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STATE OF WISCONSIN

IN SUPREME COURT

No. 2022AP161-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAMIAN L. HAUSCHULTZ,

Defendant-Appellant-Petitioner.

RESPONSE OPPOSING PETITION FOR REVIEW

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The State of Wisconsin has received Defendant-Appellant-Petitioner Damian L. Hauschultz's petition for review from the court of appeals' *per curiam* opinion and order upholding his judgment of conviction upon a guilty plea for first-degree reckless homicide. The State opposes the petition. As shown below, Hauschultz does not demonstrate that any of the three issues raised in his petition satisfy criteria for review. *See* Wis. Stat. § (Rule) 809.62(1r).

STATEMENT OF THE CASE

On an afternoon in April 2018, seven-year-old Ethan was taken to the emergency room of a Manitowoc hospital by his foster parents, Timothy and Tonya, accompanied by Tonya's son and Timothy's stepson, fourteen-year-old Hauschultz. (Pet-App. 4–5.) "Ethan was unresponsive," the court of appeals explained, "had an extremely low body temperature, and had numerous bruises and injuries on his body." (Pet-App. 5.) "[H]e was pronounced dead at 9:22 p.m. The official cause of death was identified as hypothermia due to environmental cold exposure, with other significant conditions being blunt force injuries to the head, chest and abdomen." (Pet-App. 5.)

A police lieutenant "began gathering basic information from Ethan's foster family." (Pet-App. 5.) The lieutenant "learned that the injures occurred outdoors at the Hauschultz home at a time when Hauschultz was supervising Ethan and three other children, including Ethan's twin brother Adam. Timothy and Tonya were not home at the time." (Pet-App. 5.)

The lieutenant "decided he wanted to speak with Hauschultz privately." (Pet-App. 6.) Hauschultz and his mother agreed, and the lieutenant interviewed Hauschultz in a room across the hallway for about eight minutes. (Pet-App. 6.) At first, Hauschultz denied harming Ethan. But Hauschultz then described a disturbing scene in which, at Timothy's direction, Hauschultz said that he had been

supervising an "extreme punishment" in which the children were forced to carry wood around for hours, and Hauschultz had "slapped, swatted and prodded" Ethan:

> [Hauschultz] later told [the lieutenant] that he, Ethan, and Adam were carrying wood around the yard at Timothy's direction for two hours as an "extreme punishment" for disobedience. Hauschultz stated he was in charge of this punishment while Timothy was absent, and he acknowledged that he had slapped, swatted and prodded Ethan with a stick to get him moving. The children who were not subject to this punishment watched.

(Pet-App. 6.)

When he found Ethan "slumped over a piece of wood," Hauschultz continued, he "wanted to 'get [Ethan] really cold' to force him to keep moving," and so, with about 80 pounds of wet snow, Hauschultz built what he called a "little coffin of snow" for Ethan:

> Hauschultz told [the lieutenant] that during the punishment, he found Ethan slumped over a piece of wood. He claimed he and some of the other children had thrown snow on Ethan, adding that they did this because they thought Ethan was messing around. Hauschultz said he wanted to "get [Ethan] really cold" to force him to keep moving. Hauschultz admitted to taking off Ethan's boots and described how he created a "little coffin of snow," packing Ethan to his shoulders in about eighty pounds of wet snow.

(Pet-App. 6.)

Hauschultz agreed to a second interview. (Pet-App. 6.) Timothy also gave his permission, and a detective drove Hauschultz in an unmarked vehicle to the nearby sheriff's department. (Pet-App. 6.) Ethan was still alive at the time. (Pet-App. 7.) The interview lasted about two and one-half hours. (Pet-App. 7.) It took place in a "soft" room furnished like a living room, and Hauschultz was seated on a couch near the door. (Pet-App. 7.)

The detective "told Hauschultz that he should tell her if he no longer wanted to talk." (Pet-App. 7.) Hauschultz called the situation "ironic" because he had just had a special unit about constitutional rights in his social studies class. (Pet-App. 7.) When the detective asked Hauschultz about how Timothy handled misbehavior, Hauschultz described the wood-carrying punishment—two hours at a time "per offense"—and how Ethan, who weighed about 60 pounds, had to carry a piece of wood that was "between thirty-five and forty pounds" (it was actually 44 pounds):

> Hauschultz explained that as punishment for misbehavior, Timothy required the children to carry wood in the yard for two hours per offense—an activity Hauschultz described as "boring, hard, stupid work." Timothy assigned each child their own log, and they would have to complete "laps" carrying their piece of wood. This punishment would occur during any season and during all weather conditions, including rain and snow. Hauschultz estimated the piece of wood he had to carry was about twelve pounds. Hauschultz estimated that seven-year-old Ethan's piece of wood, by contrast, weighed between thirty-five and forty pounds.

(Pet-App. 7–8 & n.4.)

Hauschultz provided more detail in the second interview about what he did to Ethan earlier that day and Hauschultz's own state of mind at the time. "It was Hauschultz's opinion," the court of appeals continued, "that Timothy had not yet 'broke' the twins, adding that they were 'still doing whatever they want and just dealing with the punishment.'" (Pet-App. 8.) "Hauschultz made statements clearly indicating his resentment for Ethan and [his twin] Adam." (Pet-App. 8.) "He said the family was 'all happy and fine'" until the twins came to live with them. He found them "annoying," and "they '[drove him] nuts.'" (Pet-App. 8.) Hauschultz told the detective that he "felt that carrying wood

was not enough punishment for the twins' misbehavior." (Pet-App. 8.)

Hauschultz described what happened that afternoon as follows: "[A]s the twins made their laps, he would poke or prod them with a stick if they dropped their wood, which occurred very often." (Pet-App. 9.) "Hauschultz stated he would usually target their torso or rear end with the stick and he would poke them hard enough to make them feel it but not hard enough to seriously injure them." (Pet-App. 9.) "Hauschultz estimated he poked them 'a few hundred times'—the vast majority of which were directed at Ethan because Hauschultz perceived that he was being defiant." (Pet-App. 9.) "Hauschultz acknowledged that he was irritated he had to be outside carrying wood and supervising the boys, and he became even more irritated because they were making things difficult." (Pet-App. 9.)

Hauschultz admitted that he could see that Ethan was in physical distress, and "he did not feel bad for Ethan":

> As the punishment progressed, Hauschultz could tell that Ethan in particular was physically exhausted. He frequently dropped his wood piece. Five or six times, when Ethan went to pick up the log, he could not keep his footing, and he fell backward. Each time, the log landed on Ethan's chest and "smushed" him. Ethan fell forward on top of the log an additional three or four times. Hauschultz told [the detective] he did not help Ethan up when Ethan fell because he did not feel bad for Ethan.

(Pet-App. 9.)

"At approximately 2:30 p.m., Hauschultz noticed that Ethan was lying motionless with the log just under his chin." (Pet-App. 10.) Though Hauschultz told the detective that Ethan was already "stiff and statue-like," was "softly whining," and "had a bloody face," Hauschultz said he then buried Ethan in the "little coffin of snow" until "Ethan stopped moving":

> Hauschultz stated he pinched Ethan to get him moving, but Ethan was "stiff and statue-like." When Ethan did not respond, Hauschultz and the other children pulled him off the log and laid him down on the ground. As he did in the first interview, Hauschultz explained how they made Ethan "a little coffin of snow" by covering Ethan except for his face. He could hear Ethan softly whining and could see that Ethan had a bloody face. Hauschultz also saw that Ethan's eyelids were slowly opening and closing, and his pupils appeared hazy. Ethan would occasionally raise his arm, and Hauschultz would rebury it. Eventually, Ethan stopped moving.

(Pet-App. 10.)

Hauschultz told the detective that he then "poured water over [Ethan] to 'solidify' or 'icify' him." (Pet-App. 10.) He apparently then left Ethan there. When Hauschultz returned after completing his own two hours of carrying wood, "[h]e found Ethan non-responsive lying in a puddle of water under the snow." (Pet-App. 10.) When Timothy came home with Tonya, Timothy "went into 'emergency mode,'" Hauschultz said, and they took Ethan to the hospital. (Pet-App. 11.) Hauschultz told the detective that Ethan felt "very cold" on the way to the hospital and "then volunteered that maybe the cold 'seeped through to [Ethan's] core,' and Hauschultz said that he knew if someone's 'core temperature changes a certain amount it doesn't work right anymore.'" (Pet-App. 11.)

The second interview ended "when Timothy arrived at the department and asked to see Hauschultz. Hauschultz left the department with Timothy after the two spoke privately." (Pet-App. 11.)

Ethan died after the second interview had concluded. At that point, the county department of human services asked to interview the children, and Timothy and Tonya drove them to the sheriff's department. (Pet-App. 11.) At 2:43 a.m., Hauschultz was interviewed a third time in the same room as

the second interview. (Pet-App. 11.) Hauschultz said that the beginning of the interview that Timothy had told him not to say more without an attorney present. (Pet-App. 12.) But the detective pressed Hauschultz for more information, "repeatedly and pointedly emphasiz[ing] that Ethan was dead, imploring Hauschultz to explain the bruises on Ethan's body." (Pet-App. 12.) In response, "Hauschultz sat quietly and refused to answer, informed [the detective] that he did not think he should talk, or gave curt answers that were almost entirely repetitive of his statements during earlier interviews." (Pet-App. 12.)

Hauschultz was charged with reckless homicide, three counts of physical abuse of a child—intentionally causing bodily harm, and three counts of substantial battery. (Pet-App. 14.) Defense counsel moved to suppress Hauschultz's statements in the three interviews, arguing that Hauschultz was subjected to custodial interrogation without *Miranda* warnings and his statements were involuntary. (Pet-App. 14.)

The circuit court, the Honorable Jerilyn M. Dietz, presiding, held a *Miranda-Goodchild* hearing over three days. (Pet-App. 14.) The court denied the suppression motion, concluding that Hauschultz was not in *Miranda* custody during any of the interviews, and his statements were voluntary. (Pet-App. 14.)

Hauschultz subsequently accepted a plea offer in which he pleaded guilty to the reckless homicide charge, and the remaining charges were dismissed and read-in. (Pet-App. 14–15.) The court sentenced Hauschultz to twenty years of initial confinement and ten years of extended supervision. (Pet-App. 15.)

Hauschultz appealed, challenging the order denying his motion to suppress. (Pet-App. 15.) The court of appeals affirmed in a 30-page *per curiam* opinion. (Pet-App. 3–32.) As discussed in detail later, the court concluded that Hauschultz

was not in *Miranda* custody in the first two interviews, and his statements in those interviews were voluntary. The court then concluded that, even if the court erred in admitting the statements in the third interview, any error was harmless beyond a reasonable doubt.

ARGUMENT

The court of appeals appropriately rejected Hauschultz's *Miranda* custody and voluntariness claims, and Hauschultz does not show that his case satisfies criteria for review.

A. The court of appeals fully considered Hauschultz's youth when it properly determined under the totality of the circumstances that Hauschultz was not in custody in the first two interviews and his statements were voluntary.

Hauschultz asks this Court to take review to address the special role of youth in determining whether a subject is in custody for purposes of *Miranda* and whether the subject's statements are voluntary: "Binding guidance remains necessary to demonstrate the constitutional significance of an interrogation subject's youth." (Pet. 26.) And: "This Court should grant review to clarify the analytical role both childhood trauma and childhood itself should play in a reviewing court's voluntariness assessment." (Pet. 30.)

Such binding guidance already exists, and Hauschultz fails to show that clarification is needed. It is well-established that courts must exercise "special caution" in assessing the voluntariness of juvenile statements. *In re Gault*, 387 U.S. 1, 45 (1967); *State v. Jerrell C.J.*, 2005 WI 105, ¶¶ 21, 22, 283 Wis. 2d 145, 699 N.W.2d 110; *see also J.D.B. v. North Carolina*, 564 U.S. 261, 265 (2011) (juvenile's age "properly informs the *Miranda* custody analysis").

Here, the court of appeals expressly recognized its duty to apply "special caution" because of Hauschultz's age when considering the *Miranda* custody and voluntariness issues. (Pet-App. 19.) The court then addressed Hauschultz's youth as the first factor in its analysis, noting that "courts have long recognized the importance of age in determining both whether a person is in custody . . . and whether a confession is voluntary," citing *Jerrell C.J.* (Pet-App. 18.) The court recognized that "Hauschultz's age is a factor weighing both in favor of a determination of custody and against a determination of voluntariness." (Pet-App. 18–19.)

But the court then weighed all the factors together, and it concluded that "the first and second interviews lacked the degree of coerciveness" to require *Miranda* warnings, "even in light of Hauschultz's age." (Pet-App. 19.) By contrast, Hauschultz's position regarding the custody and voluntariness issues starts and ends with his age.

Hauschultz ignores his other personal characteristics that tend *not* to support his claims, like his plainly demonstrated intelligence:

> [Hauschultz] told [the detective] he was in accelerated math and English. He was expecting to attend college to be a petroleum engineer, which he told [the detective] would require four years of learning about mechanical engineering, mathematics, chemistry—matters Hauschultz described as "tedious stuff." We agree with the circuit court that Hauschultz's "intelligence is apparent when he speaks in these interviews."

(Pet-App. 20.)

Further, as the court of appeals noted, Hauschultz, despite his youth, did "not appear . . . [to be] particularly susceptible to coercion"; Hauschultz told the detective that the situation was "ironic" because he had just completed a social studies unit on constitutional rights. (Pet-App. 20.) And, as the circuit court found, Hauschultz "did not appear

confused or have difficulty understanding what was going on," and he "spoke freely and fluently with everyone who interviewed him." (Pet-App. 20.)

Hauschultz's intelligence and other personal factors demonstrating capability distinguishes him from other juveniles who, nevertheless, made statements deemed to be voluntary. *See State v. Moore*, 2015 WI 54, ¶¶ 58–61, 363 Wis. 2d 376, 864 N.W.2d 827 (15-year-old's confession voluntary despite his "below-average intellect"); *Dassey v. Dittmann*, 877 F.3d 297, 310, 312 (7th Cir. 2017) (*en banc*) (upholding state court's determination that 16-year-old's confession was voluntary despite "an IQ level in the low average to borderline range").

Accounting for all of Hauschultz's personal characteristics, including his youth, the court of appeals reached the correct result in concluding that Hauschultz was not in custody for purposes of *Miranda* in the first and second interviews. As to the first interview, Hauschultz and his mother consented to the interview; it was conducted in a room across the hall from the family room in the hospital; the door was not locked; the officer was in street clothes; the officer was conducting initial interviews to gather more information about what happened; and the interview lasted eight minutes. (Pet-App. 21–22.) As to the second interview, while it lasted two and one-half hours and occurred at the sheriff's department, Timothy and Hauschultz consented for Hauschultz to be interviewed there, the station was nearby, Hauschultz was transported in an unmarked vehicle, and he was never restrained. (Pet-App. 24–25.) The interview room was furnished like a living room, Hauschultz sat on a couch next to the door, and Hauschultz told the detective he did not care if the interview room door was open or closed. Moreover, consistent with the circuit court's factual findings, "the atmosphere was relaxed and comfortable" and "the questioning was conversational." (Pet-App. 26.) Hauschultz

was told he could terminate the interview and leave at any time, and he did so when his family arrived. (Pet-App. 26.)

Likewise, accounting again for *all* of Hauschultz's personal characteristics, the court of appeals also correctly concluded that Hauschultz's statements in the first and second interviews were voluntary. The court properly found that there was nothing coercive about the tactics used by the lieutenant in the first interview and the detective in the second. (Pet-App. 22–23, 26–27.) As the court of appeals noted, the cases on which Hauschultz relied in arguing that his statements were involuntary were plainly unlike his own case.

For example, Hauschultz cited *Jerrell C.J.* in arguing that his separation from his mother rendered his statement coerced. (Pet-App. 22.) But in *Jerrell C.J.*, 283 Wis. 2d 145, ¶¶ 10–11, law enforcement refused to allow the juvenile subject to call his parents during a five-hour interrogation, and they repeatedly accused him of lying. Here, Hauschultz's mother and stepfather consented to each of the interviews here. "[T]he atmosphere was relaxed and comfortable," and "the questioning was conversational." (Pet-App. 26.) And the detective advised Hauschultz he was free to end the interview at any time, and she kept that promise when his family arrived and Hauschultz left.

In sum, the circuit court and the court of appeals properly concluded that, in the first two interviews, Hauschultz was not in custody for purposes of *Miranda*, and his statements were voluntary under the totality of the circumstances, accounting for all of Hauschultz's personal characteristics, including his youth. Hauschultz's arguments—and those of amici Juvenile Law Center, et. al—focus on Hauschultz's youth to the exclusion of all else and make little attempt to engage the full circumstances bearing on the *Miranda* custody and voluntariness analyses.

B. The court of appeals properly concluded that any error in denying suppression of the third interview statements was harmless, and its treatment of the harmless error issue does not merit review.

Hauschultz discusses the early-morning third interview at length, describing the more confrontational tone of the officers and Hauschultz's own emotional upset during this interview. (Pet. 13–15.) By this time, Ethan had died, and the investigation had taken on greater urgency. The screenshot in the petition showing Hauschultz in apparent distress is taken from this third interview. (Pet. 15.)

As noted, the court of appeals acknowledged the changed circumstances and the officers' more aggressive tone in the third interview, and it assumed without deciding that Hauschultz was in *Miranda* custody for this interview and that his statements were not voluntary. To be clear, the State does not concede that Hauschultz was in *Miranda* custody or that his statements were compelled. But the court of appeals' conclusion that any error in admitting these statements was harmless was also correct, and the manner in which the court applied harmless error was proper and does not, itself, provide grounds for review.

As the court noted, "harmless error is the appropriate test to use when a defendant has entered a guilty plea but prevailed on only a portion of the suppression issues he or she raised on appeal." (Pet-App. 29.) Citing *State v. Semrau*, 2000 WI App 54, ¶ 21, 233 Wis. 2d 508, 608 N.W.2d 376, the court observed: "Admitting statements in violation of *Miranda* is harmless error if there is no reasonable possibility that the error contributed to the conviction." (Pet-App. 29.)

Applying this well-established standard the court stated, "We easily conclude the harmless error standard is satisfied in this case." (Pet-App. 29.) "Hauschultz was extremely reluctant to speak during the third interview,

having been advised by Timothy that it was not in his interest to do so. What little relevant information Hauschultz did offer," the court continued, "was almost completely duplicative of the information he had presented during the earlier interviews." (Pet-App. 30.)

Under these circumstances, the court concluded that it had "difficulty identifying any new information that came during the third interview, let alone any information that would have had a bearing on Hauschultz's decision to plead guilty had he known of its inadmissibility." (Pet-App. 30.) The court noted that Hauschultz's himself acknowledged the "overlap[ ]" between his statements in the third interview and the prior interviews, and his identification of only one bit of new information—an admission that "he had stepped on Ethan while he was giving him a 'facewash.'" (Pet-App. 30.) The court of appeals' application of harmless error was appropriate and correct under these circumstances.

Hauschultz argues that "[t]he most obviously review-worthy issue [is] . . . whether an evidentiary hearing is required on the question of harmlessness when, following a guilty plea, a reviewing court suppresses a portion of the State's evidence." (Pet. 6.) Hauschultz then asserts that case law "answers this question in conflicting ways," asserting this Court should take review to resolve the conflict. (Pet. 6.) The State disagrees.

Hauschultz does not show why, in his case, remand would be necessary or appropriate to decide the issue of harmless error. No additional proceedings or factual findings are required; Hauschultz does not appear to contest that his statements in the third interview are duplicative of those in the first two interviews. Under these circumstances, the court of appeals properly determined that there is no reasonable probability that Hauschultz would have decided to go to trial if he had known that evidence that was merely duplicative of other, admissible evidence would be suppressed.

These circumstances are very different from those in *State v. Rejholec*, 2021 WI App 45, ¶ 35 n.14, 398 Wis. 2d 729, 963 N.W.2d 121, the case on which Hauschultz relies in arguing that a conflict of law exists for this Court to resolve. There, all of Rejholec's statements made after a certain point in the interview were deemed obtained in violation of *Miranda*. *Rejholec*, 398 Wis. 2d 729, ¶ 35. Unlike here, harmless error was not apparent on the existing record in Rejholec's case. Remand to the circuit court thus allowed the State the opportunity to prove harmless error—that, regardless the erroneous admission of inculpatory statements, there was no doubt Rejholec would have still entered his pleas—in additional proceedings as necessary. *See id*. ¶ 35 n.14.

In sum, Hauschultz attempts to manufacture a conflict in the law where none exists. The court of appeals' application of harmless error was appropriate in this case.

CONCLUSION

The petition should be denied.

Dated this 10th day of May 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 3,686 words.

Dated this 10th day of May 2024.

Electronically signed by:

Jacob J. Wittwer
JACOB J. WITTWER
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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 10th day of May 2024.

Electronically signed by:

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