and Britain have consistently shown that the vast majority of interrogations last approximately 30 minutes up to 2 hours. (Citations omitted). In a recent self-report survey, 631 North American police investigators estimated from their experience that the mean length of a typical interrogation is 1.60 hours. Consistent with cautionary advice from Inbau et al (2001) against exceeding 4 hours in a single session, these same respondents estimated on average that their longest interrogations lasted 4.21 hours. (Citations omitted). Suggesting that time is a concern among practitioners, one former Reid technique investigator has defined interrogations that exceed 6 hours as "coercive." (Citations omitted).[11]

[11] Kassin, S.M., Drizin, S.A., Grisso, T., Gudjonsson, G.H., Leo, R.A., and Redlich, A.D., *Police-Induced Confessions: Risk Factors and Recommendations*, Law and Human Behavior, Vol. 34, No.1, February 2010 at 16.

It is striking to note that Janusiak's interrogation not only far exceeded the length of the average interrogation as recognized by the Wisconsin Supreme Court and researchers, it also far exceed the length of those "interviews" or "interrogations" found to be coercive in **Tingle** (about one hour), and **Richter**, (2 hours). Janusiak would reference the length of the "interrogations" in the other cases cited but those cases are silent on the issue. Perhaps this is because in those cases, **Lynumn**, **Medina**, **Stanton** and **Brown**, the focus of the coercion inquiry was on the content or subject matter of the statements by law enforcement as opposed to the length of the interaction. However, in this case, we have both considerations which plainly come to bear upon the coercion inquiry.

Next, the custodial nature of the interrogation contributed along with the length of the interrogation and the statements made by the State actors to the coerciveness of the interrogation and the involuntariness of the statements it produced. Unlike the "interrogations" struck down in **Lynumn** (in a car), **Tingle** (at the suspect's apartment), **Medina** (at a hospital), and **Stanton** (at the suspect's brother's residence), Janusiak's interrogation took place in a formal interrogation room at the City of Reedsburg Police Department. As Stelter admitted at the suppression

hearing, Janusiak was not free to leave, 27:49, and as the State admitted in its trial brief, Janusiak was in custody for the entire interrogation. 28:7-8. As such, the interrogation by design and purpose plainly involved far more coercive features than those "interrogations," struck down in **Lynumn**, **Tingle**, **Medina**, and **Stanton**. Indeed, in Criminal Interrogation and Confessions, Fifth Edition, the authors write that "The principal psychological factor contributing to a successful interview or interrogation is privacy-being alone with the person during the questioning."[12] The authors then describe how to set up the interrogation room for maximum effect on a suspect: minimize reminders of consequences, remove all distractions, select proper lighting, arrange chairs properly, use straight-back chairs, monitor the interrogation through one-way mirror or and audio or video system.[13] As Leo and Drizin write in *The Three Errors: Pathways to False Confession and Wrongful Conviction*, "The custodial environment and physical confinement are intended to isolate and disempower suspects. Interrogation is designed to be stressful and unpleasant, and it becomes more stressful and unpleasant the more intensely it proceeds and the longer

[12] Inbau et al, 5th ed. at 43.
[13] Id. at 45 and 47.

it lasts."[14] As such, there was significant psychological if not coercive value in interrogating Janusiak at the police station as opposed to simply talking to her at her residence as Stelter initially did earlier in the day. In this case, Stelter, with the intent to "formally interview" Janusiak, 27:45, isolated Janusiak in an eight by ten room with no windows or access to fresh air or natural light. During those seven hours, there were three breaks. 27:48. The breaks were taken not in consideration of Janusiak's comfort or needs but rather so that Stelter could talk with Zellmer and Becker about the case and find out what information the doctors had to provide. 27:48. Janusiak used the breaks to smoke outside or use the bathroom. 27:48. An officer always accompanied Janusiak outside. 27:49. Janusiak had some soda during the "interview" but no food. 27:49. Unlike an interrogation which takes place at the suspect's residence, **Lynumn**, in a car, **Tingle,** at a hospital, **Medina**, or at a family member's house, **Stanton**, an interrogation which occurs in a formal interrogation room at a police department is by design and purpose more coercive. After all, if Stelter had not planned to reap the psychological and coercive benefits of interrogating Janusiak at the

[14]Leo, Richard A. & Drizin, Steven A., *The Three Errors: Pathways To False Confession And Wrongful Conviction (*2010*)*. G. Daniel Lassiter & Christian Meissner, eds., Police Interrogation and False Confessions: Current Research, Practice & Policy Recommendations, American Psychological Association, 2010; University of San Francisco Law Research Paper NO. 2012-04, 9, 30 at 18.

police department, he simply could have returned to Janusiak's house and talked to her there. Of course, such interaction with Janusiak would have been far less psychologically coercive and effective. For that reason, Stelter arranged to bring Janusiak, in handcuffs, 27:32, to the interrogation room at the police station.

Finally, this Court should note that the State has admitted that the officers were "confrontational" with Janusiak, 28:9, and that the trial court similarly found that the officers were "often accusatory." A-Ap.122.

E. Janusiak's personal characteristics, specifically her status as a mother of four young children and her advanced pregnancy made her especially vulnerable to the pressures placed upon her by law enforcement.

As indicated in **State v. Hoppe**, supra, this Court is required to consider the relevant personal characteristics of the defendant including the defendant's age, education and intelligence, physical and emotional condition, and prior experience with law enforcement. **State v. Hoppe**, 2003 WI 43 at ¶39. 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. In this case, Janusiak's status as a mother of four young children and her late stage pregnancy made her especially vulnerable to the pressures placed upon her by law enforcement.[15] At the time of the interrogation, Janusiak was 24 years of age, 1:1, an age which has been recognized as being susceptible to police coercion. See **State v. Lemoine**, 20013 WI 5, ¶63, note 21, 345 Wis.2d 171, 827 N.W.2d 589, citing Kassin, et al, *Police-Induced Confessions: Risk Factors and Recommendations*, Law and Human Behavior, Vol. 34, No. 1 at 6-7.[16] Additionally, Janusiak did not have a high school degree. 95:1220. Janusiak similarly had no work history as she was the stay-at-home mother of four children ages seven, five, four and two. 1:2, 95:1220. Janusiak was also in the advanced stages of pregnancy with the family's fifth child. 29:3, 30:2. As the mother of four young children with another on the way,

[15] Although not as important as Janusiak's status as a mother of four children and expectant mother of a fifth child, it is relevant to note that the record does not reveal that Janusiak had ever been interrogated before or otherwise had significant experience with law enforcement. The record's only reference to Janusiak's experience with law enforcement is the parties' stipulation that Janusiak had five prior convictions. 95:1150. Janusiak testified that she went into the interrogation with the beliefs that she did not have "anything to hide" and that she "didn't need a lawyer." 95:1236. Had Janusiak had extensive experience interacting with law enforcement, she undoubtedly would have believed differently and would have been more cautious in exercising and waiving her rights. Janusiak's limited experience with law enforcement therefore made her more malleable to the tactics and pressures used in the interrogation.

[16] Young suspects are more likely to give a false confession. In a recent study analyzing 125 false confessions in the United States between 1971 and 2002, the largest sample ever studied, 63% of false confessions were made by suspects under the age of 25. Thirty-two percent of the suspects were under 18, meaning that 31% of the total persons falsely confessing were between 18 and 25. See Kassin, et al, supra, note 6 at 5.

Janusiak was understandably concerned with the welfare of her children and being separated from them. In the interrogation, Janusiak made known that she "was never not with her kids," and that the duration of the interrogation was the longest time she had ever been away from them. 111:237; 12 at 55:41 (segment no.2). This mindset on the part of Janusiak presented a prime vulnerability which the State exploited to its advantage. Janusiak's status as a mother essentially made her a prime target for inducements, promises and pressures which implicated the children and/or her relationship with the children. As such, it not surprising that Stelter and Becker involved Coppernoll in Janusiak's interrogation. It was readily apparent that Janusiak would be concerned if not devastated with the prospect of having her children removed from the family home. In terms of removing the children from the home, Coppernoll expressly made known to Janusiak that she was *"looking into that very closely*," and in literally the same breath advised Janusiak to "*be as cooperative as you possibly can*." 111:183; 12 at 4:04:19. It is doubtful that Coppernoll would have been introduced into the interrogation if the suspect was a parent who was estranged from his or her children or otherwise presented a mindset or sensibility which did not make him or her vulnerable to incentives

involving his or her children. Consider a young male suspect who is the father of multiple children with multiple mothers and who has no substantive personal or financial relationship with any of children. It is highly doubtful that the government would attempt to leverage a confession by appealing to his status as an estranged and financially irresponsible father. With Janusiak however, law enforcement knew which "buttons to press." Of course, this is patently clear with Becker's and Stelter's statements about returning Janusiak home to her children if she cooperated. Both Becker and Stelter preyed upon this vulnerability not once but twice in order to leverage incriminating statements from Janusiak. 111:220, 244; 12 at 31:29 and 1:06:35. In her trial testimony, Janusiak succinctly indicated that she gave the false and incriminating statements "(b)ecause they scared me, and they told me, basically the truth wasn't enough, so if I knew what happened to (P.S.), and an accident happened, then I can go home to my children;" 95:1236; and "I was scared, If I didn't tell them something they wanted to hear, that I was going to jail, so-- ." 95:1237. It is clear that Janusiak's status as a mother and primary caregiver to her four young children made her "uncommonly susceptible" to the psychological pressures directed toward her during the interrogation. Janusiak's late

stage pregnancy made her similarly susceptible to such psychological pressures. Perhaps more importantly however, the advanced stage of Janusiak's pregnancy made her especially vulnerable from a physical and emotional perspective. The DVD recording of the interrogation depicts fatigue on the part of Janusiak as the interrogation unfolds. In particular, Janusiak's voice becomes less distinct, 3:03:04, and she yawns, 3:46:13. In Janusiak's trial testimony, she clarifies that she had not slept not more than one or two hours the night before, 95:1235, and that her pregnancy had made her "very tired, very tired." 95:1235. Janusiak's testimony in such regard was imminently reasonable. It is beyond a cavil that any woman in an advanced stage of pregnancy suffers from at least some degree of diminished physical capacity. It is similarly beyond any serious dispute that an advanced pregnancy impacts a woman's emotional and hormonal composition. The following is a list of changes and symptoms that a woman may experience during the third trimester:[17]

- Increased skin temperature as the fetus radiates body heat, causing the mother to feel hot.
- The increased urinary frequency returns due to increased pressure being placed on the bladder.

[17]http://www.hopkinsmedicine.org/healthlibrary/conditions/pregnancy_and_childbirth/the_third_trimester_85,P01242/.

- Blood pressure may decrease as the fetus presses on the main vein that returns blood to the heart.
- Swelling of the ankles, hands, and face may occur (called edema), as the mother continues to retain fluids.
- Hair may begin to grow on a woman's arms, legs, and face due to increased hormone stimulation of hair follicles. Hair may also feel coarser.
- Leg cramps may become more frequent.
- Braxton-Hicks contractions (false labor) may begin to occur at irregular intervals in preparation for childbirth.
- Stretch marks may appear on the abdomen, breast, thighs, and buttocks.
- Colostrum (a fluid in the breasts that nourishes the baby until the breast milk becomes available) may begin to leak from the nipples.
- Dry, itchy skin may persist, particularly on the abdomen, as the skin continues to grow and stretch.
- A woman's libido (sexual drive) may decrease.
- Skin pigmentation may become more apparent, especially dark patches of skin on the face.
- Constipation, heartburn, and indigestion may continue.
- Increased white-colored vaginal discharge (leukorrhea) which may contain more mucus.
- Backaches may persist and increase in intensity.
- Hemorrhoids may persist and increase in severity.
- Varicose veins in the legs may persist and increase in severity.

There can be little doubt that the symptoms associated with advanced pregnancy can be challenging for a woman both physically and emotionally even under the best circumstances. It is only reasonable to conclude that the management of such symptoms would be even more physically and emotionally taxing while undergoing a seven hour interrogation, after getting only one to two hours of sleep the night before, and after experiencing a traumatic event such as the death of child in one's home. Simply put, Janusiak's advanced stage of pregnancy made her more

physically and emotionally vulnerable than a suspect who was not similarly situated. It is significant to note that in none of the cases discussed earlier in this brief, namely **Lynumn**, **Tingle**, **Richter**, **Medina**, **Brown** and **Stanton**, did the suspects present any physical characteristics which rendered them especially vulnerable to the statements directed toward them by law enforcement. Nonetheless, in all such cases, the statements were found by the courts to be coercive. Where, as here, there is a physical and emotional condition which rendered the suspect more vulnerable to the type of psychological tactics thrust upon her, the question of whether there was coercion is an easier one. This Court cannot square the holdings in **Lynumn**, **Tingle**, **Richter**, **Medina**, **Brown** and **Stanton,** with the facts of this case and make any conclusions other than that Janusiak's statements were coerced and involuntary. To do otherwise would plainly be an unreasonable application of the Fourteenth Amendment of the U.S. Constitution and Article I, Section 8 of the Wisconsin Constitution, both of which require that a confession be voluntary to be admissible.

F. Coerciveness of Janusiak's interrogation produced a false confession.

Leo and Drizin have concluded that the primary cause of police-induced false confessions is psychologically coercive police methods that sequentially manipulate a suspect's perception of the situation, expectations for the future, and motivation to shift from denial to admission.[18] Leo and Drizin write:

> To better understand how the techniques and psychological dynamics of interrogation can become cumulatively coercive, it is helpful to view interrogation as a sequential two-step process of psychological pressure and persuasion. (Citations omitted). In the first step of interrogation, the investigator usually relies on several well-known interrogation techniques and strategies to persuade the suspect that he or she is caught and that he or she is powerless to change his or her situation. The investigator is likely to accuse the suspect of having committed the crime, cut off the suspect's denials, roll past the suspect's objections, and interrupt or ignore the suspect's assertions of innocence. If the suspect offers an alibi, the interrogator will attack it as inconsistent, contradicted by all of the case evidence, implausible or simply impossible. The most effective technique used to persuade a suspect that his or her situation is hopeless is to confront him or her with seemingly objective and incontrovertible evidence of his or her guilt whether or not any actually exists. (Citations omitted.) American police often confront suspects with fabricated evidence, such as nonexistent eyewitnesses, false fingerprints, make believe videotapes, fake polygraphs, and so on. The purpose of this technique is to convince the suspect that the state's case against him or her is so compelling and immutable that his or her guilt can be established beyond any possible doubt and that arrest, prosecution, and conviction are inevitable.[19] These techniques-accusation, cutting off denials, attacking alibis, confronting the suspect with real or non-existent evidence-are often repeated as the

[18] Leo, R. & Drizin, S.A., *The Three Errors: Pathways To False Confession And Wrongful Conviction* at 17.

[19] In this case, Stetler told Janusiak that medical evidence showed that P.S.'s injuries could only have happened in Janusiak's care, 111.199, a statement which was refuted by the defense at trial through the testimony of Dr. John Plunkett. 94:1117. Dr. Plunkett in particular testified to finding iron stain in P.S.'s right parietal dura which signified that the injury was at least 3 to 4 days old. 94:1116-1118. Dr. Plunkett also testified regarding lucid intervals, periods of time in which a person, including an infant, who suffers a head injury, appears to be neurologically intact. 94:1121-1123.

pressures of interrogation escalate. They are designed to reduce a suspect's subjective self-confidence that he or she will survive the interrogation without being arrested and thus that there is no way out of his or her predicament. (Citations omitted.)

The second stop of interrogation is designed to persuade the suspect that the benefits of compliance and confession outweigh the costs of resistance and denial and thus that the only way to improve the otherwise hopeless situation is by admitting to some version of the offense. In this part of the interrogation process, the investigator presents the suspect with inducements that communicate that he or she will receive some personal, moral, communal, procedural, material, legal, or other benefit if her or she confesses but that he or she will experience some corresponding personal, moral, communal, procedural, material, legal and other costs if her or she fails to confess. Ofshe and Leo (1997) suggested that these inducements can be arrayed along a continuum ranging from appeals to morality (at the low end) to appeals to how the criminal justice system is likely to react to the suspect's denial versus confession (in the mid range), and to implicit or explicit promises or suggestions of leniency and threats of harsher treatment or punishment (at the high end). In most false confession cases, interrogators communicate-either indirectly through pragmatic implication (citations omitted) or more explicitly-that the suspect will receive more lenient treatment if he or she confesses but harsher punishment if he or she does not. (Citations omitted). In some false confession cases, the coercion involves blatant threats of punishment or harm (e.g. threats of longer prison sentences, the death penalty, or harm to family members) or explicit promises of leniency or immunity (e.g. *offers of outright release from custody*, counseling instead of prison, or reduced charges.). (Italics added). The innocent suspect typically confesses only after the techniques have persuaded him or her that-in light of what he or she perceives to be his or her limited options and the consequences of choosing denial over silence-confession is the most rational course of action. The psychological logic of modern interrogation is that it makes the irrational (admitting to a crime that will likely lead to punishment) appear to be rational if the suspect believes that he or she is inextricably caught or perceives his or her situation as hopeless and that cooperating with authorities is the only viable course of action. (Citations omitted.)[20]

In 2004, Leo and Drizin analyzed 125 cases of proven false confessions in the U.S., the largest sample ever studied.[21] In total, 81% of the false

[20] Leo, R. & Drizin, S.A., *The Three Errors: Pathways To False Confession And Wrongful Conviction* at 18-19.
[21] Kassin, S.M., Drizin, S.A., Grisso, T., Gudjonsson, G.H., Leo, R.A., and Redlich, A.D., *Police-Induced Confessions: Risk Factors and Recommendations* at 5.

confessors in this sample were wrongly convicted at trial.[22] 81% of the confessions occurred in murder cases.[23] Leo and Drizin classify the false confessions into three categories: 1)voluntary false confessions where the innocent suspects claimed responsibility for a crime they did not commit without prompting or pressure from police, most typically to protect the actual perpetrator; 2)internalized false confessions where the suspects actually came to believe they may have committed the crime, and 3)compliant false confessions where suspects were induced through interrogation to confess to crimes they did not commit.[24] With the "compliant false confession," the suspect acquiesces to the demand for a confession to escape a stressful situation, avoid punishment, or gain a promised or implied reward. [25] This type of confession is an act of mere public compliance by a suspect who knows that he or she is innocent but bows to social pressure, often coming to believe that the short-term benefits of confession relative to denial outweigh the long term costs.[26] The researches identified some very specific incentives for this type of compliance-such as being allowed to sleep, eat, make a phone call, *go*

[22] Id.
[23] Id.
[24] Id. at 14-15.
[25] Id. at 14.
[26] Id.

home, or in the case of drug addicts, feed a drug habit.[27] Italics added. The researchers found that the desire to bring the interrogation to an end and avoid additional confinement was particularly pressing for people who were young, desperate, socially dependent or phobic of being locked up in a police station. [28] Like Leo and Drizin, the authors of Criminal Interrogation and Confessions, Fifth Edition, recognize the risk of what they call the "coerced compliant confession."[29] According to the authors, such confession occurs when the suspect confesses to achieve an instrumental gain.[30] Such gains include *being allowed to go home*, *bringing a length interrogation to an end* or avoiding physical injury.[31] Italics added. It is clear that Janusiak's confession was a "coerced compliant confession," and/or "compliant false confession." In conformity with the typical causal circumstances noted by Leo and Drizin and the Reid Technique educators, Janusiak provided incriminating statements in order to gain certain immediate benefits. Janusiak sought the immediate benefits of bringing the lengthy interrogation to an end, going home to her children, and avoiding

[27] Id.
[28] Id.
[29] Inbau, Fred. E, John E., Buckley, Joseph P., & Jayne, Brian C., Criminal Interrogation and Confessions, (5th Ed. 2013) at 340.
[30] Id. at 340.
[31] Id

the removal of her children from her home. To further those ends, Janusiak adopted factual situations posited to her by Stelter, 111:153; 12 at 3:14:39, and incriminated herself. Given the diminished physical and emotional capacity Janusiak experienced due to her advanced pregnancy and lack of sleep, the lure of the immediate benefits overwhelmed her sensibilities and precluded any rational assessment of the long term costs of her false, incriminating statements. It was a classic "compliant false confession," and/or "coerced compliant confession." As such, this Court must find that Janusiak's statements were coerced and involuntary.

Conclusion

For all reasons stated in this brief, this Court should vacate the judgment of conviction and sentence, and remand the case for a new trial with instructions that Janusiak's statements are to be suppressed as involuntary.

Dated this _____day of June 2015.

Respectfully submitted,
BY:_____/s/_____
Zaleski Law Firm
Steven W. Zaleski
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone), Zaleski@Ticon.net
Attorney for Defendant-Appellant

CERTIFICATION

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 s.809.19(2)(a) and that contains: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial 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 the 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 _____day of June 2015.

THE ZALESKI LAW FIRM

BY:_____/s/_____
Steven W. Zaleski
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone)
Zaleski@Ticon.net

Attorney for Defendant-Appellant

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I hereby certify that this petition meets the form and length requirements of Wis. Stat. Rules 909.62(4) and 809.19(8)(b) and (d) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 10424 words.

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THE ZALESKI LAW FIRM

BY:_____/s/_____
Steven W. Zaleski
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone)
Zaleski@Ticon.net

Attorney for Defendant-Appellant

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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THE ZALESKI LAW FIRM

BY:_____/s/_____
Steven W. Zaleski
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone)
Zaleski@Ticon.net

Attorney for Defendant-Appellant