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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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Introduction.

Eighth grader Damian Hauschultz, a boy police quickly learned had been suffering physical and psychological abuse at home, implicated himself in the death of his seven-year-old foster brother. The two issues are whether Damian did so voluntarily, and whether he was in *Miranda*[1] custody at the time. These are totality-of-the-circumstances questions; this Court will consider all the facts surrounding Damian's interrogations to determine the admissibility of his statements. No single factor will be dispositive.

But neither will the Court consider the relevant facts in a vacuum. Damian's youth at the time of his interrogations is key to assessing the coercive effect of their duration (the longest was two-and-a-half hours), timing (the latest was around 3am), and location (mostly the stationhouse)—to give just a few examples. As case law underscores, a 14-year-old child doesn't experience interrogation the way an adult does. *See J.D.B. v. North Carolina*, 564 U.S. 261, 270 (2011). He is far more likely to submit to questioning and to self-incriminate, not by way of a deliberate choice but because he feels he has no choice. *Id.* Thus, while the totality of the circumstances control, Damian's age affected all aspects of his interrogation experience. It should affect all aspects of this Court's analysis, as well.

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

A full review of the circumstances surrounding Damian's interrogations shows a reasonable 14-year-old in his position would not have felt free to leave. He was therefore entitled to *Miranda* warnings. The State offers no cogent, record-based rationale for holding otherwise.

Further, given what the record shows about Damian's vulnerabilities in the interrogation room—and balancing those vulnerabilities against the tactics his interrogators employed—Damian's confessions were involuntary. The State's contrary argument focuses on law enforcement's good intentions and conventional interrogation methods. But police need not intend to extract an invalid confession to do so, and they need not employ unusual interrogation methods to overbear a vulnerable suspect's will to resist self-incrimination. The State's counterarguments are thus a distraction.

Because police failed to Mirandize Damian and extracted involuntary confessions from him over the course of three interrogations, the circuit court erred in denying suppression. This Court should reverse.

II. The State misrepresents the record, attacks arguments Damian has not made, and delves into questions that are not before this Court. Stripped of distractions, the State's analysis is minimal—and unconvincing.

The State dodges and misleads rather than confronting the evidence and the legal questions at the heart of this case. Because its misrepresentations are too numerous to address in a 3,000-word brief, what follows is an overview.

A. The State mischaracterizes the facts.

The State's assessment of the facts is stubbornly black-and-white. It repeatedly protests that *none* of Damian's interrogations involved *any* coercion. *See, e.g.*, Resp't's Br. 32. It also insists that Damian had *no* vulnerabilities in the interrogation room other than "being a minor." Resp't's Br. 38. The State's blanket proclamations are inconsistent with the evidence. While a particular stationhouse interrogation may not produce an involuntary confession, it will always involve coercion (even if it's not at 3am, and even if the suspect is an adult); such interrogations necessarily entail "some degree of coercion." *State v. Bartelt*, 2018 WI 16, ¶44, 379 Wis. 2d 588, 906 N.W.2d 684. The cases leave no room to question that precept, and the State gives this Court no reason to depart from precedent.

The State makes more specific all-or-nothing assertions, too. It claims, for example, that Damian showed *no distress* in the video recording of his 3am interrogation—the one conducted after a day of carrying wood for failing to memorize Bible verses, after two other rounds of questioning, after Eli had died, after he and his siblings had been removed from their home late at night, and after he'd gotten barely any sleep on the floor of a sheriff's office conference room. *See* Resp't's Br. 31. The video is in the record for this Court to view firsthand. As it will see, Damian cried during the interview, described his emotions as "quite messed up," and listed a range of negative feelings—including regret—roiling within him. (*See* Int. 3 at 3:09-13am). His

words, his body language, and the dire reality of his situation all point one way: distress.



B. The State mischaracterizes Damian's legal arguments.

The State's characterizations of Damian's legal arguments are equally off-base.

First, it distinguishes the facts of cases Damian doesn't portray as similar. In doing so, it misses the cases' analytical (if not factual) relevance. Take, for example, *State v. Dionicia M.*: a rare, published example of this Court assessing whether an adolescent was in *Miranda* custody when she made inculpatory statements. 2010 WI App 134, 329 Wis. 2d 524, 791 N.W.2d 236. Damian's opening brief discusses *Dionicia M.* to highlight the commonsense, ordinary-teenager lens reviewing courts

use to determine whether a child was in *Miranda* custody. *See* Appellant's Br. 37. The specific facts of *Dionicia M.* are dissimilar, and Damian doesn't suggest otherwise. But the specific facts are not the point.

The State also repeatedly insists that particular facts do not "automatically" or "alone" establish *Miranda* custody or prove Damian's confessions involuntary. *See* Resp't's Br. 28, 39. That is correct; both *Miranda* custody and voluntariness are totality-of-the-circumstances inquiries. Because Damian does not hold out any one factor as dispositive, the State's assertions that he can't meet his burden with "just this" or "just that" are misleading.

C. The State delves into non-issues.

The State makes one more overarching error: it addresses issues that aren't before this Court. More specifically, it delves into the gravity of the offense Damian confessed to committing and the subjective intentions of the interrogators who extracted his confessions. Neither is a factor here.

The State describes at length, and repeatedly emphasizes, the wrongdoing by Damian that led to Eli's death. But a suspect is entitled to *Miranda* warnings in a custodial interrogation no matter how heinous his crime. And the suspect may still confess involuntarily if the tactics employed by police overbear his will to resist self-incrimination. In short, "the seriousness of [Damian's] crimes is irrelevant to the question[s]" of whether he was in *Miranda* custody or validly confessed. *See State v. Rector*, 2023 WI 41, ¶42.

Also irrelevant is the subjective intent of the law enforcement officers who questioned Damian. The State asserts that all the police wanted to do was gather facts; they didn't set out to coerce a confession. Setting aside that those two aims may align, the interrogators' subjective intent doesn't matter. The *Miranda*-custody inquiry is objective (would a *reasonable person* have felt free to leave?) and focused on the suspect, not the interrogator. The voluntariness inquiry, meanwhile, is partially objective; it balances law enforcement's tactics (not their reasons for employing them) against the interrogation subject's vulnerabilities. Thus, the subjective intentions of Damian's interrogators don't weigh into either analysis here. The State's focus on those intentions is a red herring.

III. Damian was in *Miranda* custody for all three interrogations, and he confessed involuntarily all three times.

There is a central error in the State's *Miranda* custody and voluntariness analyses: it considers Damian's failure to advocate for himself—by requesting a lawyer or parent, for example—strong proof that he willingly participated in his interrogations and validly chose to confess. *See, e.g.*, Resp't's Br. But an ordinary eighth grader, particularly one in a traumatic situation, is incapable of the degree of self-advocacy the State expects. *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)). That is why they're so vulnerable in the interrogation room.

Further, the State implies that, by asserting himself, Damian could have shown that his environment felt custodial or that he didn't feel free to stay silent—but the opposite is true. A request for a lawyer, for example, would have shown that Damian felt capable of exerting some control: that he knew he had the right to counsel (which he was never told), that he understood his statements might have severe consequences for his future (which he was never told), and that he grasped that he could mitigate those consequences by refusing to answer questions until an attorney arrived (which he was never told).

Damian's failure to speak up for himself is consistent with what case law has long acknowledged: "juveniles have less control, or less experience with control, over their own environment." *Roper*, 543 U.S. at 569. Thus, while a child's cooperation with an authority figure may be the product of an affirmative choice, it may simply stem from their youthful lot in life. That is the case here.

Beyond the State's overarching confusion about the import of Damian's compliance with interrogators' requests, it fails to rebut the analyses in Damian's opening brief. This brief will not recite arguments already made, but a few points are worth addressing.

First, in its *Miranda* custody discussion, the State takes issue with Damian's contention that his first interrogation took place in a high-stress environment. *See* Resp't's Br. 25. But the detective who drove Damian to the stationhouse had no such qualm; she testified that the

scene at the hospital was "very chaotic" with "a lot of people," "a lot going on," and no "space to sit down and be able to even have a conversation." (94:51). The State also notes that Tim consented to Damian's transport from the hospital to the stationhouse, apparently believing that fact stripped Damian's trip to the sheriff's office—and his lengthy interrogation there—of coercive force. *See* Resp't's Br. 27-29. Why? The custody inquiry centers on the perceptions of reasonable child. A reasonable child wouldn't feel freer to end an hours-long stationhouse interrogation because his parents told police they could conduct it. If anything, the opposite is true. Consider that Damian was briefly unwilling to answer law enforcement's questions when Tim told him not to. He followed his parent's cues in that moment, just as any reasonable child would.

As for its voluntariness analysis, the State agrees that Damian's age strongly indicates that his confessions were invalid, and it agrees that he lacked the experience with police that can equip interrogation subjects to resist incriminating themselves. *See* Resp't's Br. 39-40. The State also makes some tacit concessions, like that Eli's death after Damian's second interrogation added to the coercive effect of his third round of questioning. *See* Resp't's Br. 32. It also implicitly concedes that the timing of the third interrogation (again, about 3am) weighs against a determination of voluntariness. *See* Resp't's Br. 31. But instead of acknowledging that these facts matter, the State says they aren't "significant factor[s]." *See* Resp't's Br. 31-32.

Despite the State's reluctance to confront Damian's vulnerabilities, the record reveals a host of factors that cut against voluntariness—Damian's age, his lack of experience with police, the traumatic events surrounding his interrogations, and their length and timing.

There is one final fact the State repeatedly highlights, insisting it supports the circuit court's denial of Damian's suppression motion: his academic success. The State notes that Damian was in accelerated classes, was learning a foreign language, and told his interrogator he found test-taking easy. *See* Resp't's Br. 14, 37-38, 40.

The State is right that the record shows Damian did well in middle school. But it's wrong to infer much of anything from Damian's good grades. Success in an eighth-grade classroom does not translate into savviness in the interrogation room; even the circuit court recognized that. (171:9). Nor is there any suggestion that Damian knew about the constitutional rights police failed to enumerate before questioning him. Thus, while Damian does not have the kind of intellectual limitations that cast doubt on the validity of juvenile and adult confessions alike, he *did* have the limitations intrinsic to childhood. He was young, he was immature, he wasn't advised of his rights and had no experience with police, he was reeling from a tragedy still underway, and he was—most importantly—inclined to do what the adults in the room told him to, no questions asked.

For the reasons set forth in Damian's opening brief, and because the State's contrary arguments do not stand up to scrutiny, Damian was in *Miranda* custody during all three of his interrogations. He confessed involuntarily each time.

IV. Plea withdrawal and suppression are both appropriate here.

The State argues that, if Damian was in *Miranda* custody or confessed involuntarily, he should be granted only suppression (not plea withdrawal). That's because, in the State's view, any error in admitting Damian's statements was harmless. The State contends that it isn't reasonably probable that the circuit court's erroneous admission of Damian's statements contributed to his conviction. In making that claim, the State attempts to shift the burden of proof—which it bears on this issue, but which it makes no meaningful effort to fulfill.

"[A] defendant who pleads guilty waives the right to raise almost all claims of constitutional error on appeal." *State v. Abbott*, 2020 WI App 25, ¶39, 392 Wis. 2d 232, 944 N.W.2d 8. This principle is known as the "guilty plea waiver rule." *Id.* A defendant who later wishes to withdraw his plea must prove by clear and convincing evidence that withdrawal "is required to correct a 'manifest injustice.'" *Id.* The manifest-injustice test "sets a high bar for overcoming waiver." *Id.*

Suppression is the one statutory exception. Wisconsin Stat. § 973.31(10) provides that a guilty plea does not waive a defendant's right to appeal a suppression denial. If a defendant succeeds on appeal,

the remedy is plea withdrawal and suppress—unless the State proves that the erroneous suppression denial was harmless. *See Abbott*, 392 Wis. 2d 232, ¶41. An erroneous suppression denial is harmless if the defendant would have pleaded guilty even if suppression had been granted. *Id*.

The State makes shifting arguments to the contrary, saying:

- If Damian's statements are inadmissible, the proper remedy is suppression *without* plea withdrawal. Resp't's Br. 43.
- A post-appeal evidentiary hearing is necessary to assess harmlessness, i.e., to determine whether suppression *with* plea withdrawal is appropriate. *Id.* at 43-44.
- Because the State dismissed six lesser felony counts in exchange for Damian's guilty plea, "there is not a reasonable probability that [he] would not have pleaded guilty" had the circuit court granted his suppression motion. *Id.* at 43.
- Damian has not affirmatively shown that he is entitled to plea withdrawal, so he should not get it.

First: if the error is harmless, no remedy is due. But if the State fails to prove the error harmless, then plea withdrawal *and* suppression are due. *See Abbott*, 392 Wis. 2d 232, ¶39.

The State cites just one case suggesting that a contrary procedure (a post-appeal evidentiary hearing on the question of harmlessness) is warranted: *State v. Rejholec*, 2021 WI App 45, 398 Wis. 2d 729. But that case offers no analysis on harmlessness or the applicable remedy beyond a brief footnote reiterating the undisputed harmless-error test. *See id.*, ¶35 n.14. It is unclear from the *Rejholec* opinion what the parties' specific arguments were on these points. It is unclear if the suppressible evidence was significant. Thus, it is unclear why the *Rejholec* court deemed this unusual procedure appropriate.

By contrast, *Abbott* delves deep into the harmless-error test applicable in § 971.31(10) appeals, as well as the remedy question. Thus, while both cases recognize that a reviewing court assesses an erroneous suppression denial for harmlessness, only one engages with the harmless-error test and the propriety of plea withdrawal based on the facts at hand.

Both *Abbott* and *Rejholec* are recent court of appeals cases (decided about a year apart), and both remain good law. This Court should adhere to the sound reasoning in *Abbott* rather than *Rejholec*'s approach—the reasons for which do not appear in the opinion.

Setting remedy aside, the real issue is whether the State has proved harmlessness. Though the State suggests that Damian has failed to make a required showing, he need make no showing at all; the burden is the State's alone. To meet it, the State points out that it

dismissed six counts in exchange for Damian's plea—a benefit he would have wanted, the State's thinking goes, even if suppression had been granted.

Nearly all plea deals are entered in exchange for something—often dismissed counts or a favorable sentencing recommendation. The unremarkable fact that the State dismissed charges here proves nothing about the role the circuit court's suppression denial played in Damian's decision to plead.

The suppression denial was important. Damian's confessions were the key evidence against him as to *all* counts, not just the count to which he pleaded guilty. The events Damian described during his interrogations—his experience carrying wood and enforcing his siblings' punishment on Tim's behalf—were the basis of the whole case. Damian wasn't charged with discrete episodes of violence but with seven counts stemming from one tragic afternoon. If Damian's confessions mattered to the reckless homicide count (which the State does not question), they mattered to the six remaining counts as well. Absent Damian's confessions, the State would have faced an uphill battle across the board.

Damian got the benefit of his bargain, bad as that bargain was. But he would have opted for trial, and had a much better chance of securing acquittals, had the circuit court suppressed his statements. Because the State has not proved that there is *no reasonable possibility* Damian would have gone to trial given suppression of his statements, it hasn't proved harmlessness. Thus, Damian respectfully requests the

pair of remedies traditionally granted under § 973.31(10): plea withdrawal and suppression.

CONCLUSION

Damian asks this Court to reverse his conviction and the order denying suppression of the statements he made in his first three interrogations. He asks that his case be remanded for any necessary further proceedings.

Dated this 14th day of June, 2023.

Respectfully submitted,

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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 2,976 words.

Dated this 14th day of June, 2023.

Signed:

Electronically signed by
Megan Sanders-Drazen

Megan Sanders-Drazen