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STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT II

Case No. 2022AP000161-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAMIAN L. HAUSCHULTZ,

Defendant-Appellant.

On appeal from an order denying suppression
and from a judgment of conviction, both entered
in the Manitowoc County Circuit Court,
the Honorable Jerilyn M. Dietz, presiding.

BRIEF OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

ISSUES PRESENTED 7

POSITION ON ORAL ARGUMENT AND PUBLICATION 8

STATEMENT OF THE CASE AND FACTS 8

A. Damian's childhood. 8

B. Eli's death. 10

C. Damian's four interrogations. 11

1. First interrogation. 12

2. Second interrogation. 14

3. Third interrogation. 17

4. Fourth interrogation. 20

D. Damian's juvenile and criminal cases. 23

ARGUMENT 27

I. A reasonable 14-year-old under the circumstances Damian faced during his first three interrogations would not have felt free to end his questioning and leave. Thus, he was in Miranda custody. 27

A. Introduction. 27

B. The law governing Miranda warnings and the question of custody. 28

C. Damian was in *Miranda* custody during his first three interrogations. 32

1. The first interrogation. 33

2. The second interrogation. 35

3. The third interrogation. 38

D. Damian's interrogation statements should be suppressed because he was not read his rights. 42

II. The totality of the circumstances surrounding Damian's interrogations shows "the pressures brought to bear" exceeded his "ability to resist." Thus, his statements were involuntary. 43

A. Introduction. 43

B. The law governing voluntariness and the special caution exercised in assessing juvenile confessions. 44

C. Damian's interrogation statements were involuntary. 46

1. Damian's personal traits. 47

2. Weighing Damian's personal traits against law enforcement's tactics. 50

D. Because Damian's interrogation statements were not "the product of a free and unconstrained will, reflecting deliberate-ness of choice" they should be suppressed. 53

CONCLUSION 54

TABLE OF AUTHORITIES

Cases

Davis v. North Carolina,
384 U.S. 737 (1966) 49

Dickerson v. United States,
530 U.S. 428 (2000) 28, 41, 49

Gallegos v. Colorado,
370 U.S. 49 (1962) 41, 49

Haley v. Ohio,
332 U.S. 596 (1948) 33

Howes v. Fields,
565 U.S. 499 (2012) 26, 33

In re Gault,
387 U.S. 1 (1967) 41

J.D.B. v. North Carolina,
564 U.S. 261 (2011) ..... passim

Miranda v. Arizona,
384 U.S. 436 (1966) ..... passim

Reinert v. Larkins,
379 F.3d 76 (3rd Cir. 2004) 32

Schneckloth v. Bustamante,
412 U.S. 218 (1973) 48

Spano v. New York,
360 U.S. 315 (1959) 48

State v. Bartelt,
2018 WI 16, 379 Wis. 2d 588,
906 N.W.2d 684 .....29, 30

State v. Dionicia M.,
2010 WI App 134, 329 Wis. 2d 524,
791 N.W.2d 236 35

State v. Dobbs,
2020 WI 64, 392 Wis. 2d 505,
945 NW.2d 609 29

State v. Gruen,
218 Wis. 2d 581, 582 N.W.2d 728
(Ct. App. 1998) 32, 34

State v. Halverson,
2021 WI 7, 395 Wis. 2d 385,
953 N.W.2d 847 29

State v. Hoppe,
2003 WI 43, 261 Wis. 2d 294,
661 N.W.2d 407 .....42, 43, 45

State v. Jerrell C.J.,
2005 WI 105, 283 Wis. 2d 145,
699 N.W.2d 110 ..... passim

State v. Moore,
2015 WI 54, 363 Wis. 2d 376,
864 N.W.2d 827 .....32, 34, 42

State v. Rejholec,
2021 WI App 45, 398 Wis. 2d 729,
963 N.W.2d 121 .....38, 48

Thompson v. Keohane,
516 U.S. 99 (1995) 25

United States v. Slaight,
620 F.3d 816 (7th Cir. 2010) 50

Statutes and Constitutional Provisions

U.S. Const. amend. V 26

Wis. Stat. § 809.22(2)(b).....6

Wis. Stat. § 809.23(a).....6

Other Authorities

Brian Gallini, *The Interrogations of Brendan Dassey*, 102 Marq. L. Rev. 777 (2019).....38

ISSUES PRESENTED

Timothy Hauschultz disciplined his children by forcing them to carry logs around their yard for hours at a time, no matter the weather. He called the punishment "carrying wood." In April of 2018, Tim ordered Damian Hauschultz and two of Damian's foster siblings to carry wood. But since Tim would be gone for the day, he couldn't supervise. He delegated that task to Damian, who at 14 was the oldest child in the home.

Damian and his siblings picked up the logs Tim had selected for them and began trekking around their snowy yard. Eventually, one of Damian's siblings, whom this brief will call Eli, started to struggle. Under orders to enforce Eli's punishment, Damian resorted to increasingly extreme measures to keep him moving. They did not work. Instead, Eli became unresponsive and died of hypothermia later that night.

Damian was interrogated three times while Eli received medical treatment and shortly after he died. Damian was alone for each round of questioning and never received *Miranda* warnings.

1. **Was Damian in *Miranda* custody during these interrogations?**

   The circuit court answered "no."

2. **Did the State prove Damian's interrogation statements voluntary?**

   The circuit court answered "yes."

POSITION ON ORAL ARGUMENT AND PUBLICATION

This is a difficult case with a substantial record. Damian requests oral argument, as he believes the Court will benefit from post-briefing clarification of the facts and arguments presented in the parties' briefs. *See* Wis. Stat. § 809.22(2)(b).

Given the significance of the constitutional issues presented, and the dearth of published cases on juvenile interrogations conducted without *Miranda* warnings, Damian also requests publication of this Court's opinion. *See* Wis. Stat. § 809.23(a)1., 2., 5.

STATEMENT OF THE CASE AND FACTS

Damian Hauschultz appeals the denial of his motion to suppress the statements he made during three police interrogations. The key facts this Court will consider are the facts surrounding the interrogations. But, because the law governing the admissibility of Damian's statements requires close attention to context, the following summary also covers details regarding Damian's upbringing, Eli's death, and the procedural history that followed.

A. Damian's childhood.

Damian lived with his biological parents from birth to about age six, when they divorced. (32:2). Damian, his little sister, and their mother Tina later

moved in with Timothy Hauschultz. (32:3). Around 2012, when Damian was a young elementary schooler, Tina married Tim. (32:3). Damian's biological father voluntarily terminated his parental rights, and Tim adopted Damian and his sister. (32:3).

When Damian first moved in with Tim, he stayed in touch with his biological father and paternal grandparents. (32:3). Damian and his sister would take weekend trips to visit that side of the family. (32:3). But eventually, Tim stopped allowing these visits, and the family became estranged. (32:3).

Tim brought other changes to the household, as well. (32:6). As Damian put it, Tim was "a little strict." (32:6). If he or his sister talked back, Tim would put soap in their mouths. (32:6). Other punishments Tim inflicted included forcing his children to "stand outside in the ice and snow 'with no shoes on …' for lengthy periods of time" (32:6); making them "carry wood for two or more hours a day, in a circle or large triangle outside … [even in the] ice and snow" (32:7); making them "stand in a corner for two hours or more" (139:4); and having them "kneel on a paint tray on the concrete driveway" (139:4).

Damian reported that neither he nor anyone else in the home reported the abuse they suffered. (32:7). He explained, "I did not want my mom to have to leave Tim. Then we wouldn't have a house." (32:7).

After Damian had lived with Tim for several years, navigating his rules and punishments, the household expanded: Tim took foster placement of two great-nephews and one great-niece. (139:6; Int. 2 at 5:56pm).[1]

Damian reported that "circumstances within the home became increasingly stressful" when these children moved in. (32:7). In Damian's view, they "did not readily learn or adapt to 'Tim's rules.'" (32:7). As a result, Tim ordered them "to carry wood on 20 occasions or more." (32:7). One of those occasions was in the spring of 2018.

B. Eli's death.

On April 20, 2018, when Damian was 14 years old and struggling with the changes in his family, he and his seven-year-old foster brothers were ordered to carry wood. (1:2). Damian had, according to Tim, failed to sufficiently memorize 13 Bible verses; the younger boys were in trouble for different infractions. (1:7).

Since Tim and Tina would be out of the house, Tim ordered Damian both to carry wood himself and to ensure that the younger children carried wood too. (1:2). For Eli, Tim selected "a heavy wooden log, weighing approximately two-thirds his body weight." (1:2). Tim directed the boys to haul their logs "for two hours around a pre-determined path in a wet and snowy area" beside their home. (1:2).

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[1] *See infra* n.2 (regarding this brief's citations to recordings).

Damian attempted to make Eli finish this task, but Eli struggled, and Damian's enforcement methods escalated. Damian used his hands, feet, a belt, and a stick to "hit, kick, strike and poke" Eli. (1:2). Eventually, as Eli lay on the ground, Damian and his siblings buried him in heavy snow; Damian believed making Eli "really cold" would spur him to get up and finish his laps. (1:6).

After a while, Eli stopped moving. (1:8). Damian eventually "unburied" him, finding him "stiff, statue-like and unresponsive." (1:8). Damian then called Tim, reporting that Eli was "playing or acting like he's dead." (1:8-9). Before long, Tim and Tina returned home and took Eli to the emergency room. (1:2). Damian came along, with Eli draped across him in the backseat. (1:2).

When they arrived at the hospital, Eli remained unresponsive, "had an extremely low body temperature and had multiple bruises and injuries on his body." (1:2). He did not survive the night. (1:2) An autopsy showed that Eli's "cause of death was hypothermia due to environmental cold exposure," and that Eli's other "significant conditions" were "blunt force injuries of the head, chest and abdomen." (1:3).

C. Damian's four interrogations.

While Eli was still receiving medical treatment on the evening of April 20th, Damian was interrogated twice: first at the hospital, then at the sheriff's office. Around 2:45am on April 21st, several hours after Eli was pronounced dead, Damian was woken up and interrogated a third time, again at the sheriff's office.

Damian was interrogated a fourth time several months later, again at the sheriff's office, but this time with counsel present.

Details regarding these four interrogations are set forth below. They come from the testimony provided at Damian's four-day suppression hearing (*see* 94; 95; 100; 171; App. 4-32), and from the interrogation recordings that the State submitted before the first day of the suppression hearing (*see* 87).[2]

1. First interrogation.

Lieutenant Dave Remiker questioned Damian at the hospital not long after the family arrived with Eli in the early evening on April 20th. (1:6; 94:6). Remiker had already spoken with a detective about Eli's condition and had learned who was present for the incident that caused it. (94:19-20). He believed "Damian probably had more information than anybody else." (94:19).

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[2] The first interrogation was audio recorded. It consists of only one audio clip and is not date- or time-stamped. Citations to this recording reflect the relevant time within the recording. So, "Int. 1 at 4:08" means the statement at issue appears 4 minutes and 8 seconds into the recording of the first interrogation.

The second, third, and fourth interrogations were video recorded. The recordings consist of multiple clips, each displaying the date and time throughout. Citations to these recordings reflect the time of day at which the relevant statement was made. So, "Int. 2 at 6:01pm" means the statement at issue was made at 6:01pm during the second interrogation.

Remiker found Damian in the "family room" near the emergency room, where he and his mom were waiting for news about Eli's condition. (94:11). Remiker asked Damian if he would move to a separate room so they could talk privately, and Damian agreed. (94:12). "Damian was very cooperative" and "made no request to have anybody with him." (94:12).

The two went to a small room "right across the hall." (94:12, 14). Remiker either closed or "slightly closed" the door before questioning Damian. (94:23). He used his iPhone to record their conversation. (94:12-13). He did not provide *Miranda* warnings. (94:21).

According to Remiker, Damian was not "handcuffed or restrained," and Remiker did not arrest him. (94:13). Remiker also testified that he was wearing street clothes but was "armed with a badge." (94:24).

The two spoke for about 10 minutes. (94:12-14). While Damian's voice shook—his stress is apparent in the interrogation recording—he never said he wanted "to stop talking." (94:14; *see also, e.g.,* Int. 1 at 1:00, 4:55). Instead, he answered Remiker's questions. He also expressed concern about the potential consequences of his answers, at one point commenting, "I just hope I didn't make it any worse." (Int. 1 at 4:55).

While Damian was cooperative, Remiker pushed him when he claimed ignorance about the source of Eli's injuries. "You need to be honest with me," Remiker began, "something happened out there." (Int. 1 at 0:05). Later, when Damian became distressed, Remiker offered false reassurance to encourage further

disclosures: "It's okay, we're not getting anybody in trouble, obviously this was an accident, but I need to know specific details." (Int. 1 at 1:06).

Over the course of the interrogation, Damian confessed that, while trying to get Eli to finish carrying wood, Damian poked, pushed, swatted, and slapped him. (Int. 1 at 0:31, 1:16-32, 2:19, 2:56). When those efforts didn't spur Eli to complete his punishment, Damian said he took Eli's boots off and, with his siblings' help, buried Eli in a "coffin of snow." (Int 1 at 3:45, 3:57-4:10, 4:45).

Remiker expressed shock upon learning that Damian and his foster brothers were required to carry wood for "two hours straight," and he followed up with an array of questions about what Damian meant by "carrying wood." (Int. 1 at 5:36-8:05). During this discussion, the interrogation recording abruptly stops. (Int. 1 at 8:05). Remiker later testified that he'd received a call and stopped the recording so he could answer it. (94:21). He said the interrogation ended there. (94:21).

2. Second interrogation.

Later that evening, a second law enforcement officer, Detective Christine Bessler, interrogated Damian at the sheriff's office. (94:47-50). Beforehand, Bessler went to the hospital and asked Tim for permission to speak with Damian. (94:50). Tim "gave verbal consent." (94:50). She then asked Damian whether he'd "be willing to sit down with" her, and

Damian agreed. (94:50). When Bessler told Tim she'd be taking Damian to the sheriff's office, Tim did not object. (94:52).

Bessler drove Damian from the hospital to the stationhouse in an unmarked, department-issued car. (94:52). Bessler testified that she did not believe Damian could have opened his door once he was inside her car, as back doors in police cars generally don't open from the inside. (94:75).

They arrived at the sheriff's office about five minutes later. (94:53). Bessler brought Damian to an interview room with "couches, lighting, tables." (94:43). The interview room has recording equipment, which Bessler turned on at the start of the interrogation. (94:54). The room is in a secure area: citizens cannot get to it unescorted, nor are they free to leave the area without an escort. (94:71-72).

Questioning began shortly before 6:00pm. (Int. 2 at 5:49pm). Damian was not handcuffed or told he was under arrest. (94:60). Again he wasn't read his *Miranda* rights. (94:54-55). Bessler did, however, give Damian coffee and tell him he could ask questions or say that "he no longer wanted to talk." (94:55). He drank the coffee. (94:55). He did not say he no longer wanted to talk. (94:55).

Early in the interview, Bessler learned that Damian was a middle school student. (94:56-57). She considered him smart and did not perceive any communication difficulties. (94:57).

The two spent a significant amount of time clarifying the details of Damian's household—what the house and yard were like and how the members of the household were related to one another. (Int. 2 at 5:50-6:10pm). Both during this portion of the conversation and later, Damian described how he and his sister helped supervise their foster siblings—getting them on the school bus and enforcing their punishments, for example. (Int. 2 at 6:15pm, 6:21pm, 6:23pm, 6:42pm, 6:52pm). Damian also described behavioral problems his foster siblings exhibited, including "defiance" at school (with teachers) and home (with Tim). (Int. 2 at 6:05-08pm, 6:35-37pm). Damian repeatedly expressed irritation with his foster siblings and with the way his life had changed since they'd joined the household months prior. (*See, e.g.,* Int. 2 at 6:19-20pm, 7:01pm).

Over an hour into the interrogation, Bessler's questions moved to the events that led to Eli's injuries. (Int. 2 at 6:51pm). Damian again explained that, after Eli stopped making progress with his laps, he and his siblings buried him in snow and left him there for 20 to 30 minutes while they finished carrying wood. (Int. 2 at 7:02-03pm, 7:07pm). "The whole point was to get [Eli] to give up on his 'I'm not moving thing,'" Damian explained, "but at that point we didn't know he was knocked out." (Int. 2 at 7:09pm).

Damian said he eventually realized something was wrong, so he called Tim. (Int. 2 at 7:10pm). He said he told Tim that Eli was "playing dead or playing

possum." (Int. 2 at 7:12pm). When Tim and Tina got home, Damian said he got freaked out and went to sit outside on the porch with a "'what in the world have I done?' type feeling." (Int. 2 at 7:14pm). He told Bessler that, had he known this would happen, he would have been nicer to Eli and would have helped him. (Int. 2 at 7:22pm). At one point, Damian asked: "How can so many things go wrong in two hours?" (Int. 2 at 7:24pm).

While questioning continued, Tim arrived at the sheriff's office, asked to speak with Damian, and—after a brief conversation—took him away. (94:43-44, 58-60). It was about 8:15pm. Damian's second interrogation had lasted nearly two and a half hours.

3. Third interrogation.

Sometime after 10:00 p.m. (not long after Eli died), an investigator accompanied child protection social worker Laura Zimbler to the Hauschultz home. (94:37). Zimbler immediately noticed signs of problematic discipline, including a board listing the hours Eli was required to carry wood and a clock that delineated the tasks the children had to complete at various times of day. (94:44-45, 50).

Zimbler and the investigator asked Tim and Tina to bring their children back to the sheriff's office right away. (94:39). They did. (94:39).

Back at the sheriff's office, Damian and his siblings were put in a conference room. (94:62). Over the next several hours, Bessler and Zimbler pulled them out

one-by-one and questioned them. (94:62). Damian went last; it was nearly 3:00am when he was woken up for his third interrogation. (94:85-86).

The interrogation took place in the same room as before and was again recorded. (94:36, 65). Damian was not Mirandized and was not told he was free to leave. (95:26-27). It was a more intense interrogation than the preceding two, as Bessler later acknowledged: she testified that she and Zimbler got "a little excited," and that Damian got "a little emotional." (94:64, 81).

The substance of Damian's statements during this interrogation overlapped with those he'd made earlier, though he reluctantly offered additional incriminating details. Most notably, he admitted that he twice stepped on Eli's back, while wearing a snow boot, to push him into the snow for a "face wash." (Int. 3 at 3:31-33am). But despite the consistency of Damian's story, there are significant differences in the conversation's tone.

First, Damian told his interrogators that Tim had instructed him not to speak further with police until he'd talked to a lawyer. (Int. 3 at 2:43am). Damian tried to follow Tim's advice, repeatedly saying he thought he should do what Tim said and keep quiet. (Int. 3 at 2:46-49am). But he struggled, making inculpatory statements here and there, and expressing confusion about whether he should say more. (*See* Int. 3 at 2:45-47am, 2:49am, 3:07-08am). The conflict Damian felt—should I follow Tim's instructions and be quiet or answer the interrogators' questions?—is evident throughout the

interrogation recording. And at one point he verbalized his struggle, saying: "My brain is confusing itself with what it should do." (Int. 3 at 3:11am).

Second, the interrogators ratcheted up their tactics. A few minutes in, Zimbler screamed at Damian: "[Eli] is dead! How did [Eli] get dead?" (Int. 3 at 2:47am). Bessler then accused Damian of not caring that Eli had died. (Int. 3 at 2:47am). A minute later, Zimbler challenged Damian: "You don't think people's lives are a big deal?" (Int. 3 at 2:48am). At other points, Bessler referenced information gathered from her interviews with the other children, saying she already had "good information" and just wanted to give Damian a chance to tell his side. (Int. 3 at 3:03am). She also said that remaining silent meant Damian would "take the fall" for Eli's death—suggesting that speaking up would help keep him out of trouble. (Int. 3 at 2:46am).

Third, Damian's distress was more acute in this round of questioning. He repeatedly cried. (*See, e.g.*, Int. 3 at 2:53am, 3:06am). He expressed sadness not just about Eli's death, but also about how he treated Eli when he was alive, lamenting, "I never accepted him." (Int. 3 at 2:57am). Damian said he feels angry all the time—a "burning inside." (Int. 3 at 2:52am, 2:58am). And he described the emotional turmoil Eli's death was causing him, saying he was "quite messed up" inside and felt a combination of "anger, confusion, and feeling sorry all at the same time." (Int. 3 at 3:11-13am). Damian even commented, tearfully, that when he tried to go to

sleep earlier that night, he couldn't help but visualize Eli before the fateful events of the day. (Int. 3 at 3:09am). Finally, Damian articulated regret, saying: "We could have done something to prevent that from happening." (Int. 3 at 3:13am).

After over an hour of questioning, Damian's third interrogation ended. It was 3:45 a.m.

Damian and his siblings remained at the sheriff's office until later that morning, when they were sent to emergency placements outside of Tim's care—and against his wishes. (94:65; 95:38-39, 48-49). Damian went to stay with an uncle. (95:48-49).

4. Fourth interrogation.

Damian's fourth and final interrogation took place months later, back at the sheriff's office with Bessler. (94:66). He had counsel this time. (94:66). The interview was in the same room and was recorded (94:67). Damian was not read his *Miranda* rights. (94:68).

The attorney at this interrogation was Anthony Nehls. (100:3-4, 7-8). Nehls was appointed by the public defender's office to represent Damian "pre-charge." (100:7). Upon his appointment, Nehls spoke with the State about the charges Damian might face, and the State said it was considering a Class A homicide charge. (100:8). The State also said it would be willing to charge Damian with a Class B homicide "in exchange for his debriefing with law enforcement." (100:9).

Nehls discussed with Damian the goal of avoiding a Class A homicide charge but did not inform him that "an A class felony is a mandatory life sentence." (100:18). Nehls later testified that, before representing Damian, he had "[z]ero" experience with intentional homicide prosecutions. (100:15).

In the end, Damian agreed to speak with law enforcement again. (100:9-10). According to Nehls, Damian was not "excited about doing it" but wanted to follow his counsel's advice. (100:13-14). For his part, Nehls had doubts about how much Damian had to gain from the debrief, but ultimately told Damian "it was in his interest to take advantage of this deal." (100:19-20). Nehls conceded that he made that determination without discovery; his insight into the State's evidence came mostly from Damian's CHIPS file, which the CHIPS lawyer had passed along. (100:23).

Damian's original agreement with the State required only that he speak with police. (100:21). At the "last minute," however, the State added a condition: Damian also had to plead guilty to the Class B homicide. (100:20-21). If Damian went to trial, the State could charge him with a Class A homicide despite his pre-charge cooperation. (100:20-21).

Nehls said it made him "a little uncomfortable" that the State added this condition to the deal "right before the interview." (100:21-22). He conveyed the new condition to Damian on the spot, telling him he could avert a Class A homicide charge only by giving the

police another statement, with no accompanying offer of immunity, *and* pleading guilty to a Class B homicide. (100:23, 32). Damian "still went forward." (100:23).

Nehls acknowledged that his agreement with the State was merely verbal; the State never reduced its promise, or the conditions it imposed on Damian, to writing. (100:28).

Once inside the interview room, Bessler asked Damian for an update on his daily life and for more information about the Bible verses Damian had been required to memorize back in April. (Int. 4 at 2:18pm, 2:43pm). Later, Bessler asked about the frustration Damian had expressed about his foster siblings. Damian explained that they'd aggravated him simply because they acted "like kids their age." (Int. 4 at 2:34pm).

As the interrogation continued, Bessler asked about other aspects of Damian's family, including his renewed relationship with his biological father and paternal grandparents. (Int. 4 at 2:36-40pm). And she elicited more details about the strain on Damian's family—and on Damian specifically—following the addition of the foster children. (Int. 4 at 2:40-43pm). Finally, over half an hour in, they began addressing the incident underlying this case. During this portion of the conversation, Damian reported that his foster sister (Eli's biological sister) had hit Eli, kicking Eli, and stood on Eli's head the day he died. (Int. 4 at 2:54-56pm).

Towards the end of the conversation, Nehls prodded Damian to tell Bessler that, while they were en route to the hospital on April 20th, Tim told Damian not to say anything that would get anyone else in trouble. (Int. 4 at 3:05-09pm). Damian confirmed that Tim said that. (Int. 4 at 3:05-09pm). Bessler also had Damian verify some of the facts she'd learned about months earlier, and she sought clarification about the different punishments Tim had ordered when children were still in his care. (Int. 4 at 3:12-13pm).

Nehls was present throughout. (100:10-11). He considered the interrogation "cordial." (100:12). When it ended, he and Damian left the sheriff's office together. (100:11-12).

D. Damian's juvenile and criminal cases.

Well before Nehls was appointed and Bessler conducted Damian's final interrogation, Damian was adjudicated delinquent in connection with Eli's death. (32:4). The juvenile court imposed supervision, which Damian successfully completed. (32:4; 139:6). County social worker Rodney Zahn later testified about Damian's performance on supervision, saying he did very well building anger management skills, "was amenable to treatment, had no drug use, and [had] no new referrals or conflicts." (58:2, 4). Zahn believed Damian was a low risk for reoffending. (58:4).

After Damian was discharged from juvenile supervision, the State filed a criminal complaint against him, again in connection with Eli's death. (*See* 1). It charged Damian with a series of felonies, including the

Class B homicide promised to Nehls. (1:1). Damian was just 15 years old. (*See* 1:1).

Damian requested a reverse waiver hearing. (*See* 16). Dr. Deborah Collins, whom the circuit court said "has impressive credentials" and "varied experience and training," conducted a mental health evaluation in advance of that hearing. (58:3; *see also* 32:1). Dr. Collins and her associate met with Damian repeatedly, interviewing him and administering tests. (32:1). She also reviewed Damian's school records, the complaint, and an old child abuse complaint filed against Tim. (32:2). Finally, she interviewed Damian's paternal grandparents, with whom Damian had reconnected. (32:2, 7-8).

Based on these sources, Dr. Collins submitted a report with various conclusions about Damian's mental health and treatment needs. (32:8-10).

She concluded, first, that "Damian's insight into his underlying mental health problems and related developmental problems … is marginal," as "his awareness of his trauma history is in its infancy at best." (32:8-9). In speaking with Dr. Collins, Damian was forthright but did not "voluntarily identify the abusive circumstances he [faced] as abusive" in nature, instead presenting them as "commonplace within the home and as if to be expected by children." (32:7).

Still, Dr. Collins opined, "[n]either Damian's pattern of living outside of the circumstances which … brought him before the court, [nor the] collateral information" she had reviewed, nor the

"psychometric data" she had gathered "support a conclusion that Damian is an antisocial, characteristically violent or acting out adolescent." (32:9). Rather, she explained, "Damian is a youth capable of and inclined to experience prosocial emotions." (32:9).

To address Damian's traumatic childhood and resulting psychosocial needs, Dr. Collins recommended trauma-informed therapy, developmentally appropriate training in social skills and anger management, continued formal education, and support in establishing "positive peer and adult influences." (32:9). These treatment recommendations and "clinical considerations," Dr. Collins noted, "weigh in favor of [transferring Damian] … from the adult criminal court to juvenile court." (32:10).

After a two-day reverse waiver hearing, the circuit court held that Damian's case was "undeniably serious" with "few mitigating circumstances." (58:9). It was not persuaded by Dr. Collins's views on Damian's treatment needs and potential, nor by Zahn's discussion of Damian's success on juvenile supervision and the harm incarceration would cause. (*See* 58:2-8). It retained jurisdiction. (58:12).

Damian next filed a suppression motion. (61). As noted above, there were multiple hearings on this motion—three at which witnesses testified (94; 95; 100), and one at which the circuit court set forth its oral ruling (171; App. 4-32).

The issues presented at the suppression hearings were, first, whether Damian should have received *Miranda* warnings at some or all of his interrogations, and second, whether the statements Damian made during his four interrogations were voluntary. (171:5; App. 8).

The circuit court held that Damian was not in custody during any of his interrogations, so *Miranda* warnings were not required. (171:25; App. 28). It further held that the State had proven his statements voluntary. (171:25; App. 28). It denied suppression. (111; App. 3).

The parties then reached a plea deal. Damian pleaded guilty to first-degree reckless homicide, with the remaining (less serious) charges dismissed but read in. (172:6). The State agreed to, and did, recommend a term of initial confinement between 12 and 17 years. (169:10; 172:6). Defense counsel was free to argue, and he recommended eight to 10 years of initial confinement followed by 10 to 12 years of extended supervision. (169:34; 172:6).

The circuit court went further than either party suggested. On September 2, 2021, when Damian was 17 years old, it imposed 20 years of initial confinement and 10 years of extended supervision. (169:47).

Damian is just over a year into his 30 years of imprisonment. He appeals.

ARGUMENT

I. A reasonable 14-year-old under the circumstances Damian faced during his first three interrogations would not have felt free to end his questioning and leave. Thus, he was in Miranda custody.

A. Introduction.

Whether law enforcement's failure to provide *Miranda* warnings renders Damian's interrogation statements inadmissible turns on whether the interrogations were custodial. *See J.D.B. v. North Carolina*, 564 U.S. 261, 270 (2011). The interrogations were custodial if a reasonable person in Damian's shoes would not have felt free to end his questioning and leave. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995).

All the objective facts surrounding Damian's interrogations are relevant to this Court's custody inquiry. *J.D.B.*, 564 U.S. at 264. But perhaps most critical is Damian's age: "It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances will feel free to leave." *Id.* at 270. This Court will also consider the acute stressors that permeated all three interrogations; the police-dominated atmosphere in which the second and third interrogations took place; the fact that he was alone with his interrogators during questioning; the failure of his interrogators to tell him he could ask for a parent or lawyer to join him; and the psychological pressures the interrogators imposed to elicit evidence from Damian.

Under these conditions, a reasonable 14-year-old would have felt compelled to sit through, and try to answer, law enforcement's questions. This is true even though Damian was not handcuffed, endured minimal hollering from his interrogators, and was not detained when his interrogations ended. No single fact or set of facts has "talismanic power" in the custody analysis, *see Howes v. Fields*, 565 U.S. 499, 509 (2012), and *Miranda* was not primarily concerned with "overt physical coercion or patent psychological ploys," *see Miranda v. Arizona*, 384 U.S. 436, 457 (1966). *Miranda* cautioned against the "compelling pressures" inherent in "incommunicado interrogation of individuals in a police-dominated atmosphere" (just what Damian experienced) and later cases have urged extra caution when an interrogation subject is a minor (like Damian was). *See id.* at 445, 467.

Law enforcement erred in declining to read Damian his rights. His interrogation statements should be suppressed. *See id.* at 478-79.

B. The law governing Miranda warnings and the question of custody.

The Fifth Amendment to the United States Constitution guarantees that "[n]o person … shall be compelled in any criminal case to be a witness against himself." *Miranda* held that certain procedural safeguards—known now as *Miranda* warnings—are required to protect this right against the threat posed by pressures of custodial interrogation. *Miranda*, 384 U.S. at 478-79.

The significance of *Miranda* warnings has been reiterated in case after case for over half a century. In *J.D.B.*, for example, the United States Supreme Court explained that "[e]ven for an adult, the physical and psychological isolation of custodial interrogation can 'undermine the individual's will to resist and … compel him to speak where he would not otherwise do so freely.'" 564 U.S. at 269. Indeed, the pressure is so acute that "a frighteningly high percentage of people" subjected to custodial interrogation "confess to crimes they never committed." *Id.* (quoting Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82. N.C. L. Rev. 891, 906-07 (2004)). False confessions are especially common among youth, as they are more "susceptible to … outside pressures" than adults, are generally less mature and less responsible, and lack the "experience, perspective, and judgment" necessary "to recognize and avoid choices that could be detrimental to them." *Id.* (internal quotations and citations omitted).

Even when the "inherently compelling pressures" of custodial interrogation do not elicit a false confession, they may wear away at a subject's defenses, thereby coercing inculpatory—if truthful—statements. *Miranda*, 384 U.S. at 467. This, too, *Miranda* deemed intolerable. The subject of a police interrogation is entitled to "a full opportunity to exercise the privilege against self-incrimination." *See id*.

Miranda warnings proactively mitigate the risks custodial interrogation poses to the privilege against self-incrimination. *Id.* But while they are a prophylactic measure, they are also constitutionally required.

Dickerson v. United States, 530 U.S. 428, 432 (2000). As a result, when police fail to give *Miranda* warnings before conducting a custodial interrogation, the subject's statements cannot "be used against him." *Miranda*, 384 U.S. at 479.

It is undisputed that law enforcement never Mirandized Damian. The dispute is instead over whether *Miranda* warnings were required—that is, whether Damian's interrogations were custodial.

Whether an interrogation was custodial for *Miranda* purposes "is an objective inquiry." *J.D.B.*, 564 U.S. at 270. A reviewing court must first ascertain what "the circumstances surrounding the interrogation" were, and must then assess whether, under those circumstances, "a reasonable person [would] have felt he or she was at liberty to terminate the interrogation and leave." *Id.* (quoting *Keohane*, 516 U.S. at 112). Any objective fact bearing on "how a reasonable person … would perceive his or her freedom to leave" is relevant to the analysis. *Id.* at 270-71 (internal quotations omitted). The subjective views of the interrogation subject and interrogator are not. *Id.* at 271.

The objectivity of the custody test is critical to its workability: it "avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person's subjective state of mind." *Id.* But workable does not always mean easy. In determining whether a reasonable person in an interrogation subject's position would feel free to end an interview,

police must consider the full range of surrounding circumstances, including:

- the subject's age (*id.* at 272);
- whether the interrogation took place in a police-dominated environment, like a stationhouse (*Miranda*, 384 U.S. at 456);
- whether the subject was moved from one location to another for questioning (*State v. Bartelt*, 2018 WI 16, ¶32, 379 Wis. 2d 588, 906 N.W.2d 684);
- whether the subject was isolated—i.e., alone with law enforcement—during the interrogation (*Miranda*, 384 U.S. at 449-450);
- how long the interrogation lasted (*State v. Dobbs*, 2020 WI 64, ¶63, 392 Wis. 2d 505, 945 NW.2d 609);
- what statements the subject made during the interrogation (*State v. Halverson*, 2021 WI 7, ¶30, 395 Wis. 2d 385, 953 N.W.2d 847);
- whether the subject was physically restrained during questioning, and if so, what degree of restraint was employed (*id.*);
- whether the subject was released after the interrogation ended (*id.*); and

- whether the interrogator used coercive tactics, like showing confidence in the subject's guilt; exhibiting "[p]atience and persistence" when confronted with reluctance to talk; engaging in lengthy questioning; and working to "persuade, trick, or cajole" the subject out of exercising his privilege against self-incrimination (*Miranda*, 384 U.S. at 455-56).

This Court will consider these factors—and the totality of the objective circumstances surrounding Damian's first three interrogations—in two steps. *See Bartelt*, 379 Wis. 2d 588, ¶25. It will start by upholding the circuit court's findings of fact regarding the circumstances surrounding Damian's interrogations unless clearly erroneous. *Id.* It will then independently determine the legal question of whether those "findings support a determination of custody." *Id.*

C. Damian was in *Miranda* custody during his first three interrogations.

An ordinary 14-year-old is not accustomed to exerting control "over [his] own environment." *See State v. Jerrell C.J.*, 2005 WI 105, ¶128, 283 Wis. 2d 145, 699 N.W.2d 110 (Butler, J., concurring) (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)). An ordinary 14-year-old largely does what the adults in his life tell him to do: submission is expected, and it's enforced with the threat of consequences. And an ordinary 14-year-old "lack[s] the freedom that adults have to extricate themselves from a criminogenic setting." *Id.* Given

these commonsense conclusions about adolescents' perceptions, behavior, and capacities, the United States Supreme Court has recognized that, when it comes to police interrogations, "events that 'would leave a [grown] man cold and unimpressed can overawe and overwhelm a lad in his early teens.'" *J.D.B.*, 564 U.S. at 272 (quoting *Haley v. Ohio*, 332 U.S. 596, 599 (1948)).

The conditions under which Damian was interrogated presented the coercive pressures *Miranda* warnings were designed to address: isolation in a police-dominated atmosphere paired with the pressures of psychologically coercive questioning about criminal conduct. A reasonable 14-year-old in this situation—subjected to questioning not just about any old crime but about his role in the suffering and eventual death of a little boy—would not feel free to extricate himself from the interrogation. It follows that Damian was in *Miranda* custody.

1. The first interrogation.

Though relatively brief and held in a hospital, Damian's first interrogation was permeated by stress and chaos, was conducted in isolation by a police officer with a gun, and involved demands to be honest and other psychological pressures. The audio recording of this interview, alongside Remiker's suppression hearing testimony, show a reasonable person in Damian's shoes would not have felt free to leave.

The factors in the balance are as follows.

First and foremost, Damian was just 14 years old, an age at which interrogation subjects are far more susceptible to the pressures of police questioning than adults under identical circumstances. *See J.D.B.*, 564 U.S. at 272.

Second, Damian was interviewed in isolation, away from his parents, without a lawyer, in a space to which he was moved for purposes of questioning—all factors weighing towards custody. *See Miranda*, 384 U.S. at 449-450 (re: coercive power of isolation); *State v. Moore*, 2015 WI 54, ¶57, 363 Wis. 2d 376, 864 N.W.2d 827 (re: special caution required in questioning adolescent without a "friendly adult" present); *State v. Gruen*, 218 Wis. 2d 581, 595 n.5, 582 N.W.2d 728 (Ct. App. 1998) (re: coercive influence of transport to a new location for questioning).

Third, while police do not generally predominate in the emergency room, Damian's first interrogation nevertheless occurred in a high-stress environment where his movement was restricted, and in which law enforcement—and their guns and badges—were present. *Cf. Reinert v. Larkins*, 379 F.3d 76 (3rd Cir. 2004) (example of *Miranda* custody in an emergency medical setting).

Fourth, though the interrogation didn't last long, it also didn't take long for Damian to implicate himself in the grave injuries for which Eli was receiving emergency treatment. Thus, while the length of Damian's later interrogations weighs heavily in favor of a determination that they were custodial, the brevity

of this round of questioning does not negate the compelling pressures Damian faced for the span of time in which he *was* interrogated. *Howes*, 565 U.S. at 509 (no one factor controls the custody analysis).

Fifth, Damian's inculpatory statements were elicited by questions peppered with common, and coercive, interrogation ploys, including the false reassurance Remiker offered that a confession would not get anyone in trouble. *See infra*, pp. 37-39 (re: "negotiation" tactic, i.e., an interrogator suggesting that confessing will minimize consequences).

A reasonable 14-year-old under these conditions, amidst the ongoing, acute trauma Damian faced, would be "overawe[d] and overwhelm[ed]." *Haley v. Ohio*, 332 U.S. 596, 599 (1948). He would not feel at liberty to remain silent or to get up and leave. Damian was, therefore, in *Miranda* custody.

2. The second interrogation.

The circumstances surrounding Damian's second interrogation were more coercive than his first by virtually every measure, providing an even clearer case of custody. The two and a half hours of video that captured this interrogation, as well as Bessler's testimony at the suppression hearing, reveal a paradigmatically custodial police interview.

The custody analysis again begins with Damian's age. He was still a 14-year-old boy with all the attendant vulnerabilities of youth. *See J.D.B.*, 564 U.S. at 272.

This time, instead of being shepherded away from his mom to a private room at the hospital, Damian was driven from the hospital to the stationhouse. As *Miranda* explains, a person may be "confident, indignant, or recalcitrant" in familiar surroundings, but still succumb to questioning at a police station, where the interrogator "possesses all the advantages" and "[t]he atmosphere suggests the invincibility of the forces of the law." 384 U.S. at 450. Indeed, the "interrogation environment" at police stations "is created for no purpose other than to subjugate the individual to the will of his examiner." *Id.* at 457. And while the intimidation that defines this environment is "not physical" in nature, it is "equally destructive of human dignity." *Id.* Damian's interrogation in an interrogation room at the sheriff's office subjected him to these coercive forces, which weigh heavily on the side of custody.

The fact that Damian was transported away from his original location—and his parents—to submit to questioning from Bessler at the stationhouse further demonstrates that he was in *Miranda* custody. Case law recognizes that a subject who's been moved to a new location, particularly an unfamiliarly one, is—and will feel—less in control and less free to terminate questioning. *Gruen*, 218 Wis. 2d at 595 n.5; *see also Miranda*, 384 U.S. at 450, 457.

Once in the interrogation room with Bessler, Damian was alone—no parent, lawyer, or trusted adult by his side. *Moore*, 363 Wis. 2d 376, ¶57. His isolation, especially given his age, points toward custody.

Finally, the duration of Damian's second interrogation further underscores his custodial status. Damian endured two and a half hours of questioning, interrupted by just a couple breaks in which Bessler left Damian alone in the interview room, with the door closed and with nothing to occupy himself while he waited for her return. Two and a half hours would be a long period of questioning even if the subject's day hadn't started with tragedy, and even if he weren't just 14 years old. The length of this interrogation shows, again, that a reasonable person in Damian's position would not have felt free to leave.

State v. Dionicia M., 2010 WI App 134, 329 Wis. 2d 524, 791 N.W.2d 236, supports this conclusion. There, the court of appeals held that a reasonable 15-year-old would not have felt free to leave after police found her skipping class, directed her into a patrol car, told her they'd be returning her to school, and then questioned her about a crime. "From the time Dionicia entered [the] patrol car," it held, "she was in custody." *Id.*, ¶10. The court of appeals did not belabor the factors supporting custody, nor did it delve deeply into the absence of other factors that might support custody (like handcuffs or a show of force). *Id.*, ¶¶10-11. Instead, it recognized that an ordinary teenager "would not feel free to leave the back of a patrol car" after an officer told her she was going back to school and then began questioning her about a crime. *Id.*, ¶10. Because the ordinary teenager's perceptions controlled, the court of appeals ended its analysis there. *Id.*

A commonsense analysis of the circumstances here show Damian was likewise in custody. At just 14, Damian was held for two and a half hours in a private room in a quintessentially police-dominated atmosphere. He was questioned at length by a law enforcement officer who had driven him to the stationhouse—and away from his parents—alone. He was never told he could ask for a lawyer or other friendly adult to join him. And while the police did not employ overt shows of force, Damian's interrogator isolated him before conducting protracted questioning about injuries inflicted on a little boy whose survival was uncertain at best. Facing these facts, an ordinary teenager would not feel free to end the interrogation and leave. This Court can conclude its analysis there.

3. The third interrogation.

Damian's third interrogation was the most coercive yet. It shared many conditions present for his second interrogation but added new forms of coercion as well. And a critical fact had changed: Eli had died.

Damian was still a teenager, was interviewed in the same interrogation room at the same stationhouse, did not have a trusted adult with him, and was never told he could ask for one—or leave. This time, he was only questioned for an hour. But this time, it was well past the middle of the night, Eli had died, Damian and his remaining siblings had been removed from their home, a child protection social worker participated in the questioning, and the tone of the questions—from both Bessler and the social worker—was far harsher

than before. In this late-night, closed door, emotional stationhouse interrogation, 14-year-old Damian was isolated, guilted, and pushed to confess. It is no wonder that he did.

While the circumstances summarized above are all relevant to this Court's analysis and show Damian was in custody, three characteristics unique to this round of questioning are particularly significant.

First consider that Damian's hour-long interview occurred after 2:45am. Where is a 14-year-old going to go at 3:00am, particularly when law enforcement and human services have jointly removed him from his home? As a practical matter, Damian was not free to leave, and everyone knew it. The closest he could get to freedom was sleep, and he'd just been pulled from his slumber for an interrogation. Why would a child woken up in the middle of the night for an interview believe the interview could wait until morning (or be called off altogether) at his command? A reasonable person in Damian's shoes would not have believed he could exercise that authority.

Second, recall that Eli died in the hours between Damian's second and third interrogations. A reasonable 14-year-old who played a role in a child's death may not grasp the extent of the consequences he will face, but he would know the situation is grave. Despite his shock and confusion, the reasonable 14-year-old would also be grieving. In short, an ordinary person in these

extraordinary circumstances would be in an acute state of anxiety and distress, increasing their vulnerability to the compelling pressures of police interrogation.

Finally, the interrogators' tactics were more coercive this time around. Because Damian was reluctant to participate (Tim had told him not to), Bessler's mode of questioning intensified. Her tactics mirror the longstanding "Reid interrogation technique." *State v. Rejholec*, 2021 WI App 45, ¶20 n.9, 398 Wis. 2d 729, 963 N.W.2d 121. Deception is the crux of this technique, and its tactics have been categorized as "impersonation" (e.g., when the interrogator shows sympathy for the subject); "rationalization" (e.g., when the interrogator suggests that confessing will make the subject feel better); "evidence fabrication" (e.g., when the interrogator insists on the subject's guilt); and "negotiation" (e.g., when the interrogator suggests the consequences will be less severe given a confession). *Id.* (quoting Christopher Slobogin, *Manipulation of Suspects and Unrecorded Questioning: After Fifty Years of Miranda Jurisprudence, Still Two (or Maybe Three) Burning Issues*, 97 B.U. L. Rev. 1157, 1160-61 (2017)). Researchers have observed that the Reid technique "is at the heart of several documented false confessions." Brian Gallini, *The Interrogations of Brendan Dassey*, 102 Marq. L. Rev. 777, 780 (2019). And they have specifically warned against its use "on a juvenile suspect," *id.*, given children's heightened susceptibility to "outside pressures." *J.D.B.*, 564 U.S. at 269.

With that background, consider:

- *Impersonation*. Bessler talked about how she and Damian had gotten to know each other, acted as though they had a friendly relationship—not an adversarial or purely investigatory one—and expressed concern about Damian's emotional state. She also insisted she believed Damian was a good kid and didn't mean to hurt Eli.

- *Rationalization*. Bessler repeatedly cited confession as a route Damian could take to reduce the "burning inside" him, opining that he'd be able to start healing after letting the truth out.

- *Evidence fabrication*. Bessler referred to statements made by Damian's siblings that allegedly clarified what happened to Eli, then claimed she was just trying to give Damian the opportunity to share his side of the story. She expressed confidence in his guilt in various other ways, as well, at one point commenting that "process of elimination" proved Damian was guilty.

- *Negotiation*: Bessler said Damian's desire to remain silent suggested to her that he'd "take the fall" for Eli's death, implying that confessing could help minimize the consequences he'd face.

Bessler employed a few of these tactics (like impersonation) in Damian's second interrogation, and Remiker even incorporated some (like negotiation) into his brief hospital interview. But they were far more pronounced this time around because Damian was far more reluctant to speak. Bessler was not deterred; she pushed harder. And here and there, little by little, Damian incriminated himself. He continued to do so until he was told, by the authority figures in control of him and his siblings, that they were done for now.

The conditions under which Damian's third interrogation took place were extreme. For an array of reasons—from the time of night to the stationhouse environment, from the deceptive tactics employed to Eli's death—a reasonable 14-year-old in Damian's shoes would not have believed he could tell his interrogators he'd had enough and then leave the room. Holding otherwise would defy *J.D.B.*'s command that courts determine *Miranda* custody based on "commonsense conclusions about behavior and perception," and that courts acknowledge the role youth plays in both. 564 U.S. at 272.

D. Damian's interrogation statements should be suppressed because he was not read his rights.

Because Damian was in *Miranda* custody during his first three interrogations, law enforcement was required to read him his rights. Their failure to do so means Damian's statements cannot, consistent with the

Fifth Amendment, be used against him. *See Dickerson*, 530 U.S. at 435. The circuit court erred in denying suppression.

II. The totality of the circumstances surrounding Damian's interrogations shows "the pressures brought to bear" exceeded his "ability to resist." Thus, his statements were involuntary.

A. Introduction.

"[A] 14-year-old boy, no matter how sophisticated," is far from "equal to the police in knowledge and understanding of the consequences of the questions" he's answering, and "is unable to know how to … get the benefits of his constitutional rights." *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962). The special disadvantage of youth in the interrogation room led the United States Supreme Court to declare that reviewing courts must employ "the greatest care … to assure that" a child's uncounseled statement "was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or adolescent fantasy, fright or despair." *In re Gault*, 387 U.S. 1, 55 (1967).

Exercising that care here shows Damian's statements were involuntary. It was incumbent on police, at a minimum, to advise him of the rights he was expected to deliberately forsake or exercise in response to their questioning. Given their failure to do so, given Damian's array of vulnerabilities, and given the increasingly coercive tactics employed during his repeated interrogation, the record shows Damian's

self-incrimination was not based on "deliberateness of choice," but immaturity, ignorance, and susceptibility to pressure from law enforcement. *See State v. Hoppe*, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407. His statements should be suppressed.

B. The law governing voluntariness and the special caution exercised in assessing juvenile confessions.

Due process precludes the State from using a defendant's involuntary confession in prosecuting him. *Moore*, 363 Wis. 2d 376, ¶55. A confession is voluntary, and thus admissible against the defendant, if it is "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." *Id.* (quotations omitted).

The State carries the burden of proving a confession voluntary by a preponderance of the evidence. *Id.* In assessing whether the State met that burden, this Court will evaluate Damian's statements "in light of all the circumstances surrounding [his] interrogation[s]," weighing his "personal characteristics against the actions of" his interrogators. *Id.*, ¶56.

The personal characteristics most relevant to the voluntariness inquiry include the subject's "age, education and intelligence, physical and emotional condition, and prior experience with law enforcement." *Hoppe*, 261 Wis. 2d 294, ¶39. These characteristics

"are balanced against the police pressures and tactics which were used to induce the statements," including the place and length of questioning, "any excessive … pressure brought to bear," "any inducements … or strategies used by the police," and "whether the defendant was informed of the right to counsel and right against self-incrimination" at the start of questioning. *Id.*

While some evidence of "coercive or improper police conduct" is required to support "a finding of involuntariness," police conduct need "not be egregious or outrageous in order to be coercive." *Id.*, ¶19. If a subject's "condition renders him … uncommonly susceptible to police pressures," then "subtle pressures" may "exceed [his] ability to resist" and compel a finding of involuntariness. *Id.*, ¶¶33, 43, 46.

The totality-of-the-circumstances test applies whether the speaker is a child or an adult. *See id.*, ¶33. But the Wisconsin Supreme Court has cautioned that reviewing courts must "exercise special caution when assessing the voluntariness of a juvenile confession, particularly when there is prolonged or repeated questioning or when the interrogation occurs in the absence of a parent, lawyer, or other friendly adult." *Jerrell C.J.*, 283 Wis. 2d 145, ¶21 (internal quotations omitted).

This Court will apply the principles governing voluntariness—including the extra caution case law requires here—in two steps. It will first "defer to the circuit court's findings regarding the factual

circumstances" surrounding Damian's interrogations unless those findings are clearly erroneous. *Id.*, ¶16. It will then independently apply "constitutional principles to those facts." *Id.*

C. Damian's interrogation statements were involuntary.

Damian's personal characteristics put him at a unique disadvantage in the interrogation room. His youth, his acclimation to abuse from adults, his resulting instinct to comply with adults' requests, and his lack of experience with police are just some of the traits that heightened his risk of confessing involuntarily. Balanced against those traits are police tactics that, while rarely egregious, involved isolating Damian from his mom and other friendly adults, subjecting him to protracted and repeated stationhouse questioning (including a round at 3:00am), failing to give *Miranda* warnings, and using deceptive interviewing techniques that guilted Damian and suggested confessing would minimize the consequences he'd face.

Even if Damian were an ordinary teenage boy, the coercion he faced may have produced an involuntary confession. But given the physical and psychological violence in Damian's daily life, he was no ordinary teenage boy; he was far more vulnerable to knee-jerk compliance with adult demands. The statements he made in response to police interrogation thus stemmed from "a conspicuously unequal confrontation in which the pressures brought to

bear … exceeded [his] ability to resist." *Hoppe*, 261 Wis. 2d 294, ¶36. The State did not, and could not, prove otherwise.

1. Damian's personal traits.

The information in the record about Damian's relevant personal characteristics comes not just from the suppression proceedings but also from Damian's reverse waiver hearings and the report Dr. Collins submitted beforehand. These sources offer extensive insight into Damian's vulnerabilities.

Age. Damian was, as the circuit court put it, "a very young man"—14 years old—when he made the statements that led to this homicide conviction. (58:3). Case law dictates that Damian's "young age of 14" is "a strong factor weighing against the voluntariness of his confession[s]." *Jerrell C.J.*, 283 Wis. 2d 145, ¶26.

Education and intelligence. Damian was a smart child; his intelligence was evident to his interrogators, Dr. Collins, and the circuit court. (171:9). But he was smart *for a a middle schooler* when he endured these interrogations, with "limited education." *Jerrell C.J.*, 283 Wis. 2d 145, ¶27. Further, even the circuit court concluded that despite his academic success, "[t]here's no evidence … he [was] an especially savvy youth." (171:9). Considering Damian's education and intelligence thus weighs against a finding of voluntariness.

Prior experience with police. Damian had no "prior experience with the juvenile justice system, or the criminal justice system"—none at all—before he was subjected to questioning about Eli's injuries and death. (171:9). "In cases where courts have found that prior experience weighs in favor of a finding of voluntariness, the juvenile's contacts with police have been extensive." *Jerrell C.J.*, 283 Wis. 2d 145, ¶28. Since Damian hadn't been arrested, interrogated, charged, convicted, or adjudicated delinquent before, he had no framework from which he could evaluate the serious questions police were posing or the consequences his answers might have. Again, this personal characteristic undermines the circuit court's finding that Damian's statements were voluntary.

Emotional condition. Two aspects of Damian's emotional condition are significant to his capacity to resist police questioning: his underlying emotional conditions and his emotional state during the interrogations.

Damian had, in his young life, endured "repeated psychological and physical abuse over an extended period of time," and he struggled with a range of emotional challenges as a result. (58:3). The circuit court's decision denying reverse waiver acknowledged this abuse and noted, based on credible expert testimony, that Damian's diagnoses include a trauma and stress-related disorder, an anxiety disorder, and trouble managing anger. (171:9; 58:3). Yet, in denying suppression mere months later, the circuit court stated that "there is no indication" Damian has any "emotional

impairments." (171:9). Insofar as the circuit court's suppression ruling departed from its earlier recognition of Damian's "emotional impairments," the departure was unexplained, contrary to the evidence, and clearly erroneous. (*See* 171:9). Damian's status as a victim of abuse, and the mental health struggles he experienced as a result, weighs against voluntariness.

As for Damian's emotional condition during his questioning, the circuit court failed to acknowledge the distress in Damian's voice during his first interrogation, the anger and resentment he expressed during his second interrogation, or the tears and statements of guilt and confusion that pervaded his third interrogation. It likewise failed to confront what common sense dictates: the events that spawned these interrogations had a significant emotional impact on all involved. Even for a teenager used to carrying wood, what Damian went through the day Eli died—and what he said he did while enforcing his foster siblings' punishments at Tim's command—was extreme. After the day ended in tragedy, Damian acknowledged he was "quite messed up" inside—facing pressures from adults in every direction, confused about what he had done right and wrong, grieving for Eli, and longing for his life to return to "normal." (*See* Int. 3 at 3:11-13am). Damian's emotional condition during these interrogations supports a finding that his confessions were involuntary.

Physical condition. As far as Damian's physical condition at the time of the interrogations, the record shows that he had spent hours carrying wood that day,

that (per his statements and behavior) he was tired during his lengthy second and third interrogations, and that he had barely slept when he was woken overnight for his third interrogation. Depriving an interrogation subject of sleep before questioning is a "physical punishment" that renders the subject more vulnerable to having his "will … over-borne." *Schneckloth v. Bustamante*, 412 U.S. 218, 226 (1973). And even without sleep deprivation, fatigue can undermine a subject's ability to validly waive the privilege against self-incrimination. *See, e.g., Spano v. New York*, 360 U.S. 315, 323 (1959). Damian's "mounting fatigue" and lack of sleep weigh against voluntariness, especially for the statements he made in the middle of the night. *See id.* at 322.

In sum, Damian entered the interrogation room with a host of personal disadvantages. The question then becomes whether law enforcement used coercive tactics sufficient to overbear this vulnerable 14-year-old's capacity to resist self-incrimination.

2. Weighing Damian's personal traits against law enforcement's tactics.

Law enforcement employed coercive tactics that precluded Damian from exercising "a free and unconstrained will" in deciding whether and how to answer his interrogators' questions. *See Rejholec*, 398 Wis. 2d 729, ¶19. These tactics varied somewhat through the interrogations—getting steadily more intense as the night wore on—but they were consistently more than Damian could stand up to.

Before assessing law enforcement's tactics in each separate interrogation, it's worth noting what they share: Damian was not Mirandized at any point in any of his interrogations. "[T]hat a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation … is a significant factor in considering the voluntariness of statements later made." *Davis v. North Carolina*, 384 U.S. 737, 740 (1966). This is especially true for an adolescent interrogation subject like Damian, who "would have no way of knowing what the consequences of his confession were without advice as to his rights." *Gallegos*, 370 U.S. at 54. The circuit court's conclusion that Damian validly chose to incriminate himself, even though he was never told he had the right not to, is at odds with these cases and the reality they acknowledge: many people, especially youth, don't know they can refuse to answer questions from police.

The significance of law enforcement's failure to read Damian his *Miranda* rights is also apparent in the many cases that *reject* voluntariness challenges based in part on the defendants' receipt of *Miranda* warnings. *See Dickerson*, 530 U.S. at 444. "[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Id.* Absent warnings, involuntary confessions are far more common. Thus, by staying silent as to Damian's rights, Remiker and Bessler severely undermined the validity of the confessions they extracted.

For Damian's first interrogation, he was separated from his mother, questioned in a small room by an armed law enforcement officer, and subjected to psychological pressure in the form of demands that he be honest and false reassurance that no one would get in trouble based on his statements. Meanwhile, he was never told he had the right to say nothing at all. Both case law and logic demonstrate that these aspects of the interrogation were coercive. *See Jerrell C.J.*, 283 Wis. 2d 145, ¶¶21, 35 (re: coercive impact of separation from parents and demands to tell the truth); *United States v. Slaight*, 620 F.3d 816, 820 (7th Cir. 2010) (re: coercive impact of "claustrophobic" interrogation setting). Given Damian's youth and his other sources of vulnerability, Remiker's conduct was sufficient to overcome Damian's defenses. His statements during his first interrogation were involuntary.

So, too, were Damian's statements during his second interrogation. Law enforcement's conduct was more overtly coercive this time around. Bessler drove Damian away from the hospital (and his parents) to question him at the stationhouse—in isolation and outside any familiar surroundings. She kept Damian in an interrogation room for roughly two and a half hours, subjecting him to multiple rounds of questioning about serious criminal conduct, never mentioning that he had constitutional rights to remain silent or obtain counsel. In short, Bessler conducted a classic "incommunicado interrogation … in a police-dominated atmosphere"—the kind *Miranda* described as "destructive of human dignity"—without offering *Miranda* warnings and despite Damian's special susceptibility to pressures

from police. 384 U.S. at 445, 457. Even an average 14-year-old would be no match for the compulsion this interrogation presented. Damian's statements were thus involuntary.

Finally, law enforcement's conduct during Damian's third interrogation went far beyond the threshold of coercion necessary to overbear his will. Bessler questioned Damian at 3:00am, and the record offers no explanation for her decision not to wait until morning. A child pulled from sleep for police questioning will, common sense dictates, be more vulnerable to making admissions than one fully rested. Further, Damian's overnight questioning took place in the same stationhouse interrogation room he'd spent two and a half hours in before, again with no friendly adult present, again without advice about his rights—or even any mention that he could decline to answer questions. Bessler's conduct was more than enough to degrade Damian's capacity to resist the pressure she put on him to confess. It follows, once again, that his statements were involuntary.

D. Because Damian's interrogation statements were not "the product of a free and unconstrained will, reflecting deliberateness of choice" they should be suppressed.

Admitting a defendant's involuntary statements violates due process. *Jerrell C.J.*, 283 Wis. 2d 145, ¶17. Because Damian's statements during his first three interrogations were involuntary, the circuit court erred in ruling them admissible. This Court should reverse.

CONCLUSION

Damian Hauschultz respectfully requests that this Court reverse the circuit court's decision denying suppression as to the statements he made during his first three interrogations. Damian further asks the Court to remand the matter with instructions to allow plea withdrawal, enter an order suppressing the statements Damian made during his first three interrogations, and hold any necessary further proceedings.

Dated this 9th day of December, 2022.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 10,759 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

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

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

Dated this 9th day of December, 2022.

Signed:

Electronically signed by
Megan Sanders-Drazen

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