

In the Interest of:

Case No.

Honorable Thomas Witkowiak

A Child under the age of 17.

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**NOTICE OF MOTION AND MOTION TO SUPPRESS ALL STATEMENTS  
OF THE DEFENDANT**

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The juvenile, by his attorney, Robin Shellow, on the third day of January 2005 will move this Court for the entry of an order suppressing all statements, oral and written, allegedly made by the juvenile to law enforcement officers of The Milwaukee Police Department. These statements were made in violation of the juvenile's rights pursuant to *Colorado v. Connelly*, 479 U.S. 157 (1986), *Miranda v. Arizona*, 380 U.S. 435 (1965), *State ex rel. Goodchild v. Burke*, 28 Wis.2d 244, 133 N.W.2d 753 (1965), *State v. Hoppe*, 261 Wis2d 294 and the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section Eight of the Wisconsin Constitution. The Wisconsin Supreme Court's most recent articulation in *Hoppe* does not spell out, with particularity, the characteristics that make statements either voluntary or involuntary. Rather the Court in *Hoppe* re-conceptualized the attributes of a voluntary statement and did so without sole reliance on coercive misconduct by police officers as had been previously required in *Colorado v. Connelly*, 479 U.S. 157 (1986) and *State v. Clappes*, 136 Wis. 2d 222, 235-236, 401 N.W.2d 759, 765 (1987). The court in *Clappes* set forth a strict test that mandated that an involuntary statement is produced by actual police coercion or improper police conduct. For the ten years following *Clappes*, our courts continued to require that defendants

must prove actual police coercion. If coercion could be proven, then the court had to undertake a balancing test. *State v. Owen*, 202 Wis. 2d 621, 551 N.W.2d 50, 59 (Wis. App. 1996). The court in *Owen* incorporated the “personal characteristics” previously outlined in *Barrera v. State*, 99 Wis. 2d 269, 298 N.W.2d 820, 830 (1980). The *Barrera* characteristics include: age, education, intelligence, physical and emotional condition, and prior experience with the police.

After putting police coercion and the above referenced personal characteristics of an individual defendant, in the now familiar balancing test blender, there remained little or no practical pedagogical framework that gave courts much guidance until the supreme court in 2003 decided *State v. Hoppe*, 261 Wis2d 294, 661 N.W.2d 407 (2003). The court in *Hoppe* began to re-focus its inquiry and included in the concept of "voluntariness" concepts such as choice and unequal confrontation. In *Hoppe*, the court held that for a statement to be voluntary it must be:

[T] he product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the state exceeded the defendant's ability to resist. *Id at\*\*\**

Defendant was 13 years old at the time of his arrest in the middle of the night on August 5<sup>th</sup> 2004. He was in custody at the Milwaukee Police Administration building for at least fifteen hours before he was transported to the Milwaukee County Juvenile Detention Center. He told the police that he wanted to talk to his mother. The police did not allow him to do so. The police told him if he talked to them he could go home. He was thirteen. It was the middle of the night. He wanted to go home. After defendant's initial denial, he was confronted with a statement that someone else implicated him. Defendant will testify that James Myles walked past or was walked past the door of the room where defendant was being held in the police administration building. will testify that during his interrogation sometimes the door to his interrogation room

was opened and sometimes it was closed. Defendant will testify that when Myles walked past his holding cell, "Myles looked scared." Defendant will testify that during the time while he was being held, he heard Edwin Cross, or someone who he thought to be Edwin Cross, crying. Defendant will testify that he believed that the police could hit a child and that he believed he would be hit by the police. Defendant will testify that his mother has hit him in the past and that he thought the police had at least as much authority to hit him as his mother. Defendant will testify that he believed that the police threatened Cross or Myles or both. Defendant will testify that he endorsed the facts the police told him were said by others because he thought the police would do to him what he thought/imagined the police did to the others and that is why he said he did it.

There will be testimony Defendant is below grade-level. There will be testimony that Defendant has significant learning disabilities. There will be testimony that although he made and initialed the handwritten report of his interrogation, he cannot read cursive and that the report is in cursive. There will be testimony that in the 2002-03 school year, Defendant read at a second grade level. Defendant does not have the language skills to describe adequately what the police said to him and what he thought he said to the police.

Because the court is unable to have observed the demeanor, actions and words of both the police and the child during the interrogation, his statements should be suppressed. There is no way for this juvenile homicide suspect to describe to the court what the court would have seen and heard had there been videotape. The statements made by Defendant were made as a result of a conspicuously unequal confrontation in which the pressures brought to bear by the police exceeded defendant's ability to resist. The juvenile cannot re-create on the witness stand, at the suppression hearing, the fear the police instilled in him and how it effected what he said to the

police on the night he was arrested. That said, the juvenile can prove that he was thirteen at the time of his interrogation. The juvenile can prove that he was in police custody over 12 hours. The juvenile can prove that more than one detective questioned him. The juvenile can prove that he cannot read cursive. In addition, there will be testimony that defendant has cognitive deficits which makes it difficult to concentrate when he is under stress. The combination of these facts along with his age are such that the failure of the police to videotape defendant's statement constitutes a violation of the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution and Article I, section one of the Wisconsin Constitution.

Without a videotape of the interrogation how can the juvenile ever prove that he was afraid? At the heart of an inquiry for voluntariness is whether the actions of the police frightened defendant to such an extent that he simply agreed with the facts already known by the police from previous and simultaneous interviews of what are now co-defendants. Defendant believed his friend who was also at the police administration building that night had been hit. Defendant's belief was based upon the following observations: (1) Defendant's friend looked scared when he saw him at the Police Administration Building that night. (2) Defendant heard or thought he heard furniture moving in another interrogation room. (3) Defendant heard his friend crying. (4) Immediately upon re-entry of the detectives to the interrogation room, Defendant was told he had been implicated in the homicide moments after he saw one of his friends and moments after he thought he heard someone crying. Defendant will testify that although he believed that the police could hit him if they wanted to, that all the same, he doesn't like being hit. He will testify being hit hurts—regardless of who is doing the hitting. Defendant will testify that he thought he was going to be hit. Defendant will testify kids cry when they get hit. Defendant will testify that after he heard the crying that one of the "police" who came into his room rolled up his sleeves. In

Defendant's experience when an adult rolls up his sleeves, that adult may be getting ready to hit another person.

There is no reference in the 700 pages of police reports to an officer rolling up his sleeves in the presence of Defendant in an interrogation room, in the middle of the night, at the Milwaukee Police Administration building, during the hours Defendant was present. However, the 700 pages of police reports do provide some context of the frustration felt by the police department in previously failing to solve the crime. The law provides that the court must scrutinize with greatest care statements made by children to the police. In the absence of a videotape, the background of this investigation may shed light on why experienced police detectives who have been cautioned *time after time* about the dangers inherent in the lengthy questioning of juveniles, chose on one more occasion, to forgo asking their superiors, for permission to videotape the statement of Defendant.

At the time of the interrogation of Defendant and his now co-defendants, the state possessed evidence that: Rutledge was beaten. Rutledge was kicked. Whatever happened to Rutledge occurred between 28<sup>th</sup> and 29<sup>th</sup> and Richardson Place. The police also possessed videotape that purported to show a group of people arriving and leaving the scene shortly before the police were called by a security guard. The only additional facts, not known to the police and which is contained in Defendant's statement, is purportedly how many times Defendant kicked Rutledge and what the other co-actors were doing. David Rutledge died July 8, 2004. Rutledge, prior to his death made several statements that he was not beaten and that he had a seizure. Rutledge had a documented seizure disorder. An eyewitness told the police that sometime before dark and in the approximate same place as the alleged crime scene, a man had a seizure and fell. The police called an ambulance that took the man, David Rutledge, according to medical

personnel, who was combative at the scene. And had to be placed on a stretcher. Within 24 hours of Rutledge's hospitalization, hospital personal did not believe Rutledge was dying. The only statement that Rutledge made that he was beaten, was to a nurse, when his condition was improving and is not admissible under Wis. Stat. 908.045. The only identification the police possessed at the time of the interrogation was that of an eyewitness who identified someone other than Defendant or any of the juveniles or adults in custody on August 5<sup>th</sup> 2004. The positive identification is of a kid in the neighborhood where the event occurred. That person, who was identified as being one of the beaters, is a member of a completely different group than those arrested with Defendant Defendant. However, other members of that group/gang, known as "The Kilbourn Street Boys", had been implicated by more than one person, who claimed to have heard one or more members of that group admit to beating Rutledge. At least one witness was shown videotape that the police, at the time, believed contained images, of those who beat Rutledge and made identifications of persons on that videotape. None of those identifications are of those persons that Defendant allegedly implicated in his late night confession nor of Defendant.

When Defendant was in custody, it had been almost a month since the beating had occurred. The beating had been covered in the national media. There was pressure on the police to solve the crime. The lead that led the police to Defendant and his co-defendant's was that of a man named "black" and a man named Marcellus who told the police who did the beating. Contained in the statements taken before Defendant's interrogation, are references to another person named whose nickname is "Black" who is not James Myles and another person, whose name is Marcellus, not Edwin Cross.

Short of a confession, the case against Defendant is weak.

Why one child may be terribly frightened and another child not so frightened is both an easy and hard question. The answer to the question why some children are afraid of thunder or a particular police interrogation technique and others are not, is illustrative of how complicated it is for courts to assess whether a child is afraid. Some children are afraid of thunder because they do not understand that thunder is the sound of lightening leaving. Other children, despite knowing it's scientific cause are frightened because it often happens at night when they are alone in their own rooms and it startles them into wakefulness. And still others are afraid, simply because it is loud. But few will disagree with the proposition that most adults can tell if a child is afraid by looking at their demeanor and by listening to how they sound when they describe an event. Any skilled pediatrician can tell if a child is afraid of his yearly school vaccination without looking at that particular child's chart. Does the child scrunch toward a parent as the doctor comes closer with the needle? Is this child unable to answer simple questions about recent experiences at camp because he is pre-occupied with knowing he may or may not get a shot on that particular visit? And if the child brags *I'm not afraid, I'm not afraid*, to his brothers and sisters whose turns are first: is there a single pediatrician who will take those words at face value and mark in the chart-*child not afraid of shots*. And what of the pediatrician who says to the child: *Your big brother told me you weren't afraid of shots*, ought the pediatrician take the words uh huh or yeah as an affirmation of the truth that the child is not afraid of shots? No, the pediatrician knows the words themselves have very little meaning in the absence of being able to eyeball the particular child in his office.

*Without any videotape*, the statement of this child must be suppressed, as the state cannot meet its burden that the statement is voluntary. At the previously scheduled hearing, the defense intends to present evidence that it is unlikely that Defendant knowingly waived his Miranda

rights. He cannot read cursive despite the fact that he initialed his statement. Defendant reads at a 2<sup>nd</sup> grade level and his cognitive deficits get worse when he is under stress. The court will be presented with evidence by the state that Defendant explained in his own words what he thought these warnings meant – there is no tape of that either. Defendant doesn't know what the words mean now and he didn't know then.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2004.

Respectfully submitted,  
THE SHELLOW GROUP

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