STATE OF WISCONSIN

IN SUPREME COURT

No. 2023AP396-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

LOGAN T. KRUCKENBERG ANDERSON,

Defendant-Respondent.

PETITION FOR REVIEW

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INTRODUCTION

The State petitions this Court for review of a published court of appeals' decision suppressing statements made by Logan Kruckenberg, then 16 years old, to law enforcement officers. Kruckenberg confessed to killing his newborn daughter within 25 minutes of questioning beginning, after repeated assurances he was free to leave, the investigating agent remaining calm and respectful, the presence of his guardian when he requested her, and no lengthy period of questioning without gaps, including hours when he was not at any police station.

In concluding that Kruckenberg's confession was coerced, the court of appeals looked at Kruckenberg's "personal characteristics" and noted his lack of experience with law enforcement, physical, mental, and emotional condition, and lack of advocacy from his guardian against cooperating with police. It then pointed to several features of the interview itself: (1) the police contacts altogether, while broken up for significant periods, took place over more than 26 hours; (2) Kruckenberg was not given *Miranda* warnings, even though he was not in custody; (3) the agent was adamant that Kruckenberg was lying; (4) the agent leveraged the presence of Kruckenberg's adult guardian; (5) the agent suggested that he was there to help Kruckenberg; and (6) the agent made moral and emotional appeals to him, including a desire to "give that precious child . . a proper burial," taking Kruckenberg's hand.

The interview features identified by the court have been treated by this Court and others as non-coercive police questioning, and in this case they took place over the course of only five minutes of the interview. The question is whether these accepted techniques become coercive if the defendant is under 18. Review is needed because the opinion leaves law

enforcement directionless when interviewing a juvenile; it does not provide a guidepost that law enforcement and other courts can follow.

ISSUE PRESENTED FOR REVIEW

During a search for a missing newborn, police questioned the baby's 16-year-old father about what happened to her. He gave a fantastic story about giving her to a person he knew from SnapChat to take her to an adoption agency. After listening to everything Kruckenberg had to say, the interviewing agent refused to accept that story and implored Kruckenberg to tell him the truth about where she was. Kruckenberg asked his guardian[1] to leave the room, and the agent took his hand, told him he was doing the right thing, and that his child should have a proper burial. Kruckenberg then admitted to leaving her in the woods to die. In a later interview, confronted with the fact that bullet wounds were found in her skull, he confessed to shooting her.

The court of appeals found that Kruckenberg's statements admitting that he left her in the woods were involuntary because (1) all the interviews together, while broken up for significant periods, took place over more than 26 hours; (2) Kruckenberg was not given *Miranda* warnings, even though he was not in custody; (3) the agent was at times confrontational and accusatory; (4) the agent leveraged the presence of Kruckenberg's guardian; (5) the agent suggested that he was there to help Kruckenberg; and (6) the agent made moral and emotional appeals to him, including a desire

[1] The adult who Kruckenberg requested be present for the interview, "Delores," is not his legal guardian. Kruckenberg lives with Delores and her family during the week rather than at his mother's house. For simplicity, the State refers to Delores as Kruckenberg's "guardian" here.

to "give that precious child . . a proper burial," taking Kruckenberg's hand.

Was the totality of these circumstances enough to render his confession involuntary?

STATEMENT OF CRITERIA SUPPORTING REVIEW

1. The issue presented by this petition presents a "real and significant question of federal . . . constitutional law." Wis. Stat. § (Rule) 809.62(1r)(a). Specifically, this case involves the legal standards for determining what type of circumstances amount to "police coercion" sufficient to render a juvenile's confession involuntary.

2. This question is needing clarification, given the court of appeals' publication of this opinion. The opinion works a serious detriment in consistency in the law in this area because it is in conflict with controlling opinions of the United States Supreme Court, this Court, and other court of appeals' decisions. Wis. Stat. § (Rule) 809.62(1r)(d). Law enforcement is left with no clear direction on what is and is not permissible when interviewing young people—particularly one like Kruckenberg who was nearly 17—and both law enforcement and lower courts will be bound to somehow follow both this opinion and the substantial body of case law seemingly pointing in the opposite direction on how to resolve this question. The issues are thus "of the type that [are] likely to recur unless resolved by the supreme court." Wis. Stat. § (Rule) 809.62(1r)(c)3.

STATEMENT OF THE CASE

As with most confession cases, the facts necessary to assessing the voluntariness of Kruckenberg's statements are

extensive, and are condensed here for the purposes of this petition.[2]

Police are called about a missing infant. Around 1:30 a.m. on January 9, 2021, Green County Sheriff's Deputy Derek Whitcomb responded to a call from Mark P.[3], Lauren P.'s father, who said that his family had just learned that 14-year-old Lauren gave birth in his residence four days earlier. (110:11–78.) Mark reported that Lauren's 16-year-old boyfriend, Kruckenberg, had apparently taken the baby and the baby had not been seen since. (110:2.)

Kruckenberg's interview at his girlfriend's home. Whitcomb and Deputy Zachary Degner spoke with Kruckenberg, Lauren, and Lauren's family. (110:2–13, 49.) Lauren had named the baby "Heather." (110:69.) Kruckenberg said he had given the baby to "Tyler," a man whom Kruckenberg said he had met through SnapChat, and whose last name Kruckenberg did not know. (2:2; 110:5–6, 14–15.) Kruckenberg said he met Tyler at a park in Albany a few hours after the baby's birth and gave him $60 to take her to an adoption agency in Madison. (110:6–7, 16.)

Kruckenberg's first interview at the Albany Police Department. About eight hours later, Detective Christopher Fiez and Albany Police Chief Robert Ritter went to Delores F.'s house, with whom Kruckenberg lived during the week, seeking more information. (126:17.) Kruckenberg agreed to answer some questions at the Albany PD. (126:18–19.) Fiez clarified that Kruckenberg was not in any trouble or

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[2] All of the interviews were recorded and videos of each of them are in the record. The State provides transcripts of them in its appendix, but believes the recordings are much better descriptors of what occurred here. They are found principally at R. 190 and 192.

[3] Because several relevant people in this case are juveniles, the State uses pseudonyms for all of the non-law-enforcement persons apart from the defendant.

under arrest. (112:9.) Ritter beseeched Kruckenberg to tell them if something else happened and to help them locate Heather or "Tyler." (112:33–36.) Kruckenberg said he was telling them everything he knew. (112:34.) He also complained to those officers that he had not slept or eaten over the past three days and that he was having stomach pains due to stress and being "pissed" if "Tyler" did anything to the baby. (192; 113:1; 114:1–2.)

The interaction lasted about three hours (112; 113; 114; 192), and Delores picked Kruckenberg up from the station around 5:00 p.m. (126:81.)

Kruckenberg's interview at the Brodhead Police Department. Six hours later, as no trace of "Tyler" or the newborn was found, several officers were dispatched to Delores's house to ask permission to search it. (134:6.) This included DOJ's Division of Criminal Investigation Agent James Pertzborn and FBI Agent Brian Baker, not present at the earlier interviews with Kruckenberg. They asked if Kruckenberg was willing to answer some follow-up questions at the Brodhead PD; it was less crowded and had a dedicated recorded interview room. (124:8–18; 193 (Jan. 09 video) 45:14–46:00.) Kruckenberg agreed and requested that Delores come, too. (124:16–17.) The agents said "[a]bsolutely" Kruckenberg went with Pertzborn and Baker, in an unmarked Chevy Tahoe, to Brodhead PD; Delores got dressed and followed separately. (124:17–19; 193 (Jan. 09 video) 02:16–3:00.) On the way, Pertzborn said they would wait for Delores before talking about the baby, that Kruckenberg was not in custody, that he was free to leave, and he did not have to answer any questions. (124:23–24.) Kruckenberg said he would talk to anyone who would help find Heather. (124:24.)

Once at the Brodhead PD, Pertzborn, Kruckenberg, and Agent Baker were led to the interview room directly in front of the front door. (123:27.) The exit to the lobby was clear and the room was a "[s]oft interview room"—no restraints or

places to fasten restraints, no bars on the doors, nor anything where someone could be secured. (123:29–30; 190 12:04:26–12:04:30.) Kruckenberg was not frisked, handcuffed, or restrained in any way. (190 12:06:01–12:06:42.) Pertzborn removed his police vest, thanked Kruckenberg for being willing to talk to them, and offered Kruckenberg something to drink. (115:1–2; 190 12:06:41–12:09:07.) The doors to the interview room remained unlocked. (123:30.) Pertzborn again assured Kruckenberg that they would not discuss anything without Delores, and other than asking him if a phone they found at his mother's house[4] was his, they made small talk until Delores arrived. (115:1–25; 190 12:06:42–12:40:13.) The atmosphere remained cordial, even friendly, with Kruckenberg telling stories and laughing. (115:1–25; 190 12:06:42–12:40:13.)

Delores arrived around 12:40 a.m., January 10. (115:25; 190 12:40:16.) She sat next to Kruckenberg and Pertzborn again advised them: (1) that the interview was being recorded and where the camera was (190 12:40:49–12:41:00); (2) that he was with the DOJ Department of Criminal Investigation, and who Agent Baker was (190 12:41:40–12:42:05); (3) that Delores should "feel free to jump in at any time" (190 12:42:06–12:42:09); and (4) that Kruckenberg "is not under arrest, he does not have to talk to me," and he "just can leave at any time, you guys can pick up and leave, if you'd like" (115:26; 190 12:42:09–12:42:20). Kruckenberg and Delores said they understood. (190 12:42:20–12:42:24.) Delores then told Kruckenberg that she "recommend[s] talking to them" to which Kruckenberg replied, "yeah, I know." (115:26; 190 12:42:22–12:42:25.) Pertzborn said he recommended talking to him too because he was in a position to help, asked if either of them had any questions before the interview began, and they both said no. (115:26–27; 190 12:42:25–12:43:43.)

[4] This is a different location than Delores's house.

Pertzborn asked if Kruckenberg knew why Pertzborn needed to talk to him, and Kruckenberg said yes, "because . . . we have no idea where that child is," and Pertzborn said "no, some of us do, but what I want you to do is talk to me. Alright? And walk me through this. Alright? How we got to this point. That's what I need you to do." (115:28; 190 12:45:10–12:45:30.) Kruckenberg asked if Pertzborn wanted him to start the day Heather was born, and Pertzborn replied,

> We can start wherever you feel we need to start, but I want you to know there's a whole bunch of information that we have, and we have done a whole lot of background on stuff and I always tell everybody if you are going to talk to me, I can work with anything but I need you to have kind of an understanding I really need you to be honest with me. Alright, otherwise we are just wasting our time and we don't need that at all. Alright? Alright, go ahead.

(115:28; 190 12:45:32–12:46:05.)

Kruckenberg said he bought Lauren a pregnancy test a few weeks previously but that Lauren did not tell him the result until the day Heather was born. (115:29.) They discussed what to do because they did not want to keep the baby and Lauren did not want anyone to know she gave birth, including her parents. (115:29–31; 190 12:49:01–12:50:30.) He said they landed on adoption, and he texted Tyler. (115:31; 190 12:51:07–12:51:22.) Pertzborn asked for details about Tyler; Kruckenberg maintained that he met Tyler through SnapChat and did not know his last name, that Tyler was mixed race and about 23 to 24 years old, heavyset, lived in Brodhead with his mixed-race girlfriend, drove a Chevy Equinox, and that they had played darts and pool together about 18 times. (115:31–35; 190 12:51:23–12:55:13.) Delores looked incredulous, and Pertzborn asked Delores if she'd ever heard of Tyler; she said no. (115:35; 190 12:55:15–12:55:20.)

Pertzborn said he needed to interrupt because he knew Kruckenberg was not being truthful, and he needed to tell the truth or Pertzborn could not help him. (115:35–37; 190 12:55:28–12:56:01.) Delores also repeatedly urged Kruckenberg to tell the truth and that she, too, could not help him otherwise. (115:35–37; 190 12:55:59–12:59:41.) Pertzborn said he was glad Delores was there because she knew Kruckenberg better than he did, and explained that Pertzborn knew this was not true because no one contacted in Brodhead had ever heard of Tyler or his girlfriend or had ever seen their vehicle. (115:36–37; 190 12:57:15–12:58:47.) He told Kruckenberg they were going to do everything they could to help him "[b]ut we can't do this anymore. We can't do the lies. I can't possibly, I can't possibly do that. Alright?" (115:36–37.) Kruckenberg said he was telling the truth and Pertzborn said he was not, and "I think you know it and we know it." (115:37.) Pertzborn said there were people who realize they've done something wrong and feel bad about it and people who are "just evil about it, they don't give a shit. What type of person are you?" (115:37.) Kruckenberg said he cared, and Pertzborn replied, "[y]ou do care. That's why you're being given this opportunity to talk to me about this. . . Don't blow that chance. Okay? Please, you are not a bad person." (115:37.) Pertzborn asked "[c]an we just start over and do the right thing here?" (190 1:00:53–1:00:57.)

At about 1:00 a.m., 20 minutes after the questioning began, Kruckenberg asked if he could talk to Pertzborn, one-on-one. (115:38; 190 1:00:58–1:01:16.) Pertzborn said "absolutely" and thanked Kruckenberg. (115:38; 190 1:01:17.) Delores and Agent Baker left the room. (115:38; 190 1:01:20–1:01:45.) Pertzborn gave Kruckenberg another water and took Kruckenberg's hand, told him he was going to help him through this and he knew Kruckenberg was scared, but they would "just work on fixing it from here." (115:38; 190 1:01:20–1:02:09.) Kruckenberg asked what was going to happen, and

Pertzborn said he didn't know, but he'd be able to write a report saying Kruckenberg was apologetic. (115:38; 190 1:02:10–1:02:32.) Pertzborn then said "[w]e need to do a couple things. We need to bury, give that precious child of yours, a proper burial." (115:38; 190 1:02:33–1:02:41.) Kruckenberg said, "[a] burial. Yeah." (115:38; 190 1:02:41.) Pertzborn said they needed to recover her body, and Kruckenberg asked him to open Google maps. (115:38–39; 190 1:02:42–1:03:02.)

Kruckenberg described a park in Albany and said he and a "friend" buried Heather in the snow. (190 1:03:02–1:07:26.) Pertzborn then had Kruckenberg go through the morning of January 5. This time, Kruckenberg claimed his friend "Alex" was involved. (190 1:09:12–1:09:56.) Kruckenberg stopped and asked if he could give Delores a hug, and Pertzborn replied, "of course." (190 1:10:00–1:10:07.) Delores hugged Kruckenberg and told him everyone still loved him. (190 1:10:08–1:11:03.) Kruckenberg took a bathroom break and the interview resumed. (190 1:11:14–1:13:57.)

Kruckenberg said when the baby arrived, they "just needed it out of our lives." (190 1:18:42–1:26:20.) He put the baby in a backpack and started walking when he saw Alex. (190 1:19:24–1:34:04.) He asked Alex to drive him to Madison to surrender the baby, but Alex refused and suggested Kruckenberg abandon her in the woods. (190 1:34:04–1:41:43.) Kruckenberg said he then walked into the woods, took Heather out of the backpack and laid her in a hollow log, and she began to cry. (190 1:41:43–1:42:17.) He said he covered her with snow and left, knowing she would die. (190 1:42:05–1:43:35.)

Pertzborn thanked him, and he hoped Kruckenberg felt better telling the truth. (190 1:45:10–1:45:40.) He asked Kruckenberg to take them to Heather's body, and Kruckenberg said he would as long as he did not have to see her. Pertzborn said that was fine. (190 1:45:33–1:45:40.)

Kruckenberg asked if he could ride with Delores and Pertzborn said no, but clarified that Kruckenberg was not in custody; it was so Kruckenberg could direct him to the right location, and Pertzborn asked if that was alright. (190 1:45:47–1:46:17.) Kruckenberg replied, "I'm perfectly fine with it." (190 1:46:06–1:46:17.) The interview ended and Pertzborn thanked Kruckenberg again and asked if he was okay, and Kruckenberg replied that he was. (190 1:46:28–1:46:32.)

Kruckenberg got back into the front of the Tahoe and directed Pertzborn to Ruben's Cave Drive. (124:48–49.) Kruckenberg located his footprints in the snow. (124:49.) Pertzborn and other officers followed Kruckenberg's footprints until they located Heather's body. (124:51; 193 (Jan. 10 video) 00:00–07:07; 194.)

Kruckenberg's second interview at the Albany Police Department. Pertzborn returned to the car and told Kruckenberg he had some further questions, but again that he was not under arrest and was under no obligation to talk. (124:51–52.) Kruckenberg agreed, and they went to the Albany PD. (124:52.) Pertzborn asked if Kruckenberg wanted Delores to join them, and Kruckenberg said no; he found it too difficult to talk about Heather in front of Delores. (124:53.) Once there, Kruckenberg said he left the baby in the woods to die and confirmed that everything he'd said about Tyler was a lie. (116:20, 23–25; 195 AMBA0196–203.) About 40 minutes later, Green County Sheriff officers arrested Kruckenberg. (196:23–24.)

Kruckenberg's interviews after his arrest. After police recovered Heather's body, they discovered someone had shot her twice in the head. (117:42–47.) During a *Mirandized* interview at the Rock County Juvenile Detention Center, Kruckenberg confessed that he actually shot Heather. (117:42–47.) Details from that interview conflicted with other evidence collected, so Pertzborn and Agent Brian Hawley

spoke to Kruckenberg the next day. (118:3–4.) Pertzborn told him that his friend Gerald had turned over the firearm. (118:5.) Kruckenberg then admitted he gave Gerald the gun the morning of January 6, and that Kruckenberg had stolen it from Delores's house. (118:11–12, 19.) And finally, when confronted with his messages with Lauren, Kruckenberg admitted that: (1) Lauren did not know he was going to shoot the baby; and (2) after he returned from the woods, he lied and said he gave Heather to Gerald's mother to take to an adoption agency. (118:38–40.)

Criminal proceedings and Kruckenberg's motion to suppress; the circuit court suppresses all statements from the Brodhead PD interview, the Albany woods, and the second interview at the Albany PD.

The State charged Kruckenberg with one count of first-degree intentional homicide and one count of hiding or burying the corpse of a child. (2:1.)

Kruckenberg moved to suppress all of his statements to law enforcement, contending they were all custodial and impermissibly coerced. (83.) The circuit court held a multi-day hearing on the issue at which 11 law enforcement officers, Delores, and a defense-obtained psychologist, Dr. Brian Cutler, testified. (125; 127; 123; 132; 133; 148–150.) Videos of each of law enforcement's contacts with Kruckenberg were also played. (184–195.)

Regarding the first interview at Lauren's home and second interview at the Albany Police Department on January 9, the circuit court held that Kruckenberg was not in custody and gave voluntary statements. (196:9–16.)

Regarding the post-arrest interviews on January 10 and 11, the court concluded that though Kruckenberg was in custody, at both, law enforcement had read Kruckenberg his *Miranda* rights, Kruckenberg voluntarily waived them, and his statements were voluntary. (196:33–34.)

But regarding the interviews on January 10 at the Brodhead PD, Albany woods, and Albany PD, the circuit court concluded they were custodial interrogations conducted without *Miranda* warnings, and that all Kruckenberg's statements given during those interviews were involuntary. (196:17–29.) The circuit court's determination of custody was based on what it concluded Kruckenberg and the officers subjectively believed and a characterization of the circumstances that was not supported by the videos of the interviews. The court found no police misconduct, applied a non-legal definition of coercion; and relied on opinions about "the Ried Technique" of interrogation that Agent Pertzborn testified he did not remember or use, and which a court of appeals decision had already found non-coercive.

The State appealed, and the court of appeals reversed in part and affirmed in part. The court concluded that until the "proper burial" comment, Kruckenberg's statements were voluntary and he was not in custody, so it reversed the circuit court as to those holdings. But it determined that all of Kruckenberg's statements after the "proper burial" comment were involuntary, concluding that "Pertzborn's coercive techniques" exceeded Kruckenberg's ability to resist at that point. (Pet-App. 10, 12–15.) It concluded that Kruckenberg's age and "physical, mental, and emotional condition" left him unable to resist. (Pet-App. 15–18.)

The State now petitions for review.

ARGUMENT

I. This Court should grant review to clarify what constitutes coercion in the context of a juvenile's interrogation.

A. A confession is deemed voluntary if no police overreach was used to extract it.

The Fifth and Fourteenth Amendments require "that a confession be voluntary to be admitted into evidence." *Dickerson v. United States*, 530 U.S. 428, 433 (2000). A defendant's statements are voluntary if they are "the product of a 'free and unconstrained will, reflecting deliberateness of choice,'" as opposed to the result of a "conspicuously unequal confrontation in which the pressures brought to bear on [the defendant] by representatives of the [S]tate exceed[ed] the defendant's ability to resist." *State v. Clappes*, 136 Wis. 2d 222, 236, 401 N.W.2d 759 (1987) (last alteration in original) (citation omitted); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973) (A confession is voluntary if it is the product of a free and unconstrained choice.).

Coercive or improper police conduct is a necessary prerequisite for finding a confession involuntary. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986); *Clappes*, 136 Wis. 2d at 239. There must be an "essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other." *Connelly*, 479 U.S. at 165. "[V]oluntariness . . . has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word." *Id.* at 170. "[V]ery few incriminating statements, custodial or otherwise, are held to be involuntary, though few are the product of a choice that the interrogators left completely free." *United States v. Rutledge*, 900 F.2d 1127, 1129 (7th Cir. 1990).

Courts consider the totality of the circumstances in determining whether a defendant's statements are voluntary.

Clappes, 136 Wis. 2d at 236; *Bustamonte*, 412 U.S. at 226. If there was actual coercion or improper police tactics used to procure the confession, only then do courts "balance the personal characteristics of the defendant against the pressures imposed" by law enforcement officers. *Clappes*, 136 Wis. 2d at 236.

Accordingly, courts "must first examine the threshold matter of coercion." *State v. Vice*, 2021 WI 63, ¶ 31, 397 Wis. 2d 682, 961 N.W.2d 1. "The presence or absence of actual coercion or improper police practices is the focus of the inquiry because it is determinative." *Id.* (citation omitted). If the facts do not "reveal coercion or improper police pressures, there is no need . . . to engage in the balancing test between the suspect's personal characteristics and those nonexistent pressures." *Id.*

"[C]oercion can be mental as well as physical," *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960), but only techniques that "overcome the defendant's free will" are prohibited, such as "psychological intimidation," *United States v. Dillon*, 150 F.3d 754, 757 (7th Cir. 1998), or "outright fraud," *Hadley v. Williams*, 368 F.3d 747, 749 (7th Cir. 2004). Short of that, the police are allowed "to pressure and cajole, conceal material facts, and actively mislead." *Rutledge*, 900 F.2d at 1131. "[M]erely telling somebody to tell the truth is not coercive." *Etherly v. Davis*, 619 F.3d 654, 663 (7th Cir. 2010). Police officers are permitted to suggest that the suspect will reap a "net benefit" so long as they do not make specific promises of leniency that amount to outright "fraud." *Rutledge*, 900 F.2d at 1130–31; *Etherly*, 619 F.3d at 663–64. Other factors that cut against a finding of psychological coercion include the police giving *Miranda* warnings, *Missouri v. Seibert*, 542 U.S. 600, 608–09 (2004) (plurality opinion), and the suspect correcting police suggestions, *Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944).

If improper coercion is found, the court then weighs its effects against the defendant's personal characteristics. *Vice*, 397 Wis. 2d 682, ¶ 31. The relevant personal characteristics of the defendant include the defendant's age, education and "intelligence, physical and emotional condition, and prior experience with law enforcement." *Id.* ¶ 30. The personal characteristics are balanced against the police pressures and tactics which were used to induce the statements, such as: the length of the questioning, "the general conditions under which the [statements] took place, any excessive physical or psychological pressure brought to bear on the [defendant], any inducements, threats, methods or strategies utilized by the police to compel a response, and whether the [defendant] was informed of his right to counsel and right against self-incrimination." *Clappes*, 136 Wis. 2d at 236–37.

Courts also look to the content of a confession for evidence of voluntariness. Because the ultimate question is whether police conduct "overb[ore] petitioner's will to resist," *Rogers v. Richmond*, 365 U.S. 534, 544 (1961), a suspect's demonstrated ability to resist police questions even after confessing "strongly suggests" that a confession was voluntary. *Minnesota v. Murphy*, 465 U.S. 420, 438 (1984).

B. This Court and others have repeatedly treated techniques like those used here as non-coercive.

Outside the juvenile context, courts have routinely upheld questioning techniques like those employed here as non-coercive.

In *Vice*, for example, this Court recently outlined the kinds of behavior that amounts to coercion: physical violence, interrogating an "incapacitated and sedated suspect, sleep and food deprivation," threats or promises of leniency, and exceedingly long interrogation of a suspect held incommunicado. *Vice*, 397 Wis. 2d 682, ¶ 34. It also identified

several high-pressure situations that have been held *not* coercive: interrogating an injured and intoxicated suspect in an emergency room, exaggerating evidence, and sometimes even "outright deceit." *Id.* ¶ 33.

This Court and others have rejected coercion challenges to all the type of pressures the agent applied to Kruckenberg: expressing disbelief of the suspect's story, *State v. Deets*, 187 Wis. 2d 630, 636, 523 N.W.2d 180 (Ct. App. 1994); telling the suspect to tell the truth, *Etherly*, 619 F.3d at 663; indicating generally that cooperation would be to the juvenile's benefit, *Fare v. Michael C.*, 442 U.S. 707, 727 (1979); appealing to the suspect's morality, *United States v. Miller*, 984 F.2d 1028, 1031–32 (9th Cir. 1993); and accusing the suspect of lying, *State v. Owen*, 202 Wis. 2d 620, 642, 551 N.W.2d 50 (Ct. App. 1996). Additionally, the U.S. Supreme Court has rejected the argument that pressure from a third party like Delores can be factored into the analysis, because it is the coercive activity of *the State* that is at issue, not "free will" generally. *Connelly*, 479 U.S. at 165, 168. That would seem to be the end of the matter.

C. This Court and others have treated such techniques as non-coercive in the context of questioning a juvenile.

The court of appeals' decision, at its base, turns on the premise that these techniques became coercive in the context of questioning a juvenile. But this Court has previously held that questioning similar to the questioning here does not amount to "coercion," even when the suspect is a juvenile. *State v. Moore*, 2015 WI 54, ¶ 64, 363 Wis. 2d 376, 864 N.W.2d 827. The court of appeals didn't explain why the outcome here is different from *Moore*.

In *Moore,* police arrested 15-year-old Raheem Moore in connection with a murder. *Id.* ¶¶ 3, 10–12. He was held in custody for over 11 hours and questioned twice during that

time, once for over three hours, then later that day for another three hours, until almost midnight. *Id.* ¶¶ 13–43. He initially told police he was not involved in the shooting. *Id.* ¶¶ 13–16. When police told him witnesses said he was, he changed his story and said he was nearby and heard a gunshot, but insisted he wasn't involved. *Id.* ¶ 16. Detectives then asked him who "Jevonte" was and showed him a photo array, and Moore said he knew someone named Jevonte but he was not pictured. *Id.* ¶ 17. After a break, Moore admitted some involvement and claimed he was with "Jevonte" and Jevonte shot the victim, but that Jevonte was not in the photo array. *Id.* ¶¶ 18–23. That interview ended at 6:00 p.m. *Id.* ¶ 24.

A different set of detectives interviewed him beginning in the evening. *Id.* ¶ 25. The detectives asked Moore if he'd be willing to go to the crime scene, and he said yes. *Id.* ¶ 25. They left for the scene with Moore directing them where to go. *Id.* ¶¶ 26–27. Moore said Jevonte shot the victim and then they ran down an alley and separated. *Id.* ¶¶ 27–28. The detective "asked Moore why people in the neighborhood did not know Jevonte," and Moore claimed they were lying; the detective also pointed out that Moore's father did not know Jevonte. *Id.* ¶ 29.

Moore was fed dinner, and "[t]he interrogation resumed at 9:47 p.m." *Id.* ¶ 30. The detective then "told Moore that police knew Jevonte was not real and that Moore had already been identified as being at the crime scene." *Id.* ¶ 31. Moore said he feared for his life if he revealed "the other person involved" and detectives assured his safety. *Id.* ¶ 31. Moore then implicated another person, Raynard, in the shooting, and admitted being present during it, but disavowed ever having the gun. *Id.* ¶ 35. After a short break, detectives interrogated Moore for another hour, and he eventually confessed to the shooting. *Id.* ¶¶ 38–43.

He subsequently moved to suppress all of his statements to police, contending that they were involuntary.

Id. ¶¶ 51–52. This Court held that they were voluntary. *Id.* ¶ 65. This Court noted that Moore was 15 years old and in eighth grade. *Id.* ¶ 58. He indicated to police he did not have any mental problems, was not sick, and not under the influence of any drugs or alcohol. *Id.* Despite his youth and low IQ, he "demonstrated that he was able not only to develop a story about his non-involvement in the shooting but also to adapt the details of that story to information—either true or untrue—possessed by the police." *Id.* ¶ 60. The court further concluded that despite Moore's being "with police for nearly 11 hours after his arrest, his interrogation took place over shorter periods of time with breaks for food, trips to the restroom and the crime scene, and a shift change. Moore's actual questioning lasted about five and a half hours." *Id.* ¶ 62. "[T]he detectives used tactics such as minimizing, suggesting that Parish's death may have been an accident, and telling Moore that other witnesses were saying he shot Parish, to elicit a confession from him." *Id.* ¶ 64. And that was not enough for this Court to find coercion: "[a]lthough these tactics may have influenced Moore, they are tactics that courts commonly accept." *Id.*

Here, just like in *Moore*, "[t]he detectives took care to ensure," *id*. ¶ 65, that Kruckenberg understood that he was not in custody and it was made clear to him multiple times that he was free to end the interview at any time and leave. They "gave him water, took breaks, and treated him with decency and respect." *Id.*; (115). He was home for hours before this interview and could have slept or eaten if he wanted. He never indicated to Agent Pertzborn that he was hungry, ill, exhausted, in pain, or even very upset. (115; 190.) His actual questioning only lasted about 20 minutes before he decided to confess. (190 12:40:00–1:02:59.) He had average intellect and his guardian was there when he wanted her. He made up lie after lie when questioned about what happened to Heather, even after he admitted that his story about Tyler was not true.

(115:38–74; 117:1–66; 118:1–35.) "Thus, although the detectives persuaded [Kruckenberg] to confess . . . [his] decision to do so was a voluntary decision." *Moore*, 363 Wis. 2d 376, ¶ 65.

The court of appeals did not even attempt to reconcile its opinion here with that of this Court in *Moore*. The opinion cited to it once, and then only to reject the State's argument that Kruckenberg's ability to make up a new lie when he realized the agent did not believe his story about Tyler showed that his will was not overborne. (Pet-App. 17); *see Moore*, 363 Wis. 2d 376, ¶ 61.

Other court decisions are consistent with *Moore*. In *Dassey v. Dittmann*, 877 F.3d 297, 304 (7th Cir. 2017), the Seventh Circuit held that "the [Supreme] Court has held that officers may deceive suspects through appeals to a suspect's conscience, by posing as a false friend, and by other means of trickery and bluff" and those techniques did not render a finding that a juvenile's confession was voluntary incompatible with federal law. The U.S. Supreme Court has held that "voluntariness . . . has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word." *Connelly*, 479 U.S. at 170. That Court also held that, while juveniles must be treated with special care during an interview, courts have always recognized that "[a]ny police interview of an individual suspected of a crime has 'coercive aspects to it,'" *J.D.B. v. North Carolina*, 564 U.S. 261, 268 (2011) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)), and that alone has not been sufficient to render juvenile confessions involuntary, *see id.* at 277. The *J.D.B.* Court also recognized that age is not a determinative, "or even a significant, factor in every case" and "'teenagers nearing the age of majority' are likely to react to an interrogation as would a 'typical 18-year-old in similar circumstances.'" *Id.* (citations omitted).

In *Fare v. Michael C.*, the Court held that similar claims of "coercion" made by a 16-and-a-half year old—alleging that police pressured him into confessing and pointing out that he was afraid and weeping during the interrogation—were "without merit." *Michael C.*, 442 U.S. at 727. The Court observed that "[t]he officers did not intimidate or threaten respondent in any way. Their questioning was restrained and free from the abuses that so concerned the Court in *Miranda*." *Id.*

Courts have also recognized that pressure applied by non-state actors such as a juvenile's parents are not supposed to factor into the analysis, but the court of appeals held it did here. *Connelly*, 479 U.S. at 166; *see also United States v. Erving L.*, 147 F.3d 1240, 1251 (10th Cir. 1998) ("To the extent that E.L.'s will was overborne, it was overborne by the actions of his parents . . . . This type of non-government pressure does not render a confession involuntary.").

The out-of-state cases the court of appeals relied on to conclude that Pertzborn "leveraged" Delores are inapposite. In *State in Interest of A.S.*, 999 A.2d 1136 (N.J. 2010), the juvenile in question was a 14 year old with an I.Q. of only 83. *Id.* at 1138, 1146. A.S.'s adoptive parent, F.D., had already become so angry with A.S. over the allegations that F.D.'s biological daughter had a friend come over to ensure there wasn't a fight between the two. *Id.* at 1139. The police then had F.D. accompany A.S. to the police station the next day, had F.D. read A.S. *Miranda* warnings which F.D. did incorrectly: F.D. did not explain to A.S. what a lawyer's role was when she asked, and F.D. incorrectly informed A.S. that "at some point in time, you going to have to talk" because A.S. "didn't give [the victim] any rights," and police did not correct her. *Id.* at 1138–41. F.D. then incorrectly told A.S. that "when the questions are asked you have to answer the question." *Id.* at 1141. F.D. told police A.S. would be uncooperative and then badgered her to answer their questions and "[t]ell him what

you did. . . . Answer it. Answer the question." *Id.* at 1141–42. F.D. repeatedly interjected, chastising A.S., and telling her "You are such a liar. You are such a liar. You can't be trusted. You can't be trusted." *Id.* at 1142. A.S. also repeatedly attempted to remain silent during the questioning with F.D. badgering her to answer. *Id.* at 1141–1146.

Against that backdrop, the New Jersey Supreme Court held that A.S.'s confession was not voluntary. But when doing so, it expressly held that "[t]hat is not to say that a parent cannot advise his or her child to cooperate with the police or even to confess to the crime if the parent believes that the child in fact committed the criminal act," citing to another New Jersey case in which the juvenile's confession was determined to be voluntary even though the mother urged her son to confess and left the interrogation room—exactly what happened here. *Id.* at 1146 (citing *State in Interest of Q.N.*, 843 A.2d 1140 (N.J. 2004). The court of appeals ignored this portion of the opinion and the cited case.

The other cases on which the court of appeals relied are similarly off-point. In *State in Interest of M.P.*, 299 A.3d 133 (N.J. Super. Ct. App. Div. 2023), the juvenile had been arrested and was shackled to the table in an interrogation room and New Jersey law required the State to prove a voluntay waiver of *Miranda* rights beyond a reasonable doubt, a much higher standard than Wisconsin's preponderance of the evidence. *Id.* at 258, 261–62, 275. The court there was addressing was whether the juvenile's consultation with his parent *before* either heard the *Miranda* warnings was enough to prove beyond a reasonable doubt that the child understood them and it held it was not. *Id.* at 292–95. In *In re J.G.*, 228 N.E.3d 645 (Ohio Ct. App. 2023), the juvenile had also been arrested, was extremely combative and violent with police, and was handcuffed, injured, and bleeding in the interrogation room. *Id.* at 649–50. His mother then threatened him multiple times during the interrogation that

if he did not come clean "you're gonna be in a world of trouble not only with them but with me." *Id.* at 650–51. And in *State v. G.O.*, 543 P.3d 1096 (Kan. 2024), much like in *A.S.* above, the juvenile's mother incorrectly told him he *must* talk to the detectives and "'he was going to have to give more details when he talked to' the detective than he had when he talked to her about the allegations." *Id.* at 1101–02. She was then excluded from the interview and told she had to wait in the lobby. *Id.* at 1102.

None of those cases are akin to what happened here. It was made very clear to Kruckenberg and to Delores that he did not have to answer anything, that they could leave at any time, and Delores simply implored Kruckenberg to tell them what really happened. Pertzborn then said no more than that he was glad Delores was there and he could tell Delores didn't believe Kruckenberg's story about Tyler. This case is like *Q.N.*, where the confession was held voluntary. There, the 12-year-old juvenile was not arrested, and *Miranda* rights were explained to both him and his mother. *Q.N.*, 843 A.2d at 1142. The juvenile began crying when the police asked him about the sexual assaults they were investigating and his mother said "I know you did this. Please answer the officer's questions." *Id.* The juvenile then said he was embarrassed to talk about it in his mother's presence. *Id.* at 1143. His mother agreed to leave and watched through one-way glass. *Id.* The detective never changed the tenor of the interview and juvenile said "I did it" and explained the assaults. *Id.* at 1143–44. That is very similar to this case.

The court of appeals also relied extensively on *Jerrell C.J.*, but the circumstances that led to this Court finding the juvenile's written confession involuntary in that case are nothing like what happened here. *State v. Jerrell C.J.*, 2005 WI 105, 283 Wis. 2d 145, 699 N.W.2d 110. *Jerrell C.J.* actually supports a finding that Kruckenberg's confession was voluntary.

There, 14-year-old Jerrell was arrested in connection with an armed robbery and "was taken to the police station, booked, and placed in an interrogation room." *Id.* ¶ 5. He was "handcuffed to a wall and left alone for approximately two hours." *Id.* ¶ 6. Detective Spano and Detective Sutter entered the room around 9:00 a.m. and both were questioning Jerrell, with Spano raising his voice "like he was angry with" Jerrell. *Id.* ¶¶ 6–8. Jerrell continuously denied involvement in the robbery, while the detectives challenged his denial and told him to "start standing up for what he did." *Id.* ¶ 7. After a 20-minute lunch break around noon, the questioning resumed and Jerrell "'started opening up about his involvement and everybody else's' somewhere between 1:00 and 1:30 p.m." *Id.* ¶ 9. Jerrell repeatedly asked if he could call his mother or father, and each time Detective Spano said no. *Id.* ¶ 10. "At 2:40 p.m., over five-and-a-half hours after interrogation began, and eight hours after he was taken into custody, Jerrell signed a statement prepared by Detective Spano" admitting his involvement in the robbery. *Id.* ¶ 11.

Jerrell was only 14, in eighth grade, and had "limited education and low average intelligence." *Id.* ¶ 27. His prior experience with law enforcement entailed two arrests after which he admitted his involvement in the incidents and was allowed to leave, which this Court noted "may have taught him a dangerous lesson that admitting involvement in an offense will result in a return home without any significant consequences." *Id.* ¶ 29. Police denied his requests to speak with his parents. *Id.* ¶ 30. And while the detectives "refuse[d] to believe Jerrell's repeated denials of guilt," the circumstances are very different. *Id.* ¶ 35. This Court observed that "they also joined in urging him to tell a different 'truth,' sometimes using a 'strong voice' that 'frightened' him," and they did so continually over five-and-a-half hours. *Id.* ¶¶ 33, 35. This Court was concerned that "such a technique applied to a juvenile like Jerrell *over a prolonged period of*

time could result in an involuntary confession." *Id.* ¶ 35 (emphasis added).

In contrast, Kruckenberg was 16 years and 8 months old. He was in high school, of average intelligence, and had been doing well until the school opted for remote instruction during the COVID-19 pandemic. (50:2, 4–5.) He was not arrested and forcibly removed from his home: he was asked if he'd mind answering more questions and said he'd talk to "anyone that would help him find his child." (124:23–24.) He was never handcuffed or patted down. He was not left alone at any point in time. The interview room was unlocked and there were no restraints visible or even anywhere to fasten restraints. (190.) His request that Delores be present was honored, and Pertzborn did not begin questioning Kruckenberg until she arrived. (190 12:40:16.) The questioning only went on for 24 minutes before Kruckenberg confessed to leaving Heather in the woods. (190 12:42:00–1:07:26.) Over the majority of that time, Pertzborn merely listened to what Kruckenberg told him until he heard Kruckenberg's story. (190 12:42:00–12:55:26.) After that, he only said he knew Kruckenberg's story about Tyler was a lie and that it would be to his benefit to tell the truth, and he did so calmly and reasonably. (190 12:55:28–1:01:45.) Pertzborn never even raised his voice. (190 12:55:28–1:01:45.)

And perhaps most importantly, unlike in *Jerrell C.J.* where the detectives' refusal to believe the juvenile went on for five-and-a-half hours, the total amount of time Pertzborn spent telling Kruckenberg he knew he was lying about giving Heather to Tyler was five minutes. (190 12:55:28–1:01:45.)

As to Kruckenberg's personal characteristics, most juveniles have limited experience with law enforcement, and he did not tell Agent Pertzborn that he was fatigued, hungry, or sick. He was alert and talkative. His comments to other officers were nearly eight hours earlier, and in the interim he had gone home and could have rested or eaten. Kruckenberg

unsurprisingly became teary, but the court of appeals pointed to no case suggesting that officers are coercive if they question a tearful suspect. *Q.N.* held that it was not. *Q.N.*, 843 A.2d at 1145–48.

As to the techniques used, an interviewer telling someone they don't believe an unbelievable story, appealing to their morality, generic offers of help, and telling the suspect to tell the truth are all "tactics that courts commonly accept," including when a juvenile is being questioned. *Moore*, 363 Wis. 2d 376, ¶ 64; *Dassey*, 877 F.3d at 312–13; *Michael C.*, 442 U.S. at 727.

It is not clear under this opinion what police may do when questioning a juvenile. The opinion holds that five minutes of reasonably, calmly imploring a 16 year old who is telling an extremely unbelievable story to tell the truth is coercion. It cannot be squared with this Court's holding in *Moore*, nor with the court of appeals' decision in *State v. Hauschultz*, No. 2022AP161-CR, 2024 WL 1087217, ¶¶ 35–70 (Wis. Ct. App. Mar. 13, 2024) (unpublished per curiam),[5] which reached the opposite conclusion on nearly identical facts.

This Court should grant review and clarify both how to apply the test for police overreach when a juvenile is being interrogated and what type of circumstances factor into the analysis.[6]

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[5] The State cites this case for the proper purpose of showing a conflict between districts pursuant to Wis. Stat. § (Rule) 809.62(1r)(d) as recognized in *State v. Higginbotham*, 162 Wis. 2d 978, 983, 471 N.W.2d 24 (1991).

[6] The court of appeals declined to address whether Kruckenberg was in custody after the point at which it found his statements involuntary. (Pet-App. 22.) Should this Court grant review, the State will additionally argue that Kruckenberg was not in custody until his January 10 arrest because a reasonable 16 year

(Continued on next page)

CONCLUSION

This Court should grant the State's Petition for Review.

Dated this 26th day of August 2024.

Respectfully submitted,

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old would have felt free to leave under the totality of the circumstances up until that point.

FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 7881 words.

Dated this 26th day of August 2024.

Electronically signed by:

Lisa E.F. Kumfer
LISA E.F. KUMFER
Assistant Attorney General

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 Supreme Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 26th day of August 2024.

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