APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 16-3397

DASSEY,
Petitioner–Appellee,
v.

DITTMANN,
Respondent–Appellant.

Argued September 26, 2017
Decided December 8, 2017
[877 F.3d 297]

Before Wood, Chief Judge, and Easterbrook, Kanne, Rovner, Williams, Sykes, and Hamilton, Circuit Judges.[*]

OPINION

Hamilton, Circuit Judge.

Petitioner Brendan Dassey confessed on videotape to participating in the 2005 rape and murder of Teresa Halbach and the mutilation of her corpse. The Wisconsin state courts upheld Dassey's convictions for these crimes, finding that his confession was voluntary and could be used against him. The principal issue in this habeas corpus appeal is whether that finding was based on an unreasonable application of Supreme Court prec-

[*] Circuit Judges Flaum and Barrett did not participate in the consideration or decision of this case.

edent or an unreasonable view of the facts. See 28 U.S.C. § 2254(d).

Whether Dassey's confession was voluntary or not is measured against a general standard that takes into account the totality of the circumstances. See *Withrow v. Williams*, 507 U.S. 680, 693–94, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993); *Gallegos v. Colorado*, 370 U.S. 49, 55, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962); see also *Fare v. Michael C.*, 442 U.S. 707, 727, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979) (admissibility of juvenile confession). Some factors would tend to support a finding that Dassey's confession was not voluntary: his youth, his limited intellectual ability, some suggestions by the interrogators, their broad assurances to a vulnerable suspect that honesty would produce leniency, and inconsistencies in Dassey's confession. Many other factors, however, point toward a finding that it was voluntary. Dassey spoke with the interrogators freely, after receiving and understanding *Miranda* warnings, and with his mother's consent. The interrogation took place in a comfortable setting, without any physical coercion or intimidation, without even raised voices, and over a relatively brief time. Dassey provided many of the most damning details himself in response to open–ended questions. On a number of occasions he resisted the interrogators' strong suggestions on particular details. Also, the investigators made no specific promises of leniency.

After the state courts found the confession voluntary, a federal district court and a divided panel of this court found that the state courts' decision was unreasonable and that Dassey was entitled to a writ of habeas corpus. We granted *en banc* review to consider the application of the deferential standards of 28 U.S.C. § 2254(d) and the implications of the panel decision for

interrogations of juvenile suspects. The state courts' finding that Dassey's confession was voluntary was not beyond fair debate, but we conclude it was reasonable. We reverse the grant of Dassey's petition for a writ of habeas corpus.

Part I provides an overview of the applicable law. Part II sets forth the relevant facts about Teresa Halbach's murder, Dassey's confession, and the court proceedings. Part III applies the law to the relevant facts, keeping in mind the deference we must give under § 2254(d) to state court decisions as to which reasonable judges might differ.

I. *The Applicable Law*

We first discuss our standard of review under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and then describe the Supreme Court's clearly established law for when a confession, particularly a confession by a sixteen–year–old like Dassey, is deemed voluntary and admissible.

A. *Deference Under AEDPA*

In considering habeas corpus petitions challenging state court convictions, "our review is governed (and greatly limited) by" AEDPA. *Hicks v. Hepp*, 871 F.3d 513, 524 (7th Cir. 2017) (citation omitted). The standards in 28 U.S.C. § 2254(d) were designed to "prevent federal habeas 'retrials' and to ensure that state–court convictions are given effect to the extent possible under law." *Id.*, quoting *Bell v. Cone*, 535 U.S. 685, 693, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). Section 2254(d) provides that a state court conviction cannot be overturned unless the state courts' adjudication of a federal claim on the merits:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The decision federal courts look to is the "last reasoned state–court decision" to decide the merits of the case, even if the state's supreme court then denied discretionary review. *Johnson v. Williams*, 568 U.S. 289, 133 S.Ct. 1088, 1094 n.1, 185 L.Ed.2d 105 (2013). In this case, we look to the Wisconsin Court of Appeals decision that Dassey's confession was voluntary.[1]

The standard for legal errors under § 2254(d)(1) was meant to be difficult to satisfy. *Harrington v. Richter*, 562 U.S. 86, 102, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). The issue is not whether federal judges agree with the state court decision or even whether the state court decision was correct. The issue is whether the decision was unreasonably wrong under an objective standard. *Williams v. Taylor*, 529 U.S. 362, 410–11, 120

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[1] On October 30, 2017, the Supreme Court heard argument in *Wilson v. Sellers*, No. 16–6855, where one question is whether federal courts in habeas cases should continue to "look through" state supreme court summary decisions on the merits to the last state court decision that provided an explanation. See generally *Hittson v. Chatman*, ––U.S. ––––, 135 S.Ct. 2126, 2127, 192 L.Ed.2d 887 (2015) (Ginsburg, J., concurring in denial of certiorari). If the Court holds in *Wilson* that federal courts reviewing a state supreme court summary denial of review should give the state courts the benefit of any merits rationale the record could support, our review would become even more deferential, so the outcome here would not change.

S.Ct. 1495, 146 L.Ed.2d 389 (2000) (majority opinion of O'Connor, J.). Put another way, we ask whether the state court decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103, 131 S.Ct. 770. The existing law that applies is limited to that of the Supreme Court of the United States, which has instructed the lower federal courts to uphold a state court conviction unless the record "cannot, under any reasonable interpretation of the [Court's] controlling legal standard, support a certain ruling." *Panetti v. Quarterman*, 551 U.S. 930, 953, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007). Even if we were to consider the approach in past Supreme Court decisions outmoded, as the dissents suggest, a state court's decision consistent with the Supreme Court's approach could not be unreasonable under AEDPA.

As a result, federal habeas relief from state convictions is rare. It is reserved for those relatively uncommon cases in which state courts veer well outside the channels of reasonable decision–making about federal constitutional claims. AEDPA deference is not conclusive, however. Where the record shows that state courts have strayed from clearly established federal law, we can and do grant relief. E.g., *Richardson v. Griffin*, 866 F.3d 836 (7th Cir. 2017); *Jones v. Calloway*, 842 F.3d 454 (7th Cir. 2016); *McManus v. Neal*, 779 F.3d 634 (7th Cir. 2015); *Shaw v. Wilson*, 721 F.3d 908 (7th Cir. 2013); *Harris v. Thompson*, 698 F.3d 609 (7th Cir. 2012); *Jones v. Basinger*, 635 F.3d 1030 (7th Cir. 2011).

Review of state court factual findings under AEDPA is similarly deferential. Under § 2254(d)(2), federal courts cannot declare "state–court factual determina-

tions ... unreasonable merely because [we] would have reached a different conclusion in the first instance." *Brumfield v. Cain*, —— U.S. ——, 135 S.Ct. 2269, 2277, 192 L.Ed.2d 356 (2015) (internal quotation marks and citation omitted). AEDPA does not permit federal courts to "supersede the trial court's ... determination" if a review of the record shows only that "[r]easonable minds ... might disagree about the finding in question." *Id.* (internal quotations and citations omitted). But again, "deference does not imply abandonment or abdication of judicial review, and does not by definition preclude relief." *Id.* (internal quotations and citations omitted).

B. *The Law of Confessions*

The Due Process Clause of the Fourteenth Amendment forbids the admission of an involuntary confession in evidence in a criminal prosecution. *Miller v. Fenton*, 474 U.S. 104, 109, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985). In deciding whether a confession was voluntary, courts assess "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); see also *Withrow v. Williams*, 507 U.S. 680, 693–94, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993) (collecting relevant factors). The purpose of this test is to determine whether "the defendant's will was in fact overborne." *Miller*, 474 U.S. at 116, 106 S.Ct. 445.

The Supreme Court's many cases applying the voluntariness test have not distilled the doctrine into a comprehensive set of hard rules, though prohibitions on physical coercion are absolute. See *Mincey v. Arizona*, 437 U.S. 385, 401, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) (statements resulted from "virtually continuous ques-

tioning of a seriously and painfully wounded man on the edge of consciousness"); *Brown v. Mississippi*, 297 U.S. 278, 279, 56 S.Ct. 461, 80 L.Ed. 682 (1936) (confessions extracted by "brutality and violence"). AEDPA does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied" because "even a general standard may be applied in an unreasonable manner." *Panetti*, 551 U.S. at 953, 127 S.Ct. 2842, quoting *Carey v. Musladin*, 549 U.S. 70, 81, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006) (Kennedy, J., concurring in the judgment); accord, *Yarborough v. Alvarado*, 541 U.S. 652, 663–64, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004).

Nevertheless, applying a general standard like voluntariness "can demand a substantial element of judgment," and determining whether that judgment is reasonable "requires considering the rule's specificity." *Alvarado*, 541 U.S. at 664, 124 S.Ct. 2140. "The more general the rule, the more leeway courts have in reaching outcomes in case–by–case determinations." *Id.* (upholding state court *Miranda* conclusion where factors pointed in opposite directions). The state courts had such leeway here, and in the end, that leeway is decisive as we apply the test of § 2254(d)(1).

This general standard has some specific requirements to guide courts. First, a person arguing his confession was involuntary must show that the police engaged in coercive practices. See *Colorado v. Connelly*, 479 U.S. 157, 164–65, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). Physically abusive interrogation tactics would constitute coercion *per se*. *Stein v. New York*, 346 U.S. 156, 182, 73 S.Ct. 1077, 97 L.Ed. 1522 (1953) (physical violence is *per se* coercion), overruled on other grounds by *Jackson v. Denno*, 378 U.S. 368, 381, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964); *Brown*, 297 U.S. at 286–87, 56

S.Ct. 461 (coercion and brutality); *United States v. Jenkins*, 938 F.2d 934, 938 (9th Cir. 1991) (physical abuse is coercion *per se*); *Miller v. Fenton*, 796 F.2d 598, 604 (3d Cir. 1986) (same).

Interrogation tactics short of physical force can amount to coercion. The Court has condemned tactics designed to exhaust suspects physically and mentally. Such tactics include long interrogation sessions or prolonged detention paired with repeated but relatively short questioning. *Davis v. North Carolina*, 384 U.S. 737, 752, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966) (finding coercive the practice of repeated interrogations over sixteen days while the suspect was being held incommunicado).

The Supreme Court has not found that police tactics not involving physical or mental exhaustion taken alone were sufficient to show involuntariness. In several cases, the 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. See, e.g., *Procunier v. Atchley*, 400 U.S. 446, 453–54, 91 S.Ct. 485, 27 L.Ed.2d 524 (1971) (suspect was deceived into confessing to false friend to obtain insurance payout to children and stepchildren); *Frazier v. Cupp*, 394 U.S. 731, 739, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969) (deceiving suspect about another suspect's confession). False promises to a suspect have similarly not been seen as *per se* coercion, at least if they are not quite specific. See *Arizona v. Fulminante*, 499 U.S. 279, 285, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (rejecting language in *Bram v. United States*, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897), stating that a confession could not be obtained by "any direct or implied promises," *id.* at 542–43, 18 S.Ct. 183, but finding promise to protect suspect from threatened violence by others

rendered confession involuntary); Welsh S. White, *Confessions Induced by Broken Government Promises*, 43 Duke L.J. 947, 953 (1994).

False promises may be evidence of involuntariness, at least when paired with more coercive practices or especially vulnerable defendants as part of the totality of the circumstances. E.g., *Lynumn v. Illinois*, 372 U.S. 528, 534, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963) (pre–*Miranda* confession found involuntary based on false promise of leniency to indigent mother with young children, combined with threats to remove her children and to terminate welfare benefits, along with other factors). But the Supreme Court allows police interrogators to tell a suspect that "a cooperative attitude" would be to his benefit. *Fare v. Michael C.*, 442 U.S. 707, 727, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979) (reversing finding that confession was involuntary). Supreme Court precedents do not draw bright lines on this subject.

In assessing voluntariness, courts must weigh the tactics and setting of the interrogation alongside any particular vulnerabilities of the suspect. *Bustamonte*, 412 U.S. at 226, 93 S.Ct. 2041. Relevant factors include the suspect's age, intelligence, and education, as well as his familiarity with the criminal justice system. *Withrow*, 507 U.S. at 693–94, 113 S.Ct. 1745 (collecting factors); *Michael C.*, 442 U.S. at 725–26, 99 S.Ct. 2560 (significant criminal justice experience); *Clewis v. Texas*, 386 U.S. 707, 712, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967) (limited educational attainment); *Culombe v. Connecticut*, 367 U.S. 568, 620, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961) (intellectual disability); *Gallegos v. Colorado*, 370 U.S. 49, 53, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962) (age).

The interaction between the suspect's vulnerabilities and the police tactics may signal coercion even in

the absence of physical coercion or threats. The Supreme Court has made it clear that juvenile confessions call for "special care" in evaluating voluntariness. E.g., *Haley v. Ohio*, 332 U.S. 596, 599, 68 S.Ct. 302, 92 L.Ed. 224 (1948); see also *J.D.B. v. North Carolina*, 564 U.S. 261, 277, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011); *In re Gault*, 387 U.S. 1, 45, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *Gallegos*, 370 U.S. at 54, 82 S.Ct. 1209. In juvenile cases, the law is particularly concerned with whether a friendly adult is present for or consents to the interrogation. *In re Gault*, 387 U.S. at 55–56, 87 S.Ct. 1428; *Gallegos*, 370 U.S. at 53–54, 82 S.Ct. 1209; *Haley*, 332 U.S. at 600, 68 S.Ct. 302. Concerns about physical exhaustion, naïveté about friendly police in the context of an adversarial police interview, and intellectual disability also take on heightened importance for assessing whether a juvenile's will was overborne.[2]

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[2] We have reservations about the use of "suggestibility" as a factor in this analysis, at least on these facts. Dassey relies heavily on the results of a Gudjonsson Suggestibility Scale test measuring him as more susceptible to fabrication than 95 people out of 100, given slight prodding by questioners. A Gudjonsson test is administered by reading a short story aloud to an examinee and then later asking leading questions about it. The more answers that change in response to mild pressure, the more suggestible the examinee is. The administration of this test for people with intellectual disabilities has been criticized because they may have good recall of their own lived experiences but poor recall of facts not relevant to their lives. Paul Willner, *Assessment of capacity to participate in court proceedings: a selective critique and some recommendations*, 17 Psychology, Crime & Law 117, 117 (2011). This criticism mirrors Dassey's own testimony that his recall was better for lived experiences. In any event, the State's expert forcefully contested both the administration and meaning of Dassey's Gudjonsson test at trial. We cannot draw conclusions from these disputed results.

As we detail below, Dassey's case presents different factors pointing in opposite directions. Those most important to our analysis include: his age and intellectual ability; the physical circumstances of the interrogation; the manner and actions of the police in questioning Dassey, including bluffing about what they knew and assuring him of the value of honesty; Dassey's resistance or receptiveness to suggestions by interrogators; and the extent to which he provided the most incriminating information in response to open–ended, non–leading questions.

II. *The Murder, the Interrogation, and the Convictions*

A. *The Murder of Teresa Halbach*

With the applicable law in mind, we turn to the horrifying murder of Teresa Halbach and then the circumstances of Dassey's confession. More detailed accounts are available in the panel, district court, and state court opinions. See *Dassey v. Dittmann*, 860 F.3d 933 (7th Cir. 2017); *Dassey v. Dittmann*, 201 F.Supp.3d 963 (E.D. Wis. 2016); *State v. Dassey*, 346 Wis. 2d 278, 827 N.W.2d 928, 2013 WL 335923 (Wis. App. 2013) (per curiam) (unpublished disposition); see also *State v. Avery*, 337 Wis. 2d 351, 804 N.W.2d 216 (App. 2011) (affirming convictions of Dassey's uncle).

In 2005, Teresa Halbach was a young photographer with her own business based in Calumet County, Wisconsin. On October 31, her last appointment of the day was at Avery's Auto Salvage to photograph a van for an advertisement. Halbach never returned from that appointment. A few days later during a missing–person search, her car was found at the salvage yard. Her blood stained the car's interior. A further search turned up Halbach's charred remains in a burn pit on

the property, along with shell casings on the floor of Steven Avery's garage.

B. *Dassey's Early Police Interviews*

Police investigators spoke with a number of Avery's relatives in early November, including an hour–long interview of his sixteen–year–old nephew Brendan Dassey, who lived close by. Dassey said he had seen Halbach taking pictures at the salvage yard on the afternoon of October 31, but he resisted the suggestion that she had entered Avery's home. At that time, he provided no other useful information.

Several months later, though, investigators received word that Dassey had been crying uncontrollably and had lost about forty pounds of weight. They proceeded to interview him a total of three times on February 27, 2006. In these voluntary witness interviews, it became clear that Dassey knew much more about Teresa's murder. (Dassey was not in custody on February 27th. He signed and initialed a *Miranda* waiver, and his mother consented, though she did not sit in.) In those interviews, Dassey admitted that on October 31st, he had gone over to Avery's trailer around 9:00 p.m. to help with a bonfire. He told the police that he had seen parts of a human body in the fire. He also said that Avery had threatened to hurt him if he spoke to the police. When the police asked about a pair of bleach–stained jeans they had learned about from another family member, Dassey admitted that he had helped Avery clean up a spill on the garage floor late that night. But Dassey claimed to have had nothing to do with Teresa's death.

C. *The March 1st Interview and Confession*

1. *The Circumstances of the Interview*

After those interviews, investigators thought Dassey had been a witness to at least the aftermath of a terrible crime and was struggling with the horror of what he had seen. On March 1st, the investigators (Mark Wiegert and Tom Fassbender) obtained his mother's permission for another interview. They took Dassey from his high school to a local sheriff's department, where he was questioned without the presence of a friendly adult. In the car the investigators gave Dassey standard *Miranda* warnings about his right to remain silent, his right to an attorney, and the possibility that statements he gave could be used against him. Dassey orally acknowledged the warnings, and he initialed and signed a written *Miranda* waiver form. He and the officers chatted during the ride. The three took a short detour to Dassey's home to retrieve his pair of bleach–stained jeans, which were kept as evidence. When they arrived at the sheriff's department, Dassey confirmed that he understood his rights and still wanted to talk to them.

The interview took place in a so–called "soft" interview room equipped for videotaping. Dassey sat on a couch facing two officers and a camera. Over the next three hours, Dassey was repeatedly offered food, drinks, restroom breaks, and opportunities to rest. At no point in the interview did the investigators threaten Dassey or his family. Nor did they attempt to intimidate him physically. They did not even raise their voices. Neither investigator tried to prevent Dassey from leaving the room, nor did they use any sort of force to compel him to answer questions. Dassey never refused

to answer questions, never asked to have counsel or his mother present, and never tried to stop the interview.

2. *The First Hour of Questioning*

One officer began by telling Dassey how he could help the investigation, since "this information and that information" from previous accounts needed "just a little tightening up." Sensing that Dassey "may have held back for whatever reasons," the officer assured Dassey "that Mark and I both are in your corner, we're on your side." Acknowledging Dassey's potential concern that talking to the police meant he "might get arrested and stuff like that," the investigator urged Dassey to "tell the whole truth, don't leave anything out." Talking could be in Dassey's best interest even though it "might make you look a little bad or make you look like you were more involved than you wanna be," because admitting to unfortunate facts would leave "no doubt you're telling the truth." The first investigator closed by saying that "from what I'm seeing, even if I filled" in some holes in Dassey's story, "I'm thinkin' you're all right. OK, you don't have to worry about things ... [W]e know what Steven [Avery] did ... we just need to hear the whole story from you." The other investigator went next:

> Honesty here Brendan is the thing that's gonna help you. OK, no matter what you did, we can work through that. OK. We can't make any promises but we'll stand behind you no matter what you did. OK. Because you're being the good guy here .... And by you talking with us, it's, it's helping you. OK? Because the honest person is the one who's gonna get a better deal out of everything.

Supp. App. 30. After Dassey nodded in agreement, the investigator continued:

> You know. Honesty is the only thing that will set you free. Right? And we know, like Tom said we know, we reviewed those tapes .... We pretty much know everything that's why we're .... talking to you again today. We really need you to be honest this time with everything, OK.... [A]s long as you be honest with us, it's OK. If you lie about it that's gonna be problems. OK. Does that sound fair?

Id. Dassey again nodded and the questioning turned to the events of October 31st.

Over the course of the next three hours, with several breaks as the investigators conferred outside the room, Dassey told an even more disturbing and incriminating story about October 31st. In the first hour, Dassey admitted that he received a telephone call from Avery, went over to Avery's garage in the six o'clock hour, and found Teresa already dead in her car. Dassey then said he helped Avery lower Teresa's bound body onto a "creeper" (used to work underneath an automobile), which he and Avery used to take her body outside and throw her onto the already–burning bonfire.

At that point, less than an hour into the interview, Dassey's story pivoted dramatically. Dassey revised his story to say that he first noticed something amiss in the four o'clock hour. Dassey volunteered that when he was out getting the mail, he heard a woman screaming inside Avery's trailer. Supp. App. 50. Dassey knocked on Avery's door, ostensibly to deliver a piece of mail, and a sweaty Avery answered the door.

Dassey said he then saw Teresa alive, naked, and handcuffed to Avery's bed. Dassey said he went inside at Avery's invitation and had a soda while Avery told him that he had raped Teresa. Dassey said that, at Avery's urging, he then raped Teresa, having intercourse against her will as she was bound to the bed, and as she protested and begged him to stop. After the rape, Dassey reported, he then watched television with Avery for a while. Supp. App. 55–65.

In Dassey's telling, he next helped Avery subdue and kill Teresa and move her to the garage. *Id.* at 66–76. In response to questioning and prodding, Dassey told a confusing story about these critical events. Dassey said that Avery stabbed Teresa with a large knife, that her handcuffs were removed, and that she was tied up with rope. He also said that Avery cut off some of her hair with that large knife, that he (Dassey) cut her throat with the same knife, and that at some point Avery choked or punched her. All these events reportedly happened by 6:00 or 6:30 p.m.[3]

The details and sequence of these events changed repeatedly, however, as investigators pressed Dassey for more details. This portion of the interrogation provides the most support for Dassey's claim that his confession was both involuntary and unreliable.[4] For ex-

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[3] Given the damage to Teresa's body, few of these details could have been confirmed or contradicted by the surviving physical evidence. But what did survive elsewhere does not necessarily vindicate Dassey. For example, Dassey contends that no handcuff marks were found on the head–board of Steven Avery's bed, but a thin plastic film from a substance used in rope manufacturing was found on the headboard.

[4] This portion of Dassey's confession also led to another search of Steven Avery's garage that uncovered perhaps the most

ample, because the recovered remnants of Teresa's skull contained trace amounts of lead, the investigators believed that Teresa had been shot in the head. They were eager for Dassey to describe what "else was done to her head" besides cutting and punching. In this exchange, Dassey did not provide the answer they were looking for. He offered what seemed like guesses. The investigators abandoned their vague admonitions to tell the truth. They lost patience and blurted out:

> Wiegert: All right, I'm just gonna come out and ask you. Who shot her in the head?
>
> Brendan: He did.
>
> Fassbender: Then why didn't you tell us that?
>
> Brendan: Cuz I couldn't think of it.
>
> Fassbender: Now you remember it? (Brendan nods "yes") Tell us about that then.

Supp. App. 76. Dassey continued to do so over the whole course of the March 1st interview, revising upwards the number of times Teresa was shot from twice to three times, and then up to ten times.[5] Dassey also revised the location of the shooting, first outside the garage, then inside Teresa's car, then on the floor of the garage. After this shifting exchange about the shooting, the first hour of the March 1st interview concluded with Dassey explaining how he and Avery put Teresa's body on the fire, how they moved her car, and finally

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powerful physical evidence of the investigation: a bullet fragment with Teresa Halbach's DNA on it.

[5] Throughout the interview, however, Dassey resisted all suggestions that he personally ever shot Teresa, and he described his discomfort with guns from a young age.

how they cleaned up the stain in Avery's garage before Dassey went home.

3. *The Second Hour of Questioning*

The investigators then took a break to confer. During the break, Dassey had the opportunity to rest and to use the restroom. Before starting up again, Dassey and Wiegert had this exchange, indicating that Dassey did not understand the gravity of what he had told the investigators:

> Brendan: How long is this gonna take?
>
> Wiegert: It shouldn't take a whole lot longer.
>
> Brendan: Do you think I can get [back to school] before one twenty–nine?
>
> Wiegert: Um, probably not.
>
> Brendan: Oh.
>
> Wiegert: What's at one twenty–nine?
>
> Brendan: Well, I have a project due in sixth hour.

Supp. App. 102.

In the second hour of questioning, the investigators sought to confirm details from the first. They had only limited success. Dassey provided more confusing details about how Teresa was killed and the status of the bonfire. But in the main, Dassey largely confirmed his account from the first hour, especially about the details of his sexual assault of Teresa. His story regarding what he saw of Teresa in the fire—hands, feet, forehead, and part of a torso—also remained mostly consistent.

Signaling that the investigators did not overwhelm his will, Dassey resisted repeated suggestions by both investigators that he and Avery used the wires and cables hanging in the garage to torture Teresa. The investigators also tested Dassey's suggestibility. They told him falsely that Teresa had a tattoo on her stomach and asked if he had seen it. Here is the exchange:

> Fassbender: ... did she have any scars, marks, tattoos, stuff like that, that you can remember?
>
> Brendan: I don't remember any tattoos.
>
> ...
>
> Fassbender: OK. (pause) We know that Teresa had a, a tattoo on her stomach, do you remember that?
>
> Brendan: (shakes head "no") uh uh
>
> Fassbender: Do you disagree with me when I say that?
>
> Brendan: No but I don't know where it was.
>
> Fassbender: OK.

Supp. App. 150–52. In this exchange, Dassey stuck to what he thought he knew, despite being challenged and prodded by the investigators.

4. *The Final Hour of Questioning*

The investigators took another break, during which Dassey ate a sandwich and briefly fell asleep. The investigators returned to talk about the consequences Dassey was facing:

> Fassbender: What do you think's gonna happen? What do you think should happen right now?

> Brendan: I don't know.
>
> Fassbender: You know obviously that we're police officers, OK. (Brendan nods "yes") And ... because of what you told us, we're gonna have ta arrest you. Did you kinda figure that was coming? For ... what you did we ... can't let you go right now. The law will not let us. And so you're not gonna be able to go home tonight. All right?
>
> Brendan: Does my mom know?
>
> Fassbender: Your mom knows.

Supp. App. 157. After briefly discussing some logistics, the exchange continued:

> Fassbender: Did you kinda ... after telling us what you told us you kinda figured this was coming? (Brendan nods "yes") Yeah? (Brendan nods "yes")
>
> Brendan: Is it only for one day or?
>
> Wiegert: We don't know that at this time, but let me tell ya something Brendan, you did the right thing. OK. (Brendan nods "yes") By being honest, you can at least sleep at night right now ....
>
> Fassbender: Your cooperation and help with us is gonna work in your favor. I can't say what [it's] gonna do or where [you're] gonna end up but [it's] gonna work in your favor and we appreciate your continued cooperation. (Brendan nods "yes") ....

Id.[6]

Dassey's mother Barb Janda then came into the room to speak with Brendan about his arrest and confession. Dassey, now with his head buried in his hands, asked his mother what would happen if Avery gave a different version of events, such as "I never did nothin' " to Teresa Halbach "or somethin'." His mother followed up on this point, asking whether Dassey had done anything to Teresa:

> Barb Janda: Did you? Huh?
>
> Brendan: Not really.
>
> Barb Janda: What do you mean not really?
>
> Brendan: They got to my head.
>
> Barb Janda: Huh?
>
> Brendan: ... say anything.
>
> Barb Janda: What do you mean by that? (pause) What do you mean by that Brendan?

Supp. App. 157. Dassey was taken into custody after this interview, which he now contends was involuntary and should not have been used at his trial.

At trial, Dassey testified and denied any knowledge of or involvement in Teresa Halbach's murder. He did not try to explain what he had meant by telling his mother "not really" and "they got to my head." According to his lawyer's version of events, Brendan came

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[6] If Dassey had *continued* to cooperate in the case against Steven Avery, that might well have worked in his favor. At the 2010 post–conviction hearings, Dassey's lawyer and the prosecutor both indicated that the State could have advocated for more lenient punishment for Dassey if he had testified against Steven Avery. See Dkt. 19–26 at 47–48, 99–100, 158–61.

home from school at 3:45 p.m. on October 31st and played video games until having dinner with his brother and mother. After the others left, Dassey claimed, he fielded a phone call from his brother's boss and then shortly after that a call from Avery. At "about seven-ish," Dassey claimed, he joined Avery for the bonfire, making four or five trips around the salvage yard picking up discarded items to throw on the flames. Around nine o'clock, Dassey helped Avery clean up a spill in his garage, and after a phone call from his mother, Dassey claimed, he returned home around 9:30 or 9:45 p.m. According to his trial testimony, none of the incriminating events related in his March 1st confession ever happened.[7]

D. *The State Courts' Treatment of Dassey's Confession*

Before trial, Dassey moved to suppress his confession as involuntary. After briefing and a hearing, the trial judge stated detailed findings of fact in an oral ruling. Supp. App. 168–77. The judge noted Dassey's age and observed that he had "an IQ level in the low average to borderline range." The judge noted that school records showed that Dassey was in regular–track classes but had some special education help. The judge also

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[7] At trial Dassey gave no explanation for his March 1st confession beyond controverted expert testimony that he was highly suggestible and a suggestion that he had confused his own experiences on October 31st with a book he had ostensibly read "three, four years" before called *Kiss the Girls*. No scenes in either the book or the movie it inspired are remotely similar to the crimes Dassey described on March 1st. See generally James Patterson, Kiss the Girls (1st ed. 1995); Kiss the Girls (Paramount Pictures 1997) (fictional coast–to–coast hunt for serial killers) Also, in nearly six months after March 1st, Dassey never mentioned the book or movie to his then–counsel.

noted Dassey's lack of a criminal record, the noncustodial nature of the February 27th and March 1st interviews (as the parties had stipulated), and Dassey's *Miranda* waivers from both days. The judge found that Dassey knew he could stop answering questions and knew he could leave the room at any time on February 27th, and that he repeatedly indicated his continuing interest in speaking with the police on March 1st. The judge found that both Dassey and his mother consented to the interview on March 1st. The judge also quoted several of the investigators' admonitions to tell the truth, including "honesty here is the thing that's going to help you," and "honesty is the only thing that will set you free," upon which Dassey relies so heavily now.

Throughout the interview, the judge found, the investigators had used "a normal speaking tone with no raised voices, no hectoring, or threats of any kind." "Nothing on the video–tape visually depicts Brendan Dassey as being agitated, upset, frightened, or intimidated by the questions of either investigator," and he "displayed no difficulty in understanding the questions asked of him," the judge found. Though at times "prodded to be truthful," at "no time did he ask to stop the interview or request that his mother or a lawyer be present." The admonitions, the judge found, amounted to "nothing more than a reminder to Brendan Dassey that he had a moral duty to tell the truth." The judge also found that Dassey was not coerced by the "interviewers occasionally pretending to know more than they did" because that "did not interfere with [his] power to make rational choices." And finally, the judge found that "[n]o frank promises of leniency were made by the ... interviewers to Brendan Dassey," and that he was in fact flatly told "we can't make any promises."

On the basis of these findings of fact, "given Brendan Dassey's relevant personal characteristics" and applying "a totality of the circumstances test, which I'm using here," the judge found that Dassey's admissions in the March 1st interview were voluntary statements and denied Dassey's motion to suppress. Supp. App. 177.

The March 1st confession was the most incriminating evidence at trial. The jury found Dassey guilty on all charges: participating in rape and murder, and mutilation of a corpse. In August 2007, Dassey was sentenced to life in prison. Dassey filed detailed motions for a new trial in 2009, and the same trial court held five days of hearings on those motions in January 2010, probing Dassey's claims that his attorneys rendered ineffective assistance.

A three–judge panel of the Wisconsin Court of Appeals affirmed Dassey's convictions, finding that his confession was voluntary and any ineffective assistance was not prejudicial. *State v. Dassey*, 346 Wis. 2d 278, 827 N.W.2d 928, 2013 WL 335923 (Wis. App. 2013). The Court of Appeals used the trial court's findings of fact to summarize the circumstances of the March 1st confession and Dassey's claim that it was involuntary. The court then cited the legal standard for such claims—the totality of the circumstances—as applied by leading Wisconsin state cases. These state cases, particularly *In re Jerrell C.J.*, 283 Wis.2d 145, 699 N.W.2d 110 (2005), cited and discussed several of the leading precedents on voluntariness from the United States Supreme Court. The Court of Appeals cited *Jerrell C.J.* for the principle that a voluntariness "analysis involves a balancing of the defendant's personal characteristics against the police pressures used to induce the statements." Wisconsin law uses a clearly erroneous stand-

ard for appellate review of trial court findings of voluntariness.

After summarizing the trial court's findings, the Court of Appeals concluded:

> ¶7 The court's findings are not clearly erroneous. Based on those findings, we also conclude that Dassey has not shown coercion. As long as investigators' statements merely encourage honesty and do not promise leniency, telling a defendant that cooperating would be to his or her benefit is not coercive conduct. *State v. Berggren*, 2009 WI App 82, ¶31, 320 Wis. 2d 209, 769 N.W.2d 110. Nor is professing to know facts they actually did not have. *See State v. Triggs*, 2003 WI App 91, ¶¶15, 17, 264 Wis. 2d 861, 663 N.W.2d 396 (the use of deceptive tactic like exaggerating strength of evidence against suspect does not necessarily make confession involuntary but instead is factor to consider in totality of circumstances). The truth of the confession remained for the jury to determine.

The court went on to reject Dassey's claims that his pre–trial and trial counsel provided ineffective assistance. The Wisconsin Supreme Court denied Dassey's petition for review. Dassey did not file a petition for certiorari in the United States Supreme Court.

E. *Federal Habeas Corpus Review*

Dassey filed a federal habeas corpus petition in the Eastern District of Wisconsin in 2014. In a detailed opinion, the district court granted habeas relief, finding that false promises of leniency were indeed made to Dassey and that his March 1st confession was not voluntary. *Dassey*, 201 F.Supp.3d 963. A divided panel of

our court affirmed. *Dassey*, 860 F.3d 933. We granted the State's petition to rehear the case *en banc* and now reverse with instructions to dismiss Dassey's habeas petition.

III. *Applying the AEDPA Standard*

A. *Voluntariness Under § 2254(d)(1)*

The state court decision that Dassey confessed voluntarily was not an unreasonable application of Supreme Court precedent. The state appellate court drew on fairly detailed findings of fact, which were not clearly erroneous, and provided a terse but sufficient explanation for why the trial court's decision was a reasonable application of the broad totality–of–the–circumstances test.

1. *Factors Pointing in Opposite Directions*

A number of relevant factors, we recognize, tend to support Dassey's claims about the March 1st confession. He was young. He was alone with the police. He was somewhat limited intellectually. The officers' questioning included general assurances of leniency if he told the truth, and Dassey may have believed they promised more than they did. At times it appeared as though Dassey simply did not grasp the gravity of his confession—after confessing to rape and murder, he asked the officers if he would be back at school that afternoon in time to turn in a project. Portions of the questioning also included leading and suggestive questions, and throughout the interrogation Dassey faced follow–up inquiries when the investigators were not satisfied with what he had told them, leading him at times to seem to guess. In addition, the confusion and contradictions in Dassey's account of the crimes of October 31st lend support to the view that his confession

was the product of suggestions and/or a desire to tell the police what they wanted to hear.

At the same time, many other factors support the finding that Dassey's confession was indeed voluntary. Start with the circumstances of the interrogation. As stipulated by both sides, Dassey was not in custody when he admitted participating in the crimes of October 31st. He went with the officers voluntarily and with his mother's knowledge and consent. He was given *Miranda* warnings and understood them sufficiently. The interrogation was conducted during school hours and in a comfortable setting. Dassey showed no signs of physical distress. He had access to food, drinks, and restroom breaks. The interrogation was not particularly lengthy, especially with the breaks that were taken every hour.

Dassey was not subject to physical coercion or any sort of threats at all. Given the history of coercive interrogation techniques from which modern constitutional standards for confessions emerged, this is important. The investigators stayed calm and never even raised their voices. As the Wisconsin courts found, there is no sign that Dassey was intimidated.

Turning to the techniques used in the interrogation, the investigators told Dassey many times that they already knew what had happened when in fact they did not. Such deception is a common interview technique. To our knowledge, it has not led courts (and certainly not the Supreme Court) to find that a subject's incriminating answers were involuntary. See *Frazier v. Cupp*, 394 U.S. 731, 739, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969) (fabricating a co–conspirator's confession is relevant, but "insufficient in our view to make this otherwise voluntary confession inadmissible"). Al-

so, most of the incriminating details in Dassey's confession were not suggested by the questioners. He volunteered them in response to open–ended questions.

When Dassey's story did not make sense, seemed incomplete, or seemed to conflict with other evidence, the questioners pressed Dassey with further questions. Those techniques are not coercive. Dassey responded to such questioning by modifying his story on some points, but he stuck to his story on others. Those passages support the view that he was not being pushed to provide a false story against his will. For example, Dassey resisted repeated suggestions that he had participated in shooting Teresa. He denied repeated suggestions that he and Avery had used wires and cables in the garage to restrain or harm her. In one telling instance, the questioners tested Dassey by falsely telling him that Teresa had a tattoo on her stomach and asking him if he had seen it. He told them no. When the questioners pushed harder, he was not willing to say he knew they were wrong, but he stuck to his recollection that he had not seen a tattoo.

Under AEDPA, the essential point here is that the totality–of–the–circumstances test gives courts considerable room for judgment in cases like this one, where the factors point in both directions. Given the many relevant facts and the substantial weight of factors supporting a finding that Dassey's confession was voluntary, the state court's decision was not an unreasonable application of Supreme Court precedent. This view is similar to *Yarborough v. Alvarado*, 541 U.S. 652, 664–65, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004), where the Supreme Court applied AEDPA to a state court finding that a seventeen–year–old suspect had not been in custody when he confessed to murder. The custody question was governed by a similarly general

totality–of–the–circumstances standard. The Supreme Court summarized the array of factors pointing in opposite directions, in custody or not in custody. Emphasizing that the more general the rule, the more leeway courts have in reaching outcomes in case–by–case determinations, the Supreme Court found that the state court finding was not an unreasonable application of binding precedent: "These differing indications lead us to hold that the state court's application of our custody standard was reasonable. The Court of Appeals was nowhere close to the mark when it concluded otherwise." *Id.* at 665, 124 S.Ct. 2140.

2. *The Terse State Court Opinion*

Dassey criticizes the Wisconsin appellate court's decision for having been too terse, addressing the confession in just two pivotal paragraphs. The relative brevity of that part of the opinion is not a reason for granting habeas relief. Given the volume of words that federal judges have devoted to this case, one might assume that the totality–of–the–circumstances test requires courts to detail at length the weight they have assigned to all factors and how the presence of one factor affects the weight or relevance of other factors.

That assumption would be incorrect. The Supreme Court itself has issued terse final determinations on voluntariness after a recitation of relevant facts. See *Greenwald v. Wisconsin*, 390 U.S. 519, 519–21, 88 S.Ct. 1152, 20 L.Ed.2d 77 (1968) (per curiam); *Davis v. North Carolina*, 384 U.S. 737, 752, 86 S.Ct. 1761, 16 L.Ed.2d 895 (1966). It has ruled on voluntariness by simply adopting the reasoning of other courts. *Boulden v. Holman*, 394 U.S. 478, 480–81, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969). Section 2254(d)(1) does not authorize federal courts "to impose mandatory opinion–

writing standards on state courts." *Johnson v. Williams*, 568 U.S. 289, 300, 133 S.Ct. 1088, 185 L.Ed.2d 105 (2013). State court decisions receive significant deference even if they provide no reasons at all. *Harrington v. Richter*, 562 U.S. 86, 98–99, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011); *Whatley v. Zatecky*, 833 F.3d 762, 774 (7th Cir. 2016). In this case, the state appellate court endorsed detailed findings by the trial court that provide substantial support for the finding that Dassey's confession was voluntary in the eyes of the law.

3. *Juveniles and Special Care*

The requirement that courts take "special care" in analyzing juvenile confessions does not call for habeas relief here. The state appellate court met the requirements for analyzing juvenile confessions by considering Dassey's age, his intellectual capacity, and the voluntary absence of his mother during the interrogation. The state court noted that the officers read Dassey his *Miranda* rights and that Dassey later remembered his rights and agreed to talk anyway. The court assessed coercion in relation to Dassey's vulnerabilities, including his "age, intellectual limitations and high suggestibility." The court did not limit its inquiry to only whether the most abusive interrogation techniques were used. The court examined the tones and volumes of the investigators' voices, finding that the officers "used normal speaking tones, with no hectoring, threats or promises of leniency," though they did prod Dassey to be honest and sought to establish a rapport with him. The court even considered Dassey's physical comfort by noting he sat on a sofa and was offered food, drink, and restroom breaks.

4. *Precedent*

Dassey simply has not pointed to Supreme Court precedent that mandates relief under these circumstances. Even in cases where deferential review under AEDPA does not apply, the Supreme Court has not found a confession involuntary in circumstances like Dassey's March 1st confession.

Consider *Boulden v. Holman*, 394 U.S. 478, 480–81, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969). The defendant there was eighteen years old, had an I.Q. of 83, suffered from an anxiety complex, and was "susceptible to coercion." *Boulden v. Holman*, 385 F.2d 102, 104, 105 (5th Cir. 1967). He was interrogated for less than three hours after being told he had the "right not to make a statement, and that any statement made might be used against him." *Id.* at 104. He was "treated courteously and allowed to eat, smoke and to use [the] toilet facilities." *Id.* at 105. Though two years older than Dassey, Boulden was apparently still dependent on his parents. *Id.* Other facts of his interrogation were more troubling than those in this case. Boulden was interrogated from 10 p.m. until after midnight after several hours in custody. *Id.* at 104. Police had denied Boulden's father access to him, and after Boulden asked "whether he was supposed to have a lawyer," the police said "he would not get one until he talked." *Id.* The Supreme Court "determined that although the issue is a relatively close one, the conclusion ... was justified" that Boulden had confessed voluntarily. 394 U.S. at 480–81, 89 S.Ct. 1138.

In *Fare v. Michael C.*, 442 U.S. 707, 727, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979), the Court again ruled a juvenile confession was voluntary. Like Dassey, Michael C. was sixteen years old. He claimed that the police

made promises and threats during the interrogation "in the hope of obtaining leniency for his cooperative attitude." *Id.* Michael C. indicated that his pleas to stop the interrogation were ignored. He also claimed he feared police coercion and pointed out that he "wept during the interrogation." *Id.* Despite these assertions, the Court determined that Michael C.'s claims of coercion were "without merit." *Id.*

Unlike Dassey, Michael C. apparently did not have a low average to borderline I.Q., and Michael C. did have significant prior experience with the criminal justice system. See *id.* at 726, 99 S.Ct. 2560. Though the presence of those factors may have provided room for Dassey to argue on direct appeal that *Michael C.* should be distinguished, they do not show that the Wisconsin courts' decision here was unreasonable within the meaning of § 2254(d)(1). As in *Michael C.*, the police here indicated "that a cooperative attitude would be to [the suspect's] benefit, but their remarks in this regard were far from threatening or coercive." *Id.* at 727, 99 S.Ct. 2560.

In reviewing these cases, we remember the Supreme Court's admonition that determining whether a confession is voluntary "requires more than a mere color–matching of cases." *Reck v. Pate*, 367 U.S. 433, 442, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961). But like the Court, we find these comparisons helpful after "careful evaluation of all the circumstances of the interrogation." *Mincey*, 437 U.S. at 401, 98 S.Ct. 2408; see *Reck*, 367 U.S. at 442, 81 S.Ct. 1541 (finding comparison to analogous cases "not inappropriate" when determining voluntariness). AEDPA "would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law." *Alvarado*, 541 U.S. at 666, 124 S.Ct. 2140. To be sure, this line be-

tween application and extension of existing law blurs "when new factual permutations arise." *Id.* The cases show, however, that the Supreme Court has considered and rejected claims similar to Dassey's, and Supreme Court cases do not require relief here. The Wisconsin courts did not apply the law unreasonably in finding that Dassey's confession was voluntary.

B. *Factual Findings Under § 2254(d)(2)*

Dassey also argues that he is entitled to relief under § 2254(d)(2) on the ground that the state courts made an unreasonable finding of fact: that the questioners made no false promises of leniency. Affirming the trial court, which found "no frank promises of leniency were made," the Wisconsin Court of Appeals determined that the investigators' statements "merely encourage[d] honesty and [did] not promise leniency." Dassey's argument that this finding was unreasonable focuses on two things: his intellectual limitations and the spots in the March 1st interrogation where he claims the investigators implied that he would not even be arrested if he told the truth. We reject this argument.

Because the Wisconsin appellate court accepted the trial court's findings of fact, we review the trial court's factual determinations directly. See *Rice v. Collins*, 546 U.S. 333, 339, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006) (indicating that AEDPA review and deference in such a situation should extend to state trial court findings). The trial court here highlighted the key points for both sides, including the warning that the questioners could not make promises (which supports the State here) and the problematic assurance that honesty was the only thing that would set Dassey free (which helps Dassey's claim, especially in light of his limited intellect).

Whether we treat the state court's decision on this point as a finding of fact or a conclusion of law, we find nothing unreasonable about it.

As noted above, the Supreme Court has not treated general assurances of leniency in exchange for cooperation or confession as coercive. To the extent precedents from other courts might be helpful in understanding a state court's factual findings, the cases signal that such general assurances are not legally relevant facts for determining whether a suspect's will was overborne and a confession was involuntary. See, e.g., *United States v. Villalpando*, 588 F.3d 1124, 1129 (7th Cir. 2009); see also *United States v. Binford*, 818 F.3d 261, 271–72 (6th Cir. 2016); *United States v. Corbett*, 750 F.3d 245, 253 (2d Cir. 2014); *United States v. Jackson*, 608 F.3d 100, 103 (1st Cir. 2010); *United States v. Kontny*, 238 F.3d 815, 818 (7th Cir. 2001); *United States v. Rutledge*, 900 F.2d 1127, 1130 (7th Cir. 1990) ("The policeman is not a fiduciary of the suspect. The police are allowed to play on a suspect's ignorance, his anxieties, his fears, and his uncertainties; they just are not allowed to magnify those fears, uncertainties, and so forth to the point where rational decision becomes impossible."). The state appellate court should be understood as having said that the investigators made no legally relevant false promises to Dassey.

The district court, the panel majority, and our dissenting colleagues have viewed the interrogation differently, finding psychological coercion through a form of operant conditioning, where different investigative tactics combined to convince Dassey that the police had agreed to end the interrogation and to grant him leniency in exchange for confessing. *Dassey*, 860 F.3d at 963, 974. As the panel explained, in its view of the interrogation, the investigators offered Dassey multiple

assurances and "sounded the theme of 'truth leads to freedom' " culminating in the "direct promise, 'honesty is the only thing that will set you free.' " *Id.*

The state courts did not view these tactics the same way. Their view was not unreasonable. The state courts saw and read, as we have, exactly what the questioners told and asked Dassey in the interview and how he responded. AEDPA leaves room for reasonable disagreement between state and federal courts. Disagreement on a particular judgment call does not show that the state court found the facts unreasonably. *Collins*, 546 U.S. at 341–42, 126 S.Ct. 969.

In denying Dassey's suppression motion, the state trial court weighed the same statements that concerned the district court and the panel. The judge quoted four separate instances where investigators prodded Dassey by stating that honesty would help him, and the judge noted that these were "but a few example[s] of admonitions to be honest." The state court also recounted four quotations and other "similar statements" where investigators assured Dassey that they were behind him and in his corner. It viewed these statements as an "attempt to achieve a rapport" rather than "frank promises of leniency." These findings are reasonable and consistent with the evidence and the relevant law. Habeas review does not permit us to "use a set of debatable inferences to set aside the conclusion reached by the state court." *Collins*, 546 U.S. at 342, 126 S.Ct. 969.

C. *Police Best Practices and the Law*

The concerns expressed by our dissenting colleagues and the district court about the potential coercive effects of the police tactics here are understandable. Critics of Dassey's interrogation see evidence of fabrication through the confession's inconsistencies and

lack of solid corroborating physical evidence. Some of the confession's inconsistencies are startling, particularly Dassey's shifting answers on the location of the shooting (outside the garage, on the garage floor, and in the car inside the garage), and his failure to recall consistently the order of attacks in the bedroom (stabbing, hair–cutting, and throat–slicing). Also, during the dialogue about Teresa's shooting, the investigators prodded Dassey and injected some critical facts into the discussion that corroborated evidence they already knew.

The state courts did not address these factual inconsistencies or the alleged lack of corroborating evidence, though it is not clear how they should have approached the question, if at all. United States Supreme Court precedent on this point is not unequivocal. In *Blackburn v. Alabama*, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960), the Court considered the "unreliability of the confession" in determining that a mentally ill defendant's confession was not voluntary. *Id.* at 207, 80 S.Ct. 274. The very next year the Court indicated that "the reliability of a confession has nothing to do with its voluntariness" because extrinsic evidence that a confession is true can confound the inquiry into "whether a defendant's will has been overborne." *Jackson v. Denno*, 378 U.S. 368, 384–85, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), citing *Rogers v. Richmond*, 365 U.S. 534, 545, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961). The Court later seemed to signal another direction, writing in *Colorado v. Connelly* that whether a confession is reliable, as distinct from voluntary, "is a matter to be governed by the evidentiary laws of the forum ... and not by the Due Process Clause of the Fourteenth Amendment." 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).

Analysis of a confession's reliability as part of the totality of the circumstances may survive the instruction in *Connelly*, but it is not unreasonable to interpret *Connelly* as foreclosing—or at least not requiring—this line of inquiry before trial. We cannot fault the Wisconsin courts for failing to measure the inconsistency of Dassey's confession in this context. In addition, the contradictions as to some details do not necessarily undermine the reliability of the core incriminating admissions. See *Dassey*, 860 F.3d at 993–94 (Hamilton, J., dissenting).

The concerns about reliability echo the opinions of scholars who believe that certain interrogation tactics tend to produce false confessions. Some police departments and experts have acknowledged this criticism and have changed their interrogation practices in response. We must note, though, that some of the interrogation tactics used in this case—like the repeated challenges to explain details that seem implausible—reflect practices advocated by such reformers. See, e.g., Saul Kassin et al., *Interviewing Suspects: Practice, Science, and Future Directions*, 15 Legal & Criminological Psychology 39, 47 (2010) (describing as "non–coercive" the practice of investigators "challeng[ing] suspects' accounts, often by pointing out contradictions and inconsistencies"); Kassin, *The Psychology of Confessions*, 2008 Annual Rev. of Law & Soc. Sciences 193, 208 (favoring interrogation technique where investigators "address discrepancies that may appear in the suspect's narrative account" to determine if the suspect is fabricating).

These debates over interrogation techniques have not resulted in controlling Supreme Court precedent condemning the techniques used with Dassey. Absent a clear declaration from the Court, we may not create

new constitutional restraints on habeas review. See *Kernan v. Cuero*, 583 U.S. ——, 138 S.Ct. 4, 9, 199 L.Ed.2d 236 (2017) (circuit precedent does not satisfy § 2254(d)(1), "[n]or, of course, do state–court decisions, treatises, or law review articles").[8]

D. *Ineffective Assistance of Counsel*

Finally, Dassey has also pursued his separate claim that his original lawyer provided ineffective assistance of counsel on the theory that the lawyer was operating under an actual conflict of interest prohibited by *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). On this point the state and federal

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[8] Judge Rovner's dissent cites studies of exonerated defendants showing that false confessions are more common among juveniles and mentally ill or intellectually deficient suspects. See post at 332–34; *Dassey*, 860 F.3d at 952–53 (panel majority). False confessions are a real phenomenon, and even one is very troubling. Yet we should not conclude from these studies of exonerated defendants that there is an epidemic of false confessions, as might be inferred by looking at studies of only demonstrably wrong convictions. The more relevant fraction uses as the denominator the number of all confessions. That number is not easy to estimate, but we can estimate a conservative lower boundary for the number of confessions to violent felonies. Bureau of Justice Statistics reports on Felony Defendants in Large Urban Counties tally violent felony convictions by guilty plea (i.e., by confessions of guilt) in just the nation's 75 largest counties. (The most recent report is Brian A. Reaves, U.S. Dep't of Justice, Bureau of Justice Statistics, Felony Defendants in Large Urban Counties, 2009—Statistical Tables (2013), https://www.bjs.gov/content/pub/pdf/fdluc09.pdf.) The dissent's statistics report 227 demonstrably false confessions from 1989 to 2016. Post at 332. From the BJS reports, we can estimate that over that period, in just those 75 largest counties, there were more than 1.5 million guilty pleas to violent felonies. The relevant fraction may thus be estimated conservatively as 227/1,500,000. For every one demonstrably false confession over those years, there were more than 6,500 guilty pleas to violent felonies in just those counties.

courts have agreed. The Wisconsin appellate court rejected this claim. The district court also considered this claim carefully and rejected it, citing the limits placed on *Sullivan* claims by *Mickens v. Taylor*, 535 U.S. 162, 175, 176, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002). *Dassey*, 201 F.Supp.3d at 989.[9] We agree for substantially the reasons set forth by the district court. *Id.* at 987–93. In this case there was no actual conflict of interest and no multiple or concurrent representations that could have resulted in an actual conflict of interest.

Conclusion

Given the state courts' reasonable findings of fact and the absence of clearly established Supreme Court precedent that compels relief for Dassey, the district court's grant of habeas relief is REVERSED. The case is REMANDED to the district court with instructions to dismiss the petition.

[9] The panel majority did not reach the issue. 860 F.3d at 983.

Wood, Chief Judge, and Rovner and Williams, Circuit Judges, dissenting.

Psychological coercion, questions to which the police furnished the answers, and ghoulish games of "20 Questions," in which Brendan Dassey guessed over and over again before he landed on the "correct" story (*i.e.*, the one the police wanted), led to the "confession" that furnished the only serious evidence supporting his murder conviction in the Wisconsin courts. Turning a blind eye to these glaring faults, the *en banc* majority has decided to deny Dassey's petition for a writ of habeas corpus. They justify this travesty of justice as something compelled by the Antiterrorism and Effective Death Penalty Act (AEDPA). If the writ, as limited by AEDPA, were nothing more than a dead letter, perhaps they would be correct. But it is not. Instead, as the Supreme Court wrote in *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011), "[t]he writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law." *Id.* at 91, 131 S.Ct. 770. It is, the Court went on to say, "a guard against extreme malfunctions in the state criminal justice systems." *Id.* at 102, 131 S.Ct. 770 (citation and internal quotation marks omitted).

As the district court and the panel majority recognized, we have before us just such an extreme malfunction. Dassey at the relevant time was 16 years old and had an IQ in the low 80s. His confession was coerced, and thus it should not have been admitted into evidence. And even if we were to overlook the coercion, the confession is so riddled with input from the police that its use violates due process. Dassey will spend the rest of his life in prison because of the injustice this court has decided to leave unredressed. I respectfully dissent.

I

As the Wisconsin Court of Appeals correctly noted, the question whether a confession is voluntary (*i.e.*, not coerced) is assessed in light of the totality of the circumstances. The age and sophistication of the person being questioned are critical factors. When the suspect is a minor, courts must review the confession and record with "special care." *J.D.B. v. North Carolina*, 564 U.S. 261, 280–81, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011); *In re Gault*, 387 U.S. 1, 45, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *Gallegos v. Colorado*, 370 U.S. 49, 53–55, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962); *Haley v. Ohio*, 332 U.S. 596, 599, 68 S.Ct. 302, 92 L.Ed. 224 (1948). Courts also must take the suspect's intellectual capacity into account. *Culombe v. Connecticut*, 367 U.S. 568, 620, 625, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961) (opinion of Frankfurter, J., joined by Stewart, J.); 639 (Douglas, J., joined by Black, J., concurring); 641–42 (Brennan, J., joined by Warren, C.J., and Black, J., concurring). Dassey, as the majority concedes, was a mentally limited 16–year–old. It was thus incumbent on the state courts to evaluate his "confession" in light of those traits.

The Wisconsin courts failed to take this essential step. When asked at oral argument where one might find evidence that the state appellate court took the required special care, counsel for the state came up dry. All counsel could do was to point out a brief mention in the state court's opinion of Dassey's age and mental capabilities. But so what? The Supreme Court has never said or implied that the totality of the circumstances are beside the point as long as the state court simply jots down a fact without a hint about if or how that fact influenced the outcome. There is nothing "special" (or even meaningful) about a naked word on a page. The reader has no idea whether the state court mentioned

the word meaning to indicate that it found the factor irrelevant (which would have been inconsistent with the clear Supreme Court precedent listed above), or exculpatory, or damning. Notably, even though the Wisconsin Court of Appeals gave a nod to the totality test, it made no mention of the special–care standard for juvenile confessions.

To be sure, *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011), holds generally that federal courts may not draw any dispositive conclusions from a state court's silence. But by the same token, the state court's silence cannot be leveraged into any assurance that the court went the extra mile required by the U.S. Supreme Court and gave Dassey's age and limited mental ability *particularized* care. The majority's finding to the contrary has no support in the record. Worse, the majority writes off in a footnote Dassey's extreme suggestibility by casting doubt on the applicability of a formal test (Gudjonsson). *Ante* at 305 n.2. As the painstaking review of the record reflected in Judge Rovner's panel opinion reveals, even a lay–person could see readily that Dassey yielded to any suggestion the person in authority made. 860 F.3d 933 (7th Cir. 2017) (*Dassey I*). More generally, no court is entitled to pick and choose which evidence to consider when evaluating the *totality* of the circumstances. Clearly established U.S. Supreme Court decisions compelled the Wisconsin court to pay special attention to Dassey's age and intellectual abilities, including his high level of suggestibility. Its failure to do so is one reason why it erroneously concluded that Dassey's "confession" was not coerced.

If the Wisconsin Court of Appeals had done what it should have, it could not reasonably have concluded that Dassey's confession was either voluntary or relia-

ble (both of which are required for the use of a confession to be consistent with due process). Nevertheless, first the state and now the *en banc* majority have culled a sentence here and there and have attempted to craft a coherent confession from them. The video recording of the police interrogation of Dassey, however, tells another story—one that is diametrically opposed to the state's tidy and selective summary. Among the many red flags are the following:

- Dassey's answers to questions frequently changed at the detectives' prodding.
- The officers laid a trail of crumbs (indeed, large sign–posts) to the confession they sought.
- Whenever Dassey went off–course, the investigators would shepherd him back in the desired direction—at times with the use of fatherly assurances and gestures, and frequently by questioning his honesty.
- On both February 27 and March 1 the detectives misleadingly conveyed to Dassey, whose ability to think abstractly was minimal, that his "honesty" was the "only thing that will set [him] free."
- Through subsequent questioning it became clear that "honesty" meant "what the investigators wanted to hear."

Dassey's age and mental limitations made him particularly susceptible to this psychologically manipulative interrogation. Many of the officers' tactics appear to be drawn from the "Reid Technique," which was for some time the most widely used interrogation protocol in the country. Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the*

Legality of Deceptive Interrogation Techniques, 33 FORDHAM URB. L.J. 791, 808 (2006). The technique heavily relies on false evidence ploys and other forms of deceit. *Id.* at 809. It follows a nine–step approach:

> [A]n interrogator confronts the suspect with assertions of guilt (Step 1), then develops "themes" that psychologically justify or excuse the crime (Step 2), interrupts all efforts at denial (Step 3), overcomes the suspect's factual, moral, and emotional objections (Step 4), ensures that the passive suspect does not withdraw (Step 5), shows sympathy and understanding and urges the suspect to cooperate (Step 6), offers a face–saving alternative construal of the alleged guilty act (Step 7), gets the suspect to recount the details of his or her crime (Step 8), and converts the latter statement into a full written confession (Step 9).

Saul M. Kassin, *On the Psychology of Confessions: Does* Innocence *Put* Innocents *at Risk?*, 60 AM. PSYCHOLOGIST 215, 220 (2005); see Edwin D. Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 51–55 (1968) (explaining the social psychological impact of the Reid tactics). Investigators are encouraged to start by accusing the suspect while emphasizing the importance of telling the truth. FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 213 (4th ed. 2001). They learn ways to build false empathy with suspects, such as shifting the moral blame for the offense to another person or expressing understanding for the suspect's actions. *Id.* at 213, 241–42. Investigators are encouraged to sit physically near the suspect, maintain "soft and warm" eye contact, and speak sincerely. *Id.* at 214, 349. When a suspect makes an admission implying guilt, investigators are directed to make statements of reinforcement. *Id.* at 366. The technique builds in

confirmation bias; the instructions assure investigators that while an innocent suspect will stay resolute in her denials, a guilty person will submit to the "theme" the investigator presents. *Id.* at 213; see Christian A. Meissner & Melissa B. Russano, *The Psychology of Interrogations and False Confessions: Research and Recommendations*, 1 CANADIAN J. POLICE & SECURITY SERVS. 53, 56–57 (2003).

Courts have long expressed concern about approaches such as the Reid Technique that rely on psychological coercion. Just four years after the first edition of the manual was published, INBAU ET AL., *supra*, at ix, the Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), "repeatedly cited and implicitly criticized" the Reid approach. Gohara, *supra*, at 808 n.93; *Miranda*, 384 U.S. at 457, 86 S.Ct. 1602 ("To be sure, this is not physical intimidation, but it is equally destructive of human dignity."). *Miranda* commented that the Court for decades had "recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Id.* at 448, 86 S.Ct. 1602 (quoting *Blackburn v. Alabama*, 361 U.S. 199, 206, 80 S.Ct. 274, 4 L.Ed.2d 242 (1960)). Nothing in that respect has changed: the Court continues regularly to hold that psychological coercion can render a confession involuntary. *Arizona v. Fulminante*, 499 U.S. 279, 287–88, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); *Miller v. Fenton*, 474 U.S. 104, 109, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

Following the Supreme Court's guidance, we too have repeatedly recognized that "psychological coercion alone can result in an involuntary confession ...."

United States v. Lehman, 468 F.2d 93, 100 (7th Cir. 1972) (conceding that "subtle psychological ploys" can render a confession involuntary); *Etherly v. Davis*, 619 F.3d 654, 663 (7th Cir. 2010) (considering possible psychological coercion as part of the totality test, while noting the need to distinguish between coercion, on the one hand, and encouragement to tell the truth, on the other); *United States v. Villalpando*, 588 F.3d 1124, 1128 (7th Cir. 2009) ("[A] false promise of leniency may render a statement involuntary ...."); *United States v. Dillon*, 150 F.3d 754, 757 (7th Cir. 1998) ("A confession is voluntary if, in light of the totality of the circumstances, the confession is the product of a rational intellect and free will and not the result of physical abuse, psychological intimidation, or deceptive interrogation tactics that have overcome the defendant's free will."); *Burns v. Reed*, 44 F.3d 524, 527 (7th Cir. 1995) (describing the "body of due process case law, which generally proscribes the physical or psychological coercion of confessions" as "well–established, albeit heavily fact–dependent"). Outside the courtroom, our nation has long acknowledged through its international commitments that mental mistreatment can be just as bad as its physical counterpart. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 (defining torture to encompass physical and mental pain and suffering).

The majority opinion downplays this reality by refusing to acknowledge anything more than mental exhaustion and false promises. But far worse than that was going on. Dassey's investigators refused to leave him alone until he gave them an "honest" answer—where "honest" meant the answer that the officers wanted to hear. One aspect, though by no means the

only one, of the coercion was the false promise that "honesty" would "set him free." But there was so much more. A brief review of what went on shows that these tactics fell decisively on the "coercion" side of the line.

The majority finds some significance in the notion that the detectives' tactics were not *per se* coercive, but that is a red herring. These cases cannot be assessed based on one sentence, or one restroom break, or the comfort (or lack thereof) of one room. The Supreme Court has instructed that the voluntariness inquiry requires a full consideration of the compounding influence of the police techniques "as applied to *this* suspect." *Miller*, 474 U.S. at 116, 106 S.Ct. 445. Many of the factors the majority cites as evidence leaning in favor of a finding of voluntariness—the soft interview room, offers of food and drink, normal speaking tones—viewed in the context of the types of questions and answers the investigators were demanding and Dassey's conceded intellectual disabilities, were coercive. Psychological literature makes this clear. See Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOLOGIST 221, 223–24 (1997) (criticizing the Reid Technique's maximization methods, or scare tactics, such as the false evidence ploy, in addition to its minimization methods, which "impl[y] an offer of leniency," where police lull a suspect into a "false sense of security" by expressing sympathy, blaming an accomplice, and underplaying the gravity of the situation); see also Meissner & Russano, *supra*, at 57–60 (discussing the "coercive" nature of the Reid interrogation techniques and particular concerns for minors and suspects with low intelligence).

The state and majority brush aside even the possibility of psychological coercion as applied to Dassey. They claim that Dassey's March 1 confession revealed

certain "critical" details that were corroborated by independent evidence, some of which law enforcement never publicly disclosed. I have several responses to that argument. First, it rests on the false idea that if a confession is "accurate," that indicates that it was not coerced. See *Conner v. McBride*, 375 F.3d 643, 652–53 (7th Cir. 2004) (considering, under the totality test, the reliability of a confession to support a conclusion that the confession was voluntary). But coercion and reliability are two different things. A confession can be coerced yet reliable, or it can be voluntary but unreliable. Yet even if it were true that Dassey's confession revealed "critical" details, the confession would not be admissible in evidence if the totality of the circumstances demonstrated that it was not voluntary.

Just as importantly, a closer examination of the supposedly reliable facts on which the majority relies shows that they are no such thing. Without reliable facts, there is no way to draw the *Conner* inference (*i.e.*, to base a finding of voluntariness on the reliability of the facts), questionable though that link might be. This justifies a look at the reliability of Dassey's confession, even if for present purposes lack of reliability is not a stand–alone theory. A look at how some of these "key" facts emerged instills no faith in either their reliability or their knowing and voluntary quality. For ease of reference, I have summarized in the following chart how the investigators extracted the "critical" details they were looking for from Dassey. It shows that there was nothing to ensure that Dassey was offering his own independent recollection. Instead, the officers used a combination of leading questions, coaching, and refusal to accept one of Dassey's guesses as the "final" answer until it matched what they wanted to hear.

"Critical" Fact	**Why It Is Not Critical**	**How It Was Coerced**
Halbach was shot in the head.	Dassey was fed this fact through a leading question after unsuccessful guessing. SA 73-76.	"Tell us, and what else did you do? Come on. Something with the head. Brendan? After Dassey guesses cutting her hair, pucnhing her, and cutting her throat, "All right, I'm just gonna ask you. Who shot her in the head?"
Dassey's jeans were stained with bleach	This evidence corraborates Dassey's trial testimony. R. 19-21: 32-37.	Dassey testified that his jeans became stained with bleach while he helped his uncle clean up what looked like an automotive fluid spill.
The RAV4's license plates were removed	Dassey was fed this fact through a leading question. SA 90; R. 19-24: 23	"With, how's, the license plates were taken off the car, who did that?" On February 27, the investigator asked, "Did he tell you if he did anything with the license plates?"

"Critical" Fact	Why It Is Not Critical	How It Was Coerced
Dassey sexually assaulted Halbach while she was handcuffed to the bed.	The physical evidence does not corroborate this fact. R. 19-17: 96-97; R. 19-15: 214-17.	There was no evidence of handcuffs chafing against the headboard. The handcuffs and leg irons found in Avery's room contained no fingerprints or DNA from Dassey or Halbach.
	The physical evidence found on Avery's bed is not probative. R. 19-16: 246.	The plastic film found on the bed's spindle was polypropylene, which, according to the state's forensic scientist, is found in garments, in addition to plastic containers and rope manufacturing.
	This detail was drawn from popular media. R. 19-21: 65-67.	Dassey testified that he concocted this detail from *Kiss the Girls* (1995), a book he read, where a woman is restrained during a sexual assault.

"Critical" Fact	Why It Is Not Critical	How It Was Coerced
Halbach was in the back of the RAV4.	The media widely publicized that Halbach's blood was found in the back of the car. RSA 70.	This fact appeared in news stories.
The RAV4's battery cables were disconnected.	Dassey was fed the fact that Avery went under the RAV4 hood through a leading question after he unsuccessfully guessed. SA 92.	"OK, what else did he do, he did somethin' else, you need to tell us what he did, after that car is parked there. It's extremely important. (pause) Before you guys leave the car." After Dassey responded that Avery left the gun in the car, "That's not what I'm thinking about. He did something to that car. He took the plates and he, I believe he did something else in that car." "I don't know." "OK. Did he, did he, did he go look at the engine, did he raise the hood at all or anything like that?"

"Critical" Fact	**Why It Is Not Critical**	**How It Was Coerced**
Halbach was shot in the garage.	In addition to being fed that she was shot, Dassey was fed that she was shot in the garage, after initially denying she was ever in there. SA 81-86.	"Was she ever in the garage?" "No." Investigators lead him, saying "Again, we have, w-we know that some things happened in that garage, and in that car, we know that. You need to tell us about this so we know you're tellin' us the truth." Shortly after, the ask, "Tell us where she was shot?" "In the head." "No, I mean where in the garage." After Dassey answered that she was shot in the truck and not on the garage floor, "[C]ome on, now where was she shot? Be honest here." "The truth." "In the garage."

"Critical" Fact	Why It Is Not Critical	How It Was Coerced
Halbach's camera and phone were burned in a barrel.	Dassey was fed this fact through a leading question on February 27. Then on March 1, he guessed that these items were burned. R. 19-24: 36; SA 109-11.	On February 27, "Did he tell ya anything about … her other possessions … she probably had her cell phone, a camera to take pictures." After Dassey denied putting anything in the burn barrel or knowing whether she had a purse, cell phone, or camera, he was pressed about what happened to these items and guessed, "[Avery] burnt 'em." The only possessions he said he saw in the burn barrel were those fed to him ("Like a cell phone, camera, purse.").

"Critical" Fact	Why It Is Not Critical	How It Was Coerced
Halbach's remains were burned in the bonfire pit.	Fed fact and media reports. R. 19-24:5-6, 9; RSA 69.	On February 27, investigators said, "I find it quite difficult to believe that if there was a body in that [fire] Brendan that you wouldn't have seen something like a hand, or a foot, a head, hair, something." Media had reported her remains were found there.
Dassey resisted the suggestion that Halbach had a tattoo.	Dassey's response seems to accept the suggestion that she had a tatoo. SA 151-52.	"We know that Teresa had a, a tatoo on her stomach, do you remember that?" (shakes head "no") "uh uh." "Do you disagree with me when I say that?" "No but I don't know where it was."

The majority concedes that AEDPA does not require a "nearly identical factual pattern" to find that a decision involved an unreasonable application of law. *Panetti v. Quarterman*, 551 U.S. 930, 953, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007) (citation omitted). But

that is in essence what the majority has demanded. In arguing that even non–AEDPA cases have found confessions voluntary under similar circumstances, the majority cites two decisions. But as it concedes, *Fare v. Michael C.*, 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979), is critically different: Michael C. was of average intelligence and had many prior interactions with the criminal justice system. *Id.* at 726, 99 S.Ct. 2560. While *Boulden v. Holman*, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969), may superficially appear to be more similar to Dassey's case, it is of dubious relevance given the fact that it was decided (along with *Michael C.*) decades before the Supreme Court instructed lower courts to recognize the unique psychological vulnerabilities of youth stemming from their incomplete neurological development. See, *e.g.*, *Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *Roper v. Simmons*, 543 U.S. 551, 569–70, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

The Wisconsin Court of Appeals failed reasonably to apply in any meaningful way at least three principles that the Supreme Court has clearly established: (1) special care for juvenile confessions, (2) consideration of the totality of the circumstances, and, most importantly, (3) prohibition of psychologically coercive tactics. This led to the kind of extreme malfunction in the adjudication of Dassey's case for which section 2254(d)(1) provides a remedy. By turning a blind eye to these problems, the majority has essentially read habeas corpus relief out of the books.

II

There is a second, independent, reason why the district court correctly granted Dassey's habeas corpus petition and our original panel was correct to uphold

that ruling: the Wisconsin Court of Appeals made unreasonable factual determinations. See *Brumfield v. Cain*, ––– U.S. ––––, 135 S.Ct. 2269, 2276, 192 L.Ed.2d 356 (2015) (granting habeas corpus relief under section 2254(d)(2), without needing to reach petitioner's section 2254(d)(1) argument). The district court, whose factual assessments deserve some deference from us, found that the Wisconsin Court of Appeals erroneously concluded that investigators made no promises of "leniency." According to the district court, though no statement in particular rendered the confession involuntary, the cumulative effect of investigators' tactics overbore Dassey's free will.

The majority dismisses this concern because there was no "specific" promise of lenience. But as the district court concluded, when examining the totality of the circumstances, it is clear that Dassey was guessing at what he thought the investigators wanted to hear so that he could leave. Dassey was reassured across two days of interviews that being "honest" would allow him to go "free." Although an adult of average intelligence might recognize the Biblical allusion, see *John* 8:32 ("You will know the truth, and the truth will set you free."), Dassey was not an adult and not of average intelligence. Instead, he was a mentally limited teenager who did not understand abstractions. Playing their "20 Questions" game, the officers forced Dassey to try out different answers until he stumbled upon the answer they wanted—defined by them as the answer that was sufficiently truthful. And what was Dassey's response after all this? He asked if he was free to go back to school to turn in a project that was due, and when told that he could not, he indicated that he thought he would be in jail for just one day. No more conclusive evidence of his literalism and his lack of understanding is needed.

By finding no promises of lenience were made and that the confession was voluntary, the Wisconsin Court of Appeals made an unreasonable determination of fact in light of the clear and convincing weight of the evidence.

III

Under AEDPA, the role of the federal courts in reviewing Dassey's petition for habeas relief is quite limited. But AEDPA does not paralyze us in the face of a clear constitutional violation . The Due Process Clause and the right against self–incrimination demand that, in order to be admissible in evidence, a suspect's confession must be voluntary. Dassey's was not. Because the detectives used coercive interrogation tactics on an intellectually disabled juvenile, Dassey's will was overborne during his March 1 interrogation. Without this involuntary and highly unreliable confession, the case against Dassey was almost nonexistent. This court should be granting his petition for a writ of habeas corpus and giving the state an opportunity to retry him, if it so desires. I respectfully dissent.

Rovner, Circuit Judge, and Wood, Chief Judge, and Williams, Circuit Judge, dissenting.

I continue to believe, as I explained in the panel opinion, and as Chief Judge Wood's dissent so persuasively argues, that the state court failed to fulfill the Supreme Court's mandate to review juvenile confessions with special care, and unreasonably held that Dassey's confession was voluntary. And for all of the reasons upon which Chief Judge Wood has expounded and those set forth in the original panel opinion in *Dassey v. Dittmann*, 860 F.3d 933 (7th Cir. 2017), *reh'g en banc granted, opinion vacated* (Aug. 4, 2017), I too respectfully dissent. I write separately simply to point out the chasm between how courts have historically understood the nature of coercion and confessions and what we now know about coercion with the advent of DNA profiling and current social science research.

Although I write in the hope of encouraging courts to update their understandings of the factual nature of coercion, my conclusion about the proper outcome of Dassey's habeas petition does not depend on any change in law. Current Supreme Court precedent requires that a court view the totality of the circumstances of any interrogation, and to take special care when evaluating the confessions of juveniles. To comply with the command of the Supreme Court, therefore, a court must include within its evaluation of the totality of the circumstances the impact of coercive interrogation techniques upon the particular vulnerabilities of the individual subject to those techniques. The state court did not do so in considering Dassey's appeal. For this reason, Dassey's conviction cannot stand. Unfortunately, four members of the seven–member en banc panel of this court do not agree—a decision that I believe has worked a profound injustice. Nevertheless, I hope to

convince my colleagues throughout the courts that reform of our understanding of coercion is long overdue. When conducting a totality of the circumstances review, most courts' evaluations of coercion still are based largely on outdated ideas about human psychology and rational decision–making. It is time to bring our understanding of coercion into the twenty–first century.

Half a century ago the Supreme Court held that police misrepresentations during interrogations, although relevant to a totality of the circumstances inquiry, were not in and of themselves sufficient to render an otherwise voluntary confession inadmissible. *Frazier v. Cupp*, 394 U.S. 731, 739, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969). In other words, police may deceive, trick, conceal, imply, and mislead in any number of ways, provided that, under a totality of the circumstances evaluation, they do not destroy a suspect's ability to make a rational choice. See *id.* (finding an interrogator's lie that a fellow suspect had confessed insufficient to make an otherwise voluntary confession inadmissible); *Procunier v. Atchley*, 400 U.S. 446, 454, 91 S.Ct. 485, 27 L.Ed.2d 524 (1971) (determining that it was not per se coercive for police to send in a cooperating insurance agent to deceive the defendant into confessing to obtain insurance payments for his children); see also *United States v. Villalpando*, 588 F.3d 1124, 1128 (7th Cir. 2009) ("Trickery, deceit, even impersonation do not render a confession inadmissible"); *United States v. Rutledge*, 900 F.2d 1127, 1131 (7th Cir. 1990) (noting that "the law permits the police to pressure and cajole, conceal material facts, and actively mislead—all up to limits").

These cases, however, were born in an era when the human intuition that told us that "innocent people

do not confess to crimes" was still largely unchecked. This belief is rooted in the mind's tendency to assume that statements made to a police officer that are against one's self interest can be trusted or, to put it simply, the thought that most of us have that "I would never confess to a crime I did not commit."[1] Peer–reviewed studies confirm that jurors tend to have hard–to–dislodge beliefs that a suspect who is innocent could not be manipulated into confessing.[2] And, in fact, this false notion is precisely what the state implored the jurors in Dassey's trial to believe, arguing in closing that "[p]eople who are innocent don't confess." R. 19–23 at 144. We know, however, that this statement is unequivocally incorrect. Innocent people do in fact confess, and they do so with shocking regularity. As of June 7, 2016, The National Registry of Exonerations had collected data on 1,810 exonerations in the United States since 1989 (that number as of December 4, 2017 is 2,132), and that data includes 227 cases of innocent people who falsely confessed.[3] This research indicates that false confessions (defined as cases in which indisputably innocent individuals confessed to crimes they

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[1] Saul M. Kassin et al., *Police–Induced Confessions: Risk Factors and Recommendations*, 34 L. & Hum. Behav. 49, 51 (2010).

[2] Iris Blandón–Gitlin et al., *Jurors Believe Interrogation Tactics Are Not Likely to Elicit False Confessions: Will Expert Witness Testimony Inform Them Otherwise?*, 17 Psychol., Crime & L. 239, 256 (2011).

[3] Samuel Gross et al., *For 50 Years, You've Had "The Right to Remain Silent,"* The National Registry of Exonerations, False Confessions (June 12, 2016), http://www.law.umich.edu/special/exoneration/Pages/false–confessions.aspx.

did not commit) occur in approximately 25% of homicide cases.[4]

In a world where we believed that "innocent people do not confess to crimes they did not commit," we were willing to tolerate a significant amount of deception by the police. Under this rubric, the thinking went, the innocent person (or at least the vast majority of healthy, sane, innocent adults of average intelligence) would not confess even in response to deception and cajoling. And so our case law developed in a factual framework in which we presumed that the trickery and deceit used by police officers would have little effect on the innocent.

If it is true that, except in extreme cases, innocent people do not confess, what difference does it make if detectives Fassbender and Wiegert made false assurances and used deception in interrogating Dassey? So what if they gave general assurances of leniency, used leading questions, fed Dassey information, lied about how much information they had, told Dassey that they were on his side, implored him that "honesty is the only thing that will set you free," suggested answers, and even went so far as to tell a confused and floundering Dassey that Teresa had been shot in the head? "Dassey was not subject to physical coercion or any sort of threats at all," the majority tells us, and "[g]iven the history of coercive interrogation techniques from which modern constitutional standards for confessions emerged, this is important." *Ante* at 313.

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[4] Samuel Gross et al., *Exoneration in the United States, 1989–2012*: Report by the National Registry of Exonerations, 58, 60, https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf.

But what do we do when the facts that supported our "modern constitutional standards" come from a fifty–year–old understanding of human behavior, and when what we once thought we knew about the psychology of confessions we now know not to be true? Our long–held idea that innocent people do not confess to crimes has been upended by advances in DNA profiling. We know now that in approximately 25% of homicide cases in which convicted persons have later been unequivocally exonerated by DNA evidence, the suspect falsely confessed to committing the crime.[5] The majority points out that the number of known false confessions is low compared to the total number of guilty pleas to violent felonies. *Ante* at 317–18 n.8. This comparison is inappropriate for two reasons. First, the number of guilty pleas is the wrong denominator. Defendants plead guilty in all manner of situations, not only after interrogations by the police, as was the case with Dassey. Many defendants, for example, accept a plea after carefully weighing their options with a lawyer without ever having been subject to a coercive interrogation—the only type of confessions with which we are concerned in this case. Moreover, and more importantly, in the numerator, the statistics for false confessions include only those who have been exonerated based on some form of objective evidence (DNA, impossibility, the confession of another, etc.). The universe of people who falsely confess is undoubtedly larger than the subset of people who have confessed and then been fortunate enough to have been exonerated by objective, irrefutable evidence. But most importantly, as the majority concedes, even one coerced false confession is "very troubling." *Ante* at 317–18 n.8. Indeed

[5] *Id.* at 331.

any coerced false confession is an affront to due process and cannot stand.

Certainly human intuition makes it almost inconceivable to imagine that someone might falsely confess to the murder of one's own child. Yet in October 2004, Kevin Fox of Wilmington, Illinois did just that. He confessed to sexually assaulting his daughter, placing duct tape over her mouth, drowning her in the river, and then going home to sleep.[6,7] His confession was detailed and included accounts of her moving and kicking in the water and struggling to remove the duct tape as she drowned. He quickly rescinded his confession, but spent eight months in prison until DNA testing ruled him out as a suspect and the State of Illinois dropped the charges. See generally *Fox v. Hayes*, 600 F.3d 819 (7th Cir. 2010). Not only did the DNA alone exclude him as a suspect, but for any who had remaining doubts, the conviction of another man six years later made it unequivocally certain that his confession had been false. In 2010, Scott Eby, who was in prison for raping a relative, confessed to the murder.[8] At the time of the murder he had been living not far from the Fox home. While drunk and high on cocaine Eby decided to rob some houses, and when he happened upon a sleeping three–year–old Riley Fox, he abducted her, sexually assaulted her, and then drowned her to cover his crime. His DNA matched that found on the duct

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[6] Bryan Smith, *Kevin Fox, in* TRUE STORIES OF FALSE CONFESSIONS 107 (Rob Warden et al. eds., 2009).

[7] Bryan Smith, *The Nightmare: A Look at the Riley Fox Case,* Chi. Mag., July 3, 2006.

[8] Steve Schmadeke, *I'm the 'Lowest Kind of Slime,' Killer of 3–Year–Old Confessed. Court Records Outline Investigators' Path to Scott Wayne Eby,* Chi. Trib., Feb. 26, 2011.

tape used to bind Riley. A pair of boots, which had been found at the scene, photographed, and then ignored for years, had the name "Eby" written on the tongue.

Five decades ago, when the Supreme Court issued its opinions allowing interrogator deception, there was no DNA evidence that could demonstrate with such clarity that innocent people were confessing to crimes they had not committed at a surprising rate, and therefore, only a limited body of psychological science explaining why this happens.

Even now, despite the overwhelming evidence regarding the coercive nature of constitutionally permissible interrogation techniques, we have not changed our understanding of how to view the facts surrounding coercion when evaluating the totality of the circumstances. Yet we now have a robust and growing body of rigorous, peer–reviewed, legal and psychological research demonstrating how current interrogation tactics influence people, and particularly juveniles and intellectually impaired people, to act against their own self–interest in such a seemingly irrational manner.[9]

Some of the factors that induce false confessions are internal. Studies have demonstrated that personal characteristics such as youth, mental illness, cognitive disability, suggestibility, and a desire to please others may induce false confessions.[10] A survey of false confession cases from 1989–2012 found that although only 8% of adult exonerees with no known mental disabilities falsely confessed to crimes, in the population of ex-

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[9] See Saul M. Kassin, *False Confessions*, 8 WIREs Cogn Sci. e1439 (2017).

[10] Blandón–Gitlin et al., *supra* note 2, at 240.

onerees who were younger than 18 at the time of the crime, 42% of exonerated defendants confessed to crimes they had not committed, as did 75% of exonerees who were mentally ill or mentally disabled.[11] Overall, one sixth of the exonerees were juveniles, mentally disabled, or both, but they accounted for 59% of false confessions.[12] Indeed, youth and intellectual disability are the two most commonly cited characteristics of suspects who confess falsely.[13] Dassey suffered under the weight of both characteristics.

In addition to the factors specific to the suspect, some of the factors that induce false confessions are externally imposed. These include "isolation, long interrogation periods, repeated accusations, deception, presenting fabricated evidence, implicit/explicit threats of punishment or promises of leniency, and minimization or maximization of the moral seriousness or legal consequences of the offence."[14] "Maximization" describes the technique whereby the interrogator exaggerates the strength of the evidence and the magnitude of the charges.[15] Dassey's interrogators employed maximization by constantly reminding Dassey, "We already know everything." See, e.g., R. 19–25 at 17, 19, 23, 24, 26, 28, 30, 31, 36, 37, 41, 44, 47, 48, 50, 54, 55, 60, 63, 69, 71. "Minimization" describes tactics that are designed

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[11] Gross, *Exonerations 1989–2012*, *supra* note 4, at 60.

[12] *Id.*

[13] Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. Crim. L. & Criminology 523, 545 (2005).

[14] Blandón–Gitlin et al., *supra* note 2, at 240.

[15] Saul M. Kassin et al., *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 L. & Hum. Behav. 233, 234–35 (1991).

to lull a suspect into believing that the magnitude of the charges and the seriousness of the offense will be downplayed or lessened if he confesses.[16] Studies demonstrate that minimization causes suspects to infer leniency to the same extent as if an explicit promise had been made, increasing not only the rates of true confessions (from 46% to 81% in one experiment) but also the rate of false confessions (from 6% to 18%).[17,18] Although a court must exclude a confession obtained by direct promise of leniency (see, e.g., *United States v. Villalpando*, 588 F.3d 1124, 1128 (7th Cir. 2009)), the research demonstrates that minimization techniques are the functional equivalent in their impact on suspects.[19] The investigators in this case employed classic minimization techniques by repeatedly telling Dassey that it was not his fault that he committed the crime because his uncle, Steven Avery, had made him do it. See, e.g., R. 19–25 at 28, 47, 50, 60, 62. As Chief Judge Wood points out in her dissent, interrogators in this case, as in most police forces in the United States, used the Reid Technique to obtain Dassey's confession. This technique involves isolation, confrontation, maximization and minimization—the psychological strong–arm tactics that are known to produce coerced confessions even in adults of average intelligence.

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[16] *Id.* at 235.

[17] *Id.* at 241, 248.

[18] Melissa B. Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 Psychol. Sci. 481, 484 (2005).

[19] Kassin, *Police Interrogations and Confessions*, *supra* note 15, at 241, 248.

Dassey's interrogation thus combined a perfect storm of these internal and external elements. He was young, of low intellect, manipulable, without a friendly adult, and faced repeated accusations, deception, fabricated evidence, implicit and explicit promises of leniency, police officers disingenuously assuming the role of father figure, and assurances that it was not his fault.[20]

For many years, the Reid technique has been criticized by scholars and experts for increasing the rate of false confessions.[21] As far back as *Miranda*, the Supreme Court warned that "[e]ven without employing

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[20] The majority has reservations about the use of the Gudjonsson Suggestibility Scale and thus states that it can make no conclusions from the disputed expert testimony about the results. *Ante* at 305 n.2. Whatever one might make of the Gudjonsson Suggestibility Scale, the interrogation speaks for itself. Dassey is almost frantic in his desire to find the story the investigators seek. For example, in response to the question about what happened to Teresa's head, Dassey guessed at every possible injury or injustice to a head (hitting, punching, throat cutting, hair cutting) hoping to please the officers until, in frustration, they finally informed him that Teresa had been shot in the head. R. 19–25 at 60–63. In response to pressure from the investigators, he changes the locale of the crime from the house to the garage (*Id.* at 72–73), the color of Teresa's clothes (*Id.* at 20, 31–32), the location of the knife (*Id.* at 80–81, 121; R. 19–34 at 23–24, 27), whether Teresa was standing on the porch after school (R. 19–25 at 19–20, 27–28, 90–91), whether Avery went under the hood of Halbach's car (*Id.* at 77–80), when the fire occurred (*Id.* at 23, 32–33; R. 19–34 at 55), and whether he cut her hair (R. 19–35 at 60–61; R. 19–34 at 36–37, 65–66, 98). Even under the state's theory of the case, the naïve Dassey, who had never been in trouble with the law and had never had a sexual experience with a woman, was readily manipulated by his uncle into participating in a repulsive and heinous crime. One does not need the Gudjonsson Suggestibility Scale to conclude, under either party's theory of the case, that Dassey was highly suggestible and manipulable.

[21] Kassin, *False Confessions*, *supra* note 9, at 8.

brutality, the 'third degree' " used in the Reid technique "exacts a heavy toll on individual liberty and trades on the weakness of individuals," and "may even give rise to a false confession." *Miranda v. Arizona*, 384 U.S. 436, 455 & n.24, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Recently, Wicklander–Zulawski & Associates, one of the nation's largest police consulting firms, said it will stop training detectives in the method it has taught since 1984, stating that it "is not an effective way of getting truthful information."[22] After a spate of high–profile false confession cases in the 1980's, Great Britain transitioned from an accusatorial and coercive Reid–like approach to an investigative model of interviewing which prohibits deception, coercion, and minimization.[23] Meta–analyses of twelve different laboratory experiments indicate that the accusatorial approach increased both true and false rates of confessions, while the information–gathering approach increased the rate of true confessions without also increasing false confessions.[24]

No reasonable state court, knowing what we now know about coercive interrogation techniques and viewing Dassey's interrogation in light of his age, intellectual deficits, and manipulability, could possibly have concluded that Dassey's confession was voluntarily given. Alt-

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[22] Eli Hager, *The Seismic Change In Police Interrogations: A Major Player In Law Enforcement Says It Will No Longer Use A Method Linked To False Confessions*, The Marshall Project (March 7, 2017, 10:00 p.m.), https://www.themarshallproject.org/2017/03/07/the–seismic–change–in–police–interrogations.

[23] Kassin, *False Confessions*, *supra* note 9, at 8.

[24] Christian A. Meissner et al., *Accusatorial and Information Gathering Interrogation Methods and Their Effects on True and False Confessions, A Meta–Analytic Review*, 10 J. Exp. Criminology 459, 481–82 (2014).

hough it is my hope that our courts will, when evaluating the totality of the circumstances, engage with the more current understanding of coercion, as I noted at the start, Dassey does not need a change in our existing Supreme Court precedent or any existing law to prevail on his habeas petition. What has changed is not the law, but our understanding of the facts that illuminate what constitutes coercion under the law. Moreover, even under our current, anachronistic understanding of coercion, Dassey's confession was so obviously and transparently coercively obtained that it is unreasonable to have found otherwise. Dassey, however, need not rely on this finding either. Existing Supreme Court precedent allows for significantly deceptive and manipulative interrogation techniques, but those very techniques must then be evaluated, in a totality of the circumstances analysis, for what they are.

The requirement that confessions must be voluntary is a principle at the heart of our legal system. Although psychological and physical torture and coercion are commonplace in some countries as a means of obtaining "confessions," our system of justice rejects the notion that convictions can be obtained through such abuse. We refuse to accept such conduct as a means of obtaining information, not only because it impacts the veracity of the confession, but because it is conduct that we as human beings cannot tolerate from our government. In a case such as this one, where investigators are faced with a crime of horrific brutality and the loss of a treasured life, the impulse to coerce a confession from a suspect may be particularly strong. As judges, we are entrusted with the responsibility to protect against such abusive actions, and uphold those principles that our Constitution protects even in the darkest of times.

What occurred here was the interrogation of an intellectually impaired juvenile. Dassey was subjected to myriad psychologically coercive techniques but the state court did not review his interrogation with the special care required by Supreme Court precedent. His confession was not voluntary and his conviction should not stand, and yet an impaired teenager has been sentenced to life in prison. I view this as a profound miscarriage of justice. I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 16-3397

BRENDAN DASSEY,
Petitioner-Appellee,
v.

MICHAEL A. DITTMANN,
Respondent-Appellant.

Rehearing En Bank Granted,
Opinion Vacated August 4, 2017

Argued February 14, 2017
Decided June 22, 2017
[860 F.3d 933]

OPINION

* * *

Before Rovner, Williams, and Hamilton, Circuit Judges.

Rovner, Circuit Judge.

Teresa Halbach disappeared on Halloween Day, 2005. Her concerned family and friends contacted law enforcement after she did not show up at the photography studio where she worked and her voice mailbox was full. Law enforcement officers quickly zeroed in on the Avery Auto Salvage yard in Two Rivers, Wisconsin, as the last place she was known to have gone, and, in particular, on Steven Avery, the son of the salvage

yard owner who lived in a trailer on the property. Earlier in the day, Avery called Auto Trader magazine, for whom Halbach sometimes took photographs, to request that she take photographs of a minivan that he wished to sell in its magazine. Eventually the police began to suspect that Avery's 16-year-old nephew, Brendan Dassey, who also lived on the property, might have been a witness or had information about Halbach's murder. After a few preliminary conversations, the investigators were concerned enough to call Dassey into the police station for a full interrogation. After many hours of questioning and interrogation spread over several days, Dassey confessed that he, along with Avery, had raped and brutally murdered Halbach and then burned her body in an on-site fire pit. By the time of the trial, Dassey had recanted his confession, and the State had failed to find any physical evidence linking him to the crime, but he was convicted and sentenced to life in prison nonetheless. After appeals and post-conviction proceedings in the state court failed to bring him relief. The state court on post-conviction review stated the generalized standard for evaluating the voluntariness of a confession—totality of the circumstances—but failed to note how that juvenile confession requires more care and failed to apply the standard at all. Dassey filed a petition for a writ of habeas corpus in the district court, claiming that he did not receive effective assistance of counsel and that his confession was not voluntarily given. The district court, concluding as we do that the state court did not apply the proper standard, granted the writ. Despite the limited role of a federal court on habeas review we must affirm. If a state court can evade all federal review by merely parroting the correct Supreme Court law, then the writ of habeas corpus is meaningless.

I.

The facts related to this case are expansive and convoluted, and those facts have been reported in various iterations throughout the decisions of the state courts of Wisconsin and in the district court. We borrow heavily from the district court and report just those facts needed for purposes of this appeal and refer the reader to the full district court opinion, *Dassey v. Dittmann*, 201 F.Supp.3d 963 (E.D. Wis. 2016) for further details.

Teresa Halbach was a 25-year-old summa cum laude graduate of the University of Wisconsin-Green Bay who was running her own photography business. She was the second oldest of five children in a tight-knit family, and lived in a farmhouse a quarter mile from her parents. On October 31, 2005, she photographed three vehicles for Auto Trader Magazine. She took the third and final series of photographs at the Avery salvage yard. She never returned home. Her life and career were cut short by a heinous and senseless crime.

Her brutally burned body provided few clues about her death, but other investigative methods provided the state court with the following facts. Halbach had taken photographs at the Avery property on five prior occasions, and Avery called Auto Trader the morning of October 31 and requested that "the same girl who had been out here before" come and take pictures of a vehicle that was for sale. Just before 2:30 p.m., Halbach contacted Auto Trader Magazine and said that she was on her way to the Avery property. Sometime around 2:30 or 2:45 p.m., a neighbor of Avery's saw Halbach photographing a minivan and then proceed toward Avery's residence. The neighbor left home at about

3:00 p.m. and observed Halbach's 1999 Toyota RAV4 still outside Avery's residence but did not see Halbach. When he returned home at approximately 5:00 p.m., Halbach's RAV4 was gone. Halbach was not seen or heard from after that time.

On November 5, 2005, volunteer searchers scoured the forty acre, 4,000+ vehicle salvage yard and found Halbach's RAV4 partially covered by tree branches, fence posts, boxes, plywood, and auto parts. The license plates had been removed and the battery cables disconnected.

Based on that discovery, investigators obtained a search warrant for the entire salvage yard and, after a week-long search, found evidence that Halbach was the victim of a horrendous crime. Some of that evidence came from a burn barrel and a four-foot by six-foot burn pit near Avery's trailer. In those burn areas, investigators found Halbach's charred bone and dental remains, burned remnants of a cell phone and camera of the same make and model that Halbach used, and a zipper and rivets from a brand of women's jeans that Halbach was known to wear. State crime lab experts later determined, based on the skull fragments, that Halbach had been shot twice in the head. Multiple witnesses reported seeing a large bonfire in the burn pit outside of Avery's residence on October 31. The police arrested Avery after the discovery of this evidence.

Forensic investigators found a roughly six-inch blood stain in the rear cargo area of Halbach's RAV4, and other smaller stains in and around the cargo area that matched Halbach's DNA. Also in the RAV4, forensic examiners found very small blood stains that matched Avery's DNA profile on the following locations: a panel just to the right of the ignition, a CD

case, a metal panel between the rear seats and the vehicle cargo area, the driver's seat, the front passenger's seat, and the floor next to the center console. Avery's DNA was also detected on the hood latch.

The investigation of Avery continued as he awaited trial. Investigators began interviewing family members, including Dassey and Avery's niece, Kayla Avery. Kayla stated that her cousin Brendan Dassey had been "acting up lately," that he was staring into space and crying uncontrollably, and that he had lost roughly forty pounds. Dassey later explained that the weight loss had been part of an effort to find a girlfriend and that the tears had been over a break up. But based on Kayla's interview, and the fact that another witness reported seeing Dassey at the bonfire with Avery around 7:30 or 7:45 p.m. on October 31, investigators decided that it was necessary to re-interview Dassey.

Calumet County Sheriff's investigator, Mark Wiegert, and Wisconsin Department of Justice Special Agent, Tom Fassbender, travelled to Dassey's high school on February 27, 2006, and, without his parents' knowledge, met with him in a conference room for about an hour. Dassey was a sophomore who received special education services, and whose IQ had been measured at various times between 74 and 81, falling fairly far below an average range of intelligence. On the Wechsler scale of intelligence, Dassey's score meant that 90% of adolescents his age would have performed intellectually better than he did, and on the Kaufman scale, 87% of adolescents his age would have performed better. R. 19–22 at 48–49. A psychological expert at trial described Dassey as highly suggestible, docile, withdrawn, with extreme social anxiety and social avoidant characteristics, and more suggestible than 95% of the population.

At that first interview with the officers, Dassey said that Avery had asked him to help load tires and an old van seat onto a bonfire near Avery's trailer on the evening of October 31, but that he saw nothing unusual before going home. Because of the poor quality of the cassette tape recording of that interview, the prosecuting attorney requested that the investigators re-interview Dassey to create a better record. Wiegert and Fassbender made arrangements to interview Dassey again later that same day at the local police station.

Wiegert and Fassbender contacted Dassey's mother, Barbara Janda, who met them at the school. The investigators drove Dassey and Janda to the police station. According to Wiegert and Fassbender, Janda declined their offer to be present for the interview and instead remained in a waiting area of the police station. R. 19-19 at 7[1]. According to Janda, the investigators discouraged her from attending the interview. R. 19-30 at 155. This second February 27 interview, which lasted less than an hour, began with a long monologue by Fassbender, who sat down with Dassey and said, "some people back there say no, we'll just charge him. We said no, let us talk to him, give him the opportunity to come forward with the information that he has, and get it off his chest." R. 19-24 at 5. Then, Fassbender set forth his role in the investigation and made what Dassey characterizes as the first of many assurances and promises:

> Mark and I, yeah, we're cops, we're investigators and stuff like that, but I'm not right now. I'm a father that has a kid your age too.

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[1] All record cites are to the record in the United States District Court for the Eastern District of Wisconsin, Case No. 14-CV-1310.

> There's nothing I'd like more than to come over and give you a hug cuz I know you're hurtin.' Talk about it … I promise I will not leave you high and dry.

R. 19-24 at 5. After this assurance, Dassey began what would become a series of alterations in his story over time, increasing his culpability in response to suggestions by the investigators. The first such suggestion came after Dassey initially denied having seen anything but garbage and other detritus in the October 31 fire. The investigators insisted that Dassey must have seen something suspicious in the fire. Fassbender set forth his suspicions as follows:

> I'm more interested in what you probably saw in that fire or something. We know she was put in that fire, there's no doubt about it. The evidence speaks for itself. And you were out there with him. And unfortunately, I'm afraid you saw something that you wished you never would have seen. You know, I mean that's what we need to know … . Did you see a hand, a foot, something in that fire? Her bones? Did you smell something that was not too right?

Id. at 5–6. Then, after Fassbender insisted several times that Dassey must have seen something in the fire, and suggesting the body parts that he had seen, Dassey admitted that he had seen those same body parts—fingers and toes, plus a forehead, and a belly in the fire. By the end of this interview, Dassey reported that he saw Halbach's body parts in a fire, that he saw Avery burn clothing in a fire, and that Avery had confessed that he had stabbed Halbach, put her in the fire and hid her car in the yard.

Fassbender met with Dassey again that evening in a hotel room where Dassey told Fassbender, in an unrecorded interview, that he had stained his pants with bleach as he helped clean the floor of Avery's garage. Wiegert testified that after those interviews he thought Dassey might have had some culpability in the criminal disposal of Halbach's corpse. R. 19-12 at 18–21; R. 19-30 at 38.

On March 1, 2006, the officers returned to Dassey's school for a fourth interview. They read Dassey his Miranda rights, and he again agreed to speak with them. Wiegert and Fassbender first drove Dassey to his house on the Avery property to retrieve the bleach-stained jeans and then drove him forty-five minutes away to the Manitowoc County Sheriff's Department. The State asserted that it asked Janda for permission to interview her son. R. 19-19 at 12; 19-30 at 156. Janda claimed that the investigators never asked her if she wanted to be present for the interview. R. 19-30 at 156. This fourth interview produced a confession that became the key evidence against Dassey at his trial.

The March 1 interview lasted three hours, with one half-hour break, and then a second fifty-minute break at the end before Dassey was taken into custody. The interrogation was conducted in what is known as a "soft room" in the Sheriff's Department—one with a small couch, two soft chairs and lamps. Dassey was offered food, drink, and access to a restroom at the start and at various times throughout the interview. The investigators reminded Dassey of his Miranda rights, and the interview was audio and video recorded. No adult was present on Dassey's behalf.

Dassey's March 1 confession unfolded as follows in this very brief summary: Dassey first admitted only to

helping Avery clean some fluid from the garage floor after Avery cut a line of the vehicle on which he was working. Eventually, after much encouragement, the story evolved to one in which Dassey saw Halbach's already dead, clothed, and tied up body in the back of her RAV4 and helped Avery put her body in a bonfire. In the next iteration, he reported hearing screaming at Avery's house as he brought Avery his mail. He entered and found a sweaty Avery and saw Halbach naked and handcuffed to Avery's bed. Finally, Dassey admitted to a horrific series of crimes—raping Halbach, cutting her throat, tying her up, cutting her hair, and then taking her to the garage where Avery shot her in the head and the two of them disposed of her body in the fire. Although we report the evolution of his confession linearly, it is far from that. Dassey's story changes; he backtracks; officers try to pin him down on time frames and details, but they are like waves on the sand. Even the State has trouble telling its version of the timeline of the story in any cogent manner due to the fact that it changed with each re-telling. *See* Brief of Respondent-Appellant at 9, n.3. Although the State presents a cogent story line in its brief on appeal, it does so by picking and choosing pieces from various versions of Dassey's recitations.

At the very end of the confession, Dassey's mother entered the interrogation room and the following exchange occurred after the officers left the room:

> Brendan: I got a question?
>
> Barb Janda: What's that?
>
> Brendan: What'd happen if he says something his story's different? Wh-he says he, he admits to doing it?

Barb Janda: What do you mean?

Brendan: Like if his story's like different, like I never did nothin' or somethin'.

Barb Janda: Did you? Huh?

Brendan: Not really.

Barb Janda: What do you mean not really?

Brendan: They got to my head.

R. 19-25 at 148. At that point, one of the officers reentered the room and the conversation ended. We will fill in the remaining details of this confession as we discuss the voluntariness of it, *vel non*, in the following sections.

Almost the entirety of the State's case rested on these interviews and one phone call between Dassey and his mother after his final police interview which we describe below. There was no physical evidence linking Dassey to the murder of Halbach—investigators did not find *any* of Dassey's DNA or blood on any of the many objects that were mentioned in his confession—the knives in Avery's house, gun, handcuffs, bed, RAV4, key, or automotive dolly.

After his arrest, the state public defender's office appointed private attorney Len Kachinsky to represent Dassey. Kachinsky met with Dassey on March 10, 2006. Dassey told Kachinsky that he was innocent, that his confession was not true, and that he wanted to take a polygraph test. After this meeting, despite Dassey's claims of innocence, Kachinsky spoke to the media and described Dassey as sad, remorseful, and overwhelmed. The media reported that Kachinsky blamed Avery for "leading Dassey down the criminal path" and said that he had not ruled out a plea deal. R. 19-39 at 4, 9–11.

Over the next few days, nearly all of Kachinsky's work on Dassey's case involved communicating with the local media, during which appearances he stated that "there is quite frankly, no defense," and that all of the investigation techniques were standard and legitimate, despite the fact that Kachinsky had not yet watched the recorded police interview R. 19-26 at 142, 144–45, 153, 170. During each of Kachinsky's media appearances he indicated that Dassey was guilty and would likely accept a plea. Kachinsky testified at a post-conviction relief hearing that one of his reasons for making these statements to the media was so that Dassey and his family would become "accustomed to the idea that Brendan might take a legal option that they don't like …." R. 19-26 at 136–37. Eventually the prosecutor sent an email to Kachinsky expressing concern about the pretrial media appearances and referred Kachinsky to the relevant rules of ethics for attorneys.

In the meantime, Kachinsky hired investigator Michael O'Kelly, with whom he was not familiar, to help in the investigation of the case and to conduct the polygraph examination that Dassey had requested. Despite Dassey's claims of innocence, Kachinsky and O'Kelly proceeded on the assumption that Dassey would plead guilty and assist the prosecution in Avery's case. O'Kelly testified at the state post-conviction hearing that his goal was to uncover information and evidence that would bolster the prosecution's case against Avery even if that "evidence would tend to inculpate Brendan," R. 19-29 at 47, and that his "emotions sided with what happened to Teresa Halbach." *Id.* at 96. Kachinsky and O'Kelly even sent information to the prosecution about the location of a knife they thought had been used in the crime, based on what they had cajoled

from Dassey, but searches pursuant to those tips did not produce any evidence.

To effectuate his plan to garner Dassey's cooperation in Avery's prosecution, Kachinsky decided that the investigator, O'Kelly, should re-interview Dassey and compel him to confess yet again, and should do so after the trial judge denied the motion to suppress his March 1 interview, when he would be most vulnerable. R. 19-26 at 244.

Shortly before interviewing Dassey, O'Kelly wrote to Kachinsky and referred to the Avery family as "criminals" and asserted that family members engaged in incestuous sexual conduct and had a history of stalking women. R. 19-29 at 93. He continued, "This is truly where the devil resides in comfort. I can find no good in any member. These people are pure evil." *Id.* O'Kelly quoted a friend as having said, "This is a one branch family tree. Cut this tree down. We need to end the gene pool here." *Id.* at 94. O'Kelly thought that Dassey's claim of innocence was an "unrealistic" "fantasy" that was influenced by his family. R. 19-29 at 83, 84, 86–88. On O'Kelly's recommendation, Kachinsky canceled a planned visit with Dassey because Dassey "needs to be alone." R. 19-26 at 248–49. O'Kelly said, "He needs to trust me and the direction that I steer him into." R. 19-26 at 249.

O'Kelly began his interview with Dassey, which he video recorded without permission from Dassey's parents, by pointing to what he said were the polygraph examination results on a laptop computer screen and asking Dassey if he could read them. R. 19-38 at 1. Despite having previously told Kachinsky that the results of the polygraph examination were inconclusive R. 19-

26 at 210,[2] O'Kelly told Dassey that the polygraph indicated deception and that the probability of deception was 98%. R. 19-38 at 1. When Dassey asked what that meant, O'Kelly asked what he thought it meant. R. 19-38 at 1. Dassey responded, "That I passed it?" R. 19-38 at 1. "It says deception indicated," O'Kelly responded, emphasizing "deception." *Id.* After a long pause, Dassey asked, "That I failed it[?]" *Id.*

O'Kelly proceeded to harangue Dassey with photographs and personal effects of Halbach, threaten him with life in prison, and badger him to admit that he was sorry. Dassey continued to profess his innocence, insisting, "I don't know [if I'm sorry], because I didn't do anything," to which O'Kelly responded, "If you're not sorry, I can't help you … Do you want to spend the rest of your life in prison? You did a very bad thing." R. 19-38 at 2. Dassey responded, "Yeah, but I was only there for the fire though." *Id.*

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[2] Dassey's lawyer hired an expert who was prepared to testify that the polygraph showed no deception, but the state trial judge excluded any testimony about the polygraph. R. 19-30 at 231–233. The reliability and validity of polygraph evidence is hotly debated in the legal and scientific community. *United States v. Scheffer*, 523 U.S. 303, 309, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). There is not a set standard of scoring for Polygraph examinations. In some numerical scoring systems, "the scores range from 3 for a dramatic reaction to a control question to -3 for the same type of reaction to a relevant question. Noticeable but smaller reactions are scored 1 or -1. A lack of a significant reaction is scored 0. Total scores of 6 or higher indicate truthfulness, while -6 or lower indicate deception. Scores that fall in between are considered inconclusive." Paul C. Giannelli, *Polygraph Evidence: Post-Daubert*, 49 Hastings L.J. 895, 909 (1998). The record does not reflect what system O'Kelly used to score Dassey's polygraph examination. R. 19-29 at 21–22.

Eventually O'Kelly's plan prevailed after he convinced Dassey that if he confessed he would be sentenced to only twenty years in prison and could someday be released and have a family. (The government had not, in fact, placed any plea deal on the table.) Otherwise, O'Kelly threatened, Dassey would go to prison for the rest of his life. After a grueling interrogation by O'Kelly, Dassey confessed, providing yet another version of the story. O'Kelly immediately telephoned Kachinsky who arranged for Dassey to undergo another police interrogation the next day, May 13. Kachinsky did not arrange for any immunity agreements, plea offers, or other safeguards. In fact, he agreed that the State would provide "no consideration" in exchange for a second chance to interrogate (the police considered this to be only the second interrogation because they considered the first few meetings to be "witness interviews.") R. 19-26 at 80; R. 19-27 at 34–38. Kachinsky did not accompany Dassey to this meeting and allowed him to be interrogated without counsel. That interview differed in many significant ways from the story Dassey told on March 1, but it was never admitted or used at trial.

At the end of the May 13 interview, Fassbender and Wiegert advised Dassey that he should call his mother over the recorded jail telephone line and admit his guilt so that she would hear it from him first rather than from the officers. Dassey's mother was scheduled to visit him the following day, but the investigators told him that it would be a "good idea to call her before she gets here, tonight. That's what I'd do. Cuz, otherwise she's going to be really mad tomorrow. Better on the phone, isn't it?" R. 19-34 at 69. The contents of that telephone call are set forth in the district court opinion. *Dassey v. Dittmann*, 201 F.Supp.3d at 980–81. In that

call, Dassey explained why he was confessing (for a lower sentence), told his mother that he did "some of it" but denied having sexual contact with Halbach, denied seeing her in the fire, denied knowing if Avery killed Halbach but asked, "So if I was in the garage cleaning up that stuff on the floor, how much time will I get though for that?" R. 19-35 at 8. He described the liquid on the floor as "reddish-black stuff." *Id.*

When the trial court learned that Kachinsky had allowed Dassey to be interviewed without counsel, it held a hearing on the effectiveness of Kachinsky's counsel. The trial court concluded that Kachinsky's performance was indefensible and deficient under the standards set forth in *Strickland v. Washington*, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864 (1984). The trial judge decertified Kachinsky from being appointed in most felony matters going forward, noting particularly the egregiousness of the fact that Kachinsky had "allowed his 16-year-old client, who previous testimony has disclosed to have cognitive ability within borderline to below average range, to be interviewed by law enforcement officials without his attorney present." R. 19-14 at 22. The decertification was prospective only and thus did not directly apply to Kachinsky's representation of Dassey. Nevertheless, Kachinsky moved to withdraw as Dassey's counsel, and the court granted the motion.

The trial court never learned that Kachinsky and O'Kelly had worked to compel Dassey's confession, videotaped O'Kelly interrogating Dassey, exchanged e-mails describing the whole family as "evil" and "criminals," and, without Dassey's knowledge or consent, sent an e-mail to prosecutors on May 5 indicating where they thought the murder weapon was hidden. No mur-

der weapon was ever found. These facts did not come to light until the state post-conviction hearing.

The May 13 interrogation that grew from the poisoned tree of the O'Kelly interrogation was neither used nor discussed at trial, but the trial court never made any explicit ruling on its admissibility. At oral argument the State was unable to tell this court why the May 13 interview was not used at trial, but we will assume that based on what the State concedes was unacceptable representation by Kachinsky, the State recognized that the May 13 interview had been irreparably poisoned. But the May 13 phone call that resulted from the May 13 interrogation—the phone call the police had urged Dassey to make to his mother on the recorded jail telephone line—was used three times at trial: once to cross examine Dassey; once to cross-examine Dassey's expert psychologist, and in closing argument to undermine Dassey's alibi.

At trial, the centerpiece of the prosecution's case was Dassey's March 1 confession, in which he admitted to participating in the alleged sexual assault and murder of Halbach as well as the disposal of her body. Dassey's defense was that his confession was not true or voluntary, that he accepted his uncle's invitation to a bonfire and then helped him gather items from the salvage yard to burn before helping Avery clean up something that looked like automotive fluid from the garage floor, staining his pants with bleach in the process. Dassey testified that he did not know why he had said the things that he did to the police investigators and that he thought that the investigators had promised that he would not go to jail no matter what he told them.

At trial, Dassey's attorneys presented evidence that the answers in his confession came not from Dassey, but from ideas planted by the investigators, that the investigators continually linked the idea that if Dassey gave them the answers they wanted to hear, that he would be okay and set free, and that Dassey was extremely suggestible and would say things to please investigators and avoid conflict.[3] One example that the jury saw, as they watched the four hour interrogation, concerned Halbach's shooting. By the time of the March 1 confession, forensic examiners had informed law enforcement that Halbach had been shot in the head, but this information was not yet public. If Dassey could tell the investigators that Halbach had been shot in the head, it would have been strong evidence of the veracity of his confession. Dassey had never mentioned that Halbach was shot. Consequently, the investigators repeatedly asked Dassey what else happened to Halbach. After many, many attempts at this, they became more specific and asked "What else did he do to her? … Something with the head." R. 19-25 at 60. But even this clue was not enough to elicit the information they wanted and instead triggered a litany of apparent guesses from Dassey that bordered on the absurd. Dassey guessed that her hair had been cut, that she had been punched, that her throat had been cut—each time being told by the investigators that was not what they were looking for, until finally, Wiegert became frustrated and asked, "All right, I'm just gonna come out and ask you. Who shot her in the head?" *Id.* at 63. This was one of the few scenarios that Dassey had not guessed at that point. As we will explore below, this pattern of suggestive questioning continued throughout the interrogation.

[3] Dassey and Avery were tried separately.

The defense also presented the testimony of a forensic psychologist, Dr. Robert Gordon, who testified that he reviewed many years of Dassey's school records, performed a mental status examination of Dassey, and tested Dassey using various established psychological tests. R. 19-22 at 23–166. His ultimate conclusion was that Dassey had several characteristics likely to make him unusually suggestible in interrogation situations. Dr. Gordon described Dassey's thought process as slow with a mild to moderate mental impairment. His test results demonstrated that Dassey performed on the extreme ends of the scales for social avoidance (being socially passive and withdrawn), social introversion, and social alienation (alienated from society and cut off from those with whom he interacts). Dassey scored in the 99th percentile for social avoidance, the 97th percentile for social introversion and 98.5th percentile for social alienation. On other tests, Dassey's results indicated that he was shy, passive, subdued and dependent—qualities that make one more susceptible to suggestion. Dr. Gordon also testified that Dassey had low average to borderline intelligence (IQ tests ranged from the low 70s to 84, or in the 10-13% percentile of intelligence). Gordon also administered the Gudjonsson Suggestibility Scales, a test developed by a forensic psychologist and a leading expert in confessions, which is designed to measure interrogative suggestibility. The results indicated that Dassey was more suggestible than 95% of the population. Dr. Gordon also explained how, based on all of his characteristics, Dassey would have been manipulable and vulnerable to the particular interrogation techniques used, including mild pressure and leading questions. He noted that a suggestible person would be particularly swayed by false information of guilt, minimization of the seriousness of the crime, blaming other participants for their

influence, or promises that family members will be spared trouble if the suspect confesses. *Id.* at 62. In a short rebuttal, the State presented psychologist Dr. James Armentrout, who expressed discomfort with the suggestibility testing and did not agree with the conclusion that Dassey was particularly suggestible. *Id.* at 177–225.

After five and a half hours of deliberation, the jury found Dassey guilty on all counts. On August 2, 2007, the trial court sentenced Dassey to life in prison for first-degree intentional homicide, not eligible for release to extended supervision until November 1, 2048. R. 19-2 at 15–16. The court further sentenced Dassey to six years of imprisonment for mutilating a corpse, and fourteen years imprisonment for second-degree sexual assault, both to be served concurrently with the murder sentence. *Id.*; *Dassey v. Dittmann*, 201 F.Supp.3d at 985. Dassey appealed his conviction without success.

Dassey moved for post-conviction relief in the trial court claiming that his pre-trial and trial counsel provided ineffective assistance and that his March 1 confession was involuntary. Upon his motion, the Wisconsin state court held a five-day hearing, beginning January 15, 2010, which included the testimony of Dassey's mother, his school psychologist, one of his trial attorneys, the prosecutor, a social psychologist, Kachinsky, O'Kelly, and Richard Leo, an expert on false confessions. The circuit court of Wisconsin denied Dassey post-conviction relief on December 13, 2010.

On appeal of the post-conviction ruling, the Wisconsin Court of Appeals stated that it was evaluating Dassey's claim of involuntariness on the totality of the circumstances, "balancing the defendant's personal

characteristics against the police pressures used to induce the statements." *State v. Dassey*, No. 2010AP 3105, 2013 WI App 30, ¶ 5, *1, 2013 WL 335923 at *1, 346 Wis.2d 278, 827 N.W.2d 928 (table) (Wis. Ct. App., Jan. 30, 2013).[4] That evaluation boiled down to just a few sentences in the following two paragraphs:

> ¶ 6 The trial court found that Dassey had a "low average to borderline" IQ but was in mostly regular-track high school classes; was interviewed while seated on an upholstered couch, never was physically restrained and was offered food, beverages and restroom breaks; was properly Mirandized; and did not appear to be agitated or intimidated at any point in the questioning. The court also found that the investigators used normal speaking tones, with no hectoring, threats or promises of leniency; prodded him to be honest as a reminder of his moral duty to tell the truth; and told him they were "in [his] corner" and would "go to bat" for him to try to achieve a rapport with Dassey and to convince him that being truthful would be in his best interest. The court concluded that Dassey's confession was voluntary and admissible.
>
> ¶ 7 The court's findings are not clearly erroneous. Based on those findings, we also conclude that Dassey has not shown coercion. As long as investigators' statements merely encourage honesty and do not promise leniency, telling a defendant that cooperating would be to his or

[4] We will refer to the state appellate court decision as "*State v. Dassey*" and the federal district court opinion on the writ of habeas corpus as "*Dassey v. Dittmann*."

> her benefit is not coercive conduct. *State v. Berggren*, 2009 WI App 82, ¶ 31, 320 Wis.2d 209, 769 N.W.2d 110. Nor is professing to know facts they actually did not have. *See State v. Triggs*, 2003 WI App 91, ¶¶ 15, 17, 264 Wis.2d 861, 663 N.W.2d 396 (the use of a deceptive tactic like exaggerating strength of evidence against suspect does not necessarily make confession involuntary but instead is a factor to consider in totality of circumstances). The truth of the confession remained for the jury to determine.

State v. Dassey, 2013 WL 335923 at *2. Although the state appellate court listed Dassey's characteristics and some of the circumstances of his interrogation, as we will describe in detail below, it did not do the one thing that the Supreme Court requires which is to use "special caution" when assessing the voluntariness of juvenile confessions. *J.D.B. v. North Carolina*, 564 U.S. 261, 269, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011); *In re Gault*, 387 U.S. 1, 45, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *Gallegos v. Colorado*, 370 U.S. 49, 53–54, 82 S.Ct. 1209, 8 L.Ed.2d 325, (1962); *Haley v. Ohio*, 332 U.S. 596, 599–601, 68 S.Ct. 302, 92 L.Ed. 224 (1948). Paragraph 6 of the appellate court decision lists Dassey's age and intellectual limitations, but then, in paragraph 7, the only paragraph that analyzes whether Dassey's confession was voluntary or coerced, it merely applies the same analysis that would apply to an adult with full intellectual capabilities. Specifically, the state appellate court concluded that tactics such as encouraging honesty and the use of deceptive practices that are not considered coercive when used with adults must not have been coercive when used on the intellectually challenged, 16-year-old Dassey. A state court's evalua-

tion need not be lengthy or detailed, but it must at the very least meet the bare minimum requirements of Supreme Court precedent. The admonition to assess juvenile confession with special caution has no meaning if a state appellate court can merely mention a juvenile's age and then evaluate the voluntariness of his confession in reference to the standard for adults of ordinary intelligence. And if a court can merely state the generic Supreme Court rule without any analysis, then no federal court could ever find that "a decision … involved an unreasonable application of clearly established Federal law" pursuant to 28 U.S.C. § 2254(d)(1).

In juveniles, the evaluation of the totality of the circumstances "includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979); *see also Murdock v. Dorethy*, 846 F.3d 203, 209 (7th Cir. 2017); *Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir. 2002). At no time did the state appellate court *evaluate* any of these factors, other than to merely list some of them. It did not provide any analysis of how Dassey's personal characteristics played a role in the interrogation. It did not consider Dassey's suggestibility, did not discuss the fact that he was unrepresented and without a parent's assistance, and it did not consider whether Dassey's low IQ and learning disabilities may have affected how he interpreted statements made by interrogators. The court never evaluated Dassey's capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. In short, the state appellate court did not

identify the correct test at all and did not apply it correctly.

The state appellate court also declined to overrule the lower court's decision denying Dassey's claim of ineffective assistance of counsel. As for Kachinsky's conceded deficiencies, the court stated that he was "long gone before Dassey's trial or sentencing. Dassey has not convinced us that Kachinsky's actions amounted to an actual conflict and that Kachinsky's advocacy was adversely affected, such that it was detrimental to Dassey's interests." *Id.* at *4. And in reference to trial counsel's performance, the appellate court held that the trial court had not erred when it determined that each of Dassey's claims of ineffective assistance of trial counsel was based on his attorneys' reasonable tactical strategies. *Id.* at *6.

After the Wisconsin Supreme Court denied his petition for review, Dassey filed a petition for a writ of habeas corpus in the federal district court pursuant to 28 U.S.C. § 2254, claiming that he was denied his rights to effective assistance of counsel under the Sixth Amendment of the United States Constitution, and that his March 1, 2006 confession was obtained in violation of the Fifth Amendment. The district court concluded that although Kachinsky's misconduct might support a claim for relief under *Strickland*, Dassey made his claims regarding Kachinsky under *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), and case law demarcating the limits of the *Sullivan* test prohibit the court from granting Dassey's habeas relief claim on that ground. *Dassey*, 201 F.Supp.3d at 991–92. It further concluded that the state court of appeals' decision as to the admissibility of the May 13 telephone call between Dassey and his mother was not contrary to clearly established federal

law or based on an unreasonable determination of the facts. *Id.* at 992. However, the district court concluded that "the confession Dassey gave to the police on March 1, 2006 was so clearly involuntary in a constitutional sense that the court of appeals' decision to the contrary was an unreasonable application of clearly established federal law," and that the admission of the confession was not harmless error. *Id.* at 1005-06. The district court ordered the State to release Dassey from custody unless, within 90 days, the State initiated proceedings to retry him. *Id.* at 1006. On November 17, 2016, this court stayed the district court's order releasing Dassey pending resolution of this appeal. Court of Appeals Record, R. 22.

II.

A. The AEDPA and habeas relief.

The Antiterrorism and Effective Death Penalty Act of 1996 governs our review of a state court conviction and limits it considerably. It "erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court, requiring them to show that the state court's ruling … was so lacking in justification that there was an error … beyond any possibility for fair minded disagreement." *Burt v. Titlow*, —U.S.—, 134 S.Ct. 10, 12, 187 L.Ed.2d 348 (2013). "[W]e may not grant relief where reasonable minds could differ over the correct application of legal principles, and we must evaluate that application on the basis of the law that was 'clearly established' at the time of the state court adjudication." *Elmore v. Holbrook*, —U.S.—, 137 S.Ct. 3, 7, 196 L.Ed.2d 272 (2016). A federal court reviewing a habeas petition must examine the decision of the last state court to rule on the merits of the issue, which in this case is the state

appellate court ruling on post-conviction relief. *Makiel v. Butler*, 782 F.3d 882, 896 (7th Cir. 2015).

Under the AEDPA, Dassey must demonstrate that the state court proceedings "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) and (2). Under § 2254(d)(1), a state-court decision is contrary to Supreme Court precedent if it is inconsistent with the Supreme Court's treatment of a materially identical set of facts, or if the state court applied a legal standard that is inconsistent with the rule set forth in the relevant Supreme Court precedent. *Bell v. Cone*, 535 U.S. 685, 694, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) (citing *Williams v. Taylor*, 529 U.S. 362, 405–06, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). And a state-court decision constitutes an unreasonable application of Supreme Court precedent within the meaning of section 2254(d)(1) when, although it identifies the correct legal rule, it applies that rule to the facts in a way that is objectively unreasonable. *White v. Woodall*, —U.S.—, 134 S.Ct. 1697, 1705, 188 L.Ed.2d 698 (2014).

Under § 2254(d)(2), a state court's decision involves an unreasonable determination of the facts if it "rests upon fact-finding that ignores the clear and convincing weight of the evidence." *Corcoran v. Neal*, 783 F.3d 676, 683 (7th Cir. 2015), *cert. denied*, —U.S.—, 136 S.Ct. 1493, 194 L.Ed.2d 589 (2016); *see also Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (a federal court can, guided by AEDPA, conclude that a state court's decision was unreasonable or

that the factual premise was incorrect by clear and convincing evidence).

In granting the writ, the district court specifically noted that it did not reach its conclusion to declare the state court ruling unreasonable lightly. It was, as we are, mindful of the extremely restricted nature of habeas relief under the AEDPA, and that mindfulness was apparent from the great care the district court took in conscribing its ruling to the limited role a federal court can play in reviewing the petitioner's writ. *Dassey v. Dittmann*, 201 F.Supp.3d at 986–87, 1005. The district court exhaustively surveyed Supreme Court precedent and continuously held its analysis up to the light of habeas restraint. *See Id.* at 986–87, 990–91, 1003–05. "Deference," however, "does not by definition preclude relief." *Miller-El v. Dretke*, 545 U.S. 231, 240, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). Section 2254(d)(1) allows for a grant of relief when a decision involved an unreasonable application of clearly established Federal law. And if that section has any meaning, then it must mean that a state court evaluating the voluntariness of a juvenile confession must apply the factors that the Supreme Court has identified as relevant to juvenile confessions.

Moreover, the district court's grant of the writ was firmly linked to its determination under § 2254 (d)(2) that "the state court's finding that there were no promises of leniency was against the clear and convincing weight of the evidence." *Dassey v. Dittmann*, 201 F.Supp.3d at 1003 (internal citations omitted). "Concluding that the investigators never made any such promises was no minor error but rather a fact that was central to the court's voluntariness finding." *Id.* The district court found that the determination was not merely incorrect, but unreasonable. *Id.* Secondly, the

court concluded that the state court had unreasonably applied clearly established federal law by ignoring the totality of the circumstances in assessing the voluntariness of Dassey's confession. *Id.* at 1004. The district court noted that although the state appellate court articulated the correct standard (but only as it applied to adults), it ignored several determinative factors outright and, most importantly, focused on the statements of the investigators in isolation rather than assessing them in view of Dassey's personal characteristics or their cumulative effect on the voluntariness of Dassey's confession. *Id.* at 1004.

We, like the district court, have kept the strict constraints of the AEDPA forefront in our minds as we proceed with our *de novo* review of the district court's decision to grant the habeas petition. *Rodriguez v. Gossett*, 842 F.3d 531, 537 (7th Cir. 2016).

Yet even given the constraints of the AEDPA, we must conclude that the state court's determination was an unreasonable application of Supreme Court precedent. Although it identified the general rule that a court must consider the totality of the circumstances, it failed to apply the "special caution" required in juvenile confessions and failed to evaluate the totality factors for juveniles as required. Furthermore, the state appellate court applied the generic totality of the circumstances test to the facts in a way that was objectively unreasonable. *See* 28 U.S.C. § 2254(d)(1). The trial court's determination of the facts was also unreasonable as it ignored the clear and convincing weight of the evidence. *See* 28 U.S.C. § 2254(d)(2); *Miller-El v. Cockrell*, 537 U.S. at 340, 123 S.Ct. 1029. Although the state appellate court noted that it was obligated to consider the totality of the circumstances, it did not do so. As we noted, in juveniles, the evaluation of the totality

of the circumstances "includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Fare*, 442 U.S. at 725, 99 S.Ct. 2560; *see also Murdock*, 846 F.3d at 209; *Hardaway*, 302 F.3d at 762. The state appellate court *listed* Dassey's age, education and IQ, but it never, at any point, evaluated those factors to determine whether they affected the voluntariness of Dassey's confession. Likewise the appellate court analyzed *some* of the investigators' interrogation techniques, but it never evaluated or assessed how those techniques affected the voluntariness of an intellectually challenged juvenile's confession. Instead, the state appellate court merely stated that, in cases involving adults of ordinary intelligence, encouraging honesty and using deceptive practices does not make a confession involuntary.

Moreover, the state appellate court ignored the many signs that Dassey was trying to please the interrogators and avoid conflict and a clear-cut pattern of fact-feeding linked to promises that, together, resulted in a situation where Dassey's will clearly was overborne. That pattern was as follows: the investigators emphasized, ad nauseum, that in order to be "okay" to "get things over with" to be "set free" Dassey had to be "honest." Yet throughout the interrogation it became clear that "honesty" meant those things that the investigators wanted Dassey to say. Whenever Dassey reported a fact that did not fit with the investigators' theory, he was chastised and told that he would not be "okay" unless he told the truth. And this pattern continued until Dassey finally voiced what the investigators wanted him to say, seemingly by guessing, or the

investigators fed him the information they wanted. Once he spoke "correctly," the investigators anchored the story by telling Dassey, "now we believe you" to signal to him that this was the version that would allow him to be "okay," or "set him free." By doing this—by linking promises to the words that the investigators wanted to hear, or allowing Dassey to avoid confrontation by telling the investigators what they wanted to hear—the confession became a story crafted by the investigators instead of by Dassey. And, as we will see, it was a confession that therefore cannot not be viewed as voluntary.

In this case the analysis of 2254(d)(1) and 2254(d)(2) overlap. The state court unreasonably applied the rule requiring it to consider the totality of the circumstances to the facts of the case, and those were the very same facts that the state court determined unreasonably.

B. Voluntariness in confessions.

1. The constitutional requirement of voluntariness.

False confessions are anathema to the judicial process. They are not beneficial to the prosecutor whose goal is to find, punish, and incapacitate the actual criminal, they are not beneficial to grieving relatives and friends who want to bring justice to the perpetrator of a crime, and, of course, they are of no benefit to a wrongfully accused defendant. For these reasons it is obvious why coercive tactics that lead to a false confession would be an affront to our judicial system. But the use of involuntary confessions violates the Constitution even when they are confessions of truth (where, in fact, it is possible to know such a thing). "The aim of the requirement of due process is not to exclude presump-

tively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986) (citing *Lisenba v. California*, 314 U.S. 219, 236, 62 S.Ct. 280, 86 L.Ed. 166 (1941)). The Supreme Court has long held that "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment." *Miller v. Fenton*, 474 U.S. 104, 109, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985) (citing *Brown v. Mississippi*, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936)). Coerced confessions also violate the Fifth Amendment's right against self-incrimination. *Withrow v. Williams*, 507 U.S. 680, 688, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993). As the Supreme Court noted, "[A] criminal law system which comes to depend on the confession will, in the long run, be less reliable and more subject to abuses than a system relying on independent investigation." *Berghuis v. Thompkins*, 560 U.S. 370, 403–04, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010) (internal citations omitted).

"[T]he ultimate issue of 'voluntariness' is a legal question requiring independent federal determination." *Arizona v. Fulminante*, 499 U.S. 279, 287, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); *Miller v. Fenton*, 474 U.S. at 110, 106 S.Ct. 445. And under the AEDPA, this court must ask whether the Wisconsin appellate court's decision concluding that Dassey's confession was not involuntary "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," (28 U.S.C. § 2254(d)(1); *Bobby v. Dixon*, 565 U.S. 23, 27, 132 S.Ct. 26, 181 L.Ed.2d 328, (2011)), or

whether it was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(2).

2. The risks of coercion on voluntariness.

Historically, courts have looked at traditional modes of coercion in evaluating whether the defendant voluntarily confessed—that is, whether the suspect was tortured, beaten, or deprived of sleep, food or water. The Supreme Court and the community of experts on confessions have long recognized, however, that psychological coercion can be as powerful a tool as physical coercion. *Fulminante*, 499 U.S. at 287, 111 S.Ct. 1246.

> The primary cause of police-induced false confessions is the use of psychologically coercive police interrogation methods. These include methods that were once identified with the old "third degree," such as deprivation (of food, sleep, water, or access to bathroom facilities, for example), incommunicado interrogation, and extreme induced exhaustion and fatigue. Since the 1940s, however, these techniques have become rare in domestic police interrogations. Instead, when today's police interrogators employ psychologically coercive techniques, they usually consist of implicit or explicit promises of leniency and implicit or explicit threats of harsher treatment in combination with other interrogation techniques such as accusation, repetition, attacks on denials, and false evidence ploys.

Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After A Century of Research*, 100 J. Crim. L. & Criminology 825, 846 (2010).

In closing arguments at trial, the state argued that "people who are innocent don't confess." R. 19-23 at 144. We know, however, that innocent people do in fact confess and do so with shocking regularity. The National Registry of Exonerations has collected data on 1,994 exonerations in the United States since 1989 (as of February 26, 2017), and that data includes 227 cases of innocent people who falsely confessed.[5] This research indicates that false confessions (defined as cases in which indisputably innocent individuals confessed to crimes they did not commit) occur in anywhere from 15-24% of wrongful convictions cases. Samuel Gross & Michael Shaffer, *Exoneration in the United States*, 1989-2012: Report by the National Registry of Exonerations, 60.[6]

3. The heightened risks of coercion for youth and the intellectually disabled.

Nowhere is the risk of involuntary and false confessions higher than with youth and the mentally or intellectually disabled. It is for this reason that the Supreme Court has cautioned courts to exercise "special caution" when assessing the voluntariness of juvenile confessions. *J.D.B.*, 564 U.S. at 269, 131 S.Ct. 2394; *In*

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[5] The National Registry of Exonerations, False Confessions, http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2016.pdf at p.3; and http://www.law.umich.edu/special/exoneration/Pages/false-confessions.aspx.

The registry defines exoneration based on specific criteria available at http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx. The summary definition is as follows: an exoneration occurs when a person who has been convicted of a crime is officially cleared based on new evidence of innocence. *Id.*

[6] https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf.

re Gault, 387 U.S. at 45, 87 S.Ct. 1428; *Gallegos*, 370 U.S. at 53–54, 82 S.Ct. 1209, (1962); *Haley*, 332 U.S. at 599–601, 68 S.Ct. 302.

> Indeed, the pressure of custodial interrogation is so immense that it "can induce a frighteningly high percentage of people to confess to crimes they never committed." That risk is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile.

J.D.B., 564 U.S. at 269, 131 S.Ct. 2394 (internal citations omitted). In one of the seminal juvenile coerced-confession cases, the Court noted that interrogators must treat minors more carefully when questioning them as "[t]hat which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." *Haley*, 332 U.S. at 599, 68 S.Ct. 302.

As the amicus curiae and related articles demonstrate, data supports the Supreme Court's admonition for special care. A survey of false confession cases from 1989–2012 found that 42% of exonerated defendants who were younger than 18 at the time of the crime confessed, as did 75% of exonerees who were mentally ill or mentally retarded, compared to 8% of adults with no known mental disabilities. Samuel Gross & Michael Shaffer, *Exoneration in the United States*, 1989-2012: Report by the National Registry of Exonerations, 58.[7] Overall, one sixth of the exonerees were juveniles, mentally disabled, or both, but they accounted for 59% of false confessions. *Id.* In another study of those exonerated by DNA, juveniles accounted for one third of

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[7] https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf.

all false confessions. Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1094 (2010). Indeed, age and intellectual disability are the two most commonly cited characteristics of suspects who confess falsely. Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson, and Nicholas Montgomery, *Exonerations in the United States 1989 through 2003*, 95 J. Crim. L. & Criminology 523, 545 (2005).[8] Dassey suffered under the weight of both youth and intellectual deficit and thus the state court was required, by a long history of Supreme Court precedent, to assess the voluntariness of his confession with great care, yet the state appellate court did not do so. Although it mentioned Dassey's age and low IQ it never made any assessment about how the interrogation techniques could have affected a person with these characteristics.

4. The totality of the circumstances requirement for assessing voluntariness.

There is no magic formula or even an enumerated list for assessing the voluntariness of a confession. Such an assessment depends, instead, upon the totality of the circumstances. *Withrow*, 507 U.S. at 693, 113 S.Ct. 1745; *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). An incriminating statement is voluntary "if, in the totality of circumstances, it is the product of a rational intellect and free will and not the result of physical abuse, psychological intimidation, or deceptive interrogation tactics that have overcome the defendant's free will." *Carrion v. Butler*, 835 F.3d 764, 775 (7th Cir. 2016). Police conduct may be unduly coercive because of the inherent nature of the conduct itself or because "in the particular

[8] http://scholarlycommons.law.northwestern.edu/jclc/vol95/iss2/5.

circumstances of the case, the confession is unlikely to have been the product of a free and rational will." *Miller v. Fenton*, 474 U.S. at 110, 106 S.Ct. 445. "The admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne." *Id.* at 116, 106 S.Ct. 445 (emphasis in original). In short, a court must look at the interplay between the characteristics of the defendant and the nature of the interrogation. A simple recitation of each, as the state appellate court did here, is not sufficient.

Factors that courts consider as part of the totality of the circumstances include the length of the interrogation, its location, its continuity, the defendant's maturity, education, physical condition, mental health, and whether the police advised the defendant of his right to remain silent and have counsel present. *Withrow*, 507 U.S. at 693–94, 113 S.Ct. 1745. In juveniles, as we have noted, the evaluation of the totality of the circumstances "includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Fare*, 442 U.S. at 725, 99 S.Ct. 2560; *see also Murdock*, 846 F.3d at 209; *Hardaway*, 302 F.3d at 762.

The state appellate court did not give Dassey's confession the consideration required when evaluating the voluntariness of a confession of an intellectually disabled juvenile.

5. Cases as guideposts for a voluntariness assessment.

By surveying the Supreme Court cases on the voluntariness of juvenile confessions one can see how much the unique characteristics of both the defendant and the interrogation play into the assessment of voluntariness. For this reason, other cases can only act as broad guideposts. "Determination of whether a statement is involuntary requires more than a mere color-matching of cases. It requires careful evaluation of all the circumstances of the interrogation." *Mincey v. Arizona*, 437 U.S. 385, 401, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) (internal citations omitted).

For example, in *Haley*, the Supreme Court held that the methods used in obtaining the confession of a fifteen-year-old boy could not be squared with the due process commanded by the Fourteenth Amendment. *Haley*, 332 U.S. at 599, 68 S.Ct. 302. Haley was arrested at midnight and interrogated for five straight hours by six officers in relays, after which time he confessed without being told his rights. *Id.* He was then informed of his rights and signed a written confession. Only after another three days of isolation did the police allow him access to his parents or a lawyer. *Id.* That confession, the court found, could not be deemed voluntarily made.

Likewise for fourteen-year-old Robert Gallegos, who was picked up by the police for assault and robbery and immediately admitted to a crime. *Gallegos*, 370 U.S. at 50, 82 S.Ct. 1209. He was locked in juvenile hall for five days without access to a lawyer or his parents, despite his mother's attempts to see him, after which time he signed a confession. *Id.* The court concluded that a fourteen year old in those circumstances

would have had no way to know what the consequences of his confession were without advice as to his rights. *Id.* at 54, 82 S.Ct. 1209.

In contrast, in *Fare*, a sixteen-year-old with rather extensive prior experience in the criminal system confessed to murder after being informed of his *Miranda* rights. *Fare*, 442 U.S. at 709–11, 99 S.Ct. 2560. The Supreme Court found that "there is no indication that he was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be. He was not worn down by improper interrogation tactics or lengthy questioning or by trickery or deceit." *Id.* at 726–27, 99 S.Ct. 2560. And therefore, based on the totality of the circumstances, the confession was not coerced and thus admissible. *Id.* at 727, 99 S.Ct. 2560.

The cases from this circuit also demonstrate how we have applied Supreme Court precedent to determine the reasonableness of a state court's determination of voluntariness. Derrick Hardaway was only fourteen years old when the police roused him from his sleep at 8:00 a.m., and took him to the police station without his parents. *Hardaway*, 302 F.3d at 760. He was not handcuffed and remained in an unlocked interrogation room until he was interviewed at 10:30 am and then interrogated for six hours, given a break for a few hours, and then interrogated again for another four hours. A youth advocate joined the interrogation but never once spoke up to aid Hardaway. A clearly torn panel of this court could not find that the state appellate court erred when it held that the confession was voluntary, even if we might have come to a different conclusion had we been deciding the matter ourselves in the first instance.

> There is no doubt that Hardaway's youth, the lack of a friendly adult, and the duration of his interrogation are strong factors militating against the voluntariness of his confession; indeed, it seems to us that on balance the confession of a 14–year–old obtained in those circumstances may be inherently involuntary.

Id. at 767. Nevertheless, we concluded, the state court had considered the relevant factors and because "the weighing of factors under the totality of circumstances test is a subject on which reasonable minds could differ," we could not hold that the state court had been unreasonable. *Id.* The state court, we explained, noted that the officers did not psychologically trick the defendant or misrepresent evidence, but rather Hardaway confessed after being confronted with truthful contradictory evidence. The state court carefully considered Hardaway's nineteen previous encounters with law enforcement, the fact that the police not only read Hardaway his rights but that Hardaway was able to articulate them back in his own words, and that Hardaway did not have any mental incapacity or other mental infirmities. *Id.* at 767–78. Thus the state court seemed to have considered sufficiently the interaction between Hardaway's limitations and the interrogation.

Similarly, in *Carter v. Thompson*, 690 F.3d 837, 844 (7th Cir. 2012), despite the fact that we were "unsettled" that a 16-year-old was in the police station for fifty-five hours without a blanket, pillow, change of clothes, or access to a shower, and without being told she could leave, we could not find that the state courts had been unreasonable in finding that her confession was voluntary. *Id.* The state court had considered all of these factors, along with the fact that the police read Carter her rights, her parents were with her for two of

her three confessions, and her confession occurred impromptu, as she was on her way to the bathroom. *Id.*

Finally, in *Etherly v. Davis*, 619 F.3d 654, 662 (7th Cir. 2010), *as amended on denial of reh'g and reh'g en banc* (Oct. 15, 2010), we reversed a district court grant of a writ of habeas corpus, disagreeing with the lower court's assessment that the Illinois appellate court had not properly addressed and considered all of the relevant factors in its analysis, noting that reasonable jurists could disagree about the weight to assign to each factor. *Id.* The Illinois appellate court, we concluded, evaluated and discussed the importance of the defendant's age, whether a friendly adult was present, his intellectual disability, lack of criminal background, whether police engaged in physical or psychological coercion, and the defendant's assertion that he understood his Miranda rights. *Id.* at 662. And despite agreeing that the state appellate court had been unreasonable in concluding that a fifteen-year-old, with no prior criminal experience, should be expected to seek the advice of a youth officer, this court concluded that this "lone error is not of such magnitude as to result in an unreasonable application of Supreme Court precedent under AEDPA." *Id.* at 662–63.

In general, our cases demonstrate that we show great deference to state court adjudications where it is clear that the state court considered the totality of the circumstances cumulatively, in light of the defendant's age and intellect, and without omitting or overlooking relevant factors bearing on the voluntariness of a juvenile confession. *Murdock*, 846 F.3d at 210–11; *Gilbert v. Merch.*, 488 F.3d 780, 794 (7th Cir. 2007); *Ruvalcaba v. Chandler*, 416 F.3d 555, 561–62 (7th Cir. 2005).

Unlike in the cases above, where the state court sufficiently considered a totality of the circumstances, as cases like *Fare* and *Carter* require (*Fare*, 442 U.S. at 725, 99 S.Ct. 2560; *Carter*, 690 F.3d at 843), we see no similar evidence that the state court did so in Dassey's case. For example, despite the Supreme Court's emphasis on the importance of access to an adult ally in *Gallegos*, the Wisconsin state court in this case never discussed the fact that Dassey was alone, other than to note that "Dassey's mother, Barbara Janda, agreed to the second interview but declined the offer to accompany Dassey." *State v. Dassey*, 2013 WL 335923 at *1.[9]

Moreover, in this case, in comparison to *Fare* and *Hardaway* (*Fare*, 442 U.S. at 725, 99 S.Ct. 2560; *Hardaway*, 302 F.3d at 767), the state appellate court did not view interrogation techniques as a totality factor overlaid with Dassey's age and intellect. It merely looked at the investigators' comments in isolation and opined, as it would with an adult of ordinary intelligence, that "[a]s long as investigators' statements merely encourage honesty and do not promise leniency, telling a defendant that cooperating would be to his or her benefit is not coercive conduct." *State v. Dassey*, 2013 WL 335923 at *2.

And unlike in *Etherly* where the state court made a single error—unreasonably concluding that the absence of a youth officer was inconsequential (*Etherly*, 619 F.3d at 662–63)—the state court's error here was not a solitary one, but rather a failure of the very essence of Supreme Court precedent requiring a court to consider

[9] As described in the facts, Janda claimed she was cajoled out of sitting in the interview. R. 19-30 at 155. She remained instead, in the waiting room of the police station.

the totality of the circumstances and to consider juvenile confessions with special caution.

Where a determination of voluntariness is so outside the realm of reasonableness, a federal court may grant the writ, as it did in *A.M. v. Butler*, 360 F.3d 787, 801 (7th Cir. 2004). The court in *A.M.* recognized that "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief." *Id.* (citing *Miller–El v. Cockrell*, 537 U.S. at 340, 123 S.Ct. 1029). And it concluded that the confession of an inexperienced 10-year-old who had no adult advocate was simply not reliable where the detective continually challenged the boy's statements and accused him of lying—a legitimate interrogation technique in adults, but one likely to lead a young boy to confess to anything. *A.M.*, 360 F.3d at 800–01. And in fact, that is just what occurred in this case—detectives continually challenged Dassey's statements and accused him of lying until, as we will describe, his confession became a litany of inconsistencies—shirts that changed color, fires that began and ended at different times, garbage bags that sat in burning fires without melting, trucks that were seen in garages and then not seen in garages, bloody crime scenes without a trace of blood remaining, metal handcuffs that left no marks on the bed posts, etc. But again we emphasize that because of the requirements of the totality of the circumstances, these cases provide only the broadest of guidelines on determining voluntariness, *see Mincey*, 437 U.S. at 401, 98 S.Ct. 2408, and our full analysis of the voluntariness of the confession, toward the end of this opinion, will demonstrate why no reasonable court could have come to the conclusion that Dassey's confession was voluntary. As will become clear through the entirety of this opinion, we can point

to no solitary statement, factor, or interrogation question that rendered Dassey's confession involuntary (although there were certainly some individual leading questions that came close), but rather it was death by a thousand cuts. Because of the cumulative effect of these coercive techniques—the leading, the fact-feeding, the false promises, the manipulation of Dassey's desire to please, the physical, fatherly assurances as Wiegert touched Dassey's knee etc.—no reasonable court could have any confidence that this was a voluntary confession.

6. No single factor is determinative.

a. Courts must pay close attention to voluntariness when the defendant has no adult ally present.

As we have now concluded, the totality test prohibits any one factor from being determinative of voluntariness. *Murdock*, 846 F.3d at 209. Some courts, including this one, nevertheless have found particularly distressing the idea of minors waiving rights and confessing without an adult ally present. Those courts therefore have toyed with the idea of a per se rule that children under a certain age cannot waive rights or make a voluntary confession without a parent, guardian, or legal representative present. *See e.g.*, *Hardaway*, 302 F.3d at 764. Our conclusion in *Hardaway*, however, was that there is no support in clearly established federal law for such a per se rule where Supreme Court precedent has been clear that courts instead must base their assessment on the "totality of the circumstances." *Id.* (*citing Fare*, 442 U.S. at 726, 99 S.Ct. 2560). "Youth," we concluded, "remains a critical factor for our consideration, and the younger the child the more carefully we will scrutinize police questioning tactics to determine if excessive coercion or intimidation or sim-

ple immaturity that would not affect an adult has tainted the juvenile's confession." *Hardaway*, 302 F.3d at 765. *See also*, *J.D.B. v. North Carolina*, 564 U.S. 261, 269, 280, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011); *In re Gault*, 387 U.S. at 45, 87 S.Ct. 1428.

The state appellate court applied no extra care to Dassey's confession based on his lack of an adult advocate. Youth was not a "critical factor" in its analysis; indeed it was not a factor at all. It did not consider the interrogation techniques in light of Dassey's lack of an adult advocate nor acknowledge how Dassey's clear confusion during parts of the interview could have been aided by an adult ally who might have noticed Dassey's confusion and the manipulation. It did not mention how, immediately after Dassey's mother came to his side, he suddenly realized that the investigators "got to my head," and he worried that he would be caught in a lie—having confessed to a crime he did not commit. He asks his mother, "What'd happen if he says something his story's different. Wh-he says he, he admits to doing it? … Like if his story's different, like I never did nothin' or somethin.'" R. 19-25 at 148.

b. Courts must pay close attention to voluntariness when manipulative interrogation techniques are used, particularly on the young and intellectually challenged.

Psychologically manipulative interrogation techniques, likewise, are not per se coercive, but among the circumstances that a court must evaluate in total to determine whether a particular defendant's free will has been overcome. To be clear, many manipulative interrogation techniques, in and of themselves, are not unconstitutional. "Trickery, deceit, even impersonation do not render a confession inadmissible." *United States*

v. Villalpando, 588 F.3d 1124, 1128 (7th Cir. 2009) (citing *U.S. v. Kontny*, 238 F.3d 815, 817 (7th Cir. 2001)). The law permits the police to "pressure and cajole, conceal material facts, and actively mislead—all up to limits." *United States v. Rutledge*, 900 F.2d 1127, 1131 (7th Cir. 1990). That limit is exceeded, however, when the government gives the suspect information that destroys his ability to make a rational choice "for example by promising him that if he confesses he will be set free." *Aleman v. Vill. of Hanover Park*, 662 F.3d 897, 906 (7th Cir. 2011). And, as we describe further below, those limits depend on the characteristics of the defendant. False promises that a suspect will be treated leniently by the courts, we have noted, have "the unique potential to make a decision to speak irrational and the resulting confession unreliable … because of the way it realigns a suspect's incentives during interrogation." *Villalpando*, 588 F.3d at 1128; *United States v. Montgomery*, 555 F.3d 623, 629 (7th Cir. 2009) ("a false promise of leniency may be sufficient to overcome a person's ability to make a rational decision about the courses open to him."). *See also United States v. Nichols*, 847 F.3d 851, 857 (7th Cir. 2017) ("a government agent's false promise of leniency may render a statement involuntary."); *Montgomery*, 555 F.3d at 629 ("[g]iven the right circumstances, a false promise of leniency may be sufficient to overcome a person's ability to make a rational decision about the courses open to him."); *Hadley v. Williams*, 368 F.3d 747, 749 (7th Cir. 2004) (police may not extract a confession in exchange for a false promise to set the defendant free).

We attach no nefarious purposes to the investigators who were using established interrogation tech-

niques.[10] And, in any event, the investigator's purpose or subjective view of the coercive nature of the interrogation is not relevant. It is how those interrogation techniques interact with the defendant's characteristics that determines the voluntariness of a confession. A seasoned criminal who has volleyed with interrogators many times before may not be swayed at all by an explicit but false claim of leniency, but a young, unsophisticated juvenile might believe, with just the slightest hint of an offer of leniency, that if he confesses to murder "God and the police would forgive him and he could go home in time for his brother's birthday party." *A.M.*, 360 F.3d at 794.

The Constitution requires that a confession be voluntarily given. The dissent criticizes the panel opinion for relying on the subjective perception of a defendant in determining the voluntariness of his confession, but this is, in fact, what the totality of the circumstances test requires. A thirty-year-old with a law degree would not believe a police officer's assurance that if he confesses to murder he will go punishment free, but yet the ten-year-old, A.M. did just that. *Id.* A consideration of the totality of the circumstances requires the court to consider "whether the techniques for extracting the statements, as applied to *this* suspect, are com-

[10] Apparently these techniques are not still *de rigueur*, as Dassey's interrogation is now used as a "what not to do" in at least one certified interrogation course. *See* Brief of Amici Curiae, Juvenile Law Center, Wicklander-Zulawski & Associates, Inc. and Professor Brandon Garrett, In Support of Appellee and Affirmance, at p. 5–6 (citing https://www.wz.com/2016/08/19/netflixs-making-a-murderer-involuntary-confession-an-interrogators-perspective/#comment-1266). Of course our consideration of the constitutionality of the interrogation does not hinge on whether companies teaching these courses believe the technique to be effective or proper.

patible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne." *Miller v. Fenton*, 474 U.S. at 116, 106 S.Ct. 445 (emphasis added). We need not accept a defendant's after-the-fact proclamation of a lack of voluntariness, but the totality of the circumstances framework allows a court to consider the evidence about the defendant's ability to comprehend and contemporaneous evidence of what he actually did or did not understand. If the Constitution requires that a confession be voluntary, then it can only be so if the particular defendant sitting in the interrogation was not, in fact, coerced.

In other words, the totality of the circumstances test dictates that coercive interrogation on the one hand, and suspect suggestibility, on the other, are on inverse sliding scales—the more vulnerable or suggestible a suspect, the less coercion it will take to overcome her free will. This is not a statement of a new test, but rather the logical conclusion of the totality of the circumstances review itself. Therefore, to determine whether a promise is coercive as a legal matter, a court cannot consider the promise alone, but rather the promise in conjunction with the characteristics of the suspect. Again, the Supreme Court's seminal case advises, "[t]hat which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." *Haley*, 332 U.S. at 599, 68 S.Ct. 302. And the Supreme Court precedent requires lower courts to consider interrogation techniques as applied to the particular defendant at hand. *Miller v. Fenton*, 474 U.S. at 116, 106 S.Ct. 445.

The dissent accuses us of redefining what counts as a false promise of leniency, noting statements by the

police that passed muster with courts in other cases. The point of the totality test, however, is not to evaluate any promise of leniency in isolation, but rather in light of the specific characteristics of the defendant, that is, "as applied to *this* suspect." *Id.* (emphasis added). The career criminal will not interpret a promise in the same manner as an inexperienced and intellectually disabled teen. The state court, however, did not view the coerciveness of the interrogation techniques in light of Dassey's personal characteristics as the totality test requires.

The dissent states that the majority decision will make police investigations "considerably more difficult," and asks "what should police do the next time an investigation leads to a teenager with some intellectual challenge?" (post at 984). To the extent that the result makes police investigations more difficult, it is not because of any change we have made to the law, but rather because the Supreme Court requires a totality of the circumstances framework that gives special caution to confessions of juveniles, the intellectually disabled and other defendants with vulnerable characteristics.

The benefits of the Supreme Court's requirements expand beyond protecting the constitutional rights of defendants. It is of no help to the advancement of justice and to removing dangerous killers from the streets, if police coerce confessions from innocent suspects. Teresa Halbach and her family are not served if the wrong defendant spends his life in prison. Teresa's family deserves to know that the police have found and incapacitated the right perpetrator—that no other family will be forced to grieve as they have because a brutal killer remains at large. The answer to the dissent's inquiry about what police officers are to do in such a situation as Dassey's, therefore, comes from a long line

of requirements that courts have established for protecting the rights of defendants during police interrogations. Specifically, in such a case, the police should, as the Supreme Court requires, ensure that such a suspect "has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Fare*, 442 U.S. at 725, 99 S.Ct. 2560; *see also Murdock*, 846 F.3d at 209; *Hardaway*, 302 F.3d at 762. And a court reviewing a challenge to a confession must assess the totality of the circumstances to assure itself that the defendant voluntarily confessed. This the appellate court did not do.

7. The state court in this case did not apply a totality of the circumstances test.

The state court of appeals in this case affirmed the trial court's determination that Dassey's confession was not involuntary. *State v. Dassey*, 2013 WL 335923 at *2. As the last state court to speak to the issue, it is that court's decision that we review. *Makiel*, 782 F.3d at 896. As set forth in the fact section above, after noting the requirement to consider the voluntariness of the confession using the totality of the circumstances test, the state appellate court addressed the voluntariness of the confession in two short paragraphs. The first paragraph (¶ 6) consisted of a list of Dassey's characteristics and some general characteristics of the interrogation including: Dassey's limited intelligence, the comfortable interrogation room, the *Miranda* warnings, his affect during the interview, the investigators' normal speaking tones, the lack of "hectoring, threats or promises of leniency," the pleas for honesty, and the investigators' attempts to build rapport. *State v. Dassey*, 2013 WL 335923 at *2. In the second paragraph (¶ 7), the court of appeals concluded that the trial

court's finding of no coercion was not clearly erroneous. "As long as investigators statements merely encourage honesty and do not promise leniency," the court reasoned, "telling a defendant that cooperating would be to his or her benefit is not coercive conduct. Nor is professing to know facts they actually did not have." *Id.*

Although the statements in this second paragraph are accurate as applied to an adult of ordinary intelligence, they do not acknowledge the court's obligation to consider juvenile confessions with caution and they do nothing to evaluate the totality of the circumstances. An evaluation requires that the court view the interrogation tactics in light of the defendant's situation and characteristics. A court has not applied the totality of the circumstances test simply by stating its name and by noting that, in the ordinary course of dealings, a police officer may use deceptive techniques. Applying a rule of law does not require much, but it requires more than just parroting the words of the rule.

In addition to failing to consider the factors in light of the totality of the circumstances, the state appellate court failed to consider some key factors at all, even individually. The dissent correctly notes that a state court need not give all of its reasoning for its outcome. And the totality of the circumstances does indeed give state courts a somewhat wide berth for their considerations. It is true that "[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004). But the generality of the rule does not mean that a state court may forsake it completely, and it does not eradicate the general notion that "The standard [for habeas corpus relief] is demanding but not insatiable …

deference does not by definition preclude relief." *Miller–El v. Dretke*, 545 U.S. at 240, 125 S.Ct. 2317.

If the totality of the circumstances standard means anything, it means that a state court must, at a bare minimum, do what the rule requires and consider the totality of the circumstances. A state court need not say much, but the less it says, the less a federal court can ascertain that the state actually applied a totality of the circumstances evaluation.

And at the very least a court assessing the voluntariness of a juvenile's confession must evaluate whether deceptive interrogation techniques overcame the free will of this particular defendant. Missing entirely from the state appellate court's analysis is any recognition that deception that is permissible when interrogating the average adult person of ordinary intelligence, might not be permissible with someone of Dassey's age and intellect. For example, the state appellate court never considered whether the statement "the truth will set you free" would be considered idiomatically or literally by someone of Dassey's age and limitations. Indeed if taken literally, that statement is the exact kind of promise of leniency that courts generally find coercive. *Hadley*, 368 F.3d at 749 (police cannot extract a confession in exchange for a false promise to set the defendant free); *Rutledge*, 900 F.2d at 1129 (same).

Nor was there any analysis of the key fact that Dassey had no adult ally with him during the interrogation. Although not dispositive, it is one of the most critical factors in evaluating voluntariness of juvenile confessions. *Gallegos*, 370 U.S. at 55, 82 S.Ct. 1209; *Hardaway*, 302 F.3d at 765 (noting that absence of a friendly adult is not dispositive of involuntariness, but a key fac-

tor that can tip the balance against admission). A friendly adult can ensure that a minor defendant can make critical decisions, for example, like the decision to waive *Miranda* rights. *See Hardaway*, 302 F.3d at 764. She could ensure that police do not take advantage of a minor's youth or mental shortcomings. *U.S. v. Bruce*, 550 F.3d 668, 673 (2008). A friendly adult can level the playing field, help the child understand what the consequences of his confession might be, and help him understand his constitutional rights. *Gilbert*, 488 F.3d at 791–92.

Had Dassey's mother been present in the room with him, she might have noticed if Dassey were guessing as to answers, alerted him to the consequences of incriminating himself, reminded her son that the investigators were not acting as his friends or advocates, and helped him distinguish between the actual truth and the information that the investigators were feeding him.

Obviously, we cannot know if she would have done any of these things, but we have one hint that she might have: At the end of the confession, after she was allowed to see Dassey and after he said "they got to my head," she immediately asked the investigators, "Were you pressuring him?" R. 19-25 at 148. As we described above, Dassey became anchored and immediately realized, "They got to my head," as soon as his mother entered the room. R. 19-25 at 148. But whether she would have helped Dassey or not, it confirms that Dassey had no protection against manipulation by the officers. The absence of Dassey's mother or another friendly adult should have been a critical piece of the totality consideration by the state court and it was not even mentioned in the state court's analysis of the voluntariness of Dassey's confession.

Finally, the state appellate court did not consider Dassey's suggestibility while assessing the coercive nature of the claim, despite the fact that one entire day of trial testimony consisted of experts assessing Dassey's mental capacity and, in particular, his suggestibility. Given the instances we discuss below of investigators steering him to particular answers, this was a critical oversight.

The directive from the Supreme Court to consider the totality of the circumstances ensures that this particular defendant voluntarily confessed. It is no use to note that telling a defendant that cooperating would be to his benefit is not per se coercive, if the words used to convey that notion sound like a promise of leniency to this particular defendant. Likewise, falsely claiming to have knowledge is not per se coercive, unless it is used in a manner that overcomes the free will of this particular defendant. The state court did not, in any respect or manner, consider the interaction of the interrogation techniques with Dassey's youth, intellectual limitations, suggestibility, lack of experience with the police, lack of a friendly adult, and naiveté.

In sum, there was no "totality" in this "totality of the circumstances" test at all. There was no assessment of the cumulative nature of the interrogators' promises, no assessment of the fact-feeding in light of Dassey's limited intellectual abilities, no assessment of the absence of a friendly adult who could protect Dassey and advocate for his interests, no assessment of Dassey's confusion in response to many questions, or his apparent desire to please the interrogators with his answers, no assessment of how his answers changed and why, and no assessment of his repeated statements that he expected that, in return for his statements, he would be "set free" to return to school at the conclusion

of the interrogation. It is not that the state court did not do enough; we can have no confidence that it considered the totality of the circumstances at all.

Although different courts and judges might disagree as to "how much weight to assign each factor on facts similar to those in [any Petitioner's] case" (*Etherly*, 619 F.3d at 662), a reasonable jurist must, in fact, consider the relevant facts surrounding a confession, and consider their combined and cumulative effect. *Id.* A consideration of the totality of the circumstances requires the court to consider "whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne." *Miller v. Fenton*, 474 U.S. at 116, 106 S.Ct. 445 (emphasis added).

C. The voluntariness of Dassey's confession analyzed in light of the totality of the circumstances.

In addition to failing to apply a totality of the circumstances analysis to the facts of this case, as required by the Supreme Court, the state court acted unreasonably when it determined that—given the totality of the circumstances—Dassey's confession was voluntary. The state appellate court's finding that there were no promises of leniency or other factors that overcame Dassey's free will was against the clear weight of the evidence. 28 U.S.C. § 2254 (d)(2); *Ward v. Sternes*, 334 F.3d 696, 704 (7th Cir. 2003).

Thus § 2254 (d)(2) requires a federal court on habeas review to look at those facts to determine whether the state court proceedings "resulted in a decision that was based on an unreasonable determination of the

facts in light of the evidence presented in the State court proceeding." *Id.* Moreover, "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Harrington v. Richter*, 562 U.S. 86, 98, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). And a federal court reviewing a habeas petition under § 2254(d), "must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Id.* at 102, 131 S.Ct. 770. Such a determination does not turn habeas review to *de novo* review, as the dissent suggests. It is, to the contrary, precisely what the Supreme Court requires. *Id.* Because the state appellate court's opinion failed to give any explanation other than a listing of Dassey's characteristics and the circumstances of the interrogation, in reviewing the reasonableness of the determination of the facts in light of the evidence presented, we look to see what theories could have supported the state court's conclusion.

1. The message sent to Dassey: "The 'truth' is what we want you to say, and that is what will set you free."

Dassey's interview could be viewed in a psychology class as a perfect example of operant conditioning. As we will demonstrate through myriad examples below, the theme set forth for Dassey was twofold, that "honesty is the only thing that will set you free," R. 19-25 at 17, and that honesty would appease the investigators, avoid conflict, and allow them to be Dassey's "friend," to "go to bat for [him]" to "be in his corner." *Id.* at 16,

25. In other words, the key to walking out a free person, avoiding the conflict that his socially avoidant personality feared, and getting back in time for school lunch was "honesty." But Dassey quickly learned that "honesty" meant telling the investigators what it was that they wanted to hear. When they did not like his answer, they told him things like "Come on Brendan. Be honest. I told you that's the only thing that's gonna help ya here;" and "[w]e don't get honesty here, I'm your friend right now, but I gotta believe in you and if I don't believe in you, I can't go to bat for you." *Id.* at 23. Every time the investigators said "tell us the truth" or "we know what the truth is," Dassey altered his story just a bit. As Dassey got closer and closer to the answers the investigators were looking for, his statements were rewarded with affirmations like "that makes sense. Now we believe you," and in doing so, they cemented that version of the facts. *See, e.g.*, *Id.* at 73. But when Dassey deviated from the expected narrative, the investigators either offered no reward, ignored the comments, steered him away, or let him know that they thought he was not telling the truth. In short, as the examples clearly demonstrate, "be honest," "tell the truth," and similar pleas became code for "guess again, that is not what we wanted you to tell us." And "now we believe you" and "that makes sense" became code for "that's what we want to hear. Stop right there." Dassey's reaction to these cues is not unique. Experts on confessions have noted that "though courts are reluctant to find that police officers have overwhelmed a child's will by repeatedly admonishing the child to 'tell the truth,' many children will eventually hear 'tell the truth' as, 'tell me what I want to hear.' " Kenneth J. King, *Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children from Unknowing, Unintelligent, and Involuntary*

Waivers of Miranda Rights, 2006 Wis. L. Rev. 431, 472 (2006). Scholarly research such as this helps inform our understanding that the totality of the circumstances analysis means something different when applied to juveniles. It supports the reasoning behind the Supreme Court's admonition to view juvenile confessions with special caution. *See J.D.B.*, 564 U.S. at 269, 131 S.Ct. 2394.

The investigators' "honesty is the only thing that will set you free" theme established a pattern whereby Dassey, seeking the promised result—freedom, or avoidance of conflict—searched for the narrative that the investigators would accept as "the truth." Dassey found "the truth" either by stumbling upon it or by using the information the investigators had fed him. The promise of freedom became linked to the idea of truth which became defined as that which the investigators wanted to hear. Once this prompt-and-response pattern is noticed, it is impossible to read or view Dassey's interrogation and have any confidence that Dassey's confession was the product of his own free will rather than his will being overborne. Any reader who doubts that this pattern casts insurmountable doubt on the voluntariness of Dassey's confession need only watch or read the interrogation with this "key" in hand.

The following exchange is a prime example of the investigators telling Dassey that he needs to change his story and how he should do it, followed by that exact change. Prior to the interaction below, Dassey confirmed approximately eight times, often insistently, that when he got home from school on October 31, he saw Halbach and Avery talking on Avery's porch. R. 19-25 at 19–20, 27–28, 90. In fact, the officers grilled him asking "And you're sure you saw that?" *Id.* at 20; "did you really see those two talking on the porch" *Id.*

at 27; "You're 100% on that?" *Id.* at 28. And each time he answered affirmatively. Yet, once they repeatedly cued him that they did not like his answer and that he must "tell the truth"—in other words, tell them what they wanted to hear—he altered his message exactly as he was instructed:

> Fassbender: OK, and you said you walked down th [sic] the road to your house, (Brendan nods "yes") and you said that you saw Steven on the porch.
>
> Brendan: (nods "yes") uh huh
>
> Fassbender: Mark and I are havin' a problem with that. Now if, I'm not, I'm not sayin' that I'm gonna put words in your mouth so we're havin' a problem with that … the time periods aren't adding up. They're not equaling out. We know when Teresa got there. (Brendan nods "yes") Um, and, and I know **I guarantee ya Teresa's not standing on that porch when you come home from school.** I ju [sic] I don't see that … . Somethin' is not adding up here and **you need to tell us the truth**. Did this all start right when you came home from school? You need to tell me, you need to **be honest with me**. I can't tell ya, I I can't tell ya these things. I can tell ya **we don't believe you** because there's some things that are wrong but **you've gotta tell me the truth**. This is you know getting' serious here now, OK? (Brendan nods "yes") Tell me what happened when you got home.
>
> Brendan: I got off the bus. I walked down the road and when I got to that thing, ah, the other house I just sittin' there for nothin' [sic]. I

> could see her jeep in the garage just sittin' there and I didn't see Steven and her on the the porch.
>
> Wiegert: You, you did or you didn't?
>
> Brendan: I didn't.
>
> Fassbender: Did not, OK.

R. 19-25 at 90–91 (emphasis added).[11]

The state presents these changes as a normal part of a confession. That is, that a defendant tells one version of events, backtracks as he is presented with inconsistencies and errors in his story, and reveals more and more as the interrogators coax the truth out of him.

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[11] Another prime example of the investigators telling Dassey exactly what he must say comes from the May 13 interview, which was not used at trial, but is part of the record.

> Wiegert: Now where is her truck when you go into the garage.
>
> Brendan: I didn't see it.
>
> Wiegert: … you can't say you didn't see the truck or know where the truck was because … [t]hat's just the way it is.

Following this exchange, the investigators launched into a long harangue threatening to leave the interview if Brendan was not "honest with us," and beseeching Dassey to "do the right thing" for Teresa.

> Wiegert: Ok . Then tell us the truth.
>
> Fassbender: Let's start with the truck. That's a good place to start. There's other places we're going, but the truck is a good place to start. Tell us the truth about the truck.
>
> Brendan: It was backed into the garage.

R. 19-34 at 21–22.

See, e.g., Reply Brief of Respondent-Appellant at 1 ("As with many difficult admissions, the truth did not come out all at once, but little-by-little in fits of honesty.") But again, a careful review of the confession does not reveal this to be a story gaining clarity over time. Unlike the ordinary course of a confession in which the narrative increases in clarity as the suspect reveals more information, this interrogation was just the opposite. Every time the interrogators protested the veracity of Dassey's account or fed Dassey information, his story changed. If one sits in front of the taped confession with a legal pad and tries to sketch out the details and timeline of the crime, the resulting map is a jumble of scratch outs and arrows that grows more convoluted the more Dassey speaks. In fact, despite what the State describes as a detailed confession, it has never been able to map out a coherent timeline of the crime, or to figure out in what order or where many of the events occurred. *See* Brief of Respondent-Appellant at 9, n.3 (stating, in a footnote to the facts, "the narrative recounts details from Dassey's confession in the most likely timeline, consistent with other evidence at trial. It is possible that some parts of the story are out of order," and describing several items that are unclear).

Lest one think the details and timeline ever solidified, they did not. It only became more convoluted when Dassey appeared, without counsel, at the May 13 interrogation, after his lawyer's own investigator, O'Kelly, had interrogated him. As we noted, that interrogation was not used at trial and the details are not discussed by the district court or by the parties. It was used, however, as part of the post-conviction hearing, and is part of the record. *See* R. 19-34. At the post-conviction hearing Wisconsin District Attorney Ken Kratz described that May 13 interrogation as a "fiasco"

in which Dassey gave "inconsistent statements." R. 19-26 at 97. Details both significant and insignificant changed, not only from the prior confession on March 1, but also within minutes of being disclosed at the May 13 interrogation. Dassey changed details about things as benign as riding his bike to things as important as whether or not he cut Halbach's throat. R. 19-34 at 7, 25. Dassey was inconsistent about how Halbach was restrained, about whether he saw Halbach's vehicle, the order of events, facts about her body, where various events occurred, where the murder weapon came from, what it looked like, and what it was used for, where Halbach was stabbed, and, as we will see in a later example, whether he cut Halbach's hair or not. Dassey is not merely a poor story teller who forgets details and orders, but rather the details and the order changes in ways that do not amount to confusion and error but rather a "fiasco" of a story—until, as we will see, the investigators steer him to the version of the story that fits their theory of the case.

For example, in the March 1 interrogation, on several occasions the investigators tried to pin down the constantly changing order of events. The events are gruesome, serious, and distinct, and the order is critical to how they were performed. For example, it is far different to choke a victim whose throat has been cut than to cut the throat of a victim who has been choked. Nevertheless, Dassey cannot keep these details straight. Initially Dassey said that Halbach was stabbed, tied up, and then choked R. 19-25 at 54–55. Moments later he stated that she was tied up, then stabbed, then choked *Id.* at 56, and a few transcript pages later he assures the investigators that he is "sure" that she was stabbed, choked, and then tied up *Id.* at 59; but a few pages after that he stated that she

was stabbed, tied up and her throat was cut *Id.* at 64. Finally, he circles back to a re-telling in which he says that Halbach was tied up, stabbed and then cut *Id.* at 101. At one point the investigators are desperate to get the order right:

> Fassbender: Brendan, we're in the bedroom yet, OK? (Brendan nods "yes") She's handcuffed yet right? (Brendan nods "yes") And you're tellin' me if, obviously correct me if I'm wrong, what we heard. (Brendan nods "yes"). While she's handcuffed and alive, he stabs her.
>
> Brendan: (nods "yes") mm huh.
>
> Fassbender: Chokes her? Right? (Brendan nods "yes") Is that right?
>
> Brendan: (nods "Yes") mm huh.
>
> Fassbender: And then he has you cut her neck?
>
> Brendan: Yeah.

Id. at 66. But just when the investigators thought that they had the order down, at the end of the interview they asked one more time to lock it in and the order falls apart again:

> Wiegert: Well let's, let's just go back a little bit OK? Tell us what exactly happened to her, what order it happened in. You said there were basically three things prior to you guys shooting her. Explain those in, in the order that it happened.
>
> Brendan: Starting with when we got in the room?
>
> Fassbender: OK.

Wiegert: Yeah, what you guys did to her.

Brendan: We had sex with her.

Wiegert: OK.

Brendan: Then he stabbed her.

Wiegert: Then who stabbed her?

Brendan: He did.

Wiegert: Who's he?

Brendan: Steven.

Wiegert: OK, and then what?

Brendan: Then I cut her throat.

Wiegert: OK.

Brendan: And then he choked her and I cut off her hair.

Wiegert: OK. So he choked her after you cut her throat?

Brendan: (nods "yes") mm huh.

Id. at 132–33. This is not a confession that becomes increasingly more coherent and clear over time, as the defendant reveals more and more of the truth. To the contrary, although Dassey's culpability throughout these changes remains the same, the horrific story becomes less and less coherent until by the end Avery is choking a woman who has already had her throat cut. Yet through all of this tying, stabbing and throat cutting, Dassey insists he did not get any blood on himself:

Wiegert: You said that you had cut her throat. (Brendan nods "yes") Here's the thing Brendan, when you, cut somebody's throat, they

> bleed a lot, (Brendan nods "yes") OK? Am I right?
>
> Brendan: (nods "yes") Yeah.
>
> Wiegert: She bleed a lot, (Brendan nods "yes") so I know you had blood on ya, it's pretty much impossible not to. Did you have blood on you?
>
> Brendan: (shakes head "no") No.
>
> Wiegert: None at all?
>
> Brendan: (shakes head "no"') uh uh.
>
> Wiegert: What about when you moved her?
>
> Brendan: (shakes head "no") No.

Id. at 116-17.

In short, a reasonable state court that had carefully reviewed the confession would have quickly determined that the interrogators pleas for honesty—irrespective of how they intended them—did not have the effect of eliciting honesty from Dassey, but rather had the effect of eliciting guesses from Dassey about what the investigators wanted to hear. In Dassey's mind, the words "be honest" and the like came to mean "guess again until you say what we want to hear." Consequently, the interrogation became not one of eliciting honesty through a voluntary confession, but one of leading Dassey into the story the interrogators wanted to hear. Nowhere is this more clear than in the following two examples below.

The first example comes from the key part of the interrogation. As we noted earlier, by the time of the March 1 interview, the investigators knew that Halbach had been shot in the head. They also knew that the battery had been removed from her Toyota RAV4.

These two details had not yet been released publicly and thus Dassey's knowledge of these details would be particularly inculpatory. It is a common investigative technique to hold back details of a crime from the media and public to test the validity of a confession. The following exchange demonstrates many of the totality factors and interrogation techniques we will describe below—Dassey's naiveté, false information ("we already know"), minimizing Dassey's role in the crime ("he made you do it"), and admonitions to "tell the truth." But in particular it demonstrates how the interrogators' admonitions to "tell the truth" cue Dassey to keep guessing, and most importantly, how the interrogators tainted the voluntariness of the interview by feeding Dassey the information that Halbach was shot in the head.

> Wiegert: What else did he do to her? We know something else was done. Tell us, and what else did you do? Come on. (pause) Something with the head, (pause) Brendan?
>
> Brendan: Huh?
>
> Fassbender: … can't
>
> Wiegert: What else did you guys do, come on.
>
> Fassbender: What he made you do Brendan? We know he made you do somethin' else.
>
> Wiegert: What was it? (pause) What was it?
>
> Fassbender: We have the evidence Brendan, we just need you ta, ta be honest with us.

Brendan: That he cut off her hair.[12]

* * *

Fassbender: What else was done to her head. (pause)

Brendan: That he punched her.

Wiegert: What else? (pause) What else? (pause)

Fassbender: He made you do something to her, didn't he? So he would feel better about not being the only person, right? Yea.

Wiegert: mm huh.

Fassbender: What did he make you do?

Wiegert: What did he make you do Brendan? (pause) It's OK, what did he make you do? (pause)

Dassey: Cut her.

Wiegert: Cut her where?

Brendan: On her throat.

* * *

Wiegert: So Steve stabs her first and then you cut her neck (Brendan nods "yes"). What else happens to her in the head?

Fassbender: It's extremely extremely important you tell us this, for us to believe you.

Wiegert: Come on Brendan, what else? (pause)

---

[12] We note that Dassey's intonation rises at the end of this statement, as though he is asking a question. R. 19-44, Ex. 43, Disc 1 at 11:57:41.

> Brendan: That is all I can remember.
>
> Wiegert: All right, I'm just gonna come out and ask you. Who shot her in the head?
>
> Brendan: He did.
>
> Fassbender: Then why didn't you tell us that?
>
> Brendan: Cuz I couldn't think of it.

R. 19-25, at 60–63.

This example demonstrates how critical the steering was to Dassey's confession. Recall that the gunshot wounds to the head were unknown to anyone but the investigators and the real killer and thus were key to determining the veracity of the confession. Dassey "couldn't think of it" and instead launched into a litany of other dubious guesses about actions that might have befallen Teresa. Shooting a living human in the head (or seeing it happen) is not something that a person is likely to forget. Indeed, Dassey later described how he could no longer shoot a gun or go hunting because he had been traumatized by the shooting of his pet cat: "I couldn't shoot no more … cuz we used to have a cat that was like somethin' was wrong with 'em and we had to shoot 'em because we didn't want to pay for the bills … and my mom told me not to watch when hers nows ex-boyfriend shot it, shot 'em and I couldn't watch." *Id.* at 65-66. But yet despite the impact of the cat incident, Dassey "could not think of it" when asked what was done to Halbach's head. Clearly his inability to describe the shooting was not an effort to protect himself, as he had just admitted to slitting Halbach's throat. After guessing many of the most common things that a person might do to a victim's head—cutting hair, punching, cutting the throat—he simply "could not think of" anything else that was "done to her head" un-

til Wiegert says, "I'm just gonna come out and ask you. Who shot her in the head?" *Id.* at 63. Suddenly he "could[ ] think of it." *Id.* And of course he had to "think of it" because Fassbender had just told Dassey that it was "extremely important for you to tell us this, for us to believe you." In other words, finding the right answer was the key to freedom and pleasing the interrogators because "the truth"—meaning what the investigators wanted Dassey to say—would avoid conflict and "set him free."

This example also reveals the power that the false assumption technique (described more below) had on Dassey. The "who shot her in the head?" question is the proverbial "when did you stop beating your wife?" assumption. And Dassey is quick to respond despite having no idea what happened to Halbach's head just a few seconds earlier. Likewise, in the following exchange, a confused Dassey falls right into the trap again.[13]

> Fassbender: The first time we talked to you or the second time you talked about cutting off her hair. Where did the hair go? Did you cut off her hair?
>
> Brendan: Yeah.
>
> Fassbender: Where did that happen
>
> Brendan: In the, in the, bedroom.

---

[13] This exchange comes from the May 13 interview which, as we noted earlier, was not used at trial. It was admitted at the state post-conviction proceedings and is part of the record. R. 19-34. We highlight it only as an example of Dassey's confused responses to leading questions. As a side note, this conversation also serves as a glimpse into the interrogators' clear efforts to have Dassey move all of the events of the crime to the garage, as no forensic evidence was found in Avery's trailer.

Fassbender: What ya cut the hair off with?

Brendan: The knife.

Fassbender: The knife you found in the garage?

Wiegert: It doesn't make sense.

Fassbender: It's impossible. You took her out to the garage and that's where you got the knife. Explain how that can be. (pause) Did you cut her hair off?

Brendan: No.

Fassbender: Then why did you tell us you did? Brendan?

Brendan: I don't know.

* * *

Fassbender: Do you remember telling us prior? The last time that you saw that stuff in the burn barrel?

Brendan: Yeah.

Wiegert: So why did you do that?

Brendan: I had too much stuff on my mind.

Wiegert: So now you remember a little more clearly? OK. **How much of her hair did you cut off?**

Brendan: **A little bit.**

Wiegert: You told me a couple of minutes ago you didn't cut any off. What's the truth? Did you cut some of her hair off?

Brendan: No.

* * *

> Fassbender: … did anyone cut her hair off that night?
>
> Brendan: No. (shakes head no)
>
> Fassbender: Where did you get that from? (pause) I mean it seems kind of strange that you just all of a sudden told us you had cut her hair off. Where did you get that from, if it's not true?
>
> Brendan: I don't know, I was just guessing.
>
> Fassbender: Why, Did you think that was somethin' we wanted to hear?
>
> Fassbender: Brendan, didn't did someone some one [sic] cut her hair off that night? Truthfully, for Teresa?
>
> Brendan: No. (shakes head "no")

R. 19-34 at 36–37, 65–66, 98 (emphasis added). In fact investigators never found any evidence of Halbach's hair on Avery's bed, his carpet, anywhere in his trailer or the garage.

Investigators also hoped that Dassey would reveal another detail unknown to the public—the fact that the car battery had been detached:

> Wiegert: After he put the car there, what do you do next?
>
> Brendan: We walk out.
>
> Wiegert: With, how's, the license plates were taken off the car, who did that?
>
> Brendan: I don't know.
>
> Wiegert: Did you do that?

Brendan: (Shakes head "no") No.

Wiegert: Did Steve do that?

Brendan: Yeah.

Wiegert: Well then why'd you say you don't know?

* * *

Fassbender: Ok, what else did he do, he did somethin' else, you need to tell us what he did, after that car is parked there. It's extremely important. (pause). Before you guys leave that car. (pause)

Brendan: That he left the gun in the car.

Fassbender: That's not what I'm thinkin' about. He did something to that car. He took the plates and he, I believe he did something else to that car. (long pause)

Brendan: I don't know.

Fassbender: OK. Did he, did he go and look at the engine, did he raise the hood at all or anything like that? To do something to that car?

Brendan: (long pause) Yeah.

Fassbender: What was that? (pause)

Wiegert: What did he do Brendan? (Pause)

Fassbender: What did he do under the hood, if that's what he did? (long pause)

Brendan: I don't know what he did, but I know he went under.

R. 19-25 at 77–79. No reasonable court could read these exchanges and conclude that these ideas came voluntarily from Dassey's mind.

Although these were the two most egregious, they were not the only examples of the investigators feeding Brendan answers. In the following exchange, Dassey insisted for some time that he had no idea what happened to Halbach's personal effects. After some leading from Fassbender, in which Fassbender initiated the idea that there must have been a purse, a cellphone and a camera in the burn barrel, Dassey was able to parrot that he saw these exact three items in the burn barrel. Even the investigators seem concerned about the veracity of his statements, asking him several times to verify the truth, particularly in light of his claim that he saw the items beneath a garbage bag, an item that would have melted within seconds in a fire. Once again, at this point Dassey has no motivation to lie or obfuscate facts about whether Avery burned Halbach's property in the burn barrel, as he has already admitted several times that he and Avery killed Halbach and burned her body. Nevertheless he altered his answers in response to the cues from the investigators. They told him exactly which items were found in the burn barrel and then cued him to "tell the truth" which, we have established, had the effect on Dassey of meaning "tell us what we want to hear and keep guessing until you get it right."

> Fassbender: OK. We talked last er Monday we talked a little about some things a burn barrel out front do you remember anything about

that burn barrel? It's ah you might wanna be a little more truthful about now.[14]

Brendan: That it was full of stuff.

Fassbender: Was it burning?

Brendan: Yeah.

Fassbender: Did you put some things in that burn barrel that night?

Brendan: (shakes head "no") No.

Fassbender: What happened to Teresa's other personal effects? I mean ah a woman usually has a purse right? (Brendan nods "yes") Tell us what happened ta that?

Brendan: I don't know what happened to it.

Fassbender: What happened ta her ah, her cell phone? (short pause) Don't try-ta ta think of somethin' just.

Brendan: I don't know.

Fassbender: Did Steven did you see whether ah a cell phone of hers?

Brendan: (shakes head "no") No.

Fassbender: Do you know whether she had a camera?

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[14] In the earlier interview, on February 27, after asking about Avery burning clothes, Fassbender asked, "Did he tell ya anything about a, a, any of her other possessions like I imagine a woman would have a purse, she probably had her cell phone, a camera to take pictures. Did he tell you what he did with those things?" (R. 19-24 at 36). The transcript indicates no answer, but Fassbender follows up with "are you sure?" indicating that Brendan likely shook his head "no." *Id.*

Brendan: (shakes head "no") No.

Fassbender: Did Steven tell ya what he did with those things?

Brendan: (shakes head "no") No.

Fassbender: I need ya to **tell us the truth**.

Brendan: (nods "yes") Yeah.

Fassbender: What did he do with her her possessions?

Brendan: I don't know.

Wiegert: Brendan, it's OK to tell us OK. It's really important that you **continue being honest** with us. OK, don't start lying now. If you know what happened to a cell phone or a camera or her purse, you need to tell us. OK? (Brendan nods "yes") The hard parts over. Do you know what happened ta those items?

Brendan: He burnt 'em.

Wiegert: How do you know?

Brendan: Because when I passed it there was like like a purse in there and stuff.

Wiegert: When you passed what?

Brendan: The burning barrel

Wiegert: Did ya look inside? (Brendan nods "yes") Why did ya look inside?

Brendan: Cuz it was full.

Wiegert: What else was in there?

Brendan: Like garbage bags, some

Wiegert: Did you put those things in the burning barrel?

Brendan: (shakes head "no") No.

Wiegert: Did you actually see those items in the burning barrel? (Wiegert emphasizes the word "see.")

Brendan: (nods "yes") Yeah.

Wiegert: Tell me what you saw in there exactly.

Brendan: Like they were buried underneath ah, garbage, a garbage bag that was

Wiegert: How do you know, or how could you see them if they were underneath a garbage bag?

Brendan: Because the garbage bag was like on top like that far off the top.

Wiegert: OK. So we have the barrel, (Brendan nods "yes") OK. Why don't you look at me for a second, OK. We've got the barrel:

Brendan: (nods "yes") mm huh.

Wiegert: OK and here's is the top of the barrel (Brendan nods "yes") and the garbage bag is on top?

Brendan: (nods "yes") Yeah.

Wiegert: And where are those items you said you saw?

Brendan: Like right underneath there.

Wiegert: Underneath the bag?

Brendan: (nods "yes")Yeah.

> Wiegert: Well, how would you see that?
>
> Brendan: Well, if the bags like that far off the you know the top of the thing you can see though underneath it.
>
> Wiegert: You could see underneath it? (Brendan nods "yes") What did you see?
>
> Brendan: like a cell phone, camera, purse.
>
> Wiegert: Are you being honest with us?
>
> Brendan: (nods "yes")Yeah.
>
> Wiegert: Did you actually see those items?
>
> Brendan: (nods "yes") Yeah.
>
> Wiegert: When did you see them?
>
> Brendan: When I came over there with the mail.

R. 19-25 at 95–98 (emphasis added).

Although the government concedes that "Who shot her in the head" was a leading question, it characterizes the rest of the interrogation as a litany of open-ended questions that were corroborated by other evidence. The many examples we have just cited belie that claim. As in the example above, after first denying that he knew what happened to Halbach's personal effects, and after the investigators cued him, Dassey ultimately said that he saw no more nor less than precisely the three items they mention to him in their questions. But these are merely a few of many instances in which investigators explicitly told Dassey what facts he was to report: "We know the fire was going [when you arrived]" *Id.* at 23; "I think you went over to his house and then he asked [you] to get his mail." *Id.* at 41; "You went inside, didn't you?" *Id.* at 41; "Does he ask you [to

rape Halbach]? He does, doesn't he? We know. He asks you, doesn't he?" *Id.* at 47; "You went back in that room … we know you were back there." *Id.* at 48; "He asked if you want some, right? … If you want some pussy?" *Id.*; "You were there when she died and we know that." *Id.* at 54; "He did something else, we know that." *Id.* at 54; "We know that some things happened in that garage, and in that car, we know that" *Id.* at 71.

The investigators even told Dassey what kinds of language he should use. When Dassey told the investigators that Avery had raped Halbach, Fassbender asked him, "What did he say? Did he use those words?" Dassey nodded affirmatively but Wiegert knew that did not sound accurate and cued him why it did not: "Are you sure cuz its usu, not usually the words he uses?" But Dassey nodded and said "yeah." R. 19-25 at 36. But the next time they ask about the sexual assault, Dassey has figured out what they wanted to hear and they reward him by telling him that now they can start believing him:

> Brendan: That he wanted to get some.
>
> Fassbender: Some what?
>
> Brendan: Pussy.
>
> Wiegert: That's what he said to you? (Brendan nods "yes") OK.
>
> Fassbender: Now I can start believing you, OK? (Brendan nods "yes").

Id. at 46.

Now that we have set forth the pattern of questioning (the truth is what the investigators wanted Dassey to say and that truth was linked to pleasing the interrogators and his freedom), we turn to the remaining

parts of the confession which likewise influence our decision that no reasonable court, having viewed the interrogation as a whole, could have found that Dassey's confession was voluntary.

2. Dassey's characteristics and limitations.

Sixteen-year-old Dassey walked into the interrogation room without a parent, a lawyer, or an advocate to look out for his rights. He had never had any contacts with law enforcement prior to his interviews in this case. As described in the fact section, he was passive, docile and withdrawn. He also suffered from intellectual deficits. His IQ was in the low average or borderline range. He was a "slow learner" with "really, really bad grades," (R. 19-12 at 66), who received special education services and was the subject of at least three Individualized Education Programs, documents developed for children with special learning needs. Specifically, he had difficulty understanding some aspects of language and expressing himself verbally. He also had difficulties in the "social aspects of communication" such as "understanding and using non-verbal cues, facial expressions, eye contact, body language, tone of voice." R. 19-12 at 91. Testing also revealed that he had extremely poor social abilities, that he was socially avoidant, introverted and alienated, and that he was likely to be more suggestible than 95% of the population.

3. Assurances and promises.

a. Paternalistic assurances

Sitting across from the young, socially and intellectually challenged Dassey were two seasoned police interrogators. Dassey had no adult advocate, but the investigators sought to fill that role and convince him

that *they* were the adults who were on his side. During the first recorded interview, on February 27, Fassbender set the tone, saying,

> I've got … kids somewhat your age, I'm lookin' at you and I see you in him and I see him in you, I really do, and I know how that would hurt me too …. Mark and I, yeah we're cops, we're investigators and stuff like that, but I'm not right now. I'm a father that has a kid your age too. I wanna be here for you. There's nothing I'd like more than to come over and give you a hug cuz I know you're hurtin'.

R. 19-24 at 5.

The paternal assurances and relationship building continued into the March 1 interview: "I wanna assure you that Mark and I both are in your corner, we're on your side … " R. 19-25 at 16, and " … I'm your friend right now, but I … gotta believe in you and if I don't believe in you, I can't go to bat for you." *Id.* at 23.[15] Wiegert repeatedly touched Dassey's knee in a compassionate and encouraging manner during the March 1 interview. *See, e.g.*, R. 19-44, Ex. 43, Disc 1 at 11:20:28 a.m., 11:29:04 a.m., 11:37:32 a.m., 11:41:09 a.m. In one instance, Wiegert put his hand on Dassey's knee, leaned forward, and said reassuringly and encouragingly, "We already know Brendan. We already know.

[15] The State portrays these statements as having been made during a time when the investigators still considered Dassey to be a witness rather than a suspect, but prior to this March 1 interview, the investigators thought "it was possible that Brendan might have been involved in the disposal of the corpse." R. 19-30 at 38. And, as we set forth later, the investigators continued their assurances that Dassey would be "alright" throughout the interview, all of which had been prefaced and contextualized by the early assertions.

Come on. Be honest with us. Be honest with us. We already know, it's, OK? We gonna help you through this, alright?" *Id.* at 11:29:04 a.m.; R. 19-25 at 37. He later did this again while saying, "Brendan, I already know. You know we know. OK. Come on buddy. Let's get this out, OK?" *Id.* at 11:37:32 a.m.; R. 19-25 at 44. And within a few minutes of this knee touch and appeal to his "buddy," Dassey confessed to raping Halbach. *Id.* at 50–51.

The government makes much of the fact that Wiegert stated at the beginning of the interview, "[w]e can't make any promises," but that one early admonition was countered by hours and hours of subtle and not so subtle declarations otherwise—the death by a thousand cuts. Moreover, Wiegert's full statement was: "We can't make any promises, but we'll stand by you no matter what you did." R. 19-25 at 17. What would a reasonable person make of an admonition not to count on any promises, followed immediately by a clear, unconditional promise? More importantly, what would Brendan Dassey, with his limited intelligence and social skills, think of this admonition linked with a promise?

b. False promises of leniency.

After painting the "we're on your side" backdrop, the investigators brought in the main scaffolding of their approach—the false promises that Dassey would be better off confessing than remaining silent. Some of these promises were problematic in and of themselves—for example, a promise that if Dassey told the truth, he would be set free. The other promises eroded voluntariness because they were linked to a requirement to "tell the truth," which, as we have established meant "the version of the story that the investigators

wanted to hear." By linking what the investigators wanted to hear with assurances that those versions would make Dassey "alright" and "okay," the confession became not one borne of Dassey's free will but of the investigators' wills.

The investigators began the interrogation with a monologue, the theme of which was that Dassey could improve his lot by telling the truth, and culminating in the statement, "Honesty is the only thing that will set you free." R. 19-25 at 17. As the district court noted, this a biblical idiom that many adults would recognize as a figurative expression. *Dassey v. Dittmann*, 201 F.Supp.3d at 1002. Dassey, however, was not someone who understood idioms and subtle distinctions between literal and figurative language. His school special education reports (prepared long before the crime or trial, for use at school) noted in particular that idioms were an aspect of language that Dassey had trouble understanding. R. 19-20 at 79. This is a juvenile who, after all, when told that his polygraph showed a 98% probability of deception asked, "I passed?" R. 19-38 at 1. And when the tester repeated "It says deception indicated," emphasizing the word deception, Dassey asked, "That I failed it?" *Id.* And when drawing pictures of the crime scenes for the detectives, he needed help spelling words like "rack" and "garage." R. 19-25 at 124, 128. Likewise he was unlikely to understand that the other veiled, subtle promises of leniency were not actual promises. And as we know, a law enforcement officer may not promise a defendant that if he confesses he will be set free. *Hadley*, 368 F.3d at 749; *Rutledge*, 900 F.2d at 1129. *See also Aleman*, 662 F.3d at 906.

The investigators sounded the theme of "truth leads to freedom" again and again in that opening monologue:

- "It's going to be a lot easier on you down the road, ah, if this goes to trial."
- "[H]onesty here Brendan is the thing that's gonna help you. OK, no matter what you did, we can work through that. OK. We can't make any promises, but we'll stand behind you no matter what you did. Ok. Because you're being the good guy here. You're the one that's saying, 'you know what? Maybe I made some mistakes, but here's what I did."
- "[T]he honest person is the one who is going to get a better deal out of everything."
- "If, in fact, you did something, which we believe … it's OK, as long as you be honest with us, it's OK. If you lie about it, that's gonna be problems."

R. 19-24 at 17. And of course, there was the most direct promise, "honesty is the only thing that will set you free," (R. 19-25 at 17).

Promises come in many forms. It is true that the investigators never made the type of explicit and specific promise of leniency that an adult of ordinary intelligence might understand as a promise, such as "if you confess we will make certain that you will not be punished." But to a suggestible suspect with poor social skills, low IQ, and a limited ability to understand idioms and metaphors, those implied promises, made over and over, had the same effect—an effect that could have been mitigated by the presence of a friendly adult.

Likewise, it was not just the promises to be "set free" that constituted a promise of leniency, but promises that Dassey, who was exceptionally introverted

and socially avoidant, could escape the unpleasant conflict and social interaction, by providing what the interrogators wanted to hear. "Honesty" would allow them to be on his side and allow him to "get it all out … and … over with" and get out of that interrogation room. *See* R. 19-25 at 48. Although the furniture in the room may have been soft, the non-stop interrogation by two adults of authority would be very intimidating and anxiety producing to anyone but particularly for someone in the 95th percentile on the scale for social avoidance.

c. Coupling assurances and promises with false assertions of knowledge.

One form of a promise comes from coupling an acknowledgement of the facts with an assurance—in other words, stating "we already know everything you did and, even knowing all of that, everything is going to be okay." The investigators peppered the entire investigation with assurances that Dassey "was going to be alright," coupled with acknowledgements that they were making these assurances notwithstanding all of the horrible facts that they already knew. Those pleas promised that the key to unlocking the "you're going to be alright" result was honesty.

The assurances that Dassey would be "alright" came in many forms: "from what I'm seeing … I'm thinking you're all right. OK, you don't have to worry about things." R. 19-25 at 16; "[N]o matter what you did, we can work through that." *Id.* at 17; "It's OK. As long as you can, as long as you be honest with us, it's OK. If you lie about it that's gonna be problems. OK." *Id.*; "We already know. Just tell us. It's OK." *Id.* at 24; "It's OK because he was telling you to do it." *Id.* at 28; "We already know, it's, OK? We're gonna help you through this, alright?" *Id.* at 37; "It's OK Brendan. We

already know." *Id.* at 41; "It's OK, tell us what happened." *Id.* at 46; "It's not your fault." *Id.* at 47; "Let's get it all out today and this will be all over with." *Id.* at 48; "It's OK, what'd you do with it?" *Id.* at 76; "Brendan, it's OK to tell us OK." *Id.* at 96.

Again, the power came, not from the assurances alone, but the assurances coupled with the false information that the investigators "already knew everything." The investigators were not merely telling Dassey, "Based upon what you have told us *so far*, we don't think you have anything to worry about." Rather, what they told Dassey was, "We already know what happened and you don't have anything to worry about."

Those assurances that they already knew everything, linked with the plea for "honesty" were plentiful: "We pretty much know everything[.] [T]hat's why we're talking to you again today." R. 19-25 at 17. "[N]ow remember this is very important cuz we already know what happened that day." *Id.* at 19; *see also Id.* at 23 ("We already know what happened[.]"); "We already know. Just tell us. It's OK." *Id.* at 24; "Come on we know this already. Be honest." *Id.* at 26; "Remember we already know, but we need to hear it from you." *Id.* at 28; "So just be honest. We already know." *Id.* at 30; "We already know, be honest." *Id.* at 36; "We already know Brendan. We already know. Come on. Be honest with us. Be honest with us. We already know, it's, OK? We're gonna help you through this, alright?" *Id.* at 37; "It's OK Brendan. We already know." *Id.* at 41; "Cuz, we, we know but we need it in your words. I can't, I can't say it." *Id.* at 44; "Brendan, I already know. You know we know. OK. Come on buddy. Let's get this out, OK?" *Id.* at 44; "Remember, we already know, but we need to hear it from you, it's OK. It's not your fault." *Id.* at 47; "We know you were

back there. Let's get it all out today and this will be all over with." *Id.* at 48; "We know what happened, it's OK." *Id.* at 50. (For a more complete list of these assurances, *see Dassey v. Dittmann*, 201 F.Supp.3d at 1002.)

In one instance, when asking Dassey if he helped Avery put Halbach in the back of her RAV4, Wiegert explicitly assured Dassey, "If you helped him, it's OK, because he was telling you to do it. You didn't do it on your own." R 19-25 at 28. But of course, it would not be "okay" for Dassey to help mutilate and dispose of a corpse simply because Avery told him to do it. And likewise, it could not be any further from "okay" for Dassey to rape Halbach because Avery told him to do it. Yet as they were walking Dassey down the path, step-by-step, to admitting that he had raped Halbach, they stated,

> Wiegert: What happens next? Remember, we already know, but we need to hear it from you, it's OK. **It's not your fault**. What happens next?
>
> Fassbender: Does he ask you?
>
> Wiegert: He does; doesn't he?
>
> Fassbender: We know.

R. 19-25 at 47 (emphasis added). And then, as he struggled to tell them the details of the alleged rape, they again assure him, "it's not your fault, he makes you do it." *Id.* at 50. The investigators assured Dassey that once he revealed the details of the alleged rape, "this will be all over with." *Id.* at 48. Similarly, just before Dassey stated that he cut Halbach's throat, Wiegert prompted Dassey by telling him, "What did he make you do Brendan? It's OK, what did he make you

do?" *Id.* at 62. Recall, of course, that because Halbach's body was burned (adding even more atrocity to the crime) there was no forensic evidence that she had been raped or that her throat had been cut.

We can have no confidence that any person, but particularly one with Dassey's IQ and suggestibility, would think that "you're going to be alright" and "[l]et's get it all out today and this will be all over with" might lead to a life sentence in prison. A life sentence is neither "alright" nor something that would put the matter to rest and be "over with." And in fact, we need not speculate as to how Dassey would interpret those promises, because we know exactly what Dassey made of them—that if he told the tale, as the interrogators had introduced it to him, he would be released. After confessing to the heinous crimes of raping Teresa Halbach, slitting her throat, and then burning her body, Dassey asked if he would make it to school by 1:29 p.m. so that he could turn in a project he had due in his sixth hour class. R. 19-25 at 89. And later he asked "Am I gonna be at school before school ends?" *Id.* at 143. When Fassbender asked him at the end of the interrogation if he knows what is going to happen next, Dassey says "I don't know." *Id.* at 144. When they tell him he will be arrested, he responds, "Is it only for one day?" *Id.* These lamentably naïve questions suggest that Dassey counted on these assurances that he would be "okay" to mean that he had a free pass to say whatever he wanted (or, more accurately, whatever he thought the investigators wanted to hear) and would not go to jail. Certainly no adult had warned him otherwise.

Once again we recognize that false promises, like other interrogation techniques, do not, per se, make a confession involuntary. *Villalpando*, 588 F.3d at 1128.

Promises, however, cannot be viewed in a vacuum, but rather assessed as they interact with a defendant's unique characteristics. A mature adult of ordinary intelligence might always appreciate that regardless of any assurances he has been given that his incriminating statements might put him in prison. But the state appellate court viewed the words of the interrogators alone without reference to Dassey and without looking at their cumulative effect and concluded that those words by themselves did not promise leniency, but rather merely encouraged honesty. This is an unreasonable finding of fact and an unreasonable application of the federal law's "totality of the circumstances" requirement to those facts.

If, in fact, the state court had looked at those promises, not as they stood alone, but cumulatively and in light of the fact that they were linked to the interrogators' requirements that Dassey tell them what it was they wanted to hear, it could not have come to any other conclusion but that Dassey's free will was overcome. And where a defendant's will is overborne by the circumstances of the interrogation, due process precludes admission of a confession. *Schneckloth*, 412 U.S. at 225-26, 93 S.Ct. 2041.

d. The combined effect of the promises.

The false promises—that he will be "alright," that "it is not his fault" that "the truth will set him free" clearly affected the voluntariness of Dassey's confession. *Villalpando*, 588 F.3d at 1128 ("a false promise [of leniency] has the unique potential to make a decision to speak irrational and the resulting confession unreliable.") The message Dassey heard loudly and clearly was that "the truth" was the key to his freedom, and "the truth" meant those things that the interrogators

wanted him to say. Although the point has already been made, we include a few more examples to emphasize how readily apparent the involuntariness of Dassey's confession ought to have been to any reasonable court reviewing the confession in its totality. Once again, these examples establish a clear pattern of the investigators subtly (or not so subtly) feeding options to Dassey and then admonishing him to "be honest" when his answers do not fit their theory of the case. When Dassey hits upon the correct facts however, interrogators lock in the story by telling him "now we believe you." In the first example, Wiegert knew there were bullet casings found in the garage, but no bullet holes or shell casings found in Halbach's vehicle, so he worked to bring Dassey's answers in line with this evidence. Dassey's culpability does not depend on where Halbach was shot. His only stake is in determining what the investigators want "the truth" to be, because the "the truth" is the key to pleasing the interrogators, getting out of the interrogation room, and "setting him free."

Fassbender: Tell us where she was shot?

Brendan: In the head.

Fassbender: No, I mean where, in the garage?

Brendan: Oh.

Fassbender: Outside, in the house?

Brendan: In the garage.

Fassbender: OK.

Wiegert: Was she on the garage floor or was she in the truck?

Brendan: In the truck.

> Wiegert: Ah huh, come on, where was she shot? Be honest here.
>
> Fassbender: The truth.
>
> Brendan: In the garage.
>
> Wiegert: Before she was put in the truck or after?
>
> Brendan: After.
>
> Fassbender: So she's in the truck and that's when he shoots her? (Brendan nods "yes")

* * *

> Fassbender: And she was in the back of the truck or SUV the whole time that he shot her?
>
> Brendan: She was on the garage floor.
>
> Wiegert: She was on the garage floor. OK.
>
> Fassbender: Alright.
>
> Wiegert: That makes sense. Now we believe you.

R. 19-25 at 72–73.

Similarly, Dassey had no real reason to fabricate what Halbach was wearing, as it neither increased nor decreased his culpability. He did, however, have an incentive to give the investigators the details they were looking for so that he could return to school and home. The investigators, on the other hand, had a description of what Halbach was last seen wearing—blue jeans, a white shirt, and a spring jacket, R. 19-18 at 6, and therefore had a weighty incentive to align Dassey's descriptions with their known facts. As in the previous example, this exchange contains fact-feeding and pleas for "honesty," but it also includes a safety valve. When

Dassey began making a mess of things, the investigators encouraged him to backtrack and say that he could not remember.

> Fassbender: Do you remember what she was wearing? I know it's a long time ago, don't guess, if you remember, you can say it.
>
> Brendan: (shakes head "no") I don't remember.

Id. at 20. Yet later when he receives the cue to "be honest," and a set of options (t-shirt or button-up) he does seem to recall her clothes. When he gives a conflicting answer, and contradicts himself, he is told just to "say I don't remember."

> Fassbender: Did she have clothes on? Now be honest. If she did, she did, and if she didn't, she didn't.
>
> Brendan: Sort of.
>
> Fassbender: OK. What did she have on.
>
> Brendan: Like a white T-shirt and that, pants.
>
> Wiegert: What do you mean sort of? Either she had clothes on or she didn't. It's, was some of it on some of it off? What?
>
> Brendan: It was ripped.
>
> Wiegert: It was ripped (Brendan nods "yes") Where was it ripped?
>
> Brendan: Like right here. (pointing to chest)
>
> Wiegert: Was it a T-shirt or button up shirt or what kind of shirt.
>
> Brendan: A button up one.
>
> Wiegert: What color?

> Brendan: Like a black one.
>
> Wiegert: OK, before you said there was a white T-shirt. She had that on too?
>
> Brendan: Yeah. (nods "yes")
>
> Wiegert: OK, and in the other interview you said it was blue. Do you remember what color it was? If you don't remember, say you don't remember.
>
> Brendan: I don't remember.

Id. at 31–32.

There is no reason to think that Dassey's pattern of guessing at "the truth" until he got it right was any different when the stakes mattered and his culpability was on the line. This is particularly true because the investigators had already assured him that, even knowing what they knew—that is, with "the truth" that they had—Dassey would be "okay." The examples below demonstrate how these promises affected the voluntariness of Dassey's confession of the most horrific acts of the crime.

> Wiegert: What happens after you were done watching TV for 15 minutes.
>
> Brendan: I told him I had to leave cuz I had ta call Travis.
>
> Wiegert: Brendan, be honest. You were there when she died and we know that. Don't start lying now. We know you were there. What happened?
>
> Fassbender: He ain't gonna lie to you, hey we know that OK.

> Wiegert: We already know, don't lie to us now, OK, come on. What happens next?
>
> Fassbender: You're just hurting yourself if you lie now.
>
> Brendan: Then he went in, back in there and he stabbed her.
>
> Wiegert: You were with him? (Brendan nods "yes") Yes?
>
> Brendan: Yeah.

Id. at 54.

Similarly, below, although Dassey had already denied that he had touched or sexually assaulted Halbach, he came to understand that his answer "I didn't do nothing," was causing conflict, and was not "the truth" that the investigators want to hear and that would therefore "set him free."

> Wiegert: So you, he, he brings you back there and he shows you her (Brendan nods "yes") and what do you do? Honestly. Because we think
>
> Fassbender: Very important.
>
> Wiegert: We know happened.
>
> Fassbender: It's hard to be truthful.
>
> Wiegert: We know what happened, it's OK. (pause) What did you do?
>
> Brendan: I didn't do nothin'.
>
> Wiegert: Brendan, Brendan come on. What did you do?
>
> Fassbender: What does Steven make you do?

> Wiegert: It's not your fault, he makes you do it.
>
> Brendan: He told me ta do her … Ta screw her.
>
> Wiegert: Ok. Did you do that? Honestly?
>
> Brendan: Yeah.

Id. at 50.

4. Examples of resistance.

The State makes much of the fact that Dassey resisted the interrogators on many occasions. In fact, the State counts eight occasions in which Dassey resists the interrogators' suggested response. These exchanges differ markedly from the exchanges in which Dassey shifts or changes his answers. For example, in comparison to the example of the garage floor and seeing Halbach on the porch, the exchange between Dassey and the investigators regarding false information about a tattoo differs significantly in form, length and follow-up. Most importantly, it does not contain the pattern of continual pleas for honesty until the answer changes. In the exchange below, the investigators inserted the false notion that Halbach had a tattoo—a tactic interrogators are trained to do to test a suspect's honesty and suggestibility.

> Fassbender: Probably when she was alive, did she have any scars, marks, tattoos, stuff like that, that you can remember?
>
> Brendan: I don't remember any tattoos.

But then just seconds later, the following exchange occurs:

> Fassbender: Ok. (pause) We know that Teresa had a, a tattoo on her stomach, do you remember that?
>
> Brendan: (Shakes head "no") uh uh.
>
> Fassbender: Do you disagree with me when I say that?
>
> Brendan: No but I don't know where it was.
>
> Fassbender: OK.

Id. at 137–39. Rather than explore the subject further, ask where the tattoo was and what it looked like, or admonish Dassey to "be honest" to encourage him to guess again, Fassbender instead immediately moved on to a new subject. From the investigator's perspective, no good could have come from further exploration after Dassey had demonstrated a willingness to go along with the idea that Halbach had a tattoo; he just doesn't "know where it was." *Id.* Moreover, Dassey was able to affirm that he did not disagree with the investigators so he was not forced to change his story to agree. Based on our prior examples, however, one can imagine that if Fassbender had continued as he did in other areas, and the next question he asked was "Be honest, did she have a tattoo of a butterfly or a tiger?" Dassey would have responded with one or the other until he found the correct answer.

Second, it is true that at first Dassey is firm about the location of the knife that Avery used to stab Halbach, but once the investigators use the code "tell us the truth" (in other words, "change your story to tell us what we want to hear"), he immediately caved to their suggestion. The State cites the initial response, but not the follow-up where Dassey succumbs. The initial exchange was as follows:

> Wiegert: Where was the knife that he used, 'er you used. Where's that knife go?
>
> Brendan: He left it in the Jeep.
>
> Wiegert: He what?
>
> Brendan: He left it in the Jeep.
>
> Wiegert: It's not in the Jeep now, where do you think it might be?
>
> Brendan: I sure [sic] it was.
>
> Wiegert: Did you see it in the Jeep?
>
> Brendan: Yeah, cuz he set it on the floor.
>
> Wiegert: Where on the floor did he set it?
>
> Brendan: In the middle of the seats.
>
> Wiegert: Okay.

Id. at 80–81.

In that exchange, there was no admonition to tell the truth or inquiries about whether he was certain, as happened in the following exchange where he did, indeed change his answer about the location of the knife:

> Wiegert: Wh-What about the knife, where is the knife, **be honest** with me, where's the knife? It's OK, we need to get that OK? Help us out, where's the knife?
>
> Brendan: Probably in the drawer.
>
> Wiegert: In which drawer?
>
> Brendan: His knife drawer;
>
> Wiegert: And where's that?
>
> Brendan: In the kitchen.

> Wiegert: Is it probably in there, or do you know it's in there.
>
> Brendan: That's where I think it is.
>
> Wiegert: Why do you think it's in there?
>
> Brendan: Cuz he wouldn't let that knife go.
>
> Wiegert: Cuz he wouldn't let the knife go. How do you know that?
>
> Brendan: Cuz it was a pretty nice knife.

Id. at 121 (emphasis added).

Third, the State argues that Dassey resisted changing his answer regarding when Avery started the fire despite many questions by investigators. But the conversation about the fire was the very exchange in which the investigators became stern with Dassey and set forth the "rules" for the interview—that is, if Dassey failed to tell them what they wanted to hear, the investigators would reprimand him until he guessed the correct answer. Fassbender tells Dassey precisely what the only acceptable answer will be:

> Fassbender: What about the fire?
>
> Dassey: Do you mean if it was started or somethin'? No it wasn't (shakes his head "no.")
>
> Fassbender: Ok. We're not going to go any further in this cuz we need to get the truth out now. **We know the fire was going …. Let's take it through honestly now**.

Id. at 23 (emphasis added). The State argues that Dassey continued throughout the interrogation to state that the fire was going when he got there, but of course he did: Fassbender had made it clear from the very start that this was the only answer he would accept.

Dassey does indeed resist suggestions that he kept Halbach's hair and does so many times. *Id.* at 102. The problem for the State is that the information about cutting Halbach's hair came from some of the most suggestive questioning of the whole interrogation—when Fassbender was desperately trying to compel Dassey to tell him what the two of them had done "with [Halbach's] head." *Id.* at 60. In response to Wiegert's eight questions in succession about what the two had done with Halbach's head, Dassey says, with a rising intonation usually associated with asking a question, "That he cut off her hair [?]" *Id.* (question mark added, *see* R. 19-44, Ex. 43, Disc 1 at 11:57:41 a.m.). It is not surprising that he would deny keeping Halbach's hair when the notion that he cut her hair was simply one of his unsuccessful apparent guesses at what had been done to Halbach's head. Given the origin of the hair comment in the first instance and the recantation and then further confusion about the hair at the May 13 interview, it is difficult to make anything of Dassey's comments about hair cutting at all.

Dassey also resisted the investigators' several inquiries about whether the two of them had used some "wires hanging from the rafters," in Avery's garage to "do stuff" to Halbach in the garage. R. 19-25 at 132–33. This is perhaps the State's strongest evidence of resistance, as there is no readily apparent reason, apart from the truth, that Dassey resisted their questioning about these wires other than, perhaps, that he was too naïve to think of an unimaginably horrible form of torture for which those wires could have been used.

Finally, it is also true that Dassey ardently resisted any suggestion that he shot Halbach or even touched the gun. But he had a reason to do so. He told the investigators that he had been traumatized when his

mother's boyfriend shot his cat and had decided he "couldn't shoot no more" after that episode. *Id.* at 65–66. Having made a clear pronouncement to himself and others that he was a person who did not "shoot no more," he would have been unlikely to have been as suggestible about such a fact.

It was not just Dassey's ability to resist that the State used to support the voluntariness of Dassey's confession, but also the richness of the details he provided and the fact that physical evidence corroborated many of those details. As we noted at the outset, many false confessions contain intricate detail. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. at 1054. And many of the elaborate details Dassey reported were available in the media reports. It had been widely reported in the media that Halbach's RAV4 was found in the salvage yard partially concealed by branches and a car hood; her remains were found in Avery's burn pit along with remnants of clothing; Avery burned tires on the night Halbach was last seen; eleven rifle casings were found in Avery's garage; two rifles were recovered from Avery's bedroom; a key to Halbach's RAV4 was found in Avery's bedroom; the key had Avery's DNA on it; Avery's blood was found in Halbach's RAV4; and Halbach's blood was found in the cargo area of the RAV4. *Dassey v. Dittmann*, 201 F.Supp.3d at 997 (citing newspaper articles).

The State also argues that physical evidence corroborated many of the details to which Dassey confessed, but, in fact, the lack of physical evidence was the weakest part of the State's case. There was no DNA or other physical evidence linking Dassey to this crime in any way—not a strand of his DNA in the garage, Avery's bedroom, on the RAV4 or its key, on any knives, guns, handcuffs or any other relevant place.

Despite descriptions of a gruesome killing with stabbing, throat cutting, hair cutting, rape, and a shooting, investigators never found a single drop of Halbach's blood, hair or DNA in Avery's not-so-tidy trailer and garage—not on the sheets, mattress, carpet, walls, clothing, garage floor, mechanic's creeper, gun, handcuffs, or bed posts. There was no forensic evidence supporting Dassey's story that Halbach had been stabbed, raped, bound or cut. Investigators did find Halbach's blood in her vehicle and her DNA on a bullet fragment in Avery's garage. R. 19-16 at 62–66. The district court pointed out that some of the corroborative evidence had been challenged at trial as being the product of contamination and other unreliable methods. R. 19-27 at 210–32. And in any event, other purportedly corroborative evidence was as harmful as it was helpful. For example, investigators did find handcuffs and leg irons in Avery's bedroom, but not a single scratch on the wooden bed posts as one would expect were Halbach handcuffed to the bed as Dassey described. R. 19-23 at 88. Other corroborative evidence supported both the state and Dassey's theories of the events. For example, the bleach-stained pants supported the state's version of the story in which Dassey knowingly helped clean Halbach's blood from the garage, and also Dassey's version of events in which Avery asked an ignorant Dassey to help clean from the garage floor something that appeared to be automotive fluid. The district court dismissed many of the state's asserted corroborating details as unhelpful, and we need not repeat the district court's explanations. *See Dassey v. Dittmann*, 201 F.Supp.3d at 998.

In sum, the investigators promised Dassey freedom and alliance if he told the truth and all signs suggest that Dassey took that promise literally. The pattern of

questioning demonstrates that the message the investigators conveyed is that the "truth" was what they wanted to hear. When he deviated, they told him he was lying and when he successfully parroted what they wanted him to say, either because he successfully guessed or the investigators had fed him the information, they patted him on the back for telling the truth and told him he would be "okay." Dassey, however, had trouble maintaining a consistent story except when he was being led step-by-step through the facts, thus confirming that this confession emerged not from his own free will, but from the will of the investigators.

We are quite cognizant that our role in this habeas petition is limited. We have catalogued these parts of the confession not because we might have come to a different conclusion about Dassey's guilt or innocence, but because they reflect on the totality of the circumstances that the state appellate court should have been considering when assessing whether Dassey's confession was given of his own free will. By ignoring these false assurances and promises, steering, coaxing, and fact-feeding, the state court, although it knew it must address the totality of the circumstances, failed to apply that rule to these facts. *See* 28 U.S.C. § 2254 (d)(1). The requirement to view the totality of the circumstances, however, applies to adults and minors alike. *See, e.g., Missouri v. Seibert*, 542 U.S. 600, 608, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004). If the admonition to give extra care to juveniles' confessions means anything, it must mean that a court must give extra scrutiny to a child's confession. For example, it might ask if this youth was susceptible to steering. Was he fed information? Was he someone who needed an adult ally to explain the consequences of his Miranda waiver or his confession in general? Did he need someone to re-

mind him not to guess at answers to please the interrogators? Did he need someone to remind him that the investigators were police officers with a different agenda than his? Had the state court given Dassey's confession any of this required care, it simply could not have overcome the many doubts that his confession raises about voluntariness. We have shown again and again a pattern of steering, coaxing, fact-feeding and cueing followed by rewarding the "correct" answer, and we urge anyone with doubts about the voluntariness of Dassey's confession to view the interrogation with this pattern in mind.

By determining that Dassey, under the totality of the circumstances, confessed of his own free will, the court ignored the clear and convincing weight of the evidence and thus made an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(2).

D. Harmless error.

Moreover, because the confession was essentially the only evidence the State presented against Dassey at trial, we, like the district court, must conclude that allowing its admission could not have been harmless error. Specifically, the violation of Dassey's constitutional rights "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (internal citations omitted). Indeed, as the district court pointed out, "Dassey's confession was, as a practical matter, the entirety of the case against him." *Dassey*, 201 F.Supp.3d at 1006. Despite the intensity of the investigation, the brutality of the crime and the disarray of the premises, no one ever found a single hair, a drop of blood, a trace of DNA or a

scintilla of physical evidence linking Dassey to this crime.

E. Ineffective assistance of counsel.

Because we affirm the grant of the writ of habeas corpus on these bases, we need not make a determination about the effective assistance of counsel. We note, however, that should the government decide to retry Dassey, the issue of the admissibility of the May 13 telephone call between Dassey and his mother will require a fresh look to determine whether it is the fruit, so to speak, of an involuntarily-obtained confessional tree.

III.

Teresa Halbach's family has now grieved for their painful loss through several trials, multiple state court appeals, state post-conviction relief appeals, and now the habeas proceedings in federal court. If only this court, through its many words, could re-write the tragic tale of that final day of Teresa's life. But of course, we cannot. Dassey has successfully demonstrated that the state court decision resulted in a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" and that "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) and (2). The decision of the district court is **AFFIRMED** in all respects. The writ of habeas corpus is **GRANTED** unless the State of Wisconsin elects to retry Dassey within 90 days of

issuance of this court's final mandate, or of the Supreme Court's final mandate.

Hamilton, Circuit Judge, dissenting.

Brendan Dassey confessed on videotape that he raped Teresa Halbach, helped his uncle murder her, and then burned her body in a fire pit at his uncle's junkyard. A jury convicted Dassey of those crimes, and the Wisconsin state courts have upheld the convictions. On federal habeas corpus review, however, Dassey has persuaded the district court and now my colleagues that his confession was involuntary and his convictions invalid. I respectfully dissent. We should reverse.

To decide whether Dassey's confession was voluntary, the state courts applied the correct but general and even indeterminate "totality of the circumstances" test. See *Withrow v. Williams*, 507 U.S. 680, 693–94, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993); *Gallegos v. Colorado*, 370 U.S. 49, 55, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962). The Wisconsin Court of Appeals upheld the trial court's finding that Dassey's confession was voluntary in a succinct *per curiam* opinion that rejected that claim in two paragraphs. That was permissible. While the majority would have preferred a more nuanced and detailed discussion of the circumstances surrounding Dassey's confession, the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 does not authorize federal courts to sit in judgment of the length of state court opinions. Rather, as *Harrington v. Richter* teaches, even unexplained decisions by state courts are entitled to deference under AEDPA. See 562 U.S. 86, 98, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) ("Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief."). Under AEDPA and *Richter*, relief must be denied if a reasonable court *could* have reached the state courts' conclusion. *Id.*

Habeas relief from state court convictions is rare, reserved for those unusual cases where state courts abandon their obligation to enforce federal constitutional law. See *id.* at 102–03, 131 S.Ct. 770 ("If [the AEDPA] standard is difficult to meet, that is because it was meant to be …. Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal.") (citation omitted). No Supreme Court precedent compels relief for Dassey. His petition should be denied.

Rather than show how Supreme Court precedent requires habeas relief, the majority observes: "By surveying the Supreme Court cases on the voluntariness of juvenile confessions one can see how much the unique characteristics of both the defendant and the interrogation play into the assessment of voluntariness." Ante at 954. For this reason, the majority writes, "other cases can only act as broad guideposts." *Id.*

That is exactly right, but that is also why we should reverse. Without a compelling showing based on Supreme Court precedent, habeas relief must be denied. The more a state court's decision depends on weighing a host of factors as part of the totality of the circumstances, the harder it is to show that the decision was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). Applying such a broad standard to a particular case leaves substantial room for judgment. "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004) (reversing grant of habeas petition where similar fact-sensitive standard governed

whether seventeen-year-old petitioner had been "in custody" during interrogation in which he confessed).

Even if we were reviewing the admissibility of Dassey's confession *de novo*, great caution would be warranted. The majority's decision breaks new ground and poses troubling questions for police and prosecutors. It calls into question standard interrogation techniques that courts have routinely found permissible, even in cases involving juveniles.

This was a relatively brief and low-key interview of a Mirandized subject who was not mistreated or threatened, whose creature comforts were satisfied, and whose parent consented. If such a gentle interrogation can be treated as unconstitutionally coercive, what should police do the next time an investigation leads to a teenager with some intellectual challenges? Few wrongdoers are eager to own up to crimes as serious as Dassey's. The Constitution is not offended by such police tactics as encouraging the subject to tell the truth, bluffing about what the police already know, or confronting the subject with what the police know from physical evidence and with the internal contradictions and improbabilities in his story. Today's decision will make some police investigations considerably more difficult, with little gained in terms of justice.

I. *The Totality of the Circumstances*

My colleagues describe the critical March 1, 2006 interview of Dassey as "intimidating and anxiety producing." Ante at 974. I suspect the source of any anxiety Dassey felt was his guilt, not the circumstances of a relatively gentle and non-coercive interview. The majority focuses in painstaking detail on a few factors that weigh in favor of finding that Dassey's confession was

not voluntary. Many other factors weigh in favor of finding it was voluntary. The circumstances that have most concerned courts and that have contributed most to voluntariness jurisprudence—such as physical abuse, threatening behavior, or prolonged questioning—were simply absent here.

Consider these circumstances: the investigators did not initially consider Dassey a suspect in the murder. Still, they had good reason to think that he knew more about his uncle Steven Avery's involvement in Teresa Halbach's death than Dassey had told them thus far. Two days before the critical March 1 interview, Dassey had told investigators that he saw human body parts—toes, a hand, a forehead, and a stomach—in Avery's bonfire the previous Halloween. Dassey had also said that Avery told him he stabbed Teresa. In a separate conversation that evening, Dassey had told the investigators that he helped Avery clean a dark red stain on his garage floor.

On March 1, the investigators obtained consent from Dassey's mother to interview him once again. They read *Miranda* warnings to Dassey, drove him to a local sheriff's office, and reminded him about the *Miranda* warnings once they arrived. They offered him snacks, beverages, and restroom breaks. During the interview, Dassey sat comfortably on a sofa. He exhibited no signs of physical distress. The investigators spoke in measured tones. They did not threaten Dassey, nor did they use intimidating or coercive language. They coaxed and encouraged him to tell the truth. They made Dassey no specific guarantees. In fact, they told him at the outset: "We can't make any promises …."

The interview lasted about three hours in total. Fifty-four minutes into the conversation, Dassey told

the officers that he raped Teresa Halbach the day she was murdered. Fourteen minutes later, Dassey admitted, in response to a relatively open-ended question, that he cut Teresa's throat. The investigators soon took a thirty-minute break and then continued questioning Dassey for a little over an hour. At the conclusion of the interview, the investigators informed Dassey that they were placing him under arrest.

At times, the investigators challenged Dassey when his account seemed incomplete, did not make sense, or conflicted with physical evidence. At other points, the investigators deliberately misled Dassey by telling him they knew more than they actually did or by suggesting false facts to see if he would agree to them. (He did not.) Those are routine techniques in police interrogation. They do not transform a voluntary confession into an unconstitutional one. The investigators also repeatedly encouraged Dassey to tell the truth, and they offered vague assurances that it would be better for him if he did. Those are also routine techniques. They are not fraudulent or coercive. At no point did the investigators make the sort of specific false promises that can render a confession involuntary. The record here does not show police tactics "so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment." See ante at 951, quoting *Miller v. Fenton*, 474 U.S. 104, 109, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985).

II. *AEDPA and Deference to State Court Judgments*

A. *The Departure from Deference*

The Antiterrorism and Effective Death Penalty Act of 1996 amended the federal habeas corpus statute to provide that an "application for a writ of habeas cor-

pus … shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court … or (2) resulted in a decision that was based on an unreasonable determination of the facts ….” 28 U.S.C. § 2254(d). It is not enough that a federal court might have decided the case differently in the first instance. Rather, the federal court must be confident that the decision of the state court was so beyond the pale as to constitute an error “well understood and comprehended in existing law *beyond any possibility for fairminded disagreement*.” *Richter*, 562 U.S. at 103, 131 S.Ct. 770 (emphasis added).

My colleagues insist, repeatedly, that they have “kept the strict constraints of the AEDPA forefront” in their minds. E.g., ante at 949. Yet no Supreme Court case, no case decided in this circuit, and indeed no case cited by the parties or the majority has found a confession involuntary on facts resembling these, even where the subject was a juvenile.

Never before has the Supreme Court or this court signaled that police bluffs about what they know may render a confession involuntary. Neither the Supreme Court nor this court has ever held, as the majority seems to believe, that an investigator’s vague assurances about the value of telling the truth may amount to fraudulent promises of leniency. Nor have we held that such statements must be viewed from the subjective perspective of the suspect, no matter how distorted his perspective may be. The majority worries that Dassey may have taken as literal an investigator’s advice that honesty is the “only thing that will set you

free," transforming that biblical phrase into the "exact kind of promise of leniency that courts generally find coercive." Ante at 961; see *John* 8:32. The majority reaches this conclusion in spite of our long recognition that "the law permits the police to pressure and cajole, conceal material facts, and actively mislead." *United States v. Rutledge*, 900 F.2d 1127, 1131 (7th Cir. 1990).

In one telling departure from AEDPA deference, the majority cites a law review article to observe: "Experts on confessions have noted that 'though courts are reluctant to find that police officers have overwhelmed a child's will by repeatedly admonishing the child to "tell the truth," many children will eventually hear "tell the truth" as, "tell me what I want to hear."'" Ante at 963 (citation omitted). The majority then suggests that "Dassey found 'the truth' either by stumbling upon it or by using the information the investigators had fed him," and asserts boldly that it is "impossible to read or view Dassey's interrogation and have any confidence that Dassey's confession was the product of his own free will rather than his will being overborne." Ante at 963–64. The majority invites the reader to scrutinize Dassey's confession with this "key" in hand.

I read (and see) the evidence quite differently: Dassey's confession appears to have been the product of a guilty conscience, coaxed rather gently from him with standard, non-coercive investigative techniques. Even assuming, however, that the majority's interpretation is plausible, our job as a federal court reviewing a state conviction under § 2254(d) is not to consult scholarly literature in search of new best practices.

Our narrower task is to determine whether the state court decision was based either on an unreasonable ap-

plication of clearly established law as handed down by the Supreme Court or on an unreasonable view of the facts. Apart from the uncontroversial observation that juvenile confessions should be treated with care, see *J.D.B. v. North Carolina*, 564 U.S. 261, 269, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011) (direct appeal of *Miranda* custody decision), the majority cites no Supreme Court authority in support of its interpretive "key."[1]

B. *Deference or Critiquing Opinions?*

Early in its opinion, the majority writes that the "state appellate court did not identify the correct test at all and did not apply it correctly." Ante at 947. The criticism is misplaced. The state court correctly recognized that (1) a confession's voluntariness turns on the "totality of the circumstances" and (2) the analysis in-

[1] The majority supports the need for special care in juvenile confession cases by citing studies of exonerated defendants showing that false confessions are more common by juveniles and mentally ill or intellectually deficient suspects. Ante at 952–53. False confessions are a real phenomenon, and even one is very troubling. Yet we should not conclude from these studies of exonerated defendants that there is an epidemic of false confessions. The more relevant denominator in the fraction is all confessions. That number is not easy to estimate, but we can estimate a conservative lower boundary for it. Bureau of Justice Statistics reports on Felony Defendants in Large Urban Counties tally violent felony convictions by guilty plea in just the nation's 75 largest counties. (The most recent report is Brian A. Reaves, U.S. Dep't of Justice, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2009—Statistical Tables* (2013), https://www.bjs.gov/content/pub/pdf/fdluc09.pdf.) The majority's statistics report 227 demonstrably false confessions from 1989 to 2016. From the BJS reports, we can estimate there were more than 1.5 million guilty pleas to violent felonies over that period. So for every one demonstrably false confession over those years, there were more than 6,500 guilty pleas to violent felonies in just those 75 largest counties.

volves a "balancing of the defendant's personal characteristics against the police pressures used to induce the statements." That standard fits comfortably with the Supreme Court's explanation in *Withrow*: "courts look to the totality of circumstances to determine whether a confession was voluntary. Those potential circumstances include … the crucial element of police coercion; the length of the interrogation; its location; its continuity; the defendant's maturity; education; physical condition; and mental health. They also include the failure of police to advise the defendant of his rights to remain silent and to have counsel present during custodial interrogation." 507 U.S. at 693–94, 113 S.Ct. 1745 (citations omitted). This fact-sensitive balancing test applies whether the subject is a mature adult or an intellectually challenged high-school student. See *Gilbert v. Merchant*, 488 F.3d 780, 793 (7th Cir. 2007) ("[I]t is the totality of the circumstances underlying a juvenile confession, rather than the presence or absence of a single circumstance, that determines whether or not the confession should be deemed voluntary.") (collecting cases).

The majority's real concern seems to be that the Wisconsin Court of Appeals only paid lip service to the correct standard but did not apply it seriously. The majority writes that the state appellate court "*listed* Dassey's age, education and IQ, but it never … evaluated those factors to determine whether they affected the voluntariness of Dassey's confession." Ante at 950. Likewise, the majority writes that the state court "analyzed *some* of the investigators' interrogation techniques, but it never evaluated or assessed how those techniques affected the voluntariness of [Dassey's] confession." *Id.* Elsewhere the majority complains that "the state appellate court addressed the voluntariness

of the confession in two short paragraphs." Ante at 960. The majority also writes that the less a state court says, "the less a federal court can ascertain that the state actually applied a totality of the circumstances evaluation." Ante at 960–61. The majority seems to expect longer, more detailed, and perhaps more anguished opinions from the state courts in such cases. Those expectations do not call for habeas relief.

Under § 2254(d), federal courts do not judge the length or brevity of opinions issued by state courts with dockets far more crowded than ours. Federal courts have "no authority to impose mandatory opinion-writing standards on state courts .... The caseloads shouldered by many state appellate courts are very heavy, and the opinions issued by these courts must be read with that factor in mind." *Johnson v. Williams*, 568 U.S. 289, 300, 133 S.Ct. 1088, 1092, 1095–96, 185 L.Ed.2d 105 (2013) (footnote omitted) (reversing habeas relief; federal court erred by finding that state court overlooked petitioner's federal claim and by then reviewing that claim *de novo*); see also *Wright v. Secretary for Dep't of Corrections*, 278 F.3d 1245, 1255 (11th Cir. 2002) ("Telling state courts when and how to write opinions to accompany their decisions is no way to promote comity."). Where the last state court to review a claim reaches a decision and offers reasons, its decision is entitled to the same deference whether the court states its reasons succinctly in an unpublished order or expounds at length in a landmark opinion.

AEDPA deference still applies when a state court offers no reasons, facially defective reasons, or incomplete reasons for its decision. Where a state court provides no explanation, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Richter*, 562

U.S. at 98, 131 S.Ct. 770. "Under § 2254(d), a habeas court must determine what arguments or theories supported or … *could have supported*, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Id.* at 102, 131 S.Ct. 770 (emphasis added); see also *Williams*, 133 S.Ct. at 1094 ("Although *Richter* itself concerned a state-court order that did not address *any* of the defendant's claims, we see no reason why the *Richter* presumption should not also apply when a state-court opinion addresses some but not all of a defendant's claims.").

Similarly, even where the last state court to render a decision offered a faulty reason for its decision, "although we would no longer attach significance to the state court's expressed *reasons*, we would still apply AEDPA deference to the *judgment*," turning to the "remainder of the state record, including explanations offered by lower courts." *Whatley v. Zatecky*, 833 F.3d 762, 775 (7th Cir. 2016) (citation omitted); *Brady v. Pfister*, 711 F.3d 818, 827 (7th Cir. 2013) ("A state court could write that it rejected a defendant's claim because Tarot cards dictated that result, but its decision might nonetheless be a sound one.").

And by the reasoning of *Richter and Williams*, deference likewise applies where a state court "gave some reasons for an outcome without necessarily displaying all of its reasoning." *Hanson v. Beth*, 738 F.3d 158, 164 (7th Cir. 2013); see also *Jardine v. Dittmann*, 658 F.3d 772, 777 (7th Cir. 2011) (per curiam) ("This court must fill any gaps in the state court's discussion by asking what theories 'could have supported' the state court's conclusion.") (citation omitted).

Since AEDPA deference applies when a state court offers no reasons, faulty reasons, or incomplete reasons, such deference must surely be due where, as here, the state court offers a terse explanation for a reasonable result. This is not to suggest that a state court may evade habeas review by merely incanting the correct test (in this case, "totality of the circumstances"). The majority is correct in saying that "if a court can merely state the generic Supreme Court rule without any analysis, then no federal court could ever find that 'a decision … involved an unreasonable application of clearly established Federal law.'" Ante at 947 (citation omitted). AEDPA review is deferential but not toothless. Federal courts are charged with reviewing state court records to assess the reasonableness of state court decisions. We grant relief in a small but nontrivial portion of cases, at least at the appellate level. The issue is not whether the state court might have overlooked something but whether the bottom-line result is "beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103, 131 S.Ct. 770.

What federal courts may not do is infer that a decision was unreasonable based on the lack of explanation. As a reader of judicial opinions, I too would have appreciated more context and development in the opinion of the Wisconsin Court of Appeals. I cannot, however, hold that use of Dassey's confession was unconstitutional merely because the state court did not say more about all the relevant factors. The overall mix of relevant factors here simply does not dictate a finding that his confession was involuntary.

III. *Doctrinal Developments*

Showing a lack of the required deference to the state courts, the majority breaks new doctrinal ground

in three significant respects: redefining what counts as a false promise of leniency, relying on police bluffs in the interrogation to find the confession was involuntary, and departing from a series of our court's habeas cases denying relief to juveniles who were subjected to much more pressure than Dassey was.

First, what counts as a false promise of leniency? The majority opinion loses sight of the difference between general assurances of better treatment, which are permitted even when made to juveniles, and factually false promises, which are not. We have long recognized that "a false promise of leniency may render a statement involuntary" but that "police tactics short of the false promise are usually permissible." *United States v. Villalpando*, 588 F.3d 1124, 1128 (7th Cir. 2009). In *Villalpando*, we rejected a claim that a police detective made a false promise of leniency where she offered to "go to bat" for the defendant and said she would "sit down" with law enforcement and probation to "work this out," and where she also remarked, "we don't have to charge you." *Id.* at 1129.

Similarly, in *United States v. Rutledge*, a police officer asked the defendant whether he would be willing to give a post-arrest statement. The officer advised the defendant that "all cooperation is helpful." 900 F.2d at 1128. We noted that one "interpretation of the officer's statement ... is that it promised ... a net benefit from spilling the beans," and if the officer made such a promise without intending to keep it, "the statement was fraudulent." *Id.* at 1130–31 (emphasis omitted). "But it was the sort of minor fraud that the cases allow. Far from making the police a fiduciary of the suspect, the law permits the police to pressure and cajole, conceal material facts, and actively mislead—all up to limits not exceeded" in that case. *Id.* at 1131; see also *Fare v. Mi-*

chael C., 442 U.S. 707, 727, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979) (police "did indeed indicate that a cooperative attitude would be to [sixteen-year-old's] benefit," but their "remarks in this regard were far from threatening or coercive").

The majority acknowledges that in Dassey's case, the investigators "never made the type of explicit and specific promise of leniency that an adult of ordinary intelligence might understand as a promise." Ante at 974. That's right. The investigators' statements were comparable to those permitted in *Villalpando* and *Rutledge*. The investigators made vague assurances that honest cooperation would make things easier for Dassey "if this goes to trial"; that "the honest person is the one who's gonna get a better deal out of everything"; and that honesty is the "only thing that will set you free." One investigator said at the very beginning of the interview, before Dassey had confessed to anything, that "from what I'm seeing … I'm thinking you're all right. OK, you don't have to worry about things." But the other then cautioned: "We can't make any promises but we'll stand behind you no matter what you did."

At no point did the investigators assure Dassey that he would escape prosecution or receive some other specific benefit if he cooperated or confessed. Cf. *Sharp v. Rohling*, 793 F.3d 1216, 1235 (10th Cir. 2015) (subject's will was overborne where detective promised her she would not go to jail if she admitted to her participation in crime); *Henry v. Kernan*, 197 F.3d 1021, 1027 (9th Cir. 1999) (subject's will was overborne where of-

ficer falsely informed him that what he said "can't be used against you right now").[2]

The majority insists, however, that whether police have made an impermissible false promise of leniency (or of anything else) depends on the subjective perception of the suspect, no matter how distorted or inaccurate his perception might be. Thus, to Dassey—with his borderline IQ and suggestible personality—the investigators' vague assurances had in the majority's view the "same effect" as a fraudulent promise. Ante at 974.

The Supreme Court's "totality of the circumstances" test takes account of the subjective characteristics of the defendant (e.g., his age, health, and education). Yet no Supreme Court case has held that a confession should be deemed involuntary if the subject believed—however improbably or baselessly—that he had been promised a get-out-of-jail-free card. No case requires the reviewing court to disregard what police *actually said* (on a video recording, no less) in favor of what the defendant, with the benefit of time, hindsight, and savvy counsel, says he thought the police said. At a minimum, reasonable jurists could disagree whether the abstract assurances by the investigators here were, in

[2] In oral argument, we asked Dassey's counsel to identify a case—*any* case—in which a habeas petitioner was granted relief due to police representations similar to those made here. Counsel cited *A.M. v. Butler*, 360 F.3d 787 (7th Cir. 2004), a split panel decision that is readily distinguishable and illustrates how much of a stretch Dassey's claim is. In *A.M.*, the subject was just eleven years old, and he was not properly Mirandized. *Id.* at 793. He testified at trial that the interviewing officer made him a specific false promise: that if he confessed to beating and stabbing to death his elderly neighbor, "God and the police would forgive him and he could go home in time for his brother's birthday party." *Id.* at 794. Investigators made no such false promise to Dassey.

context, false and fraudulent. That alone should defeat any claim for habeas relief.

Even if we were to approach the question *de novo*, there is good reason to review any alleged promises by investigators from an objective point of view, at least when we have hard evidence of what was said (and what was not). People who commit brutal crimes of the sort Dassey was convicted of committing tend to be maladjusted and detached from social norms. It should come as no surprise that a juvenile who helps to rape a helpless victim, caps off that experience by watching television and chatting with his uncle, and then helps to murder their victim, as Dassey said he did, lives with a distorted worldview. Dassey's subjective impression of what police told him should not be decisive.[3]

Second, the majority suggests that Dassey was at greater risk of being misled by the investigators' vague moral support because they repeatedly told him that they "already knew" what happened. As the majority

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[3] Dassey brought his involuntary confession claim under both 28 U.S.C. § 2254(d)(1), decisions contrary to or unreasonably applying clearly established federal law, and (d)(2), decisions based on unreasonable factual determinations. The majority and I both focus on the Supreme Court's "totality of the circumstances" test and related doctrinal considerations under (d)(1). The majority also says in several places that the state courts made unreasonable factual findings under (d)(2) but acknowledges that the analyses under (d)(1) and (2) overlap here. Ante at 950. There is no dispute about what the investigators actually said, and the discussion in this section shows why the claim should also fail under (d)(2). The state courts' finding that the investigators made no false promises is best understood as a finding that they made no *legally relevant* false promises, i.e., no specific false promises of leniency, as distinct from vague assurances that cooperation would be in Dassey's best interests. Dassey has not shown by clear and convincing evidence that the finding was wrong. See § 2254(e)(1).

construes these statements, Dassey could have believed that—so long as he was honest—nothing bad would happen to him. See ante at 975. The majority cites no case from the Supreme Court or any other court holding that such bluffing by police about what they know could render a confession involuntary. On the contrary, we have recognized that "a lie that relates to the suspect's connection to the crime is the *least likely* to render a confession involuntary." *United States v. Ceballos*, 302 F.3d 679, 695 (7th Cir. 2002) (emphasis added) (citation omitted); see also *United States v. Sturdivant*, 796 F.3d 690, 697 (7th Cir. 2015) ("[W]e have repeatedly held that a law-enforcement agent may actively mislead a defendant in order to obtain a confession, so long as a rational decision remains possible.") (alteration in original), quoting *Conner v. McBride*, 375 F.3d 643, 653 (7th Cir. 2004).

Third, in concluding that Dassey's confession was involuntary, the majority effectively departs from a string of our habeas decisions involving confessions by juveniles who were denied relief despite being subjected to far greater pressures than Dassey was.

For instance, in *Etherly v. Davis*, 619 F.3d 654, 657 (7th Cir. 2010), we reversed habeas relief for a petitioner with no prior criminal justice experience who at age fifteen was taken from his home before dawn and interviewed by police several hours later without the consent, let alone the presence, of a parent or other friendly adult. Like Dassey, Etherly had borderline intellectual abilities; like the investigators here, the police in *Etherly* assured the juvenile that it would "go better for him in court" if he cooperated. *Id.* at 658.

In *Carter v. Thompson*, 690 F.3d 837, 839 (7th Cir. 2012), we denied relief to a habeas petitioner who at

age sixteen endured an interrogation lasting fifty-five hours in total. During gaps in the interrogation, the petitioner slept on a bench, without a pillow, a blanket, or a change of clothes. *Id.* at 841; see also *Murdock v. Dorethy*, 846 F.3d 203, 210 (7th Cir. 2017) (denying relief to sixteen-year-old who was interrogated over seven-hour period); *Gilbert*, 488 F.3d at 784–86 (denying relief to fifteen-year-old who was kept from his mother and interrogated over nine-hour period); *Hardaway v. Young*, 302 F.3d 757, 766 (7th Cir. 2002) (denying relief to fourteen-year-old who was interviewed over sixteen-hour period and abandoned for lengthy intervals in interrogation room).

The majority describes these cases but makes no real effort to reconcile them with the relief it grants Dassey. Instead, it criticizes the Wisconsin Court of Appeals for failing to elaborate on all the factors the majority considers important. See ante at 956. As explained above, § 2254(d) does not authorize federal courts to critique state court opinions so closely. It is enough that the state court identified the correct legal standard and applied it reasonably to the facts of the case. Just as police investigators will be left scratching their heads after this decision, state and federal courts will be flummoxed as they attempt to reconcile our grant of habeas relief to Dassey with the line of cases pointing the other way.

IV. *The Details of Dassey's Confession*

Having replaced deference to the state court with what amounts to *de novo* review, and having redefined what counts as a false promise of leniency, the majority evaluates Dassey's confession in the light most favorable to him. The majority opinion highlights the mo-

ments when Dassey seemed most hesitant or ambivalent.

I have no quarrel with the majority's consideration of those moments. We need to consider Dassey's strongest arguments as well as the strongest arguments advanced by the State. At a few points, the investigators' questions were so assertive and leading that it is difficult to tell whether Dassey made an honest attempt at a truthful answer or simply offered up the answer he believed the investigators were fishing for.

A good example: the investigators believed that Teresa Halbach had been shot in the head, a detail that had not been reported in the media. (A burnt fragment of her skull recovered from the fire pit had traces of lead on it.) If Dassey knew that Teresa had been shot in the head, that knowledge would tend to corroborate his story. The investigators asked Dassey, "[W]hat else did you do? Come on. Something with the head." Dassey floundered, volunteering that his uncle Avery cut off some of Teresa's hair and punched her in the head and that he—Dassey—slit Teresa's throat. Apparently exasperated, one investigator said: "All right, I'm just gonna come out and ask you. Who shot her in the head?" Avery did, Dassey replied, adding that he did not volunteer the information because he "couldn't think of it." It's reasonable to be skeptical about Dassey's response to such a leading question, at least taking the response in isolation.

But for every point when Dassey seemed uncertain or confused, at many other points Dassey gave specific and incriminating answers to open-ended questions. Most important, Dassey volunteered specific and in-

criminating details about what he did, what he saw, what he heard, and even what he smelled.

Early in the interview, the investigators asked Dassey what Avery told him and showed him after he arrived at Avery's trailer. Dassey said: "He showed me the knife and the rope." They then asked Dassey where he saw Teresa. Dassey said she was lying dead in the back of her jeep and that Avery told him he stabbed her. They asked why Avery had invited Dassey over. Dassey said, "Probably to get rid of the body." When the investigators asked what happened next, Dassey admitted that he helped his uncle move Teresa's body to the burn pit. When they asked Dassey to describe Teresa's injuries, he said she had been stabbed in her stomach, a detail he repeated several times. (The condition of Teresa's remains made it impossible to confirm or refute that fact.)

The investigators suspected Dassey had left out some important information. They asked how Dassey knew Teresa was already dead when he saw her in the jeep. Dassey volunteered that he heard screaming while riding his bike outside. He then admitted that he entered Avery's trailer and saw Teresa. He said that Teresa was handcuffed to Avery's bed. When the investigators asked Dassey what Avery told him, Dassey said: "That he never got some of that stuff so he wanted to get some," adding that Avery "wanted to f*** her so hard."

While it took more than a little coaxing from the investigators before Dassey admitted that he too raped Teresa, Dassey soon provided quite specific details about his role in the crime. He said that Teresa begged him to do the "right thing"; that Avery, conversely, praised him for doing a "good job"; that he helped

Avery tie up Teresa; and that he slit her throat and cut her hair. Dassey described the brutal cremation, recalling how he and Avery carried Teresa's body to the burn pit and covered her with branches and tires.

When the investigators asked Dassey how he and Avery cleaned the crime scene, he recounted their efforts: "We threw gas on [a pool of blood] so he could get it off. Then he tried paint thinner and then he went to bleach to get it off and … he went like he was spraying it …. I thought he got it on the floor and it splashed up on my pants …." The investigators retrieved Dassey's pants from his home. Sure enough, they were stained with bleach.

In addition to answering open-ended questions in specific and incriminating detail, Dassey resisted several lines of inquiry. Those points of resistance gave the state courts substantial reason to find that Dassey's will was not overborne. Recall that the investigators were keenly interested in any information Dassey could offer about how and when Teresa Halbach was shot. They asked him how many times he shot Teresa. "Zero," he replied. He added that he "didn't even touch the gun," explaining that he had been unable to shoot ever since his mother's ex-boyfriend had shot their sick cat.

After Dassey admitted that he cut Teresa's hair at Avery's urging, the investigators asked what had become of the hair. Dassey insisted that he did not know and did not have the hair. Even when the investigators warned Dassey that they would find the hair if he had kept it, he insisted, "I don't got none of the hair."

At another point in the interview, the investigators asked Dassey whether he saw Avery rape Teresa. Three times Dassey said no. They repeatedly asked Dassey whether he and Avery had used wires hanging

in the garage to harm Teresa; Dassey insisted they had not. He rejected their suggestion that he and Avery might have hung Teresa from a rafter, even after the investigators pointed out that the "worst" was over and nothing he said would surprise them.

In one of the most direct tests of Dassey's suggestibility, the investigators told him falsely that Teresa had a tattoo on her stomach and asked him if he remembered it. Dassey said no. They pressed Dassey, asking if he disagreed with them. Dassey replied: "No but I don't know where it was." If Dassey were as overwhelmed by the police questioning as the majority seems to believe, surely he would have simply agreed that Teresa had a stomach tattoo—and that he had kept her hair—and that he had hung her from the rafters, and so on.

To be sure, Dassey's confession was not a smooth and consistent story. There were holes in the narrative. Dassey waffled and backtracked. The sequence of events was not always clear. The majority, reviewing the interview with its defense-friendly "key" in hand, takes these inconsistencies as proof that Dassey was not recounting real memories but only telling the investigators what he believed they wanted to hear.

As an alternative "key" for reviewing Dassey's confession, one might consider that the sixteen-year-old subject was wracked by guilt and was finally coming to grips with the gravity of his crimes. He had been led to do things so awful that, in the months following the crimes, he stayed silent but lost forty pounds and had fits of uncontrolled sobbing.

Owning up to what he did proved difficult for Dassey, as it surely would for anyone with a trace of a conscience. He had trouble getting the words out. Given

the vagaries of human memory, it is not surprising that some details and sequences had become garbled as he replayed those violent and grisly images over and over in his mind for four months. It is easy to understand why, by the time of the March 1 interview, Dassey was not sure about everything that had happened and in what order.

While Dassey's recollection of the sequence of events was hazy, he remembered some details vividly. He remembered colors, sounds, and smells. He remembered his uncle standing in the doorframe in his white shirt and red shorts, beckoning him inside. He remembered Teresa Halbach, lying alive on his uncle's bed and later dead in the back of the jeep. He remembered her screams. He remembered her telling him he did not have to rape her and he should do the right thing. He remembered her blood pooling on the garage floor. He remembered the odor of her burning flesh. And he remembered why he committed the cruel acts he described: he "wanted to see how [sex] felt."

The majority writes that "the lack of physical evidence was the weakest part of the State's case." Ante at 981–82. The physical evidence does not prove or disprove Dassey's guilt or the accuracy of his confession. Still, the State offered substantial evidence that tended to corroborate some details of his confession. Examples include handcuffs and leg irons found in Avery's bedroom (corroborating Dassey's description of Teresa's rape); a charred shovel, rake, and car seat (corroborating Dassey's description of the crude cremation of Teresa's body); and a stipulation by a family friend that he saw Avery and Dassey standing by a bonfire on Avery's property on Halloween night in 2005, the same night that Teresa and her SUV vanished after she

headed to an appointment to take photographs at Avery's junkyard.

We also should not lose sight of the most damning physical evidence: the bones of Teresa Halbach, broken and charred, buried in the ashes of Avery's burn pit. The *corpus delicti* does not point inexorably to Dassey. But it is grim corroboration for much of the story he told the investigators.

V. *Conclusion*

All agree that the governing constitutional standard for the voluntariness of a confession depends on the totality of the circumstances. The state courts recognized that standard and applied it reasonably to the facts before them. As in most cases on voluntariness of confessions, relevant factors point in conflicting directions. A few factors and passages from Dassey's confession support the majority's view that the confession was not voluntary. Many other factors and passages support the state courts' view that, overall, the confession was voluntary. The Wisconsin Court of Appeals could have been much more thorough in its discussion, but its conclusion was within the bounds of reason. It was not contrary to or an unreasonable application of controlling Supreme Court precedent. We should reverse the district court's grant of the writ of habeas corpus.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 14-CV-1310

BRENDAN DASSEY,
Petitioner,
v.

MICHAEL A. DITTMANN,[1]
Respondent.

Signed August 12, 2016
[201 F. Supp. 3d 963]

DECISION AND ORDER

WILLIAM E. DUFFIN, U.S. Magistrate Judge

I. Facts and Procedural History

A. The Initial Investigation

Teresa Halbach, the oldest daughter of northeastern Wisconsin dairy farmers, graduated summa cum laude from the University of Wisconsin—Green Bay in

[1] Records of the Wisconsin Department of Corrections state that petitioner Brendan Dassey is currently incarcerated at Columbia Correctional Institution, http://offender.doc.state.wi.us/lop/, and the warden of this institution is Michael A. Dittmann, http://doc.wi.gov/families-visitors/find-facility/columbia-correctional-institution (last visited August 12, 2016). Therefore, in accordance with Rule 2(a) of the Rules Governing Section 2254 Cases and Fed. R. Civ. P. 25(d), the caption is updated accordingly.

2002. By the time she was 25-years-old she was running her own photography business. Halbach's family and friends became concerned in early November 2005 after she had not been seen or heard from for a few days. Uncharacteristically she had not stopped by her photography studio and her voicemail was full. Family, friends, and law enforcement distributed thousands of missing person posters, scoured roadside ditches in case she had had an accident, and retraced her last known activities. Searchers learned that Halbach had been photographing vehicles for Auto Trader Magazine on October 31, 2005. After photographing vehicles at two residences that day, Halbach was scheduled to photograph a minivan that was for sale at the Avery Salvage Yard. Halbach had not been seen or heard from since.

On Saturday, November 5, 2005, volunteer searchers, with the permission of the owners of the property, undertook a search of the Avery Salvage Yard. The salvage yard property was expansive, spanning 40 acres and containing roughly 4,000 vehicles. Amidst the thousands of salvaged vehicles, partially covered by tree branches, fence posts, boxes, plywood, and auto parts, a pair of searchers found Halbach's 1999 Toyota RAV4.

As a result of this discovery, investigators obtained a search warrant for the entire salvage yard property, which encompassed roughly fifteen buildings and included residences of various members of the extended Avery family, garages, and other outbuildings. The search was extensive, involving many different agencies, dozens of law enforcement personnel, and dozens more volunteer firefighters, along with dive teams for the ponds and dogs trained to detect blood and human remains. The search lasted a week and covered not only all of the

buildings but also each of the 4,000 salvaged vehicles, some of which had been crushed and required specialized equipment to inspect.

Steven Avery, a son of the owners of the salvage yard, lived in a residence on the property. Investigators recovered two firearms from a gun rack above Avery's bed and a key to Halbach's RAV4, found in Avery's bedroom. In a burn barrel and a roughly four-foot by six-foot burn pit near Avery's residence, investigators located charred human bone and tooth fragments. Also recovered from the burn areas were the burned remnants of electronics, a zipper, and rivets from a woman's jeans. In a vehicle in the salvage yard a searcher found the license plates that had been on Halbach's RAV4.

Subsequent investigation determined that the recovered human remains were those of an adult female who was no more than 30-years-old. Analysis of the skull fragments determined that she had been shot twice in the head. DNA testing of tissue remaining on one of the bone fragments was consistent with Halbach's DNA profile, with the chance that the DNA was from a source other than Halbach being one in a billion.

Additionally, investigators determined that the burned electronics were from a mobile phone, personal organizer, and digital camera of the same makes and models that Halbach was known to have owned. Halbach was seen wearing jeans shortly before she arrived at the Avery property on October 31, and the rivets recovered from the burn area were from jeans of the same brand Halbach was known to own. Multiple witnesses reported seeing a large bonfire in the burn pit outside Avery's residence on October 31.

Forensic examination of Halbach's RAV4 revealed multiple blood stains. A roughly six-inch blood stain in the rear cargo area by the wheel well displayed a pattern consistent with having been the result of bloody hair. The DNA profile developed from this stain and others in the cargo area, including along the plastic threshold to the cargo area, the door to the cargo area, and a metal piece along the opening of the cargo area, was identified as being that of Halbach.

Other small blood stains in the passenger compartment of Halbach's RAV4, just to the right of the ignition, on a CD case, on a metal panel between the rear seats and the vehicle cargo area, on the driver's seat, on the front passenger's seat, and on the floor by the center console all matched Steven Avery's DNA. Avery's DNA was also detected on the hood latch of Halbach's RAV4 and on the key to the RAV4 that was found in Avery's bedroom.

Investigators learned that Halbach had taken photographs at the Avery property on five prior occasions. Avery called Auto Trader on the morning of October 31, 2005, and requested that "the same girl who had been out here before" come and take pictures of a vehicle that was for sale. Just before 2:30 p.m., Halbach contacted Auto Trader and said that she was on her way to the Avery property. At roughly 2:30 or 2:45 p.m., a neighbor of Avery's saw Halbach photographing a minivan and then go to Avery's residence. The neighbor left home at about 3:00 p.m. and observed Halbach's RAV4 still outside Avery's residence but did not see Halbach. When he returned home at about 5:00 p.m. Halbach's RAV4 was no longer there.

Avery was arrested and charged with Halbach's murder.

B. The Investigation of Brendan Dassey

The investigation regarding Avery continued as he awaited trial. On February 20, 2006, investigators interviewed Kayla Avery, Steven Avery's teenage niece. Although the interview focused on information related to Steven Avery, at the end of the interview Kayla stated that her cousin, Brendan Dassey, had been "acting up lately." When asked to explain, Kayla stated that Dassey would stare into space and start crying uncontrollably, and that he had lost roughly 40 pounds recently.

Based on this information from Kayla, and because a witness reported seeing Dassey at the bonfire with Avery around 7:30 or 7:45 on the evening of October 31, investigators decided that they needed to re-interview Dassey. Dassey, like Avery's other relatives, had been questioned earlier in the investigation. Dassey was 16 years old and, aside from this investigation, had never had any contacts with law enforcement. (ECF Nos. 19–12 at 60; 19-13 at 4.) He was described as a "very shy boy" who "doesn't say too much." (ECF No. 19-12 at 67.) In school, he typically followed rules and did not get into trouble. (ECF No. 19-12 at 94.) He also suffered from certain intellectual deficits. His IQ was assessed as being in the low average to borderline range. (ECF No. 19-22 at 46-49.) He was a "slow learner" with "really, really bad" grades. (ECF No. 19-12 at 66.) Specifically, he had difficulty understanding some aspects of language and expressing himself verbally. (ECF No. 19-12 at 90.) He also had difficulties in the "social aspects of communication" such as "understanding and using nonverbal cues, facial expressions, eye contact, body language, tone of voice." (ECF No. 19-12 at 91.) Testing also revealed that he was extreme when it came to social introversion, social alienation, and es-

pecially social avoidance. (ECF No. 19-22 at 34-35.) As a result, he received special education services at school. (ECF No. 19-13 at 3.)

Calumet County Sheriff's Investigator Mark Wiegert and Wisconsin Department of Justice Special Agent Tom Fassbender met with Dassey on February 27, 2006, in a conference room at Dassey's high school, where they spoke for about an hour. After the interview, Wiegert and Fassbender contacted the prosecuting attorney, who requested that they create a better record of the interview than the poor-quality audio cassette recording they had. They made arrangements to interview Dassey again later that same day at a local police station that was equipped with video recording equipment.

Wiegert and Fassbender contacted Dassey's mother, Barb Janda, who went to the school. She and Dassey then went with the officers to the police station. According to Wiegert and Fassbender, Janda declined their offer to be present for the interview and instead remained in the waiting area of the police station. (ECF No. 19-19 at 7.) According to Janda, the investigators discouraged her from joining Dassey for the interview. (ECF No. 19-30 at 155.) During this second February 27 interview, which lasted less than an hour, Dassey acknowledged being present at the October 31, 2005 bonfire with Avery and that he saw body parts in the fire. (ECF No. 19-19 at 8-9.) Fassbender met with Dassey again in the evening on February 27. Dassey told Fassbender that he got bleach on his pants after helping Avery clean the floor of Avery's garage on October 31. (ECF No. 19-19 at 10-11.)

Believing that he knew more than what he had thus far told investigators, Wiegert and Fassbender ob-

tained permission from Janda to speak to Dassey again two days later, on March 1, 2006. (ECF Nos. 19–19 at 12; 19-30 at 156.) According to Janda, the investigators never asked her if she wanted to be present for this interview. (ECF No. 19-30 at 156.) The investigators picked Dassey up at his high school in the morning on March 1. After they advised Dassey of his constitutional rights under *Miranda*, he agreed to speak with them. (ECF Nos. 19–19 at 16; 19-25 at 2.) Wiegert and Fassbender then went with Dassey to his house, located on the Avery family property near Avery's home, where Dassey gave them the bleach-stained jeans he previously mentioned. (ECF No. 19-25 at 3-7.) On the way to the sheriff's department Wiegert and Fassbender asked Dassey if he wanted anything to eat or drink. He declined. (ECF No. 19-25 at 8.)

The March 1, 2006, interview was the fourth time the police had questioned Dassey in 48 hours. The interview began shortly before 11 a.m. It was conducted in a "soft room"—a room in the Manitowoc County Sheriff's Department that contained a small couch, two soft chairs, and lamps—rather than a brick-walled interrogation room with a hard table. (ECF No. 19-19 at 19-20.) The interview was video and audio recorded. No adult was present on Dassey's behalf.

The interview began with Fassbender acknowledging that one reason Dassey had said he did not come forward earlier was that he was scared that he would be implicated. (ECF No. 19-25 at 16.) Fassbender stated, "I want to assure you that Mark and I both are in your corner[.] We're on your side." (ECF No. 19-25 at 16.) Fassbender stated that it was best if Dassey told the whole truth and not leave anything out, even if the details might be against his own interests. (ECF No. 19-25 at 16.) Fassbender continued, stating,

"[F]rom what I'm seeing ... I'm thinking you're all right. OK, you don't have to worry about things." (ECF No. 19-25 at 16.) Wiegert commented, "Honesty here Brendan is the thing that's gonna help you. OK, no matter what you did, we can work through that. OK. We can't make any promises but we'll stand behind you no matter what you did. OK. Because you're being the good guy here." (ECF No. 19-25 at 17.) Wiegert continued, noting that being honest was the best way to help himself out and "[h]onesty is the only thing that will set you free. Right?" (ECF No. 19-25 at 17.) He then assured Dassey, "We pretty much know everything[.] [T]hat's why we're talking to you again today." (ECF No. 19-25 at 17.)

At the investigators' prompting, Dassey began to recount the events of October 31, 2005. (ECF No. 19-25 at 18.) Over the next approximately three hours (with a roughly half-hour break), generally responding to the investigators' questions with answers of just a few hushed words, a story evolved whereby in its final iteration Dassey implicated himself in the rape, murder, and mutilation of Teresa Halbach.

In the first version that Dassey told investigators on March 1, he got off the school bus at about 3:45 p.m. on October 31, 2005. When he went to his home, he saw Avery and Halbach talking on Avery's porch. (ECF No. 19-25 at 18-19.) Dassey said he then went inside his home, cleaned his room, played videogames, ate dinner, and watched TV until Avery called him requesting help with a car. (ECF No. 19-25 at 18-22.)

At this point Fassbender stopped Dassey and said he did not believe what Dassey was saying. Wiegert interjected, reminding Dassey to be honest and again stating, "We already know what happened." (ECF No.

19-25 at 23.) "We're in your corner," Fassbender assured Dassey. (ECF No. 19-25 at 23.) "We already know what happened[.] [N]ow tell us exactly. Don't lie," Wiegert said. (ECF No. 19-25 at 23.) The investigators continued to encourage Dassey to tell the story. Fassbender asked, "Who's [sic] car was in the garage?" (ECF No. 19-25 at 24) and Wiegert followed, "We already know. Just tell us. It's OK." (ECF No. 19-25 at 24.)

Dassey responded, "Her jeep." (ECF No. 19-25 at 24.) "That's right," Fassbender confirmed. (ECF No. 19-25 at 24.) After some questions about Halbach's RAV4 and the garage, the investigators proceeded to ask Dassey about what Avery showed him. (ECF No. 19-25 at 26.) Dassey eventually said that Avery showed him "the knife and the rope." (ECF No. 19-25 at 26.) Wiegert asked where Halbach was, continuing, "Come on, we know this already. Be honest." (ECF No. 19-25 at 26.) "In the back of the jeep," Dassey answered. (ECF No. 19-25 at 26.) Slowly, Dassey came to say that he first encountered Halbach when Avery showed him her body, deceased, bound with rope, and wearing a black shirt, a ripped t-shirt, and pants, in the back of her RAV4. (ECF No. 19-25 at 26, 31-32.) He said that Avery told him that he had stabbed her and raped her because she had upset him. (ECF No. 19-25 at 27, 30, 36.) The investigators pressed Dassey for more details, with Wiegert reminding him, "Remember we already know, but we need to hear it from you." (ECF No. 19-25 at 28.) Dassey told the investigators that he and Avery took Halbach out of the back of the RAV4 and put her in the fire pit where a bonfire was already burning. (ECF No. 19-25 at 32-33.)

With further prompting and assurances from the investigators that they already knew the details (ECF

No. 19-25 at 30, 31, 36, 37), Dassey added details. He told them, for example, that he was outside riding his bike after school when he heard a woman screaming for help inside Avery's home. (ECF No. 19-25 at 37-38.) When Fassbender said he thought that Dassey went over to Avery's house, Dassey stated that he rode his bike to get the mail and, after noticing that there was mail for Avery, he went to Avery's house. (ECF No. 19-25 at 41.) Avery answered the door, Dassey gave him the mail, and he left. (ECF No. 19-25 at 41.)

Wiegert again challenged Dassey's story, stating, "It's OK Brendan. We already know," and soon thereafter, "You went inside, didn't you?" (ECF No. 19-25 at 41.) Dassey nodded yes. (ECF No. 19-25 at 41.) Dassey then said that he knocked three times before Avery finally came to the door, sweaty, and invited Dassey into the kitchen. (ECF No. 19-25 at 45.) Once inside Avery's home Dassey could see down the hallway to Avery's bedroom where Halbach was naked, handcuffed to Avery's bed, and screaming for help. (ECF No. 19-25 at 42-43.)

Dassey said that Avery asked him if he wanted a soda. Dassey accepted. (ECF No. 19-25 at 46.) As Dassey drank his soda, Avery said that he wanted to continue raping Halbach and asked Dassey if he wanted to as well. (ECF No. 19-25 at 46-48.) Dassey said he "wasn't aged," and, "I ain't old enough ta have a kid yet." (ECF No. 19-25 at 48, 99.) But Avery continued to pressure Dassey (ECF No. 19-25 at 99) and took him into the bedroom (ECF No. 19-25 at 48-49).

Dassey denied doing anything further. But Wiegert assured Dassey, "We know [what] happened.... We know what happened, it's OK." (ECF No. 19-25 at 50.) Dassey again denied doing anything. (ECF No.

19-25 at 50.) Wiegert continued, "It's not your fault, he makes you do it." (ECF No. 19-25 at 50.) Dassey responded, "He told me ta do her." (ECF No. 19-25 at 50.) Dassey eventually came to say he raped Halbach while Avery watched from the doorway. (ECF No. 19-25 at 51.) When it was over, Avery congratulated Dassey, and the two went to watch TV in another room for about 15 minutes. (ECF No. 19-25 at 52-53, 101.)

The investigators asked Dassey what happened next. Dassey said he told Avery that he had to leave. (ECF No. 19-25 at 54.) Wiegert responded, "Brendan, be honest. You were there when she died and we know that. Don't start lying now. We know you were there.... We already know, don't lie to us now, OK, come on." (ECF No. 19-25 at 54.) Dassey said that Avery then stabbed Halbach once in the stomach. (ECF No. 19-25 at 54-55.) Wiegert continued to prompt Dassey, "He did something else, we know that." (ECF No. 19-25 at 54.) By this time the investigators knew from forensic examination of the recovered skull fragments that Halbach had been shot at least once in the head. (ECF Nos. 19–19 at 85; 19-20 at 27.) They would learn later that Halbach had been shot at least twice in the head. (ECF No. 19-20 at 52.)

Dassey responded that Avery tied up Halbach. (ECF No. 19-25 at 54.) Wiegert continued, "We know he did something else to her, what else did he do to her?" (ECF No. 19-25 at 55.) Dassey responded that Avery choked Halbach until she went unconscious (ECF No. 19-25 at 55), at which point Dassey got the handcuff key, unlocked Halbach's hands, and helped Avery tie her up with rope. (ECF No. 19-25 at 56-57.) Dassey initially said that Halbach was unconscious when they tied her up. But then he said that as they bound her she was screaming for Avery to stop and

that Avery told her he would not, that she should shut her mouth, and that he was going to kill her. (ECF No. 19-25 at 56-58.)

Wiegert prompted Dassey: "What else did he do to her? We know something else was done. Tell us, and what else did you do? Come on. Something with the head, Brendan?" (ECF No. 19-25 at 60.) Dassey did not answer Wiegert's questions, leading to further questioning and prompting from Wiegert and Fassbender. (ECF No. 19-25 at 60.) Fassbender said, "What he made you do Brendan, we know he made you do somethin' else.... We have the evidence Brendan, we just need you ta, ta be honest with us." (ECF No. 19-25 at 60.) To this Dassey responded, "That he cut off her hair." (ECF No. 19-25 at 60.) After a few short questions about the hair, Fassbender moved on, "What else was done to her head." (ECF No. 19-25 at 61.) Dassey responded, "That he punched her." "What else? What else?" Wiegert prompted. (ECF No. 19-25 at 61.)

Fassbender continued, "He made you do something to her, didn't he? So he would feel better about not being the only person, right?" (ECF No. 19-25 at 61.) Dassey responded that he cut her on her throat. (ECF No. 19-25 at 62.) Again Wiegert continued, "What else happens to her in her head?" (ECF No. 19-25 at 63.) After a couple more prompts and a pause, Fassbender said, "We know, we just need you to tell us." (ECF No. 19-25 at 63.) Dassey said, "That's all I can remember." (ECF No. 19-25 at 63.) Wiegert responded, "All right, I'm just gonna come out and ask you. Who shot her in the head?" (ECF No. 19-25 at 63.) "He did," answered Dassey. (ECF No. 19-25 at 63.) When asked why he did not say that, Dassey said he "couldn't think of it." (ECF No. 19-25 at 63.)

Dassey said that Avery shot Halbach with his .22 caliber rifle twice in her head after they had carried her outside and placed her on the side of the garage. (ECF No. 19-25 at 63-67, 103.) When asked again how many times Avery shot Halbach, Dassey said three, once each in the head, stomach, and heart. (ECF No. 19-25 at 67-68.) According to Dassey, as Avery was shooting Halbach, Avery said that they had to hurry up because he had people coming over. (ECF No. 19-25 at 69.) They then carried her and placed her in the fire, putting tires and branches on top of her. (ECF No. 19-25 at 68-69.)

Dassey denied that Halbach was ever in the garage. (ECF No. 19-25 at 68.) But Fassbender persisted. "[W]e know there's some, some things that you're, you're not tellin' us. We need to get the accuracy about the garage and stuff like that and the car." (ECF No. 19-25 at 69.) After some discussion about the fire, Fassbender returned to the subject of the garage, stating, "Again, we have, we know that some things happened in that garage, and in that car, we know that. You need to tell us about this so we know you're tellin' us the truth. I'm not gonna tell you what to say, you need to tell us." (ECF No. 19-25 at 71.) In response to this prompt Dassey said that Avery put Halbach in the back of the RAV4 and planned to throw her into a pond. (ECF No. 19-25 at 71-72.) But Avery then decided that burning Halbach would be better and would dispose of the evidence faster, so they took her out of the RAV4 and placed her on the fire. (ECF No. 19-25 at 72, 105.)

Fassbender again asked Dassey where Halbach was when she was shot. (ECF No. 19-25 at 72.) This time Dassey answered, "In the garage." (ECF No. 19-25 at 72.) Wiegert asked whether Halbach was on the

garage floor or in the back of the RAV4. Dassey said she was in the RAV4. Wiegert responded, "Ah huh, come on, now where was she shot? Be honest here." (ECF No. 19-25 at 73.) "In the garage," Dassey said. Changing his story yet again, Dassey now said that Halbach was shot *after* she was taken out of the RAV4. (ECF No. 19-25 at 73.) Fassbender asked Dassey again how many times Halbach was shot and added, "Remember [we] got a number of shell casings that we found in that garage. I'm not gonna tell ya how many but you need to tell me how many times, about, that she was shot." (ECF No. 19-25 at 73.) Dassey said that Avery shot Halbach "[a]bout ten" times while she was on the garage floor. (ECF No. 19-25 at 73.) Wiegert responded, "That makes sense. Now we believe you." (ECF No. 19-25 at 73.)

Dassey said that after they placed Halbach in the fire Avery drove the RAV4 into the salvage yard with Dassey as a passenger. (ECF No. 19-25 at 76-77.) The two of them then put branches and a vehicle hood on the RAV4. (ECF No. 19-25 at 77.) Avery said he was going to crush the car. (ECF No. 19-25 at 87.) Dassey initially said that he did not know who took the license plates off the RAV4. But, when asked if Avery did so, Dassey responded in the affirmative. (ECF No. 19-25 at 77-78.)

Fassbender asked, "OK, what else did he do, he did somethin' else, you need to tell us what he did, after that car is parked there. It's extremely important. Before you guys leave that car." (ECF No. 19-25 at 79.) Dassey responded, "That he left the gun in the car." (ECF No. 19-25 at 79.) Fassbender continued, "That's not what I'm thinkin' about. He did something to that car. He took the plates and he, I believe he did something else in that car." (ECF No. 19-25 at 79.) "I don't

know," said Dassey. (ECF No. 19-25 at 79.) Fassbender's prompts continued: "OK. Did he, did he, did he go and look at the engine, did he raise the hood at all or anything like that? To do something to that car?" (ECF No. 19-25 at 79.) Investigators knew that the battery in Halbach's RAV4 had been disconnected. (ECF No. 19-17 at 142.) Dassey agreed that Avery did raise the hood but could not say what he did under the hood. (ECF No. 19-25 at 79-80.)

Dassey said that when they got back to Avery's house Avery put the key to the RAV4 "under his dresser or something." But then he said Avery put the key in his dresser drawer—specifically, the second drawer from the top. (ECF No. 19-25 at 78-79.)

Dassey said that he and Avery then cleaned up the blood in the garage, at which time Dassey got bleach on his jeans. (ECF No. 19-25 at 82.) According to Dassey, there was a roughly two-foot square blood stain on the garage floor near where the back tire of the RAV4 had been. (ECF No. 19-25 at 85-86.) Around this time, about 9:30 p.m., Dassey said his mother called and told him to be home by 10:00 p.m. (ECF No. 19-25 at 82-83.) Avery took the bloody sheets from the bedroom and burned them. (ECF No. 19-25 at 83.) Avery then told Dassey to get Halbach's clothes from the garage and throw them on the fire. (ECF No. 19-25 at 84.)

After Dassey recounted all of this to Wiegert and Fassbender, the investigators took a break. They provided Dassey with a soda and sandwich, and Dassey asked Wiegert, "How long is this gonna take?" (ECF No. 19-25 at 89.) "It shouldn't take a whole lot longer," Wiegert answered. (ECF No. 19-25 at 89.) "Do you think I can get [back to school] before one twenty-nine?" Dassey asked. (ECF No. 19-25 at 89.) "Um,

probably not." (ECF No. 19-25 at 89.) "Oh," Dassey said. (ECF No. 19-25 at 89.) "What's at one twenty-nine?" asked Wiegert. (ECF No. 19-25 at 89.) "Well, I have a project due in sixth hour," Dassey said. (ECF No. 19-25 at 89.) Wiegert responded, "OK. We'll worry about that later, OK?" (ECF No. 19-25 at 90.)

Following the break Wiegert and Fassbender explained to Dassey that they did not believe some of his story. (ECF No. 19-25 at 90-91.) In response to their challenges Dassey now denied seeing Avery and Halbach on Avery's porch when he got home from school. (ECF No. 19-25 at 91.) But he said he did see Halbach's RAV4 in Avery's garage. (ECF No. 19-25 at 92.) He now said that when he got home he watched television for about half an hour while his brother used the phone, after which he made a phone call and then went to get the mail. (ECF No. 19-25 at 91-92.)

When asked about Halbach's personal effects, Dassey denied seeing them or knowing that Avery put them in the burn barrel. (ECF No. 19-25 at 95-96.) In response to Dassey's denials, Wiegert said, "Brendan, it's OK to tell us OK. It's really important that you continue being honest with us. OK, don't start lying now. If you know what happened to a cell phone or a camera or her purse, you need to tell us. OK? The hard part's over. Do you know what happened to those items?" (ECF No. 19-25 at 96.) Dassey responded, "He burnt 'em," (ECF No. 19-25 at 96), adding that he knew this because he saw them in the burn barrel when he went over with the mail (ECF No. 19-25 at 97-98).

Dassey said that he later heard from Avery that Avery used a shovel to break up some of the bones that remained after the fire burned down and that he buried some of these fragments in spots around the fire and

scattered others. (ECF No. 19-25 at 112-13.) At the investigators' request, Dassey drew various pictures detailing what he had described. In doing so, the investigators asked Dassey to label various things in the pictures, prompting Dassey to ask how to spell "rack" and "garage." (ECF No. 19-25 at 124, 128.)

Fassbender asked Dassey to describe Halbach, stating, "We know that Teresa had a tattoo on her stomach, do you remember that?" (ECF No. 19-25 at 138.) Dassey shook his head and said, "Uh uh." (ECF No. 19-25 at 139.) Fassbender followed up, "Do you disagree with me when I say that?" (ECF No. 19-25 at 139.) "No but I don't know where it was," Dassey responded. (ECF No. 19-25 at 139.) In fact, the investigators knew that Halbach did not have any such tattoo. (ECF No. 19-12 at 45-46.) They posed the question in an effort to gauge whether Dassey was merely agreeing with details suggested by them. (ECF No. 19-12 at 45-46.)

When asked why he did what he did, Dassey said, "Cuz I wanted to see how [sex] felt." (ECF No. 19-25 at 140.) Dassey said he thought about stopping Avery but did not because he was afraid Avery would try to kill him. (ECF No. 19-25 at 140.) Dassey said that afterward Avery told him not to say anything. (ECF No. 19-285 at 141.)

When the investigators took another break, Dassey asked if he was going to be back at school before the end of the day. (ECF No. 19-25 at 143.) Fassbender responded, "Probably not." (ECF No. 19-25 at 143.)

After the break Fassbender told Dassey, "because of what you told us, we're gonna have to arrest you.... And so you're not gonna be able to go home tonight." (ECF No. 19-25 at 144.) "Does my mom know?" Das-

sey asked. (ECF No. 19-25 at 144.) The investigators told Dassey his mom did know, that in fact she was at the police station, and that she could come in to talk with him if he would like. (ECF No. 19-25 at 144.) Dassey asked if he would be in jail for just one day. Wiegert said he did not know. (ECF No. 19-25 at 144.)

Dassey and Janda were left alone in the room. Dassey asked his mother, "What'd happen if he says something his [sic] story's different? Wh-he says he, he admits to doing it?" (ECF No. 19-25 at 148.) "What do you mean," asked Janda. (ECF No. 19-25 at 148.) "Like if his story's like different, like I never did nothin' or somethin'." (ECF No. 19-25 at 148.) "Did you? Huh?" Janda asked. (ECF No. 19-25 at 148.) "Not really," replied Dassey. (ECF No. 19-25 at 148.) "What do you mean not really?" asked Janda. (ECF No. 19-25 at 148.) "They got to my head," Dassey answered. Wiegert and Fassbender reentered the room (Ex. 43, Disc 3 at 3:19:32) and Dassey never explained what he meant by "not really." (ECF No. 19-25 at 148.)

"Were you pressuring him?" Janda asked the investigators. (ECF No. 19-25 at 148.) She later said that she asked that question because she believed that if Dassey was pressured he would say anything. (ECF No. 19-30 at 184-85.) Wiegert answered, "No we told him we needed to know the truth. We've been doing this job a long time Barb and we can tell when people aren't telling the truth." (ECF No. 19-25 at 149.)

Based upon the new information from Dassey investigators obtained another search warrant for the Avery property. (ECF No. 19-20 at 53-54.) Pursuant to the warrant investigators again searched the garage, finding two fired bullets. (ECF No. 19-20 at 54.) Halbach's DNA was found on one of the bullets, and inves-

tigators determined that it had been fired from the .22 caliber rifle recovered from above Avery's bed. (ECF No. 19-20 at 54.)

The state charged Dassey with first-degree intentional homicide, second-degree sexual assault, and mutilation of a corpse. (ECF No. 19-1.)

C. Leonard Kachinsky, Pre-Trial Counsel for Brendan Dassey

1. Media Interviews

On March 7, 2006, attorney Leonard Kachinsky was appointed to represent Dassey. (ECF No. 19-26 at 113.) Kachinsky was excited to be involved in Dassey's case because by then it had garnered significant local and national attention. (ECF No. 19-26 at 122-23.) Essentially immediately after his appointment Kachinsky began giving media interviews in which he discussed the case. (ECF No. 19-26 at 114-26.)

Kachinsky first met with Dassey on March 10, 2006. (ECF No. 19-26 at 123.) Dassey told Kachinsky that what was in the criminal complaint was not true and that he wanted to take a polygraph test to prove his innocence. (ECF No. 19-26 at 137-38.) After this initial meeting, local media reported Kachinsky as having described Dassey as sad, remorseful, and overwhelmed. (ECF No. 19-39 at 3, 9-10.) The media reported that Kachinsky blamed Avery for "leading [Dassey] down the criminal path" and said that he had not ruled out a plea deal. (ECF Nos. 19–26 at 134-35; 19-39 at 4, 10-11.) Kachinsky later said that one of his reasons for speaking to the media was to communicate to both Dassey and to his family so that he could get them "accustomed to the idea that Brendan might take a legal option that they don't like ...." (ECF No. 19-26 at 136-37.)

Over the next few days nearly all of Kachinsky's work on Dassey's case involved communicating with local and national media outlets. (ECF No. 19-26 at 138-40.) On March 17 Kachinsky appeared on Nancy Grace's national television show. (ECF No. 19-26 at 141-42.) During that appearance Kachinsky said that, if the recording of Dassey's statement was accurate and admissible, "there is, quite frankly, no defense." (ECF No. 19-26 at 142-43.) Kachinsky later said that he was merely "stating the obvious." (ECF No. 19-26 at 144.) However, Kachinsky had not yet watched the March 1 recorded interview. (ECF No. 19-26 at 145.) All he had seen was the criminal complaint. (ECF No. 19-26 at 145.)

In subsequent media interviews Kachinsky referred to the techniques the investigators used in questioning Dassey as "pretty standard" and "quite legitimate." (ECF No. 19-26 at 170.) One local news broadcast included Kachinsky's response to statements Avery had made to the media. Avery had said that he knew that Dassey's confession must have been coerced because there was no physical evidence to support what Dassey had said. (ECF No. 19-26 at 175.) Kachinsky responded that he had reviewed the recorded statement and it did not appear that the investigators were putting words in Dassey's mouth. (ECF No. 19-26 at 175-76.) Kachinsky also publicly refuted Avery's statement that Dassey was not very smart and that it would be easy for law enforcement to coerce him. (ECF No. 19-26 at 180.)

In another interview Kachinsky said that, although he believed Dassey had some intellectual deficits, he also believed Dassey had a reasonably good ability to recall the events he participated in. (ECF No. 19-26 at 182-83.) Over the roughly three weeks following his

appointment Kachinsky spent about one hour with Dassey and at least 10 hours communicating with the press. (ECF No. 19-26 at 183.)

Kachinsky met with Dassey again on April 3, at which time Dassey again professed his innocence and asked to take a polygraph examination. (ECF No. 19-26 at 186.) Kachinsky hired Michael O'Kelly, with whom he was not familiar, to conduct a polygraph exam. (ECF No. 19-26 at 187-88.) O'Kelly held himself out as a private investigator and polygraph examiner. (ECF No. 19-33 at 3.) Kachinsky informed Dassey of the upcoming polygraph examination in a letter, stating, "the videotape is pretty convincing that you were being truthful on March 1," and encouraging Dassey not to cover up for Avery. (ECF No. 19-26 at 190.) Shortly before the polygraph examination, the prosecutor sent an email to Kachinsky expressing concern about the pretrial publicity that Kachinsky was engaging in and referring him to the relevant rule of attorney ethics governing such publicity. (ECF No. 19-26 at 28, 201.)

2. Defense Investigator Michael O'Kelly

O'Kelly conducted a polygraph examination of Dassey, the results of which were inconclusive. (ECF No. 19-26 at 212.) Nonetheless, O'Kelly described Dassey to Kachinsky as "a kid without a conscience" or something similar. (ECF No. 19-26 at 212.) Notwithstanding O'Kelly's opinion of Dassey, Kachinsky hired him as the defense investigator in the case. (ECF No. 19-26 at 213.)

Despite Dassey's claims of innocence, both O'Kelly and Kachinsky proceeded on the assumption that Dassey would cooperate with the prosecution and become the key witness against Avery. (ECF No. 19-29 at 46-

47.) O'Kelly's primary goal was to uncover information that would bolster the prosecution's case. (ECF No. 19-29 at 47, 53.) To this end he purportedly developed information as to the possible location of certain evidence. (ECF No. 19-29 at 42-44.) Kachinsky provided this information to the prosecutor and a lead investigator and informed them that they may wish to speak to O'Kelly. (ECF No. 19-26 at 236-37.) Although the information led to a search warrant being issued, the search warrant did not yield any additional evidence against Dassey. (ECF No. 1-5, ¶ 12.)

Kachinsky decided that he wanted O'Kelly to re-interview Dassey to get him once again to admit to his involvement in the rape, murder, and mutilation of Halbach. (ECF Nos. 19–26 at 243-48; 19-29 at 83.) Kachinsky wanted to make it clear to Dassey that, based upon the evidence, a jury was going to find him guilty. (ECF No. 19-27 at 17.) Toward that end, he chose May 12 as the date for O'Kelly to interview Dassey—the date a decision on Dassey's motion to suppress his March 1 confession was scheduled to be rendered. (ECF No. 19-26 at 243-44.) Kachinsky expected to lose the motion to suppress and believed that the effect of losing such a crucial motion would leave Dassey vulnerable. (ECF No. 19-26 at 244.)

Shortly before meeting with Dassey, in an email to Kachinsky O'Kelly expressed contempt for the Avery family. (ECF No. 19-33 at 1-2; *see also* ECF No. 19-29 at 93.) He referred to the Avery family as "criminals" and asserted that family members engaged in incestuous sexual conduct and had a history of stalking women. (ECF No. 19-33 at 1.) He continued, "This is truly where the devil resides in comfort. I can find no good in any member. These people are pure evil." (ECF No. 19-33 at 1.) O'Kelly quoted a friend as having said,

"This is a one branch family tree. Cut this tree down. We need to end the gene pool here." (ECF No. 19-33 at 1.) O'Kelly thought that Dassey's denial of his confession was an "unrealistic" "fantasy" that was influenced by his family. (ECF Nos. 19–33 at 1; 19-29 at 86-88.) On O'Kelly's recommendation, Kachinsky canceled a planned visit with Dassey because Dassey "needs to be alone." (ECF No. 19-26 at 248-49.) O'Kelly said, "He needs to trust me and the direction that I steer him into." (ECF No. 19-33 at 1.)

As predicted, on May 12 the court denied Dassey's motion to suppress his March 1 confession. (ECF No. 19-13.) Afterwards O'Kelly interviewed Dassey in a room at the Sheboygan County Juvenile Detention Center where Dassey was being held. (Ex 44; *see also* ECF No. 19-38 at 16.) O'Kelly videotaped the interview. He laid out on a table before Dassey numerous photographs: snapshots of a smiling Teresa Halbach, a missing person poster for Halbach, a "Dead End" road sign on the Avery property, pictures of the Avery property and of the inside of Avery's house, pictures of Halbach's RAV4 as it was initially found, a photograph of Halbach's church, and a photograph of a blue ribbon tied to a post on a roadside. (Ex. 44; ECF No. 19-38 at 1-2.) O'Kelly even had a local shop make a blue ribbon like the one shown in the photograph and placed it on the table as well. (ECF No. 19-29 at 75.) O'Kelly believed that presenting the images would help him get an admission from Dassey. (ECF No. 19-29 at 115.)

O'Kelly began by pointing to what he said were Dassey's polygraph examination results on a laptop computer screen and asked Dassey if he could read them. (ECF No. 19-38 at 1.) Despite having previously told Kachinsky that the results of the polygraph examination were inconclusive (ECF No. 19-26 at 210),

O'Kelly told Dassey that the polygraph indicated deception and that the probability of deception was 98 percent (ECF No. 19-38 at 1). When Dassey asked what that meant, O'Kelly asked what he thought it meant. (ECF No. 19-38 at 1.) Dassey responded, "That I passed it?" (ECF No. 19-38 at 1.) "It says deception indicated," O'Kelly responded, emphasizing "deception." (ECF No. 19-38 at 1; Ex. 44.) After a long pause, Dassey asked, "That I failed it[?]" (ECF No. 19-38 at 1.)

O'Kelly proceeded to discuss the photographs that he had laid out on the table. When he got to the "Dead End" sign, he said, "This is the last thing that Teresa saw.... It's pretty prophetic, isn't it?" (ECF No. 19-38 at 1.) In a confrontational and adversarial tone, O'Kelly proceeded to question Dassey. (ECF No. 44.) O'Kelly said, "The two things I don't know is, are you sorry for what you did and will you promise not to do it again. Those are the two things I don't know. I know everything else that I need to about this case except for those two things.... Are you sorry?" (ECF No. 19-38 at 2.) "I don't know, because I didn't do anything," Dassey answered. (ECF No. 19-38 at 2.)

O'Kelly said, "If you're not sorry, I can't help you.... Do you want to spend the rest of your life in prison? You did a very bad thing." (ECF No. 19-38 at 2.) "Yeah, but I was only there for the fire though," Dassey responded. (ECF No. 19-38 at 2.)

O'Kelly encouraged Dassey to say he was sorry for what he did. Dassey persisted in professing his innocence, saying that he did not really feel sorry because he did not do anything; he was only at the fire. (ECF No. 19-38 at 3-4.) Dassey told O'Kelly that his prior statement to the police was false and that he had either simply agreed with what the investigators said or

guessed at the answers. (ECF No. 19-38 at 4-5.) O'Kelly told Dassey that he was not being truthful, and if he was not truthful Dassey would spend the rest of his life in prison. O'Kelly would help Dassey only if he was truthful. (ECF No. 19-38 at 2-4.)

Eventually Dassey's story changed and he recounted for O'Kelly a story largely similar to that which Dassey had told the investigators on March 1. (ECF No. 19-38 at 5.) This time he said he first went over to Avery's at about 8:00 p.m. and that Halbach was conscious when Avery brought her outside to the garage where he stabbed her and shot her five times. (ECF No. 19-38 at 7-9, 15.)

After the interview was concluded, Kachinsky understood from O'Kelly that Dassey was now "on board with cooperating in the Avery prosecution and, ultimately, entering a plea agreement." (ECF No. 19-27 at 45.) However, Kachinsky had not watched O'Kelly's interview of Dassey. (ECF No. 19-27 at 35.) Nevertheless, he approved of O'Kelly communicating the substance of his taped interview of Dassey to the prosecution's investigating agents. (ECF No. 19-27 at 31.)

3. May 13, 2006 Interrogation

Following the O'Kelly interview, Kachinsky arranged for the state's investigators to interrogate Dassey again. (ECF No. 19-27 at 35-36.) Kachinsky did not attend the interrogation. The state had not made any offer of immunity or prosecutorial consideration. (ECF No. 19-27 at 36-38; *see also* ECF No. 19-34 at 1.) Kachinsky did not prepare Dassey for the interrogation, trusting O'Kelly to do so. (ECF No. 19-27 at 43.) The plan was to have O'Kelly watch Dassey's interrogation from a separate monitoring room. (ECF No. 19-29 at 157.) Kachinsky instructed O'Kelly not to interrupt un-

less Dassey asked to speak with Kachinsky or otherwise asked to stop. (ECF No. 19-29 at 155-56.)

The interrogation took place on the morning of May 13, 2006, at the Sheboygan County Juvenile Detention Center. (ECF No. 19-34 at 1.) Wiegert and Fassbender re-advised Dassey of his *Miranda* rights and confirmed that he wanted to speak with them and that no one had made any promises. Dassey then recounted a version of the events of October 31, 2005. (ECF No. 19-34 at 2-6.)

The version of events that Dassey now told differed in certain significant respects from the version he recounted on March 1. Dassey denied ever seeing Halbach's RAV4, riding his bike to get the mail, hearing any screaming coming from Avery's home, cutting Halbach's throat (ECF No. 19-34 at 6-7, 25), or seeing Avery ever punch Halbach (ECF No. 19-34 at 50). Dassey said he did not go over to Avery's until about 7:00 p.m. after Avery twice called inviting him to the bonfire. (ECF No. 19-34 at 9.)

At numerous points throughout the May 13 interrogation the agents stated that they were giving Dassey a final chance to tell the truth. They said that they did not have to come back to listen to him and that they would leave if he did not tell the truth. (ECF No. 19-34 at 10, 21, 29, 34, 75.) At one point Wiegert told Dassey that they knew Halbach had been in the back of the RAV4 while she was bleeding. (ECF No. 19-34 at 21.) Despite previously denying having seen the RAV4, Dassey now said that the RAV4 was backed into Avery's garage and that, after Halbach was stabbed, Avery put her into the RAV4 before deciding to burn her. (ECF No. 19-34 at 22, 53.) According to Dassey, Avery's plan had been to crush the RAV4, with Hal-

bach in it, before anyone noticed. (ECF No. 19-34 at 31.)

Dassey then said that Avery drove the RAV4 into the salvage yard but that he did not go with him. (ECF No. 19-34 at 33-34.) Wiegert challenged him: "How did your DNA get in the truck?" (ECF No. 19-34 at 34.) "It ain't," responded Dassey. (ECF No. 19-34 at 34.) "And how do you know that?" asked Wiegert? (ECF No. 19-34 at 34.) Dassey responded, "Cuz I never went in it." (ECF No. 19-34 at 34.) Fassbender confronted Dassey with the version of events he had provided on March 1 where he said that he accompanied Avery in the RAV4 and described certain events that occurred there. (ECF No. 19-34 at 34.) "What did you just grab that out of the air? How do you know those things?" (ECF No. 19-34 at 34.) "Just guessing," Dassey responded. (ECF No. 19-34 at 34.) However, later in the interrogation on May 13 Dassey said (as he had on March 1) that he *had* accompanied Avery to the salvage yard in the RAV4. (ECF No. 19-34 at 89.)

Dassey's May 13 statement contained numerous internal contradictions. For example, initially he said Halbach was shot after she was taken out of the RAV4. (ECF No. 19-34 at 22.) But later he said she was shot before Avery put her in the RAV4. (ECF No. 19-34 at 31.) Dassey initially said that Halbach was screaming when he stabbed her. (ECF No. 19-34 at 22-23.) Immediately thereafter he said that she was not moving or breathing. (ECF No. 19-34 at 25-26.) Dassey said he cut Halbach's hair with the knife in the bedroom. But when the investigators pointed out that Dassey had just said that Avery got the knife from the garage, Dassey denied ever cutting Halbach's hair. (ECF No. 19-34 at 37.) When Fassbender asked Dassey why he had said that he had cut Halbach's hair, Dassey re-

sponded, "I don't know." (ECF No. 19-34 at 37.) When later asked how he came up with the story about cutting Halbach's hair, Dassey responded, "I don't know, I was just guessing." (ECF No. 19-34 at 98.)

Wiegert told Dassey, "Your mom told me you'd be honest with me.... I haven't called her yet to tell her that you lied to me, but I will do that, what do you think she's gonna say to you? She's gonna be mad." (ECF No. 19-34 at 39.) Wiegert asked Dassey if he was going to tell his mom about their discussion. Dassey said he probably would the next time he saw her. (ECF No. 19-34 at 68.) Wiegert asked, "Don't you think you should call her?" (ECF No. 19-34 at 68.) Wiegert knew that calls from the jail were recorded. (ECF No. 19-30 at 110.) Dassey responded, "Yeah." (ECF No. 19-34 at 68.) "When you gonna do that?" asked Wiegert. (ECF No. 19-34 at 69.) "Probably tonight," said Dassey. (ECF No. 19-34 at 69.) "Yeah. I think she'd like to hear it coming from you rather than from me," said Wiegert. (ECF No. 19-34 at 69.) "And if she has any questions cuz I'm seeing her tomorrow," Dassey responded. (ECF No. 19-34 at 69.) "Oh. She's coming here tomorrow?" Wiegert asked. (ECF No. 19-34 at 69.) "Mm huh," mumbled Dassey. (ECF No. 19-34 at 69.) Wiegert continued, "Then maybe it [sic] be a good idea to call her before she gets here tonight. That's what I'd do. Cuz, otherwise she's going to be really mad tomorrow. Better on the phone, isn't it?" (ECF No. 19-34 at 69.) "Mm huh," agreed Dassey. (ECF No. 19-34 at 69.)

4. Dassey's Recorded Phone Call to his Mother

Later that day Dassey called his mother from jail. (ECF No. 19-35; Ex. 45.) Like all calls from jail inmates, the phone call was recorded. (ECF Nos. 19–35;

19–30 at 110.) Dassey's first question to his mother was, "Did you talk to anybody?" (ECF No. 19-35 at 1.) When his mother said she did not and asked him what he meant, Dassey explained, "Cause Mark and Fassbender are gonna talk to you." (ECF No. 19-35 at 1.) Janda asked Dassey to explain what he meant. (ECF No. 19-35 at 1.) "Well, I guess yesterday that Mike [O'Kelly] guy came up here and talked to me about my results." (ECF No. 19-35 at 1.)

Dassey asked, "Do you feel bad if I say it today?" (ECF No. 19-35 at 1.) "You don't even have to say it Brendan," she responded. (ECF No. 19-35 at 1.) When Dassey asked why, Janda responded, "Because just by the way you are acting I know what it is." (ECF No. 19-35 at 1-2.) Dassey then made clear that they were talking "[a]bout what [m]e and Steven did that day." (ECF No. 19-35 at 2.) "What about it?" asked Janda. (ECF No. 19-35 at 2.) "Well, Mike and Mark and Matt came up one day and took another interview with me and said because they think I was lying but so, they said if I come (sic) out with it that I would have to go to jail for 90 years.... But if I came out with it would probably get I dunno about like 20 or less. After the interview they told me if I wanted to say something to her family and said that I was sorry for what I did." (ECF No. 19-35 at 2.) "Then Steven did do it[!]" Janda exclaimed. (ECF No. 19-35 at 2; Ex. 45.) "Ya," Dassey agreed. (ECF No. 19-35 at 2.) Dassey expressed concern to Janda about being able to face Avery in court and what might happen if Avery were to become angry. (ECF No. 19-35 at 3.) Janda told Dassey that he had to worry about himself. (ECF No. 19-35 at 3.)

Janda asked Dassey how he was able to answer the phone when his brother's boss called. (ECF No. 19-35 at 5.) Dassey responded, "They told me that they

looked at the records and that he didn't call." (ECF No. 19-35 at 5.) "What about when I got home at 5:00 you were here[?]" Janda asked. (ECF No. 19-35 at 5.) "I went over there earlier and then came home before you did," Dassey responded. (ECF No. 19-35 at 5.) When Janda asked Dassey why he did not say anything to her then, Dassey responded, "I dunno, I was scared." (ECF No. 19-35 at 5.) "So in those statements you did all that to her too?" Janda asked. (ECF No. 19-35 at 5.) "Some of it," Dassey responded. (ECF No. 19-35 at 5.)

"Was your attorney there when Mark and those guys were?" Janda asked. When Dassey said he was not, Janda responded, "Don't talk to them no more.... They are putting you in places where you're not.... You know the reason they're talking to you is to get more information out of you and what your attorney should be doing is putting an order on all of them that they cannot interfere with you or your family members unless your attorney is present.... Cause they're all investigators for the Halbach case.... Not the Dassey case, it's the Halbach case.... Cause the only thing that they're putting out there is bad stuff about you and if you weren't there at the time if you didn't slice her throat. You did not have sexual contact with her." (ECF No. 19-35 at 7.) "No," Dassey responded. (ECF No. 19-35 at 7.)

"So if I was in the garage cleaning up that stuff on the floor, how much time will I get though for that?" Dassey asked. (ECF No. 19-35 at 8.) "What was it?" Janda inquired. "I don't know. It was this reddish-black stuff." Dassey answered. (ECF No. 19-35 at 8.) "So did you see the body in the fire?" asked Janda. (ECF No. 19-35 at 9.) "No," replied Dassey. (ECF No. 19-35 at 9.) "You know if he killed her[?]" Janda asked. (ECF No. 19-35 at 9.) "Not that I know of," Dassey re-

sponded. (ECF No. 19-35 at 9.) Janda asked Dassey why he lost so much weight and Dassey responded that he "was trying to impress a girl." (ECF No. 19-35 at 11.) The call ended when an automated voice broke in and cut off the call. (Ex. 45 at 15:27.)

5. Court Removes Kachinsky as Counsel

At a hearing on August 25, 2006, the trial court discussed a letter it had received from the State Public Defender stating that Kachinsky allowing law enforcement to interview Dassey without counsel present was "indefensible." (ECF No. 19-14 at 4.) It said that it had decertified Kachinsky from being appointed in Class A through Class D felony matters. (ECF No. 19-14 at 4, 22.) The decertification was prospective only and thus did not directly apply to Kachinsky's representation of Dassey. (ECF No. 19-14 at 22.) Nevertheless, Kachinsky moved to withdraw as Dassey's counsel. (ECF No. 19-14 at 5-6.)

Dassey confirmed that he wished to have a new attorney appointed to represent him. (ECF No. 19-14 at 15.) The prosecution suggested the need for an evidentiary hearing to determine, in part, the admissibility of the statement obtained without Kachinsky's presence. (ECF No. 19-14 at 17-18.) The court disagreed that an evidentiary hearing was necessary, noting the "institutional interest in ensuring that criminal trials are conducted within the ethical standards of the profession," "that legal proceedings appear fair to all who observe them," and "that the court's judgments remain intact on appeal." (ECF No. 19-14 at 19-20.) The court concluded that, particularly in light of Dassey's age and record of intellectual deficits, "Kachinsky's failure to be present while his client gave a statement to investigators" "constituted deficient performance on Attorney

Kachinsky's part." (ECF No. 19-14 at 22-23.) It further stated that "Kachinsky's withdrawal is necessary to assure the entire proceeding be viewed as fair and trying to ensure that we can maintain public confidence in the administration of justice and the fair administration of justice." (ECF No. 19-14 at 24.) "If this case has to be tried, I want to do my level best to make sure that it is tried only once. The prosecution, the defense, the families involved, the system deserve no less. Accordingly, I—as I have said, I'm going to grant Mr. Kachinsky's motion to withdraw." (ECF No. 19-14 at 24.)

D. Trial

Successor counsel was appointed to represent Dassey, and on April 16, 2007, a jury trial commenced. (ECF No. 19-15.) Over the course of the next roughly six days the prosecution presented its case against Dassey. (ECF Nos. 19–15; 19–16; 19–17; 19–18; 19–19; 19–20 at 1-63.) The centerpiece of the prosecution's case was Dassey's March 1 confession to Wiegert and Fassbender (ECF No. 19-23 at 50-85 (prosecution's closing argument)). The prosecution played the recorded interview for the jury at trial. (ECF No. 19-19 at 23.) The May 13 interrogation by Wiegert and Fassbender was not discussed at trial.

Dassey's defense was that the statements he made on March 1 were not true. Dassey presented his academic records that showed that, although he was in regular high school classes (ECF Nos. 19–20 at 86-87; 19-21 at 47-48), he also received special education assistance (ECF No. 19-20 at 77) due to various cognitive difficulties (*see, e.g.*, ECF No. 19-20 at 75, 79) and had overall borderline to below average intellectual ability (ECF No. 19-20 at 99). Dassey's brother testified that he was at home with Dassey on October 31, 2005, until

about 5:20 p.m. when he left, leaving Dassey alone at home. (ECF No. 19-20 at 109-10.) Dassey's brother's boss also testified that he called the Dassey residence on October 31, 2005 at about 6:00 p.m. and spoke with Dassey. (ECF No. 19-20 at 129-31.)

Dassey testified on his own behalf. He said that after he got off the school bus with his brother at about 3:45 p.m. he played video games until he made himself dinner at about 5:00 p.m. (ECF No. 19-21 at 17-20.) Dassey's mother came home around that time and, after he was done eating, he spoke with her briefly. (ECF No. 19-21 at 20-22.) Dassey's brother left at about 5:20 p.m. and his mother left at about 5:30 p.m. (ECF No. 19-21 at 21-22.)

After his brother and mother left, Dassey watched television until about 6:00 p.m., when he received a call from his brother's boss. (ECF No. 19-21 at 24.) After a brief conversation, Dassey returned to watching television until about 7:00 p.m., when Avery called. (ECF No. 19-21 at 25-26.) Avery invited Dassey over to the bonfire, so Dassey changed clothes. (ECF No. 19-21 at 27-28.) Avery called again and Dassey told him he was on his way. (ECF No. 19-21 at 28.)

Dassey went to the fire pit by Avery's house, where Avery was burning some branches and tires. (ECF No. 19-21 at 29.) Avery told Dassey that he wanted to pick up the yard, so they drove around in a golf cart for about 45 minutes picking up things that they could burn—wood, tires, an old cabinet, and a van seat. (ECF No. 19-21 at 29-32.) Avery then asked Dassey to help him clean up something in the garage. (ECF No. 19-21 at 32.) Dassey described it as looking like fluid from a car. They used gasoline, paint thinner, and bleach, along with his brothers' old clothes to clean

it up. (ECF No. 19-21 at 33.) When done they threw the clothes on the bonfire. (ECF No. 19-21 at 34.) Dassey never asked Avery what it was they were cleaning up. (ECF No. 19-21 at 35.) After about 15 minutes of cleaning, Dassey and Avery returned to the bonfire and added some of the debris they gathered from the yard. (ECF No. 19-21 at 37.) They watched the fire until Dassey went home around 10:00 p.m. (ECF No. 19-21 at 37-39.)

Dassey explained that he subsequently lost about five or ten pounds because people had been calling him fat and he thought his girlfriend broke up with him because of his weight. (ECF No. 19-21 at 40.)

Dassey denied ever seeing Halbach on October 31, 2005, and said he did not see her picture or hear her name until after she was reported missing and his mother called him and told him to turn on the news. (ECF No. 19-21 at 40-41.) Asked why he told Wiegert and Fassbender that he participated in the rape and murder of Halbach, Dassey responded, "I don't know." (ECF No. 19-21 at 42.) When the investigators during the March 1 interview told him that it was not his fault, Dassey understood that to mean that he would not be taken away from his family and put in jail regardless of what he said. (ECF No. 19-21 at 77.)

On cross-examination, the state played portions of Dassey's May 13 phone call to his mother. (ECF No. 19-21 at 50, 53.) The prosecutor noted that Dassey told his mother in that call that he had been over at Avery's house *before* he saw his mother at about 5:00 p.m. (ECF No. 19-21 at 50-51, 54.) Dassey said that was not true and acknowledged that he had lied to his mother. (ECF No. 19-21 at 54-55.) Dassey said he did not know why he lied to her. (ECF No. 19-21 at 56.)

The prosecutor also replayed portions of Dassey's March 1 confession to Fassbender and Wiegert. Dassey said he made up the details that he recounted in the confession. (ECF No. 19-21 at 53-54, 68-69.) Dassey said he did not know why he had made various inculpatory statements. (ECF No. 19-21 at 58, 60, 62, 69-70, 74.) Dassey speculated that the details he provided to investigators might have been gleaned from books, perhaps one called *Kiss the Girls*. (ECF No. 19-21 at 65, 67.) Dassey also acknowledged lying to a detective earlier when he said that during the week after Halbach was last seen that Avery did not have a fire. (ECF No. 19-21 at 56.) When asked why he lied, Dassey explained, "I'm just like my family. I don't like cops." (ECF No. 19-21 at 56.)

The defense presented the testimony of forensic psychologist Dr. Robert H. Gordon, who examined Dassey. (ECF No. 19-22 at 4-76.) Dr. Gordon testified that certain factors could make a person more suggestible. (ECF No. 19-22 at 18-19, 30, 35, 37-38.) With respect to some of these characteristics, Dassey tested in extreme percentiles. For example, when it came to social avoidance, Dassey tested in the first percentile, meaning 99 out of 100 people would grade as more socially outgoing than Dassey. (ECF No. 19-22 at 34.) As for social introversion and social alienation, Dassey was in the 2.3 and 1.5 percentiles, respectively. (ECF No. 19-22 at 35-36.) Dassey also tested on the low end of the scales for accommodation and deference, and was also found to be passive and subdued, all characteristics Dr. Gordon opined were consistent with suggestibility. (ECF No. 19-22 at 37-39.) Intelligence testing indicated that Dassey's intelligence was in the low average to borderline range, at the 10th to 13th percentile (ECF No. 19-22 at 46-49). Dr. Gordon also noted that minors,

even older minors such as 15 or 16-year-olds, have a greater likelihood of suggestibility, especially when they have low intellectual functioning (ECF No. 19-22 at 71), as do people who have had minimal or no contact with the criminal justice system (ECF No. 19-22 at 72).

Dr. Gordon also assessed Dassey using a test developed specifically to measure suggestibility in the context of interrogations. (ECF No. 19-22 at 51-52.) He noted that certain police interrogation techniques could make a person more vulnerable to suggestibility in an interrogation. Such techniques include making promises, telling the subject that he is sure to be convicted, referencing inculpatory information that does not exist, minimizing the seriousness of the offense or the suspect's role in the offense, noting that the suspect did not mean to do it, questioning the suspect about what he would do if he could do it over again, and stating how the suspect's family could be spared if he confessed. (ECF No. 19-22 at 62.)

Dr. Gordon explained how various segments of the March 1 interrogation exhibited suggestibility. (ECF No. 19-22 at 64-71.) The test used by Dr. Gordon measured two types of suggestibility. By one measure, Dassey was in the 3rd percentile. (ECF No. 19-22 at 54-55.) By the second measure, he was in the 20th percentile. (ECF No. 19-22 at 54-55.) Dr. Gordon acknowledged instances where Dassey resisted certain suggestions. (ECF No. 19-22 at 161.) Overall, Dassey tested in the 5th percentile with respect to suggestibility—meaning, again, he was more suggestible than 95 percent of the population. (ECF No. 19-22 at 55.) It was Dr. Gordon's conclusion that Dassey was "highly suggestible ... when being interrogated." (ECF No. 19-22 at 56.)

On cross-examination, the prosecutor again referred to and quoted from Dassey's May 13, 2006 phone call to his mother, asking Dr. Gordon whether the statements were relevant to an assessment of Dassey's suggestibility. (ECF No. 19-22 at 122-24.) Dr. Gordon agreed that the information was relevant but stated it did not change his conclusion that Dassey was vulnerable to suggestibility. (ECF No. 19-22 at 123-24.)

In closing argument, Dassey's attorney highlighted the complete absence of any DNA evidence connecting Dassey to the crimes despite extensive testing and much evidence connecting Avery to the offenses. (ECF No. 19-23 at 88-95.) He also noted the absence of other evidence that he argued would have been found if the offense had occurred as Dassey said (and the state alleged) it did. (ECF No. 19-23 at 95-106.) For example, Halbach's blood was not found in Avery's bedroom as would be expected if Halbach had been stabbed and had her throat been cut there as Dassey said had happened. (ECF No. 19-23 at 96-97.)

Defense counsel also focused on evidence showing that the March 1 statements were untrue. (ECF No. 19-23 at 107-37.) He noted Dassey's poor academic performance and intellectual deficits (ECF No. 19-23 at 108-11, 116) and highlighted how the investigators used techniques that are susceptible to producing a false confession (ECF No. 19-23 at 116-26). As for Dassey's May 13 phone call to his mother, counsel noted that Dassey never told her that he did the things he was charged with doing. All he said was that he did "some of it," which could mean he stood around the fire and picked up debris in the yard. (ECF No. 19-23 at 133-34.)

In rebuttal the state asserted that an innocent person would not confess. (ECF No. 19-23 at 144.) It not-

ed how aspects of Dassey's confession were consistent with the physical evidence. (ECF No. 19-23 at 145-48.) It further noted instances where Dassey resisted suggestions from the investigators. (ECF No. 19-23 at 148-50.) The state was also dismissive of the defense expert's testimony regarding suggestibility. (ECF No. 19-23 at 150-51.)

After roughly five-and-a-half hours of deliberation the jury found Dassey guilty on all counts. (ECF No. 19-23 at 158-60; ECF No. 19-1.) The court sentenced Dassey to life in prison for first-degree intentional homicide, not eligible for release to extended supervision until November 1, 2048. (ECF No. 19-1 at 2.) The court further sentenced Dassey to six years of imprisonment for mutilating a corpse and 14 years imprisonment for second-degree sexual assault, both to be served concurrent to the murder sentence. (ECF No. 19-1 at 1.)

E. Post-Conviction Proceedings

Dassey moved for post-conviction relief. A hearing was held over five days beginning on January 15, 2010. (ECF Nos. 19–26; 19–27; 19–28; 19–29; 19–30.) The hearing included testimony of one of Dassey's trial attorneys, the prosecutor, a social psychologist, Kachinsky, O'Kelly, and Richard Leo, an expert in false confessions. The circuit court denied Dassey post-conviction relief on December 13, 2010. (ECF No. 19-43.) Dassey appealed, and on January 30, 2013, in an unpublished per curiam decision the Wisconsin Court of Appeals affirmed his conviction. (ECF No. 1-5); *see also State v. Dassey*, 2013 WI App 30, 346 Wis.2d 278, 827 N.W.2d 928, 2013 Wisc. App. LEXIS 85 (unpublished). The Wisconsin Supreme Court denied Dassey's petition for review on April 1, 2013. (ECF Nos. 1–6; 19–11.)

Dassey filed the present petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on October 20, 2014. (ECF No. 1.) After Dassey consented to have a magistrate judge resolve his petition (ECF No. 5), the court reviewed the petition in accordance with Rule 4 of the Rules Governing Section 2254 Cases and ordered the respondent to answer the petition (ECF No. 6). The respondent likewise consented to have this court resolve the petition. (ECF No. 9.) Therefore, in accordance with 28 U.S.C. § 636(c), having received the consent of all parties, this court may order the entry of judgment in this case. Briefing is concluded and the matter is ready for resolution.

II. Standard of Review

With the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104–132, 110 Stat. 1214 (1996), Congress dramatically changed the federal courts' role in reviewing the judgments of state criminal courts. *Rhines v. Weber*, 544 U.S. 269, 274, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005). "AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Burt v. Titlow*, —— U.S. ——, 134 S.Ct. 10, 16, 187 L.Ed.2d 348 (2013). Under § 2254, a federal court may grant a writ of habeas corpus only when the state court's adjudication of the petitioner's claim on the merits:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light

> of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Under § 2254(d)(1), a state court decision is contrary to clearly established federal law "if the state court applies a rule different from the governing law set forth in [United States Supreme Court] cases, or if it decides a case differently than [the United States Supreme Court has] done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *see also Conner v. McBride*, 375 F.3d 643, 649 (7th Cir.2004) ("[A] state court decision is 'contrary to' federal law if the state court either incorrectly laid out governing Supreme Court precedent, or, having identified the correct rule of law, decided a case differently than a materially factually indistinguishable Supreme Court case.") (citing *Williams v. Taylor*, 529 U.S. 362, 405–06, 412–13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the United States Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413, 120 S.Ct. 1495. The Supreme Court's holding must provide a clear answer in the petitioner's favor; novel arguments for the expansion of constitutional rights or arguments dependent upon the decisions of any court other than the United States Supreme Court do not merit federal habeas relief. *See Woods v. Donald*, —U.S. ——, 135 S.Ct. 1372, 1377, 191 L.Ed.2d 464 (2015); *Lopez v. Smith*, —U.S. ——, 135 S.Ct. 1, 1–4, 190 L.Ed.2d 1 (2014) (per curiam)); *Renico v. Lett*, 559 U.S. 766, 779, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010); *Wright v. Van Patten*, 552 U.S. 120,

126, 128 S.Ct. 743, 169 L.Ed.2d 583 (2008). Moreover, a court may rely upon only the Supreme Court's holdings, not its dicta. *Woods*, 135 S.Ct. at 1376 (citing *White v. Woodall*, —— U.S. ——, 134 S.Ct. 1697, 1702, 188 L.Ed.2d 698 (2014)).

Under § 2254(d)(2), a state court's "decision 'involves an unreasonable determination of the facts if it rests upon fact-finding that ignores the clear and convincing weight of the evidence.'" *Bailey v. Lemke*, 735 F.3d 945, 949–50 (7th Cir.2013) (quoting *Goudy v. Basinger*, 604 F.3d 394, 399–400 (7th Cir.2010)).

If the state court adjudicated the petitioner's claim on its merits, a federal court cannot grant a petitioner habeas relief merely because the federal court disagrees, or even strongly disagrees, with the state court's decision. *Davis v. Ayala*, —— U.S. ——, 135 S.Ct. 2187, 2198, 192 L.Ed.2d 323 (2015). A federal court is required to afford substantial deference to the findings and decisions of the state court. *Brumfield v. Cain*, —— U.S. ——, 135 S.Ct. 2269, 2277, 192 L.Ed.2d 356 (2015); *Ayala*, 135 S.Ct. at 2198 (citing *Harrington v. Richter*, 562 U.S. 86, 103, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011)); 28 U.S.C. § 2254(d). For a federal court to grant habeas relief, a state court's decision must be not merely wrong but so wrong that no reasonable judge could have reached that decision. *Woods*, 135 S.Ct. at 1376. More specifically, to grant relief under § 2254(d)(2), the petitioner must meet the "demanding but not insatiable" standard, *Miller–El v. Dretke*, 545 U.S. 231, 240, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005), of showing any reasonable factfinder would reach a conclusion other than that reached in the state court, *Rice v. Collins*, 546 U.S. 333, 341, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006).

This substantial restraint upon the authority of federal courts is intended to "further the principles of comity, finality, and federalism." *Panetti v. Quarterman*, 551 U.S. 930, 945, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007) (quoting *Miller–El v. Cockrell*, 537 U.S. 322, 337, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)). The limitations are "designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 1316, 182 L.Ed.2d 272 (2012). Moreover, the Supreme Court has said that "[s]tate courts are adequate forums for the vindication of federal rights." *Titlow*, 134 S.Ct. at 15. State judges, like federal judges, have the "the solemn responsibility ... to safeguard constitutional rights," *id.* (quoting *Trainor v. Hernandez*, 431 U.S. 434, 443, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977)), and "there is no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned ... than his neighbor in the state courthouse." *Id.* (quoting *Stone v. Powell*, 428 U.S. 465, 494, n. 35, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976)). "Federal habeas review thus exists as 'a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal.'" *Id.* (quoting *Richter*, 562 U.S. at 102–03, 131 S.Ct. 770).

III. Dassey's Claims

Dassey's petition for a writ of habeas corpus contains two claims for relief. First, Dassey claims that he was denied his Sixth Amendment right to the effective assistance of counsel. (ECF No. 1-2 at 9-18.) Second, Dassey claims that his March 1, 2006 confession was obtained in violation of the Fifth Amendment. (ECF No. 1-2 at 18-29.)

A. Ineffective Assistance of Counsel

"In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." U.S. Const. Amend. VI. This includes the right for a defendant to retain an attorney of his own choice, *Johnson v. Zerbst*, 304 U.S. 458, 468, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), to have an attorney appointed to represent him if he cannot afford an attorney, *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), to be represented by an attorney whose actions are not impacted by a conflict of interest, *Cuyler v. Sullivan*, 446 U.S. 335, 348–49, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), and to receive the effective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

When a convicted defendant alleges that his Sixth Amendment right to counsel was violated due to the conduct of his attorney, the claim most commonly alleges that counsel was ineffective under *Strickland*. Under *Strickland*, a defendant must demonstrate both that his attorney's performance was deficient, *id.* at 687, 104 S.Ct. 2052, and that the deficient performance prejudiced the defendant, *id.* at 687, 691–92. *Strickland* encompasses a wide variety of attorney errors and misconduct.

In its decision granting Kachinsky's motion to withdraw from the case, the trial court found that Kachinsky's performance was deficient under *Strickland* when he allowed investigators to interrogate Dassey without an attorney present. (ECF No. 19-14 at 23; *see also* ECF No. 19-43 at 2, 9.) On appeal to the Wisconsin Court of Appeals, however, rather than seeking relief under *Strickland*, Dassey sought relief under the more forgiving *Sullivan* standard, arguing that Kachinsky

acted under a conflict of interest when he assisted the prosecution in obtaining evidence against Dassey. (ECF No. 19-4 at 62 (all citations reflect the ECF pagination).) Dassey argued that Kachinsky's conflict of interest adversely affected him because it led to Kachinsky's failure to attend the May 13, 2006 interrogation. That uncounseled interrogation led to Dassey's recorded phone call with his mother, which was used to his detriment at trial.

The Wisconsin Court of Appeals found that Dassey failed to show that Kachinsky had a conflict of interest. (ECF No. 1-5, ¶ 13.) It also concluded that Dassey had failed to draw a "viable link between Kachinsky's actions and any demonstrable detriment to him." (ECF No. 1-5, ¶ 11.) It stated that there was no indication that Kachinsky's alleged conflict had any adverse effect at the suppression hearing. (ECF No. 1-5, ¶ 11.) Nor did the search warrant obtained pursuant to the information Kachinsky provided to the prosecution yield any evidence. (ECF No. 1-5, ¶ 12.) It did acknowledge that "[t]he jury did view a brief video [sic] clip of Dassey's post-interview telephone conversation with his mother." (ECF No. 1-5, ¶ 12.) "Significantly, though, the State properly introduced it only to rebut Dassey's testimony on direct that the acts to which he had admitted 'didn't really happen' and that his confession was 'made up.' " (ECF No. 1-5, ¶ 12.) The court of appeals concluded that "[v]oluntary statements obtained even without proper *Miranda* warnings are available to the State for the limited purposes of impeachment and rebuttal." (ECF No. 1-5, ¶ 12 (citing *State v. Knapp*, 2003 WI 121, ¶ 114, 265 Wis.2d 278, 666 N.W.2d 881, *vacated and remanded by* 542 U.S. 952, 124 S.Ct. 2932, 159 L.Ed.2d 835 (2004), *reinstated in material part by* 2005 WI 127, ¶ 2 n. 3, 285 Wis.2d 86, 700 N.W.2d 899).)

Dassey sets forth three arguments regarding the Wisconsin Court of Appeals' decision regarding his ineffective assistance of counsel claim. First, he argues that the court's conclusion that Kachinsky did not labor under an actual conflict and that any conflict did not adversely affect the trial was an unreasonable application of clearly established federal law. (ECF No. 1-2 at 11-17.) Second, he argues that the court of appeals made an unreasonable finding of fact when it found that the State had used the May 13 telephone call between Dassey and his mother only to cross-examine Dassey, when in fact the State used the call at least three times, including during closing argument to neutralize Dassey's alibi. (ECF No. 1-2 at 17-18.) Third, Dassey argues that the decision applied the wrong rule of law—the Fifth Amendment *Miranda* impeachment rule—to assess his Sixth Amendment ineffective assistance of counsel claim. (ECF No. 1-2 at 9-11.)

1. Conflict of Interest

Although it probably does not need to be stated, it will be: Kachinsky's conduct was inexcusable both tactically and ethically. It is one thing for an attorney to point out to a client how deep of a hole the client is in. But to assist the prosecution in digging that hole deeper is an affront to the principles of justice that underlie a defense attorney's vital role in the adversarial system. That said, Dassey's attempt to characterize Kachinsky's misconduct as a conflict of interest under *Sullivan* is misplaced.

In *Sullivan*, two attorneys jointly represented three co-defendants, all at separate trials. The Supreme Court concluded that, if the defendant did not object to the joint representation at trial, he may prevail on a claim that his right under the Sixth Amend-

ment to the effective assistance of counsel was violated only if he demonstrates "that an actual conflict of interest adversely affected his lawyer's performance." 446 U.S. at 348, 100 S.Ct. 1708. That requires a showing that "his counsel actively represented conflicting interests." *Id.* at 350, 100 S.Ct. 1708. However, unlike a claim under *Strickland*, no showing of prejudice is required.

Some federal courts of appeals interpreted *Sullivan* as applying to various types of conflicts other than those involving the representation of multiple clients. *See, e.g.*, *Summerlin v. Stewart*, 267 F.3d 926, 935–41 (9th Cir.2001) (romantic "entanglement" with the prosecutor); *Perillo v. Johnson*, 205 F.3d 775, 797–99 (5th Cir.2001) (obligation to former client); *Freund v. Butterworth*, 165 F.3d 839, 858–60 (11th Cir.1999) (same); *Garcia v. Bunnell*, 33 F.3d 1193, 1194–95, 1198, n. 4 (9th Cir.1994) (job with the prosecutor's office); *United States v. Sayan*, 968 F.2d 55, 64–65 (D.C.Cir.1992) (fear of antagonizing the trial judge); *United States v. Michaud*, 925 F.2d 37, 40–42 (1st Cir.1991) (teaching classes to IRS agents); *Mannhalt v. Reed*, 847 F.2d 576, 580 (9th Cir.1988) (obligation to former client); *United States v. Young*, 644 F.2d 1008, 1013 (4th Cir.1981) (same); *United States v. Hearst*, 638 F.2d 1190, 1193 (9th Cir.1980) (book deal).

However, in *Mickens v. Taylor*, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002), the Supreme Court stated that "the language of *Sullivan* itself does not clearly establish, or indeed even support, such expansive application." *Mickens*, 535 U.S. at 175, 122 S.Ct. 1237. As stated in *Mickens*, *Sullivan* stressed the high probability of prejudice arising from the concurrent representation of multiple clients and the difficulty of proving that prejudice. 535 U.S. at 175, 122 S.Ct. 1237.

"Not all attorney conflicts present comparable difficulties." *Id.* The purpose of the *Sullivan* exception to the ordinary requirements of *Strickland* is "to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." 535 U.S. at 176, 122 S.Ct. 1237.

In his argument to this court, Dassey asserts that "there can be no doubt that Kachinsky labored under an 'actual conflict'" (ECF No. 1-2 at 12), but he never explicitly identifies the nature of Kachinsky's alleged conflict. The closest Dassey comes is when he asserts, "the problem is that [Kachinsky] actively and concurrently worked for two masters: the prosecutor and (or, often, at the expense of) his own sixteen-year-old client." (ECF No. 22 at 8.) Dassey never identifies any sort of relationship that Kachinsky had with the prosecutor that establishes a conflict of interest in the sense that the term is generally used. *See, e.g.*, Wis. SCR 20:1.7, 20:1.8 (attorney ethical rules regarding conflicts of interest). Kachinsky was not concurrently employed by the prosecutor's office, did not have any personal relationship with the prosecutor's office, nor did he have any financial (or other) interest in the work of the prosecutor's office. *Cf. Blankenship v. Johnson*, 118 F.3d 312, 318 (5th Cir.1997) (finding conflict of interest when defendant's appellate counsel was concurrently a county attorney).

The case upon which Dassey primarily relies is an unpublished district court decision from the Eastern District of Michigan that does not even refer to *Sullivan*. (ECF No. 1-2 at 10; ECF No. 22 at 6-7 (citing *Thomas v. McLemore*, 2001 WL 561216, 2001 U.S. Dist. LEXIS 6763 (E.D.Mich. Mar. 30, 2001).) In that case, while entertaining the premise of the petitioner's ar-

gument that a defense attorney who chooses to assist the prosecution has a conflict of interest, the court quickly rejected its merits. *Thomas*, 2001 WL 561216, 10, 2001 U.S. Dist. LEXIS 6763, 30–32. Thus, in addition to being non-precedential, *Thomas* cannot be read as endorsing an expansion of *Sullivan* in the manner Dassey suggests.

In *Osborn v. Shillinger*, 861 F.2d 612, 629 (10th Cir.1988), cited in *Thomas*, the defendant pled guilty to various crimes and was sentenced to death. *Id.* at 614. The Court of Appeals for the Tenth Circuit affirmed the district court's decision to grant Osborn's petition for a writ of habeas corpus. *Id.* at 630. The court said, "A defense attorney who abandons his duty of loyalty to his client and effectively joins the state in an effort to attain a conviction or death sentence suffers from an obvious conflict of interest." *Id.* at 629. The court continued, "In fact, an attorney who is burdened by a conflict between his client's interests and his own sympathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants, because the interests of the state and the defendant are necessarily in opposition." *Id.* at 629.

These statements would seem to strongly support Dassey's position that an attorney who works to facilitate his client's conviction acts under a conflict of interest. However, *Osborn* not only predates AEDPA, but also *Mickens*, where the Supreme Court made it clear that *Sullivan* was clearly established federal law only with respect to conflicts of interest resulting from the concurrent representation of multiple clients. 535 U.S. at 175, 122 S.Ct. 1237. Finally, *Osborn* was not strictly a *Sullivan* conflict of interest case. The court relied upon the general rules set forth in *Sullivan*, *Strickland*, and *United States v. Cronic*, 466 U.S. 648, 655,

104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), to conclude that Osborn's rights under the Sixth Amendment were violated. Specifically, the court stated, "We base our conclusion that Osborn did not receive effective assistance of counsel on the clear evidence that the process by which he pled and was sentenced to death was not adversarial, and therefore was unreliable." *Osborn*, 861 F.2d at 629. That principle is taken from *Strickland*. 466 U.S. at 696, 104 S.Ct. 2052. Thus, it appears that *Osborn* was more accurately a *Strickland* case and statements that might be seen as emerging from *Sullivan* were merely corroborative to the decision.

The Supreme Court has never held that the *Sullivan* standard applies to the sort of purported conflict Dassey identifies here. In fact, the Court in *Mickens* expressly stated that it is *not* "clearly establish[ed]" that *Sullivan* applies in any context other than conflicts resulting from the concurrent representation of multiple clients. Thus, *Sullivan* is inapplicable here. Because Dassey may obtain relief under § 2254(d)(1) only when the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" the Supreme Court's statements in *Mickens* make it clear that this court is prohibited from granting Dassey the relief he seeks now. Relief under the Sixth Amendment may be found, if at all, only under *Strickland*.

Thus, the court considers whether it might be appropriate to re-construe Dassey's ineffective assistance of counsel claim as arising under *Strickland*. The respondent argues that it is not. (ECF No. 20 at 14.) Although in both the court of appeals (ECF Nos. 19–4 at 12, 59, 60, 61, 73; 19-8 at 8) and in his petition for review to the Wisconsin Supreme Court (ECF No. 19-9 at

14) Dassey repeatedly referred to his claim regarding Kachinsky's misconduct as one of "ineffective assistance of counsel," he never actually made a *Strickland* argument. Dassey's only discussion of *Strickland* in the Wisconsin Court of Appeals in the context of Kachinsky's actions was when he asserted, "[e]ven *Strickland* itself establishes that when defense counsel 'breaches the duty of loyalty'—as Kachinsky unquestionably did here—then he 'operates under a conflict of interest' governed by [*Sullivan*]." (ECF No. 19-4 at 65; *see also* ECF No. 19-4 at 61.) What the Court actually said in *Strickland* was the inverse—that if a defense attorney operates under a conflict of interest, he breaches the duty of loyalty to his client. *Strickland*, 466 U.S. at 692, 104 S.Ct. 2052.

Although a claim of "ineffective assistance of counsel" is often synonymous with a *Strickland* claim, courts have used the term to describe both *Strickland* and *Sullivan* claims. *See, e.g., Blake v. United States*, 723 F.3d 870, 880 (7th Cir.2013); *Stoia v. United States*, 22 F.3d 766, 770 (7th Cir.1994). But the claims are distinct. Naturally one might wonder what difference it makes if an argument for relief for a violation of the Sixth Amendment is under *Sullivan* or *Strickland*. Why not just view the matter broadly, as the court arguably did in *Osborn*, 861 F.2d at 629, and focus on the general Sixth Amendment consideration of whether "the result of the particular proceeding is unreliable because of a breakdown in the adversarial process"? *Strickland*, 466 U.S. at 696, 104 S.Ct. 2052.

The answer lies in AEDPA and doctrines set forth in case law that restrain a federal court's authority to correct errors in state criminal proceedings. It is not only presumed that state courts are capable of protecting constitutional rights but also that state judges will

adhere to that "solemn responsibility." *Titlow*, 134 S.Ct. at 15. Federal courts are bound to respect the decisions of state courts and the finality of their judgments. *See Martinez*, 132 S.Ct. at 1316; *Panetti*, 551 U.S. at 945, 127 S.Ct. 2842. As part of the policy of ensuring that federal intervention occurs only as a last resort, the prisoner must have given the state courts "a 'meaningful opportunity to pass upon the substance of the claims later presented in federal court.'" *Sweeney v. Carter*, 361 F.3d 327, 332 (7th Cir.2004) (quoting *Chambers v. McCaughtry*, 264 F.3d 732, 737–38 (7th Cir.2001)). That requires that "he articulates both the operative facts and the controlling legal principles on which his claim is based." *Perruquet v. Briley*, 390 F.3d 505, 519 (7th Cir.2004).

There is certainly commonality between the *Sullivan* claim Dassey made and the *Strickland* claim he could have made. *See Blake*, 723 F.3d at 880 (noting that a conflict of interest claim may be presented under both *Strickland* and *Sullivan*). As noted above, each constitutes a violation of the Sixth Amendment that can be referred to generally as ineffective assistance of counsel. The argument Dassey made in the state courts calls to mind the same Sixth Amendment right implicated under *Strickland*. Each requires proof of a harm, varying only in the *amount* of harm (adverse effect versus prejudice) that the petitioner must prove. *See Hall v. United States*, 371 F.3d 969, 973 (7th Cir.2004) ("Proceeding under *Sullivan* places a 'lighter burden' on the defendant than *Strickland* because demonstrating an 'adverse effect' is significantly easier than showing 'prejudice'.") Dassey's *Sullivan* claim and his plausible *Strickland* claim are also based on the same facts.

However, the court finds that it need not consider whether it may, consistent with the rules regarding exhaustion and fair presentment, re-construe Dassey's *Sullivan* claim as a *Strickland* claim. Crucially, Dassey never asked this court to consider whether Kachinsky rendered ineffective assistance under *Strickland*. Indeed, he acknowledges a distinction between a *Sullivan* and a *Strickland* claim when he emphasizes that "'demonstrating an adverse effect under *Sullivan* is significantly easier than showing prejudice' under *Strickland v. Washington*." (ECF No. 1-2 at 13 (quoting *Hall*, 371 F.3d at 973).) Even after the respondent noted that *Sullivan* was not clearly established federal law for the claim Dassey presented, Dassey made no argument that his claim ought to be alternatively construed under *Strickland*. Dassey's argument has been consistently and exclusively under *Sullivan*.

In the absence of any request from Dassey, the court finds it inappropriate to re-construe his *Sullivan* claim as a *Strickland* claim. Such extraordinary action would be outside the permissible bounds of judicial action, especially given the policies that circumscribe the role of federal courts in reviewing state court convictions.

In short, the Supreme Court has never recognized misconduct such as Kachinsky's as a conflict of interest under *Sullivan*. Therefore, federal law prohibits the court from granting Dassey habeas relief on this claim. Although Kachinsky's misconduct might support a claim for relief under *Strickland*, Dassey never made this argument to the state courts or to this court. Consequently, federal law likewise prohibits the court from considering whether Dassey would be entitled to habeas relief on this alternative basis.

2. Introduction of the Phone Call at Trial

When discussing the significance of Dassey's May 13 phone call to his mother, the court of appeals said, "Significantly, though, the State properly introduced it only to rebut Dassey's testimony on direct that the acts to which he had admitted "didn't really happen" and that his confession was 'made up.'" (ECF No. 1-5, ¶ 12.)

Dassey argues that the court of appeals "found, as a factual matter, that the May 13 telephone call was only used to cross-examine Brendan[.]" (ECF No. 1-2 at 18.) He points out that the trial transcript is clear that his phone call to his mother was referenced by the prosecution at least three times at trial: during its cross-examination of Dassey; during its cross-examination of Dassey's expert; and during its closing argument. (ECF No. 1-2 at 17-18.)

But the court of appeals never said that Dassey's phone call to his mother was "used" only to cross-examine Dassey. It said it was "introduced" for only one purpose, which was to rebut Dassey's testimony on direct that the acts to which he had admitted "didn't really happen" and that his confession was "made up." Evidence *introduced* for only one purpose might be *used* multiple times, in various ways, and with many different witnesses. What the court of appeals said was accurate and not unreasonable.

3. The Legal Standard Applied by the Court of Appeals

Regarding the admission of Dassey's phone call to his mother, the court of appeals also said, "Voluntary statements obtained even without proper *Miranda* warnings are available to the State for the limited purposes of impeachment and rebuttal. *See State v.*

Knapp, 2003 WI 121, ¶ 114, 265 Wis.2d 278, 666 N.W.2d 881." (ECF No. 1-5, ¶ 12.) Dassey argues that the court of appeals acted contrary to clearly established federal law by applying the wrong legal standard to his claim. (ECF No. 1-2 at 11.)

The court acknowledges that the court of appeals' statement that "[v]oluntary statements obtained even without proper *Miranda* warnings are available to the State for the limited purposes of impeachment and rebuttal" is confusing given the context of this case. Dassey never claimed that his call to his mother should have been excluded because it was made without the benefit of his *Miranda* warnings. The court suspects that the court of appeals was merely attempting to analogize the admission of a statement obtained in violation of *Sullivan* to the admission of a statement obtained in violation of *Miranda*. Whether such a comparison is sound is a question this court need not determine. The court of appeals' decision is clear that this was not the basis for its rejection of Dassey's claim. The statement was extraneous and immaterial. *See Rhodes v. Dittmann*, 783 F.3d 669, 675 (7th Cir.2015) ("Section 2254(d) focuses on the ultimate decision of the state court, not on parts of a written opinion that might in isolation appear to be misguided but that in the end are not necessary to the outcome."). Thus, the court cannot conclude that Dassey has shown that the court of appeals' decision denying him relief on his *Sullivan* claim was contrary to clearly established federal law or based upon an unreasonable determination of facts.

B. Voluntariness of Dassey's March 1, 2006 Confession

The United States Supreme Court "has long held that certain interrogation techniques, either in isolation

or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment." *Miller v. Fenton*, 474 U.S. 104, 109, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985) (citing *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); *Haynes v. Washington*, 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963); *Ashcraft v. Tennessee*, 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192 (1944); *Chambers v. Florida*, 309 U.S. 227, 235–238, 60 S.Ct. 472, 84 L.Ed. 716 (1940); *Brown v. Mississippi*, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936)). This includes the sorts of means that are "revolting to the sense of justice," such as "beatings and other forms of physical and psychological torture." *Id.* (quoting and citing *Brown*, 297 U.S. at 286, 56 S.Ct. 461). But the Constitution prohibits far more than barbaric and torturous conduct. Indeed, more subtle police pressures such as a false promise of leniency may render a confession involuntary. *See United States v. Villalpando*, 588 F.3d 1124, 1128 (7th Cir.2009). If a confession is the product of "deceptive interrogation tactics that have overcome the defendant's free will," the confession is involuntary. *Id.* (quoting *United States v. Dillon*, 150 F.3d 754, 757 (7th Cir.1998)).

"In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). "[T]he voluntariness of juvenile confessions must be evaluated with 'special care.'" *Gilbert v. Merchant*, 488 F.3d 780, 791 (7th Cir.2007) (quoting *Haley*, 332 U.S. at 599, 68 S.Ct. 302; citing *In re Gault*, 387 U.S. 1, 45, 87 S.Ct.

1428, 18 L.Ed.2d 527 (1967)). Relevant factors include "the length of the interrogation, *Ashcraft v. Tennessee*, 322 U.S. 143, 153–154, 64 S.Ct. 921, 88 L.Ed. 1192 (1944); its location, *see Reck v. Pate*, 367 U.S. 433, 441, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961); its continuity, *Leyra v. Denno*, 347 U.S. 556, 561, 74 S.Ct. 716, 98 L.Ed. 948 (1954); the defendant's maturity, *Haley v. Ohio*, 332 U.S. 596, 599–601, 68 S.Ct. 302, 92 L.Ed. 224 (1948) (opinion of Douglas, J.); education, *Clewis v. Texas*, 386 U.S. 707, 712, 87 S.Ct. 1338, 18 L.Ed.2d 423, (1967); physical condition, *Greenwald v. Wisconsin*, 390 U.S. 519, 520–21, 88 S.Ct. 1152, 20 L.Ed.2d 77 (1968) (per curiam); and mental health, *Fikes v. Alabama*, 352 U.S. 191, 196, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957)." *Withrow v. Williams*, 507 U.S. 680, 693, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993). "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). A confession is not involuntary merely because the actions of the police caused the person to confess. *Johnson v. Trigg*, 28 F.3d 639, 641 (7th Cir.1994). And a suspect's "deficient mental condition," standing alone, will not sustain a finding of involuntariness. *Connelly*, 479 U.S. at 164–65, 107 S.Ct. 515. Whether a statement was voluntary is a question of law. *Miller*, 474 U.S. at 115–16, 106 S.Ct. 445.

"Though the voluntariness of a confession is an issue of law, the factors underlying that determination are issues of fact to which § 2254(e)(1)'s presumption of correctness applies." *United States ex rel. Weems v. Williams*, 2014 WL 5423268, 3, 2014 U.S. Dist. LEXIS 151281, 9 (N.D.Ill. Oct. 21, 2014) (citing *Miller*, 474 U.S. at 110–17, 106 S.Ct. 445); *see also Everett v. Barnett*,

162 F.3d 498, 501 (7th Cir.1998). "[D]eterminations of factual issues made by the state court are presumed correct in federal habeas corpus proceedings, unless the petitioner rebuts that presumption by clear and convincing evidence." *Ward v. Sternes*, 334 F.3d 696, 703 (7th Cir.2003) (citing 28 U.S.C. § 2254(e)(1)). "The presumption of correctness also applies to factual findings made by a state court of review based on the trial record." *Morgan v. Hardy*, 662 F.3d 790, 797–98 (7th Cir.2011) (citing *Sumner v. Mata*, 449 U.S. 539, 546–47, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981); *Rodriguez v. Peters*, 63 F.3d 546, 554 (7th Cir.1995)). Thus, a decision involves an unreasonable determination of facts under 2254(d)(2) "if it rests upon fact-finding that ignores the clear and convincing weight of the evidence." *Goudy*, 604 F.3d at 399–400 (citing *Ward*, 334 F.3d at 704).

As recounted by the court of appeals, the state trial court found the following facts regarding Dassey's March 1 confession:

> Dassey had a 'low average to borderline' IQ but was in mostly regular-track high school classes; was interviewed while seated on an upholstered couch, never was physically restrained and was offered food, beverages and restroom breaks; was properly Mirandized; and did not appear to be agitated or intimidated at any point in the questioning.... [I]nvestigators used normal speaking tones, with no hectoring, threats or promises of leniency; prodded him to be honest as a reminder of his moral duty to tell the truth; and told him they were 'in [his] corner' and would 'go to bat' for him to try to achieve a rapport with Dassey and to convince him that being truthful would be in his best interest.

(ECF No. 1-5, ¶ 6.) The court of appeals held that these findings of fact were not clearly erroneous. (ECF No. 1-5, ¶ 7.) It noted that investigators are permitted to make statements that encourage honesty and do not promise leniency. (ECF No. 1-5, ¶ 7 (citing *State v. Berggren*, 2009 WI App 82, ¶ 31, 320 Wis.2d 209, 769 N.W.2d 110).) Moreover, investigators may assert that they know facts of which they do not actually have knowledge. (ECF No. 1-5, ¶ 7 (citing *State v. Triggs*, 2003 WI App 91, ¶¶ 15, 17, 264 Wis.2d 861, 663 N.W.2d 396).) "The truth of the confession remained for the jury to determine." (ECF No. 1-5, ¶ 7.)

1. Similar Cases

In a number of post-AEDPA cases the Court of Appeals for the Seventh Circuit addressed the question of whether a state court unreasonably concluded that a juvenile's confession was voluntary. Some of these cases deal with sufficiently analogous circumstances such that the court finds it helpful to look to them in guiding the present decision.

In *Carter v. Thompson*, 690 F.3d 837, 840–41 (7th Cir.2012), the court denied habeas relief to a 16-year-old girl who was kept in the police station for 55 hours, never told she was free to leave, never afforded the opportunity to shower or given a change of clothes, a pillow, or a blanket, and who had to sleep on a bench in the interview room. She was repeatedly subjected to questioning. *Id.* at 840. No parent or other adult protecting her interests was present until after she had confessed. *Id.* at 839, 841. While referring to the circumstances as "unsettling," the court ultimately concluded that the state court's decision, holding that her confession was voluntary, was not objectively unreasonable. *Id.* at 844.

In *Etherly v. Davis*, 619 F.3d 654 (7th Cir.2010), Etherly was 15 years old, illiterate, enrolled in special education classes, and had "borderline intellectual functioning" when police officers went to his home at about 5:30 a.m. and took him to the police station for questioning about his involvement in a murder. *Id.* at 657–58. He had no prior involvement in the criminal justice system, and no parent was present during the interview. *Id.* at 659. Two hours after arriving at the station, detectives undertook a brief, unproductive interview of him. *Id.* at 658. After a uniformed officer took Etherly to the restroom, "Etherly informed the detectives that the uniformed officer had told him that he had an obligation to tell the truth, and that 'it would go better for him in court' if he helped the police to locate the guns." *Id.* A detective responded that they could not make any promises but said they would inform the court of his assistance. *Id.* Etherly then provided an inculpatory statement. *Id.* The court of appeals determined that the state court was not unreasonable in finding that Etherly's statement was voluntary. *Id.* at 663–64.

In *Hardaway v. Young*, 302 F.3d 757, 759 (7th Cir.2002), the suspect was just 14 years old when he was questioned about murdering an 11-year-old gang member. Detectives roused Hardaway from sleep at his home at about 8:00 a.m. and took him to the police station, where they questioned him briefly before he spent most of the next eight hours alone in an interview room. *Id.* at 760. At 4:30 p.m., two new detectives advised Hardaway of his *Miranda* rights and proceeded to question him. *Id.* Hardaway confessed. *Id.* Given Hardaway's "extreme youth," the court of appeals carefully scrutinized the circumstances of his confession, including the fact that "there was no friendly adult presence to guard against undue police influence." *Id.*

at 765–67. But the court noted other facts that tended to support a finding that the confession was voluntary. "The police used no particularly coercive or heavy-handed interview techniques, such as making Hardaway strip and wear jail clothes or handcuffs, questioning him for lengthy periods without a break, misrepresenting evidence, or showing graphic pictures of the murder scene." *Id.* at 766 (discussing cases where these techniques were used). Hardaway was experienced with the criminal justice system, having been arrested 19 times in the preceding two years. *Id.* at 767. He appeared to understand his *Miranda* rights in that he was able to explain them in his own words. *Id.* There was no indication that Hardaway "had mental incapacities or other infirmities that would make him incapable of understanding his rights." *Id.* His "test scores showed an IQ of 95 and the educational performance of an average sixth-grader." *Id.* Despite "the gravest misgivings," the court of appeals "reluctantly conclude[d]" that, given the deferential standard set forth under AEDPA, it was "compelled to defer to the findings and the conclusion of the state courts" because "reasonable minds could differ." *Id.* at 759, 767–68.

Conversely, in *A.M. v. Butler*, 360 F.3d 787 (7th Cir.2004), the court affirmed the district court's grant of the writ to a petitioner who, at 11-years-old, confessed to the brutal murder (committed when he was 10 years old) of his 83-year-old neighbor. *Id.* at 789, 792, 802. Initially regarded as a witness, the youth was questioned numerous times and told various versions of the relevant events, eventually repeatedly admitting to the murder. *Id.* at 792–93. However, once his mother was located and joined him in the interrogation room, he recanted. *Id.* at 793. Later, he purportedly admitted the murder to his mother, a point disputed by his

mother at trial. *Id.* at 793–94. According to the petitioner, a detective "pounded on his knees, told him his fingerprints were on the murder weapon, and said that if he confessed, God and the police would forgive him and he could go home in time for his brother's birthday party." *Id.* at 794. The court emphasized that the petitioner "was not a seasoned juvenile delinquent. In fact, he had no prior experience with the criminal justice system when he was questioned for almost 2 hours in a closed interrogation room with no parent, guardian, lawyer, or anyone at his side." *Id.* at 797, 800. A detective "continually challenged [the petitioner's] statement and accused him of lying, a technique which could easily lead a young boy to 'confess' to anything." *Id.* at 800. The court affirmed the district court's decision to grant the writ. *Id.* at 802.

In dissent, Judge Easterbrook accused the majority of continuing to apply the pre-AEDPA standard of review. *Id.* at 805. In his view, affording the state court decision the significant deference required under AEDPA, the court was required to deny the writ. *Id.* at 805. He noted that the detective did not attempt to overbear the petitioner's will, treat him poorly, or hold him for extended periods, and the petitioner repeated his confession many times after the relevant interview. *Id.* at 805.

2. Reliability as a Factor Under the Totality of the Circumstances

Dassey argues that during the March 1 interrogation the investigators repeatedly fed him facts, including facts that were not publicly known. Such fact feeding could suggest that Dassey's confession was not reliable. Thus, as a preliminary question the court considers whether the reliability of Dassey's confession is a

factor that the court should take into account when assessing whether Dassey's confession was voluntary under the totality of the circumstances.

Intuitively, one would not expect Dassey to provide the level of detail he did on March 1 had he not been involved in the events he described. The prosecution emphasized as much in its closing argument: "People who are innocent don't confess in the detail provided to the extent this defendant provided it. They don't do that." (ECF No. 19-23 at 144.) Research, however, shows that some people *do* make detailed confessions to crimes they did not commit. (ECF No. 19-27 at 202-08); *see also* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 933-43 (2004) (documenting 125 "proven false" confessions) (presented as an exhibit by the state in its cross-examination of Leo at Dassey's post-conviction hearing and discussed at length (*see, e.g.*, ECF No. 19-27 at 273-81)); Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1062-66 (2009-10) (examining multiple cases where individuals confessed to crimes for which they were later exonerated by DNA testing, noting that many of the false confessions included details about how the crime had occurred) (study relied upon by Leo in his testimony at Dassey's post-conviction hearing) (*see, e.g.*, ECF No. 19-27 at 202-03, 208-09)). Moreover, false confessions are especially likely among juveniles and persons with low IQs. (ECF No. 19-27 at 140, 165); *see also* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 919 (2004). Other traits such as low self-esteem, aversion to conflict, and poor memory tend to make a person more susceptible to false confessions. (ECF No. 19-27 at 140-41.)

One explanation for the level of detail in false confessions is that the suspect learned the details through the media, family, friends, or from investigators as part of the questioning process. *See generally* Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051 (2009-10); (*see also* ECF No. 19-30 at 149-53 (Janda's testimony regarding Dassey's exposure to media coverage and family discussions of the case).) The investigation and prosecution of Avery garnered significant media attention in Wisconsin and nationally. *See, e.g.*, Kevin Braley, *Halbach Case Draws Media Crowd*, Herald Times Reporter (Manitowoc, WI), Nov. 23, 2005, p. 1A.

The prosecution emphasized that details Dassey provided were corroborated by other evidence. However, the details that Dassey provided were predominantly either matters that had been publicly disclosed or could be readily surmised from those facts. For example, long before Dassey's March 1 confession, it had been reported in the media that Halbach's RAV4 was found in the salvage yard partially concealed by branches and a car hood; that her remains were found in Avery's burn pit along with remnants of clothing; that Avery burned tires on the night Halbach was last seen; that 11 rifle casings were found in Avery's garage; that two rifles were recovered from Avery's bedroom; that a key to Halbach's RAV4 was found in Avery's bedroom; that the key had Avery's DNA on it; that Avery's blood was found in Halbach's RAV4; and that Halbach's blood was found in the cargo area of the RAV4. *See, e.g.*, Kevin Braley, *Avery Bound Over for Trial*, Herald Times Reporter (Manitowoc, WI), Dec. 7, 2005, p. 1A; Kevin Braley, *Homicide Charge Filed*, Herald Times Reporter (Manitowoc, WI), Nov. 16, 2005, p. 1A.

Certain other details, such as the fact that Halbach had been shot in the head and that the battery to the RAV4 had been disconnected, apparently had *not* been publicly disclosed as of March 1, 2006. However, how Dassey came to say that Avery shot Halbach in the head offers perhaps the strongest indication that Dassey was, as he later would claim, at times guessing at the answers in an attempt to provide the investigators with the information they said they already knew. (*See* ECF Nos. 19–34 at 34, 98; 19-38 at 4-5.)

The investigators knew that Halbach had been shot in the head and repeatedly told Dassey that they knew "something else was done.... Something with the head." (ECF No. 19-25 at 60-63.) Dassey first said that Avery "cut off her hair," his inflection suggesting more a question than a statement. (ECF No. 19-25 at 60; Ex. 43, Disc 1 at 11:57:45 AM.) After more prompting from the investigators, he then said that Avery "punched her." (ECF No. 19-25 at 61.) Yet more prompting led to Dassey saying that, at Avery's direction, he cut Halbach's throat. (ECF No. 19-25 at 62.) Despite more prompting, eventually Dassey stated, "That's all I can remember." (ECF No. 19-25 at 63.) Having unsuccessfully gotten Dassey to tell them that Halbach had been shot in the head, much less who had shot her, Wiegert finally said, "All right, I'm just gonna come out and ask you. Who shot her in the head?" (ECF No. 19-25 at 63.) "He did," Dassey replied. (ECF No. 19-25 at 63.) When asked why he did not say so earlier, Dassey said, "Cuz I couldn't think of it." (ECF No. 19-25 at 63.)

Thereafter, the details of the shooting emerged, or perhaps evolved, in a similarly protracted fashion. Initially, Dassey told the investigators that Avery shot Halbach twice. (ECF No. 19-25 at 65.) Then it was three times. (ECF No. 19-25 at 67.) Later, after Fass-

bender said, "Remember [we] got a number of shell casings that we found in that garage" (ECF No. 19-25 at 73), Dassey said that Avery shot Halbach "about ten" times while she was on the garage floor. (ECF No. 19-25 at 73.) Wiegert responded, "That makes sense. Now we believe you." (ECF No. 19-25 at 73.)

Dassey's description of where the shooting took place was also an evolution. He first told the investigators that the shooting occurred outdoors and that Halbach was never in the garage. (ECF No. 19-25 at 67-68.) Then he told them that the shooting occurred in the garage. (ECF No. 19-25 at 72.) Specifically, Dassey said Halbach was in the back of her RAV4 when shot. (ECF No. 19-25 at 73.) But immediately thereafter he said that she was on the garage floor when she was shot. (ECF No. 19-25 at 73.)

Finally, only after Fassbender's highly leading questions did Dassey acknowledge that Avery went under the hood of Halbach's RAV4. When Fassbender asked Dassey what else he and Avery did to the RAV4, he could not muster the answer Fassbender was looking for until Fassbender asked, "[D]id he go and look at the engine, did he raise the hood at all or anything like that?" (ECF No. 19-25 at 79.) Dassey responded affirmatively, but when pressed for additional details he could offer none. (ECF No. 19-25 at 79.) Instead, all he could say was, "I don't know what he did, but I know he went under." (ECF No. 19-25 at 79.)

The investigators' use of leading questions and disclosure of non-public facts makes it difficult to evaluate whether Dassey really knew the facts or was simply agreeing with the investigators. *Cf.* Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051, 1066-67 (2009-10) (discussed in Leo's testi-

mony (ECF No. 19-27 at 202-08)) (noting that police training materials emphasize that, to enable later evaluation of whether a statement was true, interrogators should not provide the suspect with non-public details or ask leading questions on crucial points).

Based on its review of the record, the court acknowledges significant doubts as to the reliability of Dassey's confession. Crucial details evolved through repeated leading and suggestive questioning and generally stopped changing only after the investigators, in some manner, indicated to Dassey that he finally gave the answer they were looking for. (See ECF No. 19-27 at 210-32.) Purportedly corroborative details could have been the product of contamination from other sources, including the investigators' own statements and questioning, or simply logical guesses, rather than actual knowledge of the crime. (*See* ECF No. 19-27 at 210-32.)

Courts have long excluded involuntary confessions on the basis that they are inherently unreliable. *Dickerson v. United States*, 530 U.S. 428, 434, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). The Court of Appeals for the Seventh Circuit in *Conner v. McBride*, 375 F.3d 643, 652 (7th Cir.2004), stated that the fact that the petitioner's confession was found to be reliable tended to support the conclusion that the statement was voluntary. The present case presents the flip side of the *Conner* coin—whether *doubts* as to the reliability of Dassey's confession would tend to support a finding that the confession was *in*voluntary.

The Supreme Court long ago detached the admissibility of a confession from its reliability and made voluntariness alone the benchmark of admissibility. *See Culombe v. Connecticut*, 367 U.S. 568, 583–84 n. 25, 81

S.Ct. 1860, 6 L.Ed.2d 1037 (1961) (quoting *Lisenba v. California*, 314 U.S. 219, 236, 62 S.Ct. 280, 86 L.Ed. 166 (1941). "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." *Connelly*, 479 U.S. at 167, 107 S.Ct. 515 (quoting *Lisenba v. California*, 314 U.S. 219, 236, 62 S.Ct. 280, 86 L.Ed. 166 (1941)). Thus, voluntariness is "a question to be answered with complete disregard of whether or not petitioner in fact spoke truth." *Rogers v. Richmond*, 365 U.S. 534, 544, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961).

Accordingly, from a constitutional perspective, if a person voluntarily but falsely confesses, it is the jury, not the court, that serves as the check against an innocent person being convicted of a crime he did not commit. (*See* ECF No. 19-12 at 4 ("The motion that's before the Court today is not directly concerned with the truthfulness or the falsity of the statements given, but, rather, their voluntariness.").) By returning verdicts of guilty, the court presumes the jury found Dassey's confession reliable. This court's doubts as to the reliability of Dassey's confession are not relevant considerations in the assessment of whether Dassey's confession was constitutionally voluntary.

3. Analysis of Dassey's Confession

The court must look to all relevant facts to determine whether Dassey's March 1 confession was voluntary. The interview occurred mid-day rather than in the early morning hours, *see Etherly v. Davis*, 619 F.3d 654, 657 (7th Cir.2010), or at a time when Dassey might expect to be asleep, *see Hardaway v. Young*, 302 F.3d 757, 766 (7th Cir.2002). The questioning was not particularly prolonged. Although Dassey was in the inter-

view room from about 11:00 a.m. until 4:00 p.m., the relevant questioning spanned less than three hours. (Ex. 43.) Dassey was left alone for less than two hours, the longest single stretch being about 50 minutes. He was offered food and beverages. Although the interview occurred in a police station, it was in a "soft interview room," with carpeting and upholstered furniture as opposed to a room with an uncarpeted floor, a hard table, and chairs. Wiegert advised Dassey of his rights under *Miranda*, including the right to not answer questions, to stop the questioning, and to have an attorney appointed for him and present during any questioning. (ECF No. 19-25 at 2.) Dassey exhibited no signs of agitation or distress throughout the interview (he sobbed only after being told he was under arrest). The investigators maintained calm tones, never using aggressive or confrontational tactics. If these were the only relevant facts, they would tend to support a finding that the March 1 confession was voluntary. But when assessed against all of the circumstances of Dassey's interrogation, these facts are overshadowed by far more consequential facts.

For starters, Dassey was a juvenile—only 16 years old—at the time of his confession. *See, e.g.*, *J. D. B. v. North Carolina*, 564 U.S. 261, 280, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011); *Gallegos v. Colorado*, 370 U.S. 49, 52, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962); *Haley v. Ohio*, 332 U.S. 596, 599–600, 68 S.Ct. 302, 92 L.Ed. 224 (1948). Also significant is the fact that investigators questioned Dassey without the presence of a parent or other adult looking out for his interests. *Cf. Gilbert*, 488 F.3d at 792. It is true that neither federal law nor the United States Constitution requires that the police even inform a juvenile's parents that the juvenile is being questioned or honor a juvenile's request that a parent

or other adult (other than a lawyer) be present during questioning. *Hardaway*, 302 F.3d at 765. However, because "[i]t is easier to overbear the will of a juvenile than of a parent or attorney, ... in marginal cases—when it appears the officer or agent has attempted to take advantage of the suspect's youth or mental shortcomings—lack of parental or legal advice could tip the balance against admission." *United States v. Bruce*, 550 F.3d 668, 673 (7th Cir.2008) (quoting *United States v. Wilderness*, 160 F.3d 1173, 1176 (7th Cir.1998)).

Not only did Dassey not have the benefit of an adult present to look out for his interests, the investigators exploited the absence of such an adult by repeatedly suggesting that *they* were looking out for his interests: "I wanna assure you that Mark and I both are in your corner, we're on your side ..." (ECF No. 19-25 at 16), and "... I'm your friend right now, but I ... gotta believe in you and if I don't believe in you, I can't go to bat for you." (ECF No. 19-25 at 23.) In the interview just two days earlier, on February 27, 2006, where Dassey was also unaccompanied by an adult, Fassbender went even further:

> I've got ... kids somewhat your age, I'm lookin' at you and I see you in him and I see him in you, I really do, and I know how that would hurt me too.... Mark and I, yeah we're cops, we're investigators and stuff like that, but I'm not right now. I'm a father that has a kid your age too. I wanna be here for you. There's nothing I'd like more than to come over and give you a hug cuz I know you're hurtin'.

(ECF No. 19-24 at 5.)

Consistent with this paternalistic approach, Wiegert repeatedly touched Dassey's knee in a com-

passionate and encouraging manner during the March 1 interview. (*See, e.g.*, Ex. 43, Disc 1 at 11:20:28 a.m., 11:29:04 a.m., 11:37:32 a.m., 11:41:09 a.m.) In one instance, Wiegert put his hand on Dassey's knee, leaned forward, and said reassuringly and encouragingly, "We already know Brendan. We already know. Come on. Be honest with us. Be honest with us. We already know, it's, OK? We gonna help you through this, alright?" (Ex. 43, Disc 1 at 11:29:04 AM; ECF No. 19-25 at 37.) He later did this again while saying, "Brendan, I already know. You know we know. OK. Come on buddy. Let's get this out, OK?" (Ex. 43, Disc 1 at 11:37:32 AM; ECF No. 19-25 at 44.)

Moreover, Dassey's borderline to below average intellectual ability likely made him more susceptible to coercive pressures than a peer of higher intellect. *See Henderson v. DeTella*, 97 F.3d 942, 948 (7th Cir.1996) ("Henderson's purportedly low I.Q. and limited reading and comprehension capabilities obviously call for caution in assessing the uncounseled waiver of his constitutional rights."); *see also Ruvalcaba v. Chandler*, 416 F.3d 555, 561 (7th Cir.2005) (noting as a factor in denying habeas petition the absence of "evidence that he was of abnormally low intelligence or otherwise was highly vulnerable"). Although he attended regular education classes, Dassey received special education support services. (ECF No. 19-12 at 93-94.) Ten years earlier, his IQ was assessed at an overall score of 74. (ECF No. 19-12 at 86-87.) Testing over time yielded similar results. (ECF No. 19-12 at 87-90.) In addition, prior to the Halbach investigation Dassey had had no contact with law enforcement. *Cf. Hardaway*, 302 F.3d at 767 (noting petitioner "had 19 previous arrests for charges including robbery, attempted criminal sexual

assault, unauthorized use of a weapon, and delivery of a controlled substance").

Crucial in the voluntariness analysis is what the investigators told Dassey at the beginning of the interrogation. Fassbender assured Dassey, "from what I'm seeing ... I'm thinking you're all right. OK, you don't have to worry about things." (ECF No. 19-25 at 16.) In isolation, such a statement would not be a problem. Based on what the investigators actually knew at that time, they very possibly believed Dassey to be merely a witness. However, less than two minutes later, Wiegert assured Dassey, "We pretty much know everything[.] [T]hat's why we're talking to you again today." (ECF No. 19-25 at 17.) The combination of these statements, that the investigators already "pretty much know everything" and that Dassey did not "have to worry about things," is an entirely different matter. The investigators were not merely telling Dassey, "Based upon what you have told us *so far*, we don't think you have anything to worry about." Rather, what they told Dassey was, "We already know what happened and you don't have anything to worry about."

The investigators' assertions that they already knew what happened and assurances that Dassey did not have anything to worry about were not confined to an isolated instance at the beginning but rather persisted throughout the interrogation. Early on, before Dassey had said anything incriminating, Wiegert again told Dassey, "[N]ow remember this is very important cuz we already know what happened that day." (ECF No. 19-25 at 19; *see also* ECF No. 19-25 at 23 ("We already know what happened[.]").) Fassbender assured Dassey, "I'm your friend right now, but I gotta believe in you and if I don't believe in you, I can't go to bat for you." (ECF No. 19-25 at 23.) Fassbender continued,

"We're in your corner," and Wiegert added, "We already know what happened, now tell us exactly." (ECF No. 19-25 at 23.) Less than a minute later Wiegert again said, "We already know. Just tell us. It's OK." (ECF No. 19-25 at 24.)

The investigators went on to repeat that they already knew what happened at least 24 additional times throughout the interrogation. (*See, e.g.*, ECF No. 19-25 at 26 (Wiegert: "Come on we know this already. Be honest."); 28 (Wiegert: "Remember we already know, but we need to hear it from you."); 30 (Wiegert: "So just be honest. We already know."); 31 (Wiegert: "We already know."); 36 (Wiegert: "We already know, be honest."); 37 (Wiegert: "We already know Brendan. We already know. Come on. Be honest with us. Be honest with us. We already know, it's, OK? We're gonna help you through this, alright?"); 41 (Wiegert: "It's OK Brendan. We already know."); 44 (Fassbender: "Cuz, we, we know but we need it in your words. I can't, I can't say it."); 44 (Wiegert: "Brendan, I already know. You know we know. OK. Come on buddy. Let's get this out, OK?"); 47 (Wiegert: "Remember, we already know, but we need to hear it from you, it's OK. It's not your fault."); 47 (Fassbender: "We know."); 48 (Wiegert: "We know you were back there. Let's get it all out today and this will be all over with."); 50 (Wiegert: "We know happened." [sic]); 50 (Wiegert: "We know what happened, it's OK."); 54 (Wiegert: "You were there when she died and we know that. Don't start lying now. We know you were there."); 54 (Wiegert: "We already know, don't lie to us now, OK, come on."); 54 (Wiegert: "He did something else, we know that."); 55 (Wiegert: "We know he did something else to her, what else did he do to her?"); 60 (Wiegert: "We know something else was done. Tell us, and what

else did you do?"); 60 (Fassbender: "[W]e know he made you do somethin' else."); 63 (Fassbender: "We know, we just need you to tell us."); 69 (Fassbender: "[W]e know there's some, some things that you're, you're not tellin' us."); 71 (Fassbender: "[W]e know that some things happened in that garage, and in that car, we know that."); 73 (Wiegert: ("We know you shot her too.").)

The record indicates that these false assertions had a powerful effect upon Dassey. Even the respondent acknowledges that "the most damaging admissions Dassey made in his interview ... were all made as investigators encouraged Dassey to tell the truth because they 'already knew' what had happened." (ECF No. 20 at 21 (citing 19-25 at 37-64); *see also* ECF No. 20 at 29.)

At the same time the investigators were telling Dassey that they already knew what happened, they frequently reassured him that he did not have anything to worry about. After Fassbender assured Dassey that, "from what I'm seeing ... I'm thinking you're all right. OK, you don't have to worry about things," (ECF No. 19-25 at 16), at least four separate times, Wiegert returned to this theme when he told Dassey, "It's OK," while saying they already knew the details Dassey was not telling them. (ECF No. 19-25 at 24, 37, 41, 47.)

Many other times, removed from assertions that the investigators already knew what happened, the investigators repeatedly suggested to Dassey that he had nothing to worry about. (*See, e.g.*, ECF No. 19-25 at 17 (Wiegert: "[N]o matter what you did, we can work through that."); 17 (Wiegert: "It's OK. As long as you can, as long as you be honest with us, it's OK[. I]f you lie about it that's gonna be problems. OK."); 28

(Wiegert: "It's OK."); 46 (Wiegert: "It's OK, tell us what happened.") 51 (Wiegert: "It's OK."); 76 ("It's OK, what'd you do with it?"); 96 (Wiegert: "Brendan, it's OK to tell us OK."); 121 (Wiegert: "What about the knife, where is the knife, be honest with me, where's the knife? It's OK, we need to get that OK? Help us out, where's the knife?").) In one instance, when asking Dassey if he helped Avery put Halbach in the back of her RAV4, Wiegert explicitly assured Dassey, "If you helped him, it's OK, because he was telling you to do it." (ECF No. 19-25 at 28.) Similarly, just before Dassey stated he cut Halbach's throat, Wiegert prompted Dassey by telling him, "It's OK, what did he make you do?" (ECF No. 19-25 at 62.) In another instance, Wiegert told Dassey not only that "it's OK," he assured Dassey, "It's not your fault." (ECF No. 19-25 at 47.) Wiegert separately assured Dassey that, once he told them everything that they already purportedly knew, "this will all be over with." (ECF No. 19-25 at 48.)

Wiegert also told Dassey that "honesty is the only thing that will set you free." (ECF No. 19-25 at 17). Granted, that statement is just an idiom, *see John* 8:32 ("... and you will know the truth, and the truth will make you free"), and routinely understood not to be taken literally, *see, e.g., People v. Thompson*, 2013 WL 3091664, 2013 Cal. App. Unpub. LEXIS 4324 (Cal.App.2d Dist. June 20, 2013) ("With respect to possible coercion, the court found the detective's comment, 'the truth will set you free' was a general statement about relieving one's conscience rather than a promise of freedom."); *State v. Osborne*, 2002 Me. Super. LEXIS 266 (Me.Super.Ct. Sept. 25, 2002) ("The court interprets [the truth will set you free] to mean that telling the truth will ease the Defendant's conscience."); *Edwards v. State*, 793 So.2d 1044, 1048 (Fla.Dist.Ct.App.

4th Dist.2001) ("the 'truth shall set you free' statement, although questionable, amounts to nothing more than encouragement to tell the truth. Surely, Edwards did not think the truth would literally set him free. The investigators simply were appealing to Edwards' religious background in encouraging him not to lie."). However, some courts have criticized its use by interrogators. *See, e.g., Morgan v. State*, 681 So.2d 82, 88, 96–97 (Miss.1996). And, especially relevant here, testing revealed that idioms were an aspect of abstract language that Dassey had difficulty understanding. (ECF No. 19-20 at 79.)

Dassey's conduct during the interrogation and his reaction to being told he was under arrest clearly indicate that he really did believe that, if he told the investigators what they professed to already know, he would not be arrested for what he said. *Cf. Sharp v. Rohling*, 793 F.3d 1216, 1235 (10th Cir.2015) ("Ms. Sharp's surprised and angry reaction when Detective Wheeles arrested her at the end of the interview indicated her incriminating statements were not the product of free will because they were given on the false premise she would not go to jail."). After admitting to committing exceptionally serious crimes, Dassey twice expressed his expectation that he would be allowed to return to school that day. (ECF No. 19-25 at 89, 143.) And at the end of the interrogation, when asked what he thought should happen, there is absolutely no indication that Dassey anticipated that he would be arrested. (ECF No. 19-25 at 144.) Even after being told he was under arrest, he did not seem to grasp the seriousness of the matter, asking, "Is it only for one day?" (ECF No. 19-25 at 144.)

The investigators' statements were not merely ambiguous promises to Dassey that cooperating would

lead to a better deal or that the investigators would "stand behind" him or "go to bat" for him, *see Villalpando*, 588 F.3d at 1130, although they said those things as well (*see, e.g.*, ECF No. 19-25 at 17, 23). Rather, the investigators' collective statements throughout the interrogation clearly led Dassey to believe that he would not be punished for telling them the incriminating details they professed to already know. While at one point Wiegert did rotely say, "We can't make any promises..." this single, isolated statement was drowned out by the host of assurances that they already knew what happened and that Dassey had nothing to worry about.

Thus, the state courts' finding that there were no "promises of leniency" (ECF No. 1-5, ¶ 6) was "against the clear and convincing weight of the evidence," *Ward*, 334 F.3d at 704. Concluding that the investigators never made any such promises was no minor error but rather a fact that was central to the court's voluntariness finding. *See O'Quinn v. Spiller*, 806 F.3d 974, 978 (7th Cir.2015) (holding that minor factual errors do not merit habeas relief unless the petitioner can show that the state court's decision was "based on" that factual error) (quoting 28 U.S.C. § 2254(d)(2)). Given the other facts that tend to support the conclusion that Dassey's confession was involuntary, as discussed above, this unreasonable determination of fact was undoubtedly crucial in the courts' ultimate decision that Dassey's confession was voluntary. "A state court decision that rests upon a determination of fact that lies against the clear weight of the evidence is, by definition, a decision 'so inadequately supported by the record' as to be arbitrary and therefore objectively unreasonable." *Id.* (quoting *Hall v. Washington*, 106 F.3d 742, 749 (7th Cir.1997)).

"Because the trial court based its decision on an unreasonable factual determination, the substantive merits of [the petitioner's] claim are analyzed under the pre-AEDPA standard—that is, de novo—because there is no state court analysis to apply AEDPA standards to." *Carlson v. Jess*, 526 F.3d 1018, 1024 (7th Cir.2008). As discussed below, the court finds that the court of appeals' decision was not merely incorrect; it was unreasonable. Thus, Dassey satisfies the lower de novo review standard required for relief under 28 U.S.C. § 2254(d)(2). Consequently, Dassey is entitled to relief by way of 28 U.S.C. § 2254(d)(2). *See Sharp*, 793 F.3d at 1230–33 (granting petition for writ of habeas corpus under 28 U.S.C. § 2254(d)(2) because state court unreasonably found that interrogators did not make any promises of leniency to the petitioner).

The court also finds that, independent of the state courts' unreasonable factual determination and Dassey's entitlement to relief under the de novo standard of review by way of 28 U.S.C. § 2254(d)(2), Dassey is separately entitled to relief under 28 U.S.C. § 2254(d)(1). The court of appeals' factual error is itself relevant in assessing the reasonableness of its ultimate conclusion. *See Pole v. Randolph*, 570 F.3d 922, 936 (7th Cir.2009) (discussing *Wiggins v. Smith*, 539 U.S. 510, 520, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)). More than merely disagreeing with the court of appeals' decision or concluding that it would have reached a different decision if it had been the state court, the court finds that the state court's decision was an unreasonable application of clearly established federal law as set forth in many decisions of the United States Supreme Court, including *Miller v. Fenton*, 474 U.S. 104, 109–10, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985) (reiterating that the Supreme Court has long held that involuntary

statements are not admissible) and *Arizona v. Fulminante*, 499 U.S. 279, 287, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (holding, in part, that psychological pressures may render a confession involuntary).

The primary error in the court of appeals' terse decision was its focus on facts in isolation and its failure to assess voluntariness under the totality of circumstances. Although the court of appeals correctly noted the totality of the circumstances standard (ECF No. 1-5, ¶ 5), its decision does not reflect its application. For example, omitted from its discussion is any consideration of how the absence of a parent or allied adult affected the voluntariness of Dassey's confession. Nor does the court of appeals' decision reflect any consideration of how the investigators overcame Dassey's resistance by deliberately exploiting the absence of his mother, feigning paternalistic concern for his best interests and by statements such as, "Your mom said you'd be honest with us." (ECF No. 19-25 at 23.) *See Bruce*, 550 F.3d at 673 (quoting *Wilderness*, 160 F.3d at 1176).

Granted, "state courts are not required to address every jot and tittle of proof suggested to them, nor need they 'make detailed findings addressing all the evidence before [them].'" *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir.2004) (quoting *Miller–El v. Cockrell*, 537 U.S. 322, 347, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)); *see also Gray v. Zook*, 806 F.3d 783, 791 (4th Cir.2015) (citing *Moore v. Hardee*, 723 F.3d 488, 499 (4th Cir.2013)). However, if the overlooked fact was "highly probative and central to the petitioner's claim," the state court's omission will "fatally undermine [its] fact finding process, and render the resulting finding unreasonable." *Taylor*, 366 F.3d at 1001. The absence of Dassey's mother, especially when considered in conjunction with evidence of how the investigators delib-

erately exploited her absence, is a fact highly probative of Dassey's claim such that its absence from the court of appeals' analysis undermines its conclusion.

Most significantly, however, the court of appeals erred when it focused on the statements of the investigators in isolation to conclude that they did not make any promises of leniency. True, no single statement by the investigators, if viewed in isolation, rendered Dassey's statement involuntary. But when assessed collectively and cumulatively, as voluntariness must be assessed, it is clear how the investigators' actions amounted to deceptive interrogation tactics that overbore Dassey's free will.

The Supreme Court has long recognized that a false promise is a powerful force in overcoming a person's free will. *See Bram v. United States*, 168 U.S. 532, 542–43, 18 S.Ct. 183, 42 L.Ed. 568 (1897) ("[A] confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.") (quoting 3 H. Smith & A. Keep, Russell on Crimes and Misdemeanors 478 (6th ed. 1896)). Consequently, "[a] false promise of lenience is 'an example of forbidden [interrogation] tactics, for it would impede the suspect in making an informed choice as to whether he was better off confessing or clamming up.'" *United States v. Stadfeld*, 689 F.3d 705, 709 (7th Cir.2012) (quoting *United States v. Baldwin*, 60 F.3d 363, 365 (7th Cir.1995)).

More than merely assuring Dassey that he would *not* be punished if he admitted participating in the offenses, the investigators suggested to Dassey that he *would* be punished if he did not tell "the truth." (*See*,

e.g., ECF No. 19-25 at 17, 23, 54, 102.) However, because the investigators' assertions that they already knew what happened were often false, "the truth" to the investigators was often merely whichever of Dassey's version of events they eventually accepted. Thus, as long as Dassey told a version the investigators accepted as "the truth," he was led to believe he had no fear of negative consequences. But if the investigators did not accept as true the story Dassey told them, he was told there would be repercussions.

Especially when the investigators' promises, assurances, and threats of negative consequences are assessed in conjunction with Dassey's age, intellectual deficits, lack of experience in dealing with the police, the absence of a parent, and other relevant personal characteristics, the free will of a reasonable person in Dassey's position would have been overborne. Once considered in this proper light, the conclusion that Dassey's statement was involuntary under the totality of the circumstances is not one about which "fairminded jurists could disagree." *See Richter*, 562 U.S. at 101, 131 S.Ct. 770 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004)). Consequently, the court finds that the confession Dassey gave to the police on March 1, 2006 was so clearly involuntary in a constitutional sense that the court of appeals' decision to the contrary was an unreasonable application of clearly established federal law.

The court does not reach this conclusion lightly. The present decision is made in full appreciation of the limited nature of the habeas remedy under AEDPA and mindful of the principles of comity and federalism that restrain federal intervention in this arena. *See, e.g.*, *id.* at 15. However, the high standard imposed by AEDPA is not a complete bar to relief. *Cockrell*, 537

U.S. at 340, 123 S.Ct. 1029. While the circumstances for relief may be rare, even extraordinary, it is the conclusion of the court that this case represents the sort of "extreme malfunction[] in the state criminal justice system[]" that federal habeas corpus relief exists to correct. *Richter*, 562 U.S. at 102, 131 S.Ct. 770. That said, the court does not ascribe any ill motive to the investigators. Rather than an intentional and concerted effort to trick Dassey into confessing, what occurred here may have been the product of the investigators failing to appreciate how combining statements that they already "knew everything that happened" with assurances that Dassey was "OK" and had nothing to worry about collectively resulted in constitutionally impermissible promises.

Thus, the court turns to the final obstacle to obtaining habeas relief—whether the admission of the involuntary confession was harmless. Specifically, the court must decide whether the admission of a confession obtained in violation of Dassey's constitutional rights "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)); *see also Ayala*, 135 S.Ct. at 2197.

"A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.'" *Fulminante*, 499 U.S. at 296, 111 S.Ct. 1246 (quoting *Bruton v. United States*, 391 U.S. 123, 139–40, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (White, J. dissenting)). A confession can be so decisive and "so profoundly prejudicial" in the adversarial process as to "make[] the other aspects of a trial in court superflu-

ous." *Connelly*, 479 U.S. at 182, 107 S.Ct. 515 (Brennan, J., dissenting). Having thoroughly reviewed the trial transcript, the court has no difficulty concluding that the admission of Dassey's confession was not a harmless error. Dassey's confession was, as a practical matter, the entirety of the case against him on each of the three counts.

IV. Conclusion

Although Kachinsky's misconduct was indefensible, the United States Supreme Court has never accepted arguments such as those Dassey makes here as a basis for relief under *Sullivan*. Therefore, federal law prohibits the court from granting Dassey habeas relief on the first claim he presented to this court.

However, the state courts unreasonably found that the investigators never made Dassey any promises during the March 1, 2006 interrogation. The investigators repeatedly claimed to already know what happened on October 31 and assured Dassey that he had nothing to worry about. These repeated false promises, when considered in conjunction with all relevant factors, most especially Dassey's age, intellectual deficits, and the absence of a supportive adult, rendered Dassey's confession involuntary under the Fifth and Fourteenth Amendments. The Wisconsin Court of Appeals' decision to the contrary was an unreasonable application of clearly established federal law.

IT IS THEREFORE ORDERED that Brendan Dassey's petition for a writ of habeas corpus is **GRANTED**. The respondent shall release Dassey from custody unless, within 90 days of the date of this decision, the State initiates proceedings to retry him. *See Jensen v. Schwochert*, 2013 WL 6708767, 17, 2013 U.S. Dist.

LEXIS 177420, 55 (E.D.Wis. Dec. 18, 2013). The Clerk shall enter judgment accordingly.

In the event the respondent files a timely notice of appeal, the judgment will be stayed pending disposition of that appeal. *See id.*

APPENDIX D

SUPREME COURT OF WISCONSIN

No. 2010AP3105-CR

STATE

v.

BRENDAN R. DASSEY

August 1, 2013

[350 Wis.2d 703]
[839 N.W.2d 866 (table)]

OPINION

Disposition: Petition for Review Denied.

Disposition: 08/01/2013.

APPENDIX E

COURT OF APPEALS OF WISCONSIN

No. 2010AP3105–CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
BRENDAN R. DASSEY,
Defendant-Appellant.

January 30, 2013

[346 Wis.2d 278]
[Unpublished Disposition]

Appeal from a judgment and an order of the circuit court for Manitowoc County: Jerome L. Fox, Judge.
Affirmed.

OPINION

Before BROWN, C.J., NEUBAUER, P.J., and REILLY, J.

¶ 1 PER CURIAM.

Brendan Dassey appeals from a judgment convicting him of first-degree intentional homicide, second-degree sexual assault, and mutilation of a corpse, all as party to a crime. He also appeals from the order denying his motion for postconviction relief. Dassey contends that his pre-trial and trial counsel provided ineffective assistance, that his confession was involuntary

and that, because the jury did not hear evidence of the unreliability of his confession, the real controversy was not tried. He seeks a new trial and/or a new suppression hearing. We reject his arguments, deny the requested remedies, and affirm the judgment and order.

¶ 2 Sixteen-year-old Dassey and his uncle, Steven Avery, were charged in the October 2005 sexual assault and murder of Teresa Halbach and with later burning her body. After a nine-day trial, the jury returned guilty verdicts on all three counts. Avery was tried and convicted separately. Postconviction, Dassey moved for a new trial and a new suppression hearing. The trial court denied his motion after a five-day hearing in a thorough, soundly reasoned decision. This appeal followed. Additional facts will be supplied as warranted.

Voluntariness of Confession

¶ 3 On February 27, 2006, law enforcement officers conducted a witness interview of Dassey at his high school and a second videotaped interview at the Two Rivers Police Department. Dassey's mother, Barbara Janda, agreed to the second interview but declined the offer to accompany Dassey. On March 1, again with Janda's permission, officers retrieved Dassey from school for a videotaped interview. During the ride to the Manitowoc County Sheriff's Department, Dassey was read his *Miranda*[1] rights and signed a waiver. Upon arriving, Dassey acknowledged that he remembered the advisories and still wanted to talk to the interviewers. Dassey made several inculpatory statements over the course of the three-hour interview, such that he

[1] *See Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

now was viewed as a suspect. He was charged two days later.

¶ 4 Dassey contends that his March 1 confession was involuntary and should have been suppressed. He claims that law enforcement used psychological interrogation tactics like fact feeding and suggestions of leniency that overbore his will and exceeded his personal ability to resist due to his age, intellectual limitations and high suggestibility.

¶ 5 In assessing voluntariness, "the essential inquiry is whether the confession was procured via coercive means or whether it was the product of improper pressures exercised by the police." *State v. Clappes*, 136 Wis.2d 222, 235–36, 401 N.W.2d 759 (1987). A prerequisite for a finding of involuntariness is coercive or improper police conduct. *Id.* at 239, 401 N.W.2d 759. We evaluate a confession's voluntariness on the totality of the circumstances. *Id.* at 236, 401 N.W.2d 759. Our analysis involves a balancing of the defendant's personal characteristics against the police pressures used to induce the statements. *State v. Jerrell C.J.*, 2005 WI 105, ¶ 20, 283 Wis.2d 145, 699 N.W.2d 110. "This court will not upset a trial court's determination that a confession was voluntary unless it appears that the finding was clearly erroneous," nor will we substitute our judgment for that of the trial court as to the credibility of disputed factual testimony. *State v. Echols*, 175 Wis.2d 653, 671, 499 N.W.2d 631 (1993). Whether the facts as found constitute coercion is a question of law that we review independently. *See Clappes*, 136 Wis.2d at 235, 401 N.W.2d 759.

¶ 6 The trial court heard the testimony of Dassey's mother, his school psychologist and a police interviewer, and had the benefit of listening to the audiotapes

and viewing the videotaped interviews. The trial court found that Dassey had a "low average to borderline" IQ but was in mostly regular-track high school classes; was interviewed while seated on an upholstered couch, never was physically restrained and was offered food, beverages and restroom breaks; was properly Mirandized; and did not appear to be agitated or intimidated at any point in the questioning. The court also found that the investigators used normal speaking tones, with no hectoring, threats or promises of leniency; prodded him to be honest as a reminder of his moral duty to tell the truth; and told him they were "in [his] corner" and would "go to bat" for him to try to achieve a rapport with Dassey and to convince him that being truthful would be in his best interest. The court concluded that Dassey's confession was voluntary and admissible.

¶ 7 The court's findings are not clearly erroneous. Based on those findings, we also conclude that Dassey has not shown coercion. As long as investigators' statements merely encourage honesty and do not promise leniency, telling a defendant that cooperating would be to his or her benefit is not coercive conduct. *State v. Berggren*, 2009 WI App 82, ¶ 31, 320 Wis.2d 209, 769 N.W.2d 110. Nor is professing to know facts they actually did not have. *See State v. Triggs*, 2003 WI App 91, ¶¶ 15, 17, 264 Wis.2d 861, 663 N.W.2d 396 (the use of deceptive tactic like exaggerating strength of evidence against suspect does not necessarily make confession involuntary but instead is factor to consider in totality of circumstances). The truth of the confession remained for the jury to determine.

Alleged Ineffective Assistance of Pre–Trial Counsel

¶ 8 Attorney Len Kachinsky was appointed to represent Dassey shortly after Dassey was charged in

March 2006. Dassey contends that Kachinsky rendered ineffective assistance due to an "actual conflict of interest" that so breached the fundamental duty of loyalty owed him that, under *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), and its progeny, prejudice can be presumed. We disagree.

¶ 9 Conflict of interest claims in criminal cases are analyzed as a form of ineffective assistance of counsel. *State v. Love*, 227 Wis.2d 60, 68, 594 N.W.2d 806 (1999). To prevail, the defendant must show by clear and convincing evidence that counsel had an "actual conflict of interest"—*i.e.*, that counsel "was required to make a choice advancing his [or her] own interests to the detriment of [the] client's interests." *Id.* at 71–72 & n. 5, 594 N.W.2d 806 (citations and one set of quotation marks omitted). Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected [counsel's] performance." *Sullivan*, 446 U.S. at 350. "The possibility of conflict is insufficient to impugn a criminal conviction." *Love*, 227 Wis.2d at 68, 594 N.W.2d 806 (citing *Sullivan*, 446 U.S. at 350).

¶ 10 Dassey contends that Kachinsky: conceded that the March 1 interview was noncustodial; made statements to the media about the possibility of a plea deal; directed his investigator, Michael O'Kelly, to gather further evidence on the Avery property; shared information with the State that helped build its case against Avery but which also implicated him because he faced party liability; and, through O'Kelly's duplicity,[2] allowed another Dassey police interview on May 13

[2] O'Kelly told Dassey that his inconclusive polygraph results showed a ninety-eight percent probability of deception.

which resulted in a telephone confession to his mother. Dassey asserts that he at least is entitled to a new suppression hearing because when he did not prevail at the original hearing, his March 1 statement went on to become "the centerpiece" of the State's case.

¶ 11 Dassey draws no viable link between Kachinsky's actions and any demonstrable detriment to him. While Dassey contends that at least as of April 23, 2006, Kachinsky and O'Kelly began planning to gather evidence favorable to the State and to extract a confession from him against his will, he identifies no "adverse effect" at the May 4 suppression hearing. Kachinsky testified at the *Machner*[3] hearing that he hoped to get the best deal he could for Dassey and that, knowing Dassey's family was pressuring him, he mentioned the possibility of a plea to the media to "send a message" to them that Dassey might have to "take a legal option that they don't like." He also concluded that Dassey was properly Mirandized before the March 1 questioning; the trial court agreed and successor counsel likewise saw no meritorious *Miranda* issue. The totality of the circumstances also persuades us that Dassey was sufficiently aware of the precustodial *Miranda* advisements after the nature of the interview changed. *See State v. Grady*, 2009 WI 47, ¶ 20, 317 Wis.2d 344, 766 N.W.2d 729.

¶ 12 The search warrant resulting from information given to the State yielded nothing. The jury did view a brief video clip of Dassey's post-interview telephone conversation with his mother. Significantly, though, the State properly introduced it only to rebut Dassey's testimony on direct that the acts to which he had ad-

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[3] *See State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct.App.1979).

mitted "didn't really happen" and that his confession was "made up." Voluntary statements obtained even without proper *Miranda* warnings are available to the State for the limited purposes of impeachment and rebuttal. *See State v. Knapp*, 2003 WI 121, ¶ 114, 265 Wis.2d 278, 666 N.W.2d 881, *vacated and remanded by* 542 U.S. 952, 124 S.Ct. 2932, 159 L.Ed.2d 835 (2004), *reinstated in material part by* 2005 WI 127, ¶ 2 n. 3, 285 Wis.2d 86, 700 N.W.2d 899.

¶ 13 Kachinsky was long gone before Dassey's trial or sentencing.[4] Dassey has not convinced us that Kachinsky's actions amounted to an actual conflict and that Kachinsky's advocacy was adversely affected, such that it was detrimental to Dassey's interests. He is not entitled to a new trial or hearing.

Alleged Ineffective Assistance of Trial Counsel

¶ 14 Dassey next submits that the representation by successor counsel, Attorneys Mark Fremgen and Ray Edelstein, also was ineffective because they failed to present substantial evidence that his March 1 confession was unreliable, failed to retain an expert on coercive interrogation tactics, failed to present a part of his confession suggesting recantation, and, in closing argument, conceded his guilt to the corpse-mutilation charge. Once again, we disagree.

¶ 15 To prevail, Dassey must show that he was prejudiced by his counsel's deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel is deficient when

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[4] Kachinsky ceased representing Dassey eight months before Dassey's trial began. He withdrew after his performance was deemed "deficient" for arranging to have Dassey again questioned by the State on May 13, 2006 and then failing to appear.

the identified acts or omissions were "outside the wide range of professionally competent assistance." *See State v. Pitsch*, 124 Wis.2d 628, 637, 369 N.W.2d 711 (1985). Prejudice results when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 642, 369 N.W.2d 711. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* We "strongly presume" that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 637, 369 N.W.2d 711. We need not address both prongs of the ineffectiveness analysis if the defendant fails to make a sufficient showing on one. *Strickland*, 466 U.S. at 697.

¶ 16 Dassey complains that his counsel should have engaged in a point-by-point attack on each of the nineteen details in his confession to demonstrate that his knowledge came from external contamination such as fact-feeding by police, exposure to media coverage and conversations with his family, rather than personal knowledge. It is unclear how Dassey thinks counsel should have proceeded. He denied that he watched television coverage, does not establish what facts he actually learned from other sources, repeatedly said he did not know why he gave various answers and even told counsel he might have dreamed the details or gotten them from a book. Under the circumstances, we are satisfied that counsel's performance was reasonable. *See id.* at 688.

¶ 17 Dassey also asserts that trial counsel should have introduced evidence that his March 1 confession was unreliable, and likely false, by calling an expert on police interrogation methods. The failure was more egregious, he claims, once counsel learned that the

State had retained Joseph Buckley, a prominent expert in that area and head of the firm that markets the "Reid" interrogation technique. Although forensic psychologist Dr. Robert Gordon, the expert the defense did retain, testified as to Dassey's "high suggestibility" under "mild pressure," he lacked the credentials to testify about coercive police tactics.

¶ 18 Besides Dr. Gordon, Fremgen and Edelstein consulted with other experts, including a Reid Institute-trained police officer and Dr. Lawrence White, a professor of psychology and legal studies. They ultimately decided not to counter Buckley with an expert of their own. Fremgen was reluctant to engage in a "battle of the experts" he was not certain they could win, and Edelstein thought experts would detract from the defense strategy of trying to humanize Dassey. Moreover, the State did not call Buckley, and Fremgen testified that retaining White always was tied to responding to Buckley's testimony. Had the defense put White on the stand, the State could have called Buckley in rebuttal. We cannot say that failing to call a false-testimony expert was "outside the wide range of professionally competent assistance" evidence.[5] *See Pitsch*, 124 Wis.2d at 637, 369 N.W.2d 711; *State v. Van Buren*, 2008 WI App 26, ¶ 19, 307 Wis.2d 447, 746 N.W.2d 545.

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[5] At the postconviction motion hearing, police interrogation expert Dr. Richard Leo testified in person about Dassey's vulnerability to the police interview methods; Dr. White provided similar testimony by affidavit. Noting that the trial court found that both would have qualified as experts at trial and that at least some of their testimony would have been admissible, Dassey contends that it was "manifestly unreasonable" not to call them at trial. In an ineffective assistance claim, the question is not the admissibility of expert testimony but whether the failure to attempt to introduce it was unprofessional error.

¶ 19 Next, Dassey contends counsel ineffectively failed to play the portion of a videotape, taken after his May 13 questioning, that contained this spontaneous exchange with his mother:

> BRENDAN: What'd happen if he [Avery] says something his story's different? Wh—he says he, he admits to doing it?
>
> BARB JANDA: What do you mean?
>
> BRENDAN: Like if his story's like different, like I never did nothin' or somethin'.
>
> BARB JANDA: Did you? Huh?
>
> BRENDAN: Not really.
>
> BARB JANDA: What do you mean not really?
>
> BRENDAN: They got to my head.

Dassey asserts that the comments "not really" and "[t]hey got to my head" amount to a recantation.

¶ 20 The defense team disagreed on the clip's benefit. Fremgen feared it depicted a parent who recognized that her child was involved in a serious matter; Edelstein thought the jury should see it. Fremgen, as lead counsel, prevailed. The trial court found that the exchange at best was ambiguous and at worst validated Dassey's confession. This finding is not clearly erroneous. Further, had the defense played that clip, the State well might have played portions in which Dassey nods "yes" when Janda asks, "Did [Avery] make you do it?" and, when she asks, "What did he do to you to make you do it?" he answers, "Nothin'." We cannot say that Fremgen's decision was unreasonable trial strategy.

¶ 21 Finally, Dassey contends that, without his consent, Edelstein conceded the mutilation charge dur-

ing closing argument. Edelstein told the jury that Dassey went to Avery's house expecting a Halloween bonfire and "probably" saw something in the fire "and that something was Teresa Halbach." Dassey argues that Edelstein's concession is the "functional equivalent of a guilty plea."

¶ 22 We disagree. "A guilty plea waives trial, cross-examination of witnesses, the right to testify and call witnesses in one's own defense, and the right to a unanimous jury verdict of guilt beyond a reasonable doubt." *State v. Gordon*, 2003 WI 69, ¶ 24, 262 Wis.2d 380, 663 N.W.2d 765. Dassey exercised all of these rights. Furthermore, Edelstein in no way conceded that Dassey mutilated, disfigured or dismembered a corpse with intent to conceal a crime. *See* WIS. STAT. § 940.11 (2009–10).[6] Mere presence at a crime scene does not establish party-to-a-crime liability. *See State v. King*, 120 Wis.2d 285, 293, 354 N.W.2d 742 (Ct.App.1984). Edelstein testified postconviction that, as the mutilation charge carried the least penalty, he wanted to "provide that option to the jury." The trial court's finding that counsel's concession was a reasonable tactical decision is not clearly erroneous. *See Gordon*, 262 Wis.2d 380, ¶ 28, 663 N.W.2d 765.

Discretionary Reversal

¶ 23 Lastly, Dassey asks us to reverse his conviction in the interest of justice, asserting that the real controversy—whether his March 1 confession was reliable evidence of his guilt—was not fully tried. *See* WIS. STAT. § 752.35. We decline to use our discretionary power of reversal so that Dassey may take a differ-

[6] All references to the Wisconsin Statutes are to the 2009–10 version unless otherwise noted.

ent approach in a new trial when the defense that was presented was competent, if unsuccessful. *See State v. Hubanks*, 173 Wis.2d 1, 28–29, 496 N.W.2d 96 (Ct.App.1992).

Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

APPENDIX F

STATE OF WISCONSIN
CIRCUIT COURT
MANITOWOC COUNTY

Case No. 06 CF 88

STATE OF WISCONSIN,
Plaintiff,
v.
BRENDAN R. DASSEY,
Defendant.

December 13, 2010
[Unpublished Disposition]
[STAMP: RECEIVED
DEC 15 2010
WI DEPT OF JUSTICE]
[No. 14-cv-1310-WED, filed May 4, 2015 (Doc. 19-43)]

MEMORANDUM DECISION AND ORDER

INTRODUCTION

The defendant, Brendan Dassey (Dassey) was charged on March 3, 2006, with being party to the crimes of first degree intentional homicide, second degree sexual assault, and mutilation of a corpse. The victim in all three charges was Teresa Halbach, who was murdered on October 30, 2005, in Manitowoc County. In a separate trial, Dassey's uncle, Steven Avery, was convicted on March 18, 2007, of being a party to the crime of Teresa Halbach's first degree murder, and be-

ing a felon in possession of firearms. Jury selection for Dassey took place over a day-and-a-half period in Dane County. The court ordered Dassey's jury sequestered in Manitowoc and his trial began on April 16, 2007. It concluded on April 25, 2007, when the jury returned guilty verdicts to all three charges.

On August 2, 2007, this court sentenced Dassey on the intentional homicide conviction to life in prison with the possibility of release to extended supervision on November 1, 2048; additional concurrent sentences were given for the other two convictions.

Dassey filed a motion under Wis. Stats. §809.30, on August 25, 2009, seeking post-conviction relief. Specifically, Dassey is seeking a new trial or a new suppression hearing. He alleges he is entitled to this because his trial counsel, Mark Fremgen and Ray Edelstein and Attorney Leonard Kachinsky, who represented him immediately before trial counsel was appointed, were ineffective in their representation of him. He also requests a new trial in the interest of justice because, he alleges, the real controversy was not fully tried and his conviction represented a miscarriage of justice. Lastly, Dassey asks for a new hearing on the suppression of his March 1, 2006, confession. A motion to suppress those statements was originally heard by this court on May 4, 2006, and denied in a decision given May 12, 2006. Subsequently, a motion to reopen the hearing to suppress statements was filed by successor trial counsel; the court denied that motion on December 15, 2006.

Dassey's post-conviction motions were heard by this court over a five-day period beginning January 15, 2010, and ending January 22, 2010. No hearings were held on Martin Luther King Day, January 19, 2010. Following the close of defendant's post-conviction case,

the State waived its right to call witnesses on its behalf. The court ordered a briefing schedule for the parties and those briefs have been completed and received. The court's decision follows.

STANDARD OF REVIEW
Ineffective Assistance of Counsel

Dassey was represented by Attorney Len Kachinsky from March 8, 2006, until August 25, 2006, when this court found his performance as counsel for Dassey to be "deficient" as a result of his failure to attend a police interview with his client which Kachinsky had arranged. Attorney Mark Fremgen was appointed successor counsel on August 29, 2006; Attorney Ray Edelstein joined Fremgen as co-counsel for Dassey. All counsel were appointed through the Wisconsin State Public Defender's Office. Dassey's post-conviction motions allege each counsel ineffectively assisted him, either singly or collectively, and their deficient performance entitles him to the relief he is seeking.

To establish an ineffective assistance of counsel claim, Dassey must show that counsel made errors so serious that counsel was "not functioning as the counsel 'guaranteed' the defendant by the Sixth Amendment … [and] … that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 US 668, 687 (1984). The court need not address both components of this inquiry if the defendant does not make a sufficient showing on one. *Id.* at 697.

Deficient performance requires a showing "that counsel's representation fell below an objective standard of reasonableness" *Id.* at 688. The court reviews

the attorney's performance with great deference and the burden is placed on the defendant to overcome the strong presumption that counsel acted reasonably within professional norms. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 NW 2d 845 (1990). An attorney's performance "need not be perfect, nor even very good, to be constitutionally adequate." *State v. Carter*, 2010 WI 40, §22, 324 Wis. 2d 640, 782 NW 2d 695. When evaluating effectiveness, the court grants "a heavy measure of deference to counsel's judgments." *Id.*, §23. A defendant that can demonstrate counsel's performance was deficient must also show a reasonable probability that the deficient performance had an adverse effect on the outcome. *Id.*, §37.

Generally, when a defendant accepts counsel, the defendant delegates to counsel those tactical decisions an attorney must make at trial. To show prejudice, the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different," *Strickland* at 694. The burden of proof is on the defendant to show by clear and convincing evidence that both components of the ineffective assistance of counsel test have been met. *State v. Lukasik*, 115 Wis. 2d 134, 140, 340 NW 2d 62 (Court App. 1983).

I. Attorney Len Kachinsky's Ineffective Assistance of Counsel.

A. His breach of loyalty to his client.

Dassey urges this court to find that Kachinsky's actions on behalf of his client constituted disloyalty to the client and amounted to a conflict of interest. He sets forth in his brief a series of things Kachinsky did or that were done at his direction which Dassey says justi-

fy his claim that Kachinsky was disloyal and furnished him ineffective assistance of counsel. He starts with statements Kachinsky made to media even before meeting Dassey in which Kachinsky seemed to imply that Dassey may have had some involvement in the Halbach matter. (Def. Br. at 2; PC Exs. 317, 374.) This brief notes other instances of remarks made by Kachinsky to the press which again implied that Dassey had some involvement in the crime for which his uncle, Steven Avery, was also charged. In his post-conviction testimony, Kachinsky admitted talking to the press about his client's possible involvement in the crime but said he did it in part to blame Steven Avery and in part to send a message to the family that Dassey might have to take a "legal option that they don't like". (Tr. 1-19-10 at 134, L. 13 to 25; at 136, L. 24-25, at 137, L.1 to 9.)

Dassey goes on to cite what he believes are additional instances of Kachinsky's disloyalty. Chief among them is a confession extracted from Dassey on March 12, 2006, by Michael O'Kelley, an investigator employed by Kachinsky. The admissions made by Dassey followed a "lie detector" test administered to Dassey by O'Kelley and which O'Kelley told Dassey he failed because the test showed a 98% probability of deception. (PC Ex. 97 at 1). After some prefatory prodding and cajoling by O'Kelley, Dassey went on to make a series of incriminating admissions and created a number of drawings depicting events that he was describing. (PC Ex, 97 at 5 to 19).

Dassey also points to Kachinsky's direction of O'Kelley to gather additional evidence from the Avery salvage yard bolstering the State's case against Steven Avery even though that evidence would further implicate Dassey. (Def. Br. at 3-4). Kachinsky's actions, according to Dassey, even if motivated by a benign intent

to secure a favorable plea deal for his client, were neither authorized nor supported by Dassey who continued to maintain to Kachinsky that he was innocent of any wrongdoing. Dassey argues that Kachinsky's acts were disloyal and represented a conflict of interest as that term is defined in *Cuyler v. Sullivan*, 446 US 335 (1980). Furthermore, once an actual conflict of interest is shown prejudice is automatic. *State v. Kaye*, 106 Wis. 2d 1, 8-16, 315 NW 2d 337 (1982).

The State counters Dassey's position by saying that Kachinsky was trying to get the best deal for Dassey and some of his actions were simply push-back against family members who were fearful that Dassey would testify against Steven Avery. (St. Br. at 8 & 9). The State characterizes Dassey's May 13th statement given to Fassbender and Wiegert in Sheboygan Comity without Kachinsky present as a "proffer" which could result in a plea agreement, (St. Br. at 9).

In *Cuyler v. Sullivan*, 446 US 335 (1980), two privately retained lawyers represented three defendants charged with first degree murders of two victims. *Id.* at 446. The three were tried at separate trials and Sullivan was convicted while his co-defendants were acquitted. His appeal, on grounds that his counsel had impermissible conflicts of interest with the multiple representation, was denied by the state courts but ultimately his conviction was reversed by the Federal Court of Appeals on his Writ of Habeas Corpus. In vacating and remanding for further proceedings, the Supreme Court held that the defendant "who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief". 446 US at 349-350.

The Wisconsin Supreme Court, in *State v. Kaye*, 106 Wis. 2d 1, 315 NW 337 (1982) adopted the holding of *Sullivan* in a case where the defendant claimed ineffective assistance of counsel because he and his co-defendant had been represented by the same attorney. While it denied the defendant's claim of ineffective assistance of counsel, the language of the opinion suggested that it viewed any representation of multiple defendants by a single lawyer or law firm as problematic and it prospectively required trial courts to make an inquiry on the record whenever that situation arose. *Kaye* at 13-14. The *Kaye* holding was amplified in *State v. Dadas*, 190 Wis. 2d 339, 526 NW 2d 818 (Ct. App. 1994) where the court ruled that "specific prejudice need not be shown if the defendant demonstrates by clear and convincing evidence that trial counsel actively represented a conflicting interest". *Id.* at 344. Counsel in *Dadas* undertook the representation of two defendants who were charged with commercial gambling, His clients waived in writing any potential conflict of interest and then entered guilty pleas after which they were sentenced. Their attorney, who represented both of them throughout, urged them to cooperate with law enforcement so that they might avoid federal charges. *Dadas* at 345-346. The court found an actual conflict of interest to exist when an attorney has one client voluntarily supply incriminating information to be used against another client. *Dadas* at 346-347.

Dassey believes that the sum effect of what he refers to as Kachinsky's "multiple, concrete acts of disloyalty" warrant a finding by this court that an actual conflict of interest existed which entitles him to a new trial. (Def. Br. at 10). Additionally, he contends Kachinsky's acts are egregious enough so that the court should use them to presume prejudice, a presumption

which makes unnecessary any inquiry into trial counsel's performance. *U.S. v. Cronic*, 466 US 648, 662 (1984).

He cites as support for his actual conflict argument *State v. Love*, 227 Wis. 2d 60, 594 N.W. 2d 806 (1999) where the Supreme Court reiterated the holding in *Kaye* while at the same time reversing a court of appeals' decision which had found on a per se rule an attorney to have provided ineffective assistance of counsel when she represented the state at the defendant's original sentencing, and then months later working as a public defender she represented the same defendant at his sentencing after revocation of probation. The court defined an actual conflict of interest as occurring "when the defendant's attorney was actively representing a conflicting interest, so that the attorney's performance was adversely affected." *Love* at 71. No showing of prejudice need be made because prejudice is presumed and counsel is considered per se ineffective. *Love* at 71. The defendant in *Love* argued that the per se rule should be extended to cases of serial representation. The court declined to do so and found that on the facts of the case no clear and convincing evidence was adduced to prove an actual conflict of interest. *Love* at 82.

Unquestionably, Wisconsin courts have recognized that in certain instances a presumption of prejudice will attach to counsel's representation of a defendant. A number of the instances in which prejudice is presumed are set out in *State v. Erickson*, 227 Wis. 2d 758, 770, 596 NW 2d 749 (1999). The *Erickson* court opines that these instances are rare and in the absence of a presumption of prejudice a defendant must make a showing of actual prejudice and that the actual prejudice created a reasonable probability that the result of the

trial would have been different. *Erickson* at 773 citing *Strickland*, 466 US at 694.

Dassey relies on *Kaye*, *Dadas*, *Cuyler*, and *Love* to support his claim that the court should use the per se rule to find Kachinsky ineffective and grant Dassey a new trial. (Reply Br. at 3 to 7). There are distinct factual differences between Dassey's situation and the conduct complained of in the cases on which he relies. All except *Love* are instances in which an attorney or attorneys jointly represented more than one client being charged on the same set of facts. Moreover, the lawyer or lawyers involved in the joint representation cases, represented their clients from the onset of the case through the plea or trial stage. The court has previously alluded to the factual background in *Love* and those facts do not parallel any of Dassey's complaints about Kachinsky's representation nor do the facts in *State v. Franklin*, 111 Wis. 2d 681, 331 NW 2d 633 (Ct, Apps. 1983), another case Dassey cites in support for his per se argument. The *Franklin* court found that the defendant's attorney who had represented the defendant throughout her proceeding, had placed himself in an "actual conflict of interest" with his client when he placed his financial interest before his allegiance to his client. *Franklin* at 688-689.

Kachinsky's representation of Dassey ceased on August 25, 2006, after this court found that his failure to personally appear with his client at a May 13, 2006, interview with Investigators Wiegert and Fassbender constituted deficient performance. (Tr. 8-25-06 at 21 to 24). This was some seven months before the actual trial began with the selection of the jury in Dane County on April 12, 2007. Regardless of how the conduct of Kachinsky and his agent, O'Kelley, is characterized as it relates to the events of May 12th and May 13, 2006, Das-

sey "must establish that an actual conflict of interest adversely affected his lawyer's performance". *Cuyler* at 350. By the time a jury was selected and Dassey was tried Kachinsky was long gone from the case. Nothing from O'Kelley's May 12th interview in which he had Dassey incriminate himself found its way into tire trial record. Other than a brief audio clip of a portion of a phone conversation between Dassey and his mother, which the State played without objection in its cross-examination of the defendant, and several questions asked on the cross-examination of Dr. Robert Gordon, nothing from May 13th was introduced at trial. (Tr. 4-23-07 at 50-51; Tr. 4-24-07 at 121-122). And, the State made little more than passing reference to the May 13th phone call in its closing to the jury. (Tr. 4-25-07 at 57, L. 1 to 3; at 80, L. 1 to 3).

To successfully sustain a challenge absent a showing of actual prejudice, Dassey must show that the reliability of the trial process itself was somehow negatively affected by Kachinsky's conduct or the conduct of his agent, O'Kelley. *Cronic* at 658. On this record, in this case, this court cannot find that Kachinsky's conduct constituted an actual conflict of interest that somehow affected the reliability of a trial which was held seven months after his departure from the case.

B. Kachinsky's deficient performance at the May 4, 2006, suppression hearing.

Dassey also claims to be entitled to a new suppression hearing because Kachinsky's performance at the May 4, 2006, hearing was inflected by his conflict of interest and this deficient performance unfairly prejudiced his offense. (Def. Br. at 15 to 17). As proof of this claimed deficient performance, Dassey points to Kachinsky's failure to effectively cross-examine the

State's witnesses as well as his concession that there were no Miranda issues concerning Dassey's March 1, 2006, statement to Investigators Mark Wiegert and Thomas Fassbender.

Kachinsky filed on April 19, 2006, a motion to suppress the use of any statements made by Dassey to law enforcement agents on February 27, 2006 and March 1, 2006. His motion came in the form of a ten page statement of facts coupled with a written argument citing what he believed to be the relevant law as it related to those facts. (4-19-06 Motion to Suppress). The State responded with a memorandum of law setting forth its position on the legal issues it believed were implicated in the suppression hearing. (5-1-06 State's Memorandum in Response). Kachinsky filed a reply to the State's memorandum in which he argued that the video-recorded March 1, 2006, statement given by Dassey to Wiegert and Fassbender contained inculpatory statements made by Dassey as a direct or indirect result of misrepresentations made to him by his interviewers. (5-3-06 at 1 to 5).

At the suppression hearing, Investigator Wiegert testified how he and Special Agent Fassbender had elicited Brendan Dassey's admission to his involvement in the Teresa Halbach murder at their March 1, 2006, interview of him. Kachinsky cross-examined Wiegert and following the completion of Wiegert's testimony he called Dassey's mother, Barbara Janda, and Kids Schoenenberger-Gross, the Mishicot School District psychologist, as his witnesses. (Tr. 5-4-06 at 64 to 80; at 81 to 100).

In his brief Dassey criticizes Kachinsky by accusing him of a conflict of interest at the suppression hearing which compromised his ability to faithfully proceed on

his client's behalf. (Def. Br. at 15). He also scores Kachinsky for failing to call a police interrogation expert and doing a poor job of cross-examining Investigator Wiegert. (Def. Br. at 16-17). Lastly, he faults Kachinsky for conceding that the Miranda warnings were not an issue by stipulating to that fact at the outset of the hearing. (Tr. 5-4-06 at 6-7). According to Dassey, Kachinsky's failure to argue that the March 1st statement should be suppressed for its violation of Miranda guidelines is, in and of itself, an example of his deficient performance. (Def. Br. at 28).

On May 12, 2006, this court issued findings of fact and conclusions of law finding that the State had met its burden of showing by a preponderance of the evidence that the Dassey statements given to Wiegert and Fassbender on March 1, 2006, "were the product of Brendan Dassey's free and unconstrained will reflecting deliberateness of choice. In short, they were voluntary statements." (Tr. 5-12-06 at 11). The court has heard or seen nothing that was introduced at the Machner hearing or in the briefings which would cause it to recede from its May 12, 2006, decision. Moreover, the court believes that Kachinsky, at the hearing and in his prehearing briefs, adequately represented Dassey's interests and cannot be said to have provided ineffective assistance of counsel. Nothing raised in Dassey's post-conviction briefs, either by way of new or different witnesses, or more rigorous cross-examination of Wiegert, comes close to showing that Kachinsky's representation at the hearing fell below an objective standard of reasonableness. Wiegert acknowledged both at the May 4, 2006, suppression hearing and the post-conviction motion hearing that initially he did not regard the interview of Dassey as a suspect interview, but rather a witness interview. (Tr. 5-4-06 at 23; Tr. 1-

22-10 at 139). Nonetheless, Dassey was given written Miranda warnings on March 1, 2006, before arriving at the Manitowoc County Sheriff's Office and was reminded of those warnings shortly after getting to the interview room at the sheriff's department. (5-4-06 Hearing Exhibit 2; Tr. 5-4-06 at 28, and Tr. 1-22-10 at 138-139). Despite the fact that the officers interviewing Dassey on March 1, 2006, considered him a witness rather than a suspect, they furnished him written Miranda warnings. It became evident as the interview progressed that Dassey was much more than a witness to the events that culminated in Teresa Halbach's death. The court believes that the initial segment of the interview qualified as a noncustodial interview when viewed under the totality of the circumstances standard set out in *State v. Gruen*, 218 Wis. 2d 581, 594 to 596, 582 NW 2d 728 (1998).

The fact that it became a custodial interrogation after Dassey made inculpatory admissions, does not mean that it was necessary for the interrogators to revivify the previously given Miranda warnings, *State v. Grady*, 2009 WI 47, 317 Wis. 2d 344, 766 NW 2d 729, a case discussed by the State in its brief, held that there is no bright line rule requiring a readministration of Miranda rights after a noncustodial interview becomes a custodial interrogation. *Grady* at §§19 & 20. Instead, the court found that the sufficiency of the timing of the Miranda warnings must be determined under a totality of the circumstances test. *Grady* at §31, The purpose of Miranda warnings is to make a defendant aware of his or her rights during any kind of questioning. Here, Dassey had received the written warnings which he signed and initialed on the morning of March 1, 2006. He was reminded of those warnings not many minutes later when he arrived at the Manitowoc County Sher-

iff's Department. There is nothing in the videotape of his interview that suggests he was either physically or emotionally exhausted. The length of time elapsing between his receipt of the warnings and his inculpatory statements belie any notion that he had forgotten them. Indeed, at his trial, he testified on direct examination:

"Q Okay, Brendan, I want to talk about that video a little bit with you, okay?

A Okay.

Q You—you know it was being videotaped that day?

A Yes.

Q And—and the officers explained to you your rights; is that right?

A Yes.

Q Did you understand them?

A Yes."

(Tr. 4-23-07 at 42, L. 7 to 14).

This court concludes that neither Kachinsky's conduct of the suppression hearing nor his concession on the Miranda issues constituted ineffective assistance of counsel.

II. Attorneys Mark Fremgen and Raymond Edelstein's Ineffective Assistance of Counsel.

A. Failure to call the appropriate expert was ineffective assistance.

Dassey raises a number of instances in his postconviction brief which he contends show that Kachinsky's successor counsel, Attorneys Mark Fremgen and Ray Edelstein ineffectively assisted him at and be-

fore his trial. Chief among them is his assertion that while these defense counsel called Dr. Robert Gordon as an expert witness on the issue of false confession, they should have called, in addition to Gordon, one or more expert witnesses to show the jury that Dassey's confession was produced by coercive police questioning. These additional experts were necessary because Gordon lacked the requisite expert qualifications to opine on coercive police interrogation tactics. (Def. Br, at 23 to 26).

Dassey's defense counsel elicited a substantial amount of testimony at the post-conviction motion hearing attempting to show that Dassey's confession may have been a false confession. Dr. Richard Leo, an associate professor of law at the University of San Francisco, testified at length on behalf of the defendant. His area of professional expertise includes the social psychology of police interrogations and how unreliable confessions can be produced by coercive police interrogation tactics. (Tr. 1-19-10 at 91). In his direct examination testimony, Dr. Leo reviewed the statements Dassey had given to police, as well as his confession, and pointed out areas that he believed were examples of psychologically coercive interrogation tactics employed by the police who questioned Dassey. He said in looking at the videos in the case he observed some psychologically coercive tactics being used by those who questioned Brendan Dassey; even tactics which are not psychologically coercive, if repeated over and over again, can become psychologically coercive, according to his testimony. (Tr. 1-19-10 at 149).

He said Investigators Fassbender and Wiegert provided Dassey with "systemic inducements" when they talked to him about interceding with the district attorney on his behalf or going "to bat" for him if he

was honest with them. (Tr. 1-19-10 at 160). The defense claims that these inducements couched as promises to help him out with law enforcement, the justice system or his family, were tactics designed to undermine his will and get him to confess. According to Dr. Leo, the investigators repeatedly used what he referred to as the "superior knowledge ploy" in which they pretended to know far more about what occurred than in fact they did. (Tr. 1-19-10, at 168-169). These, and a number of other stratagems Dr. Leo said investigators used in questioning Dassey could have pushed him into implicating himself in a crime in which he was not involved.

Under police questioning, Dassey was able to identify the fact that Teresa Halbach was shot in the left side of her head when questioned by the investigators, a fact the state believed tied him to the crime. Dr. Leo said this was not truly corroborative of his confession because the information about the head shot was supplied by the investigators and the side location was a fact that could be arrived at by a chance guess. (Tr. 1-19-10 at 220 to 222). When asked about evidence the police found in the Avery garage which they searched as a result of Dassey's confession, Dr. Leo denied that this was evidence of corroboration and said this occurred because the police had planted the garage suggestion in Dassey's mind and he simply was repeating it back to them. (Tr. 1-19-10 at 224-225). Certain police interrogation techniques, many of which he described as being used on Dassey, can lead to false confessions and as a social scientist he could have educated the jury "about these counterintuitive and not popularly known phenomena in their effects and why they're significant in understanding how false confessions come about". (Tr. 119-10 at 237 to 239).

Testimony similar to that offered by Dr. Leo was furnished in affidavit form by Dr. Lawrence White, a professor of psychology and legal studies at Beloit College. (PC Exhibit 80). In Dr. White's affidavit, he reviews Dassey's confession to Investigators Wiegert and Fassbender along with his February 27th interviews at Mishicot High School and the Two Rivers Police Department with the same two investigators. (PC Exhibit 80, at 9 to 19). His affidavit testimony makes many of the same points as Dr. Leo's testimony about the police interrogation tactics and Dassey's vulnerability. Dr. White concludes his affidavit testimony by saying that there are reasons to believe that Dassey's "statements may not be wholly reliable or truly voluntary." (PC Exhibit 80, at 20). Dr. White's affidavit was used as his direct examination at the post-conviction motion hearing but he appeared personally and was subject to cross-examination by the State. On his cross-examination he said he had received an email request from Attorney Mark Fremgen to testify on the defendant's behalf at the Dassey trial. (Tr. 1-21-10 at 189). The Fremgen request concerned testimony Dr. White might give about the police interrogation tactics used on Dassey and how those techniques may have affected the reliability for voluntariness of the defendant's statements. (Tr. 1-21-10 at 190, 191.) Dr. White said he would have testified had he been asked to by Attorney Fremgen but Fremgen did not make that request of him.

Dassey contends that Attorneys Fremgen and Edelstein rendered ineffective assistance of counsel by their failure to supplement Dr. Gordon's testimony on the personality factors which may make a suspect more suggestible or vulnerable to suggestion when being questioned by the police, with an expert like Dr. Leo or

Dr. White who could testify about the psychology of interrogation, coercion and false confessions. Dr. Leo testified that he thought the suggestibility expert such as Dr. Gordon could not adequately educate a jury on the social science research and phenomena of false confessions. (Tr. 1-19-10 at 237 to 239). Dassey believes that only through testimony from experts like Dr. White or Dr. Leo could the jury learn how contaminated was his March 1st confession. (Def. Br, at 27 to 29). Under the circumstances of this case Dassey argues that trial counsel's "failure to call such an expert was manifestly unreasonable and constitutes deficient performance." (Def. Br. at 30).

In its brief the State questions whether the type of testimony discussed by Dr. Leo and Dr. White would have been admissible in Wisconsin since it might be opinion testimony which invades the fact-finding role of the jury by opining on the truthfulness of Dassey's statements. *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 NW 2d 673 (Ct. App. 1984). The State also points to cases from other jurisdictions that have baited Dr. Leo's testimony as invading the province of the jury, citing two cases, one from Kansas and the other from Missouri, (St. Br. at 21). This court believes that both Dr. Leo and Dr. White would have qualified as expert witnesses at Dassey's trial and in all likelihood some, and maybe much of their testimony, at least as they outlined it in the post-conviction motion, would have been admissible. *State v. Walstad*, 119 Wis. 2d 483, 515-516, 351 NW 2d 469 (1984).[1] With that said, the fact

[1] The subject of false confessions has been treated in a number of law review pieces but articles about false confessions are not confined to law journals and academic literature. Two recent examples appealing in general circulation media: Joint Schwartz, "*Confessing to Crime but Innocent*," **New York Times Online**,

that the testimony may have been admissible and that trial counsel failed to procure it for trial does not mean that they acted deficiently.

In *State v. VanBuren*, 2008 WI App. 26, 307 Wis. 2d 447, 746 NW 2d 545, a case decided *after* the Dassey trial, our Court of Appeals faced a similar claim when post-conviction counsel challenged as ineffective assistance trial counsel's failure to offer evidence from a false confession expert at trial. *Id.* at §17 to 19. The court concluded, given the dearth of published or unpublished cases in Wisconsin in which false confession expert testimony was introduced, it could not find that failing to offer that kind of testimony constituted ineffective assistance of counsel. *Id* at § 19. At the time this court granted defense counsel's motion to permit Dr. Gordon to testify it noted that it was unable to find a reported or published Wisconsin case discussing the admissibility of false confession testimony. (Tr. 4-5-07 at 7-8). Even if the holding in *VanBuren* is outdated or not applicable to Dassey, this court cannot and will not find that absence of testimony from a social scientist who could talk about the psychology of interrogation and confession constituted deficient performance by trial counsel.

Attorney Edelstein explained at some length in the post-conviction motion hearing how trial counsel considered, but rejected, another expert who could have offered testimony on Dassey's confession. (Tr. 1-21-10 at 266 to 269). Referring to Dr. Gordon, he said: "We

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September 13, 2010, www.nytimes.com/2010/09/14/us/14confess.html: Robert Kolker, "*I Did It*", **New York**, October 11, 2010, at 22, 89. Interestingly, Kolker says at one point in his article: "To prevent false confessions, interrogation critics say there's a solution so simple that it's remarkable it hasn't happened already: videotaping every minute of every police interrogation". At 90.

had an expert who we best believed was appropriate for the defense in this case." (Tr. 1-21-10 at 266269). Later, he went on:

> "To muddy the waters with another expert, irregardless (sic) of whether the State presented one, sometimes, and can, I believe, in the eyes of jurors, look like a desperate attempt by an accused to turn it into a battle of the experts without focusing on both the facts and, most importantly in this case in the defense of Brendan, the humanization of Brendan as a young, easily manipulated individual." (Tr. 1-21-10 at 267, L. 15 to 23).

It is clear that Dassey's trial counsel made a strategic choice to use Dr. Gordon as their expert witness and not supplement him with another expert or other experts. They were also aware that the state was prepared to call Joseph Buckley, an expert on the Reid method of interrogation if the defense produced its own interrogation expert. (Tr. 1-21-10 at 259-260). It was their considered opinion that the trial focus should be Dassey and his cognitive limitations and suggestibility, not interrogation techniques. (Tr. 1-21-10 at 260 and 266 to 269).

The court finds this not to be deficient performance but a trial decision rationally based on the facts and the law, *State v. Elm*, 201 Wis. 2d 452, 464-465, 476 NW 2d 471 (Ct. App. 1996).

B. The State's trial testimony and Dassey's own trial testimony nullified anything additional defense experts could have said.

Dassey's March 1, 2006, videotaped confession was the centerpiece of the trial and the State's case against

him. Our Supreme Court, in *State v. Jerrell*, C, J., 205 WI 105, 283 Wis. 2d 145, 674 NW 2d 607 adopted a rule requiring electronic recording of all questioning of a juvenile when it occurs at a place of detention. *Id.* at §58. Here, the jury had the opportunity as the finder of fact to view the questioning of Brendan Dassey by Investigators Wiegert and Fassbender. It heard and saw how Dassey responded to the questions asked of him and his admissions of his participation in the charged crimes.

While his confession may have been the pivotal piece of evidence against Dassey, it was by no means the only testimony implicating him heard by the jury. Jurors had an opportunity to watch and listen to Dassey testify in his own defense at trial. They heard him admit to being with his uncle, Steven Avery, on the evening of Teresa Halbach's murder (Tr. 4-23-07 at 29 to 31). They heard him say he helped his uncle clean up a three foot by three foot stain on the garage floor with gas, paint thinner, and bleach. (Tr. 4-23-07 at 32, L. 13 to 25 and at 33, L. 1 to 10). Jurors heard his counsel ask Dassey:

Q "Why did you tell those two investigators that you participated in killing and—raping Teresa Halbach?

A I don't know.

Q You have no idea why you would say that?

A No."

(Tr. 4-23-07 at 42, L. 1 to 6).

When asked on cross-examination how he was able to tell Fassbender and Wiegert so much detail about what happened to Teresa he responded first by saying "I don't know" and then answering a follow-up question

said "I could have got it out of books". (Tr. 4-23-07 at 65, L. 12 to 19). Pressed on cross-examination about the name of the book he would have read that had events such as he described to the police, he said "I believe it was called *Kiss the Girls*". (Tr. 4-23-07 at 67, L. 17 to 21). The jurors had a chance to weigh Dassey's credibility based, not only on his video-taped confession but upon his testimony in open court. That testimony, with its evasive answers to questions, frequent "I-don't-knows", and closing with what jurors may have felt was an outlandish explanation for the origin of the story he gave the police in his March 1st confession gave them a firsthand opportunity to evaluate his credibility.

Jurors also heard a much less equivocal Dassey in an audio interview played during the trial testimony of Marinette County Sheriff's Department Detective Anthony O'Neill. (Tr. 4-19-07 at 113; Tr. Ex. 201). O'Neill and other Marinette County officers stopped a car in which Dassey was a passenger late in the morning of November 6, 2005. (Tr. Ex. 202). Marinette County police had been asked to assist because Dassey's uncle, Steven Avery, and other family members were staying on property owned by Steven Avery's parents (Dassey's grandparents) in Marinette County. The Marinette police stopped a car registered to Steven Avery but occupied by his nephews, Bryan and Brendan Dassey. (Tr. Ex, 202). They removed Brendan to another vehicle and questioned him extensively. (Transcript of Interview, Tr. Ex, 203). The jury heard the aggressive and sometimes confrontational questioning of Dassey during which he adamantly resisted any suggestion that he knew where Teresa Halbach went. (Tr. Ex. 203, at 32-33, at 40-41).

The jury heard testimony from Susan Brandt, who interned at Mishicot High School from January of 2006

to May of 2006, while pursuing a master's degree in educational counseling, that she had contact with Kayla Avery who came to the counseling office because she said she was feeling scared. (Tr. 4-18-07 at 168). Kayla said she was scared because her uncle, Steve Avery, had asked one of her cousins to help move a body. (Tr. 4-18-07 at 169). In her trial testimony, Kayla Avery, who was Dassey's first cousin, said Brendan appeared to change between October 31, 2005, and the end of February, 2006. And she described that change as Brendan losing weight and being a little bit more upset. (Tr. 4-18-07 at 7). At a birthday party in November she said that she observed Brendan crying. (Tr. 4-18-07 at 8- 9). While at trial she claimed not to have talked at that time with Brendan about Steven, she admitted telling the school counselors and Officers Wiegert and Fassbender about her conversation with Brendan at the party. (Tr. 4-18-07 at 10). Investigator Mark Wiegert testified that the Mishicot school counselors had notified the police about their contact with Kayla Avery and what she had told them. Following that contact, Wiegert and Fassbender interviewed Kayla in the presence of her mother and she told them that Brendan had told her about hearing screaming from Steven Avery's residence and seeing body parts in the fire behind Steven Avery's residence. (Tr. 4-19-07 at 193-194). Kayla also gave them a written statement. (Trial Ex. 163).

Even if this court were to conclude that trial counsel committed unprofessional errors by failing to call an expert on police interrogation tactics, the quality and quantity of evidence against Dassey is such that there is no reasonable probability that the proceeding would have turned out differently.

C. Trial counsel's failure to deconstruct the March 1st confession as ineffective assistance of counsel.

In his brief, Dassey reprises the contaminated confession argument that he raised with Dr. Leo's post-conviction testimony when he claims as deficient trial counsel's failure "to systematically deconstruct Brendan's March 1st confession so that the jury would understand that each, corroborated 'fact in the confession' was a product of external contamination." (Def. Br. at 30). He claims that each of nineteen details in his confession that the State represented to the jury as corroborated by physical evidence should have been deconstructed by counsel at trial because each of those so-called facts could be traced to either Dassey's innocent knowledge of events or his acquaintance with the news media reports or arose from contamination introduced by the investigators who questioned Dassey on March 1st. (Def. Br. at 30 to 33).

In short, the jury heard testimony about purportedly corroborated evidence that actually emanated from noninculpatory sources and trial counsel was deficient by not forcefully bringing this to the jury's attention. The State responds to this by pointing out that there is no proof in the record that Dassey obtained the information he now calls contaminated from other than his own personal experience. Additionally, it discusses some of the post-conviction testimony of trial counsel who asked Dassey where he got the information that he used in his confession and why he falsely confessed. (St.'s Br. at 28-29).

According to that testimony, Dassey never adequately explained to either Attorney Fremgen or Attorney Edelstein the source of the details in his confes-

sion or why he might have falsely confessed. The two attorneys said in their post-conviction motion testimony that Dassey told them he might have dreamt it or gotten it out of a book. (Tr. 1-20-10 at 226; Tr. 1-21-10 at 256).

The appropriate measure of attorney performance within professional norms is reasonableness under the circumstances of the case. *State v. Brooks*, 124 Wis. 2d 349, 352, 369 NW 2d 183 (Ct. App. 1985). Dassey provided little or nothing to his trial counsel that they could have used to deconstruct his March 1st confession. His trial testimony, both on direct and cross-examination, provided no evidentiary platform on which trial counsel could construct a plausible contamination attack. Instead, it created through Dassey's own words an explanation for his March 1st confession which lacked any credibility and added to the negative weight of his original admissions. Moreover, much of what Dassey maintains about the deconstruction of his confession by either Dr. Leo, another interrogation expert or trial counsel, comes at a remove of more than two plus years from the trial itself and rests entirely upon assumptions as to what testimony would or might have been and how that testimony would have played out to the jury. The court considers much of the post-conviction testimony on deconstructing Dassey's confession through either defense counsel or an expert more speculative than convincing. The court finds trial counsel's performance with respect to these matters to be within the realm of reasonableness, considering the circumstances of the case.

D. Video clips of Dassey's "recantation".

Dassey's post-conviction motion faults trial counsel as being deficient for their failure to insist upon the

admission at trial of several video clips from the March 1, 2006, confession. The clips, which post-conviction counsel categorize as a "recantation55 of Dassey's confession to police occurred after the end of police questioning while Dassey was speaking with his mother, Barbara Janda. The text of the video clip reads:

"Brendan:	What'd happen if he [Steven Avery] says something his story's different? Wh- he says he, he admits to doing it?
Barb Janda:	What do you mean?
Brendan:	Like if his story's like different, like I never did nothin' or somethin'.
Barb Janda:	Did you? Huh?
Brendan:	Not really.
Barb Janda:	What do you mean, not really?
Brendan:	They got to my head."

(Post-conviction Exhibit 209 at 672).

Post-conviction counsel seizes on the phrases "not really" and "they got to my head" as being Dassey's recantation of the confession he had just given to the police investigators, (Def. Br. at 33-34).

Testimony at the post-conviction motion hearing showed trial counsel differed on showing this video clip to the jury. Attorney Edelstein thought the jury should see it while Attorney Fremgen did not. (Tr. 1-21-10 at 236; Tr. 1-20-10 at 195). As lead counsel, Attorney Fremgen made the strategic decision not to play the portion of the tape because he thought it depicted a mother coming in to see her son and realizing he had

just done something serious and would go to jail. (Tr. 1-20-10 at 195). This was not deficient performance. Counsel made a rational decision based on an evaluation of the information and emotion the video clip would convey to the jury.

Apart from that, to suggest as post-conviction counsel do that these remarks somehow constituted an unequivocal recantation of Dassey's previous confession is a dubious proposition. At best, the terms "not really" and "they got to my head" are, in the context of the conversation between Dassey and his mother, ambiguous. At worst, the words can be viewed as substantiating the confession he previously gave to the police.

E. Trial Counsel's Claim Deficient Performance in Closing Argument.

Post-conviction counsel frame as concessions of guilt two statements that Attorney Edelstein made in his closing. The first statement made by Attorney Edelstein which counsel says represents a concession appears to do so at least as defense counsel excerpts Attorney Edelstein's remarks in the post-conviction brief. (Def. Br. at 34). However, when removed from the isolated context, post-conviction counsel gives it, it appears to concede nothing other than to depict Dassey as being pushed by investigators to say things he truly didn't believe. Edelstein argued:

> "But the truth of the matter is, a couple of times, when they weren't specific about who they're even talking about, he gives an answer, such as a number. And it changes. It bounces back and forth, He was confused. He was scared.

> And let's just briefly touch upon that. Ask yourselves, how probing were they when he told them, I seen it. And he said, he told, he seen me see it, so he told me not to say something or else it will—he threatened me a little bit. He made it clear to them early on. And they had no reason to doubt it. They just didn't like the answers. They didn't like what he said. But they never explored the potential truth and alternative that this young man walked over there and did see something in a fire, and that something was Teresa Halbach.
>
> They go through this scenario, and they start—once he tells them, I seen it, and Steve knew it, and he said, don't say anything, that's when it becomes, you saw this, you saw that."

(Tr. 4-25-07 at 124, L. 25, at 125, L. 1 to 20).

The second part of Edelstein's argument which Dassey labels a concession begins where Edelstein talks about the Halloween bonfire and how Dassey went about picking things up for the fire "and eventually they start throwing stuff in there, and he probably did see something. Pretty traumatic." (Tr. 4-25-07 at 128, L. 2 to 5).

Dassey acknowledged in his testimony at trial that he had been at the bonfire and helped his uncle put things on the fire including tires and the seat from Teresa Halbach's RAV4 automobile. (Tr. 4-23-07 at 64-65.) Edelstein's remarks in closing draw on Dassey's own admissions at trial but in no way suggest that Dassey committed either element necessary for conviction of mutilating a corpse as a party to a crime, (Wis. JI-CR 1193). Even if this court concluded that Edelstein's discussion of Dassey's appearance at the bonfire was a

concession, it would not be ineffective assistance of counsel. *State v. Silva*, 2003 WI App. 191, 266 Wis. 2d 906, 670 NW 2d 385, and *State v. Gordon*, 2003 WI App. 69, 262 Wis. 2d 380, 663 NW 2d 765, both of which Dassey cites in his brief, give counsel leeway to concede on a count if counsel's decision is tactically reasonable. (*Silva* at §15 to §20 and *Gordon* at §28).

At the post-conviction motion hearing, Attorney Edelstein did not recall making any frank admission of Dassey's direct involvement in the corpse mutilation, the charge that carried the least significant penalty, but he did acknowledge making an argument "which was intended to provide that as an option to the jury." (Tr. 1-21-10 at 236, L. 23-24 and at 237). The court believes this falls within conduct permitted under *Silva* and *Gordon*.

F. Trial counsel's alleged deficiency in failing to get Dassey's February 27, 2006, and May 13, 2006, statements admitted into evidence.

Defense trial counsel sought to have admitted at trial all or portions of Dassey's February 27, 2006, interview at Mishicot High School with Wiegert and Fassbender. Dassey's March 1, 2006, interview with the two investigators had been heard by the jury and that interview as well as some trial testimony that had made mention of a discussion with the defendant on February 27th. (Tr. 4-20-07 at 55-56). After hearing argument from counsel, this court, citing *State v. Pepin*, 110 Wis. 2d 431, 328 NW 2d 898 (1982), and Wis. Stats. §908.01 (4)(b)1, ruled that the state could use any inculpatory statements made by Dassey since they constituted an exception of the hearsay rule. The defense could not, however, use exculpatory material from the February 27th interview unless it was intertwined with

the inculpatory statements and bore the same guarantee of trustworthiness, (Tr. 4-20-07 at 62). Dassey now says that trial counsel performed deficiently by failing to cite the right evidentiary rale for the admission of the February 27th and May 13th statements. His trial counsel, he says, should have urged the court to admit the statements because they weren't being offered to prove the truth of the matter asserted, but rather as examples of Dassey's suggestibility. (Def. Br. at 36). This court finds nothing in Dassey's post-conviction argument that would cause it to rale any differently than it did at the time the matter was initially argued and the court determined the statements to be inadmissible hearsay. Even if the statements were admitted as requested by trial counsel, the weight of the evidence against Dassey was such that there is no reasonable probability that the outcome would have been different.

Post-conviction counsel also contend the statement's admissibility should have been argued by trial counsel under the completeness rule codified at Wis. Stat. §901.07. This court understands that statute to permit the admission of otherwise hearsay evidence if it is necessary to provide context and prevent distortion. *State v. Eugenio*, 219 Wis. 2d 391, 412, 579 NW 2d 642 (1998). Neither the February 27th nor the May 13th interview of Dassey was necessary to complete or fairly balance other trial evidence. Trial counsel did not perform deficiently by failing to use the rale of completeness as a basis for the admission of the February 27th and May 13th statements.

Dassey closes that portion of his brief dealing with the deficient performance of his trial counsel, by asserting that the five instances of trial counsel's deficient performance cumulatively as well as individually prejudiced him and he is entitled to a new trial. (Def. Br. at

37-38). And he again raises as ineffective assistance of counsel the failure of Kachinsky and trial counsel to seek the suppression of his March 1st statement as the fruit of an illegal arrest. This court believes it has dealt sufficiently with the claim of an illegal arrest in an earlier portion of this decision. As to the five areas Dassey articulates as constituting deficient performance of trial counsel, this court has found trial counsel not to have performed deficiently in these instances. *State v. Felton*, 110 Wis. 2d 485, 505-506.

Even assuming that one or more of the complained of acts was wrong, none of them, either singly or collectively, was "so serious that the defendant was deprived of a fair trial and a reliable outcome." Strickland v. Washington, 466 U.S. 668, 687 (1984). Withal, this court has neither seen nor heard anything which creates a reasonable probability sufficient to undermine its confidence in the outcome of Dassey's trial. *Id.* 466 U.S. at 694.

G. Dassey's claim to be entitled to a new trial in the interests of justice.

Wisconsin Stat. §805.50(1) empowers the trial court to set aside a verdict and order a new trial "in the interest of justice." Dassey urges the court to affirmatively exercise that power in his case "because his trial counsel failed to fairly explore the unreliability of his confession and therefore deprived the jury of trying his case on an informed basis." (Def. Br. at 39.) The failure of trial counsel to deconstruct his confession or call an expert to deconstruct his confession has resulted in a miscarriage of justice entitling him to another trial or at least another suppression hearing. (Def. Br. at 40).

This court has examined the cases Dassey cites in his brief and can find nothing in any of them which lend support to his claim for a new trial in the interest of justice. *State v. Hicks*, 202 Wis. 2d 150, 549 NW 2d 435 (1996) which he cites in support of his request was a case in which newly discovered DNA evidence excluding the convicted defendant was received at a post-conviction evidentiary hearing. *Id.* at 156. The State had used at trial a hair sample to help convict a defendant but no DNA test had been done of that sample. Our Supreme Court reasoned that the real controversy was not tried because the evidence excluding the defendant as the origin of one of the hair samples was relevant to the issue of identification and it was not heard by the jury. *Id.* at 158. Likewise, the defendant in *State v. Jeffrey*, 2010 WI App. 29, 323 Wis. 2d 541, 780 NW 2d 231 introduced post-conviction testimony that showed he did not have herpes in a case in which the victim claimed her case of herpes originally stemmed from sexual contact the defendant had with her when she was three years of age. *Id.* at §1 and §2. On appeal, the court reversed because it believed that the post-conviction evidence could have had a "great impact on the credibility battle between the prosecutor and the defendant, had it been presented." *Id.* at §20.

Both *Hicks* and *Jeffrey* were reversed because the respective courts decided that each jury should have had an opportunity to hear the critical, material, and relevant scientific evidence that was not disclosed until a post-conviction evidentiary hearing. Dassey seeks to have us believe that expert testimony from academic police interrogation experts or trial counsel's deconstructing cross-examination exposing the contaminated parts of Dassey's confession would have the same quali-

tative trustworthiness as the scientific tests referenced in *Hikes* and *Jeffrey*.

Questions of its admissibility aside, the proposed testimony of experts such as Drs. Leo or White would not present any exculpatory evidence for the jury to consider. Rather, it would simply allow the expert to offer an opinion about the reliability of Dassey's confession. Opinion testimony and deconstructing cross-examination are a far cry from the evidence in *Hicks* and *Jeffrey* which triggered their reversals. This court cannot find that Dassey's trial represents a miscarriage of justice nor can this court find that the real controversy was not fully tried. *Lock v. State*, 31 Wis. 2d 110, 118, 142 NW 2d 183 (1966). He is not entitled to a new trial nor should he have another suppression hearing.

CONCLUSION

In his post-conviction motions, Brendan Dassey has claimed that counsel who represented him at and prior to trial were ineffective and performed deficiently on his behalf. Because of counsel's various failures to effectively pursue his defense, Dassey says he is entitled to a new trial in which his inculpatory admissions are suppressed or, alternatively, a new hearing to suppress his self-incriminating statements. This court has examined Dassey's arguments on the issues raised in his post-conviction motions. Based on that examination, the court has concluded for the reasons set forth in the body of this opinion, that nothing done by his pretrial or trial counsel has rendered the result of Dassey's trial unreliable or the proceeding fundamentally unfair. Accordingly, the court denies Dassey's motions for a new trial and a new suppression hearing. The state is directed to draft the order reflecting the court's decision.

Dated this 13th day of December, 2010.

BY THE COURT,

/s/ Jerome L. Fox
JEROME L. FOX
Circuit Judge

APPENDIX G

STATE OF WISCONSIN
CIRCUIT COURT
MANITOWOC COUNTY
BRANCH 3

DECISION
Case No. 06 CF 88

STATE OF WISCONSIN,
Plaintiff,
vs.

BRENDAN R. DASSEY,
Defendant.

DATE: May 12, 2006
BEFORE: Hon. Jerome L. Fox, Circuit Court Judge
* * *

TRANSCRIPT OF PROCEEDINGS

* * *

THE COURT: Morning, counsel, morning ladies and gentlemen. This is 06 CF 88. State of Wisconsin vs. Brendan R. Dassey. Appearances, please.

ATTORNEY KRATZ: The State of Wisconsin appears by Ken Kratz, Calumet County D.A., appearing as special prosecutor.

ATTORNEY KRATZ: The defendant appears personally and with Attorney Len Kachinsky.

THE COURT: All right. Um, we are here today for a decision on a motion to suppress. Uh, the defend-

ant, Brendan Dassey, has brought this motion requesting that the Court suppress statements he made to Investigator Mark Wiegert with the Calumet County Sheriff's Department and Agent Thomas Fassbender of the Wisconsin Department of Justice.

The motion brought contends that the statements made by Brendan Dassey were obtained from him involuntarily and should, under the applicable law, be suppressed. The motion was heard in this courtroom last Thursday, May 4.

Court heard testimony from Investigator Wiegert. It heard testimony from the defendant's mother, Barb Janda, and Kris Schoenenberger-Gross, a school psychologist for the Mishicot School District. The Court also received, five exhibits during the course of the hearing.

In addition, the Court has read the relevant case law cited by the parties in their briefs as well as a number of other pertinent cases.

The Court has also reviewed the DVDs of the interviews, read the transcripts and listened to the audiotapes. The audiotape in the form of a CD. Now, these electronic recordings are all part of Exhibit 5. Based on those exhibits, that testimony, the briefs, and arguments of Counsel, the Court makes the following findings of fact:

Number one. The defendant, Brendan Dassey, was born October 19, 1989, and was, at the time of the police interviews in February and March of 2006, 16 years of age.

Number two. At the time of the police interviews, he was a student at Mishicot High School enrolled in mostly regular classes, but also in some special educa-

tion classes. Testing, it disclosed, an IQ level in the low average to borderline range. There is no evidence that he suffered from any emotional disorder which made him unusually susceptible or vulnerable to police pressures.

Three. Prior to his interviews which are the subject of this motion, his only known police contacts were on November 6 and November 10, 2005, when he was questioned in Marinette County about Teresa Halbach.

Number four. The parties have stipulated to the noncustodial nature of the police interviews with Brendan Dassey on February 27, 2006, and March 1, 2006.

Hearing Exhibit No. 1 is a *Miranda* warning and waiver signed and initialed by Brendan Dassey on February, uh, 27, 2006, at 3:21 p.m. And Exhibit 2 is a *Miranda* warning and waiver signed and initialed by Brendan Dassey on March 1, 2006, at 10:10 a.m.

Number five. Investigator Wiegert and Agent Fassbender met with Brendan Dassey on February 27, 2006, at Mishicot High School at approximately 12:30 p.m. He was told by them that he didn't have to answer any questions and he was free to go whenever he wanted. Exhibit 5, transcript page 440.

He was questioned for approximately an hour and was again told he could stop answering questions and could, quote, walk out anytime, end quote. Exhibit five, transcript page 467.

At the close of that interview, he gave the investigators a written statement. The investigators both complimented him for giving them a voluntary statement telling him they knew how difficult it was to tell—tell them the details he divulged. The interview ended

at 2:14 p.m. He returned to his eighth hour class at Mishicot High School.

Number six. At approximately 3:00 p.m. on February 27, 2006, the same day of the earlier interview, Brendan Dassey and his mother, Barb Janda, met with the investigators at Mishicot High School and agreed that Brendan Dassey could do a videotape interview with the Two Rivers Police Department.

Ms. Janda was asked if she wanted to be present during the interview. She said it was not necessary. And Brendan Dassey said he did not care if his mother was present or not.

After he signed and initialed Exhibit 1, the *Miranda* warnings and waiver, the investigators interview Brendan Dassey about certain events which he claimed occurred on the night of October 31, 2005.

The interview lasted approximately 41 minutes and was conducted entirely in a conversational tone of voice by the interviewers. At no time during the interview did Brendan Dassey appear visibly stressed or pressured by the questions or conducts—conduct of the interviewers.

Number seven. On March 1, 2006, Investigators Wiegert and Agent Fassbender sought and received permission from Brendan Dassey's mother, Barb Janda, to speak with Brendan. She was to pick him up at the conclusion of the interview. Following her grant of permission, Investigators Wiegert and Fassbender picked up Brendan Dassey at Mishicot High School at approximately 10:05 a.m. and transported him to the Manitowoc County Sheriff's office, stopping on the way at Brendan Dassey's residence so he could retrieve a

pair of blue jeans that the investigators wanted for evidentiary purposes.

Number eight. The conversation in the car on the way to the sheriff's office was electronically recorded except for the time spent in Brendan Dassey's residence. The three arrived at the sheriff's office at approximately 10:43 a.m. and went to a carpeted interview room equipped with videotaping equipment.

Shortly after arriving in the interview room and while the videotape equipment had been activated, Brendan Dassey was asked by Investigator Wiegert whether he remembered his *Miranda* rights that had been read to him and whether he still wanted to talk to the investigators.

He responded in the affirmative to both questions by saying, quote, yeah, unquote, and nodding his head.

Uh, number nine. The interview between Brendan Dassey and the two investigators lasted approximately three hours during the course of which Brendan Dassey made a number of inculpatory admissions. At no time during the interview was Brendan Dassey handcuffed or otherwise physically restrained.

On several occasions during the course of the interview the investigators offered soda, water, or food to Brendan Dassey and asked him if he wanted to use the bathroom. Throughout the interview, Brendan Dassey was seated on an upholstered loveseat.

Number 10. At various times during the interview the investigators encouraged Brendan Dassey to provide details to them by appealing to his sense of honesty. Quote, honesty here is the thing that's going to help you, end quote. Exhibit 5, transcript page 541.

Quote, honesty is the only thing that will set you free, uh, end quote. Exhibit 5, uh, transcript 5—page 541.

Quote, come on Brendan, be honest. I told you before that's the only thing that's going to help ya here, end quote. Exhibit 5, transcript page 547.

Quote, we just need you to be honest with us. Exhibit 5, transcript page 584.

These are but a few example of admonitions to be honest made to Brendan Dassey by the investigators. The entire interview, including the admonitions, was done by both investigators in a normal speaking tone with no raised voices, no hectoring, or threats of any kind.

Nothing on the videotape visually depicts Brendan Dassey as being agitated, upset, frightened, or intimidated by the questions of either investigator. His demeanor was steady throughout the actual questioning.

He displayed no difficulty in understanding the questions asked of him. At no time did he ask to stop the interview or request that his mother or a lawyer be present. Instead, he answered the questions put to him.

Sometimes he revised his answers after being prodded to be truthful or being told by his questioners that they knew his answer was either incomplete or untrue and he should be honest.

These appeals to honesty made by the interviewers were nothing more than a reminder to Brendan Dassey that he had a moral duty to tell the truth.

Number 11. On occasion, the interviewers purported to know details which, in fact, were not true or which represented uncorroborated theories of the

crime in which they presented to Brendan Dassey as factually accurate in order to draw information from him. In the context of this interview, the Court finds that this tactic of misleading Brendan Dassey by the interviewers occasionally pretending to know more than they did was neither improper nor coercive because it did not interfere with Brendan Dassey's power to make rational choices.

Number 12. No frank promises of leniency were made by the interviews to—interviewers to Brendan Dassey. He was told, quote, we can't make any promises, but we'll stand behind you no matter what you did, end quote. Exhibit 5, transcript page 541.

Quote, I want to assure you that Mark and I are both in your corner. We're on your side, end quote. Exhibit 5, uh, transcript page 540.

Quote, we don't get honesty here. I'm your friend right now, but I gotta—I gotta believe in you, and if I don't believe in you, I can't go to bat for you, end quote. Exhibit 5, page 547.

Quote, we're in your corner, end quote. Exhibit 5, page 547.

These and similar statements made by the interviewers were an attempt to achieve a rapport with Brendan Dassey and convince him that a truthful account of events would be in his best interest.

Based on those findings of fact, based on the record, the exhibits in this matter, the Court concludes, as a matter of law, the following:

Under a totality of the circumstances test, which I'm using here, given Brendan Dassey's relevant personal characteristics as set forth in the previous findings and on the record in this case, the State has met its

burden by showing by a preponderance of the evidence that the statements made by Brendan Dassey to Investigators Wiegert and Fassbender, and which are the subject of this motion, were the product of Brendan Dassey's free and unconstrained will reflecting deliberateness of choice. In short, they were voluntary statements.

Accordingly, the defendant's motion to suppress these statements is denied. And, I might add as a—as a footnote or, perhaps, more than a footnote here, the parties stipulated to the fact that this was not—either of these interviews, the 27th of February, March 1 of 2006, were noncustodial interviews.

Uh, the Court, after reviewing the record, has determined that even had they been custodial interviews, that the appropriate *Miranda* warnings were given, were understood by this defendant, and, thus, had they been custodial—had they been custodial interviews, uh, the result, uh, that the statements were voluntary would remain unchanged.

Now, uh, Exhibit 5, which I've alluded to in the preface of—of the findings, as well as during the course of the findings, is, as I noted at the last hearing, uh, an in camera, that means in chambers, uh, exhibit. The Court is going to seal that exhibit, uh, and it will remain sealed until the trial.

The Court believes, given the continuing media scrutiny in this matter, that the dissemination of Exhibit 5, uh, would have, conceivably, a tendency to taint a jury pool. It's my understanding—And, gentlemen, correct me if I'm wrong. First you, Mr. Kratz, you have no objection to proceeding in that fashion?

ATTORNEY KRATZ: That's correct, Judge.

THE COURT: Mr. Kachinsky?

ATTORNEY KACHINSKY: I don't object either, Your Honor.

THE COURT: All right. Anything else on this before we move on to—And I'm going to ask you, Mr. Kratz, to draft the order.

ATTORNEY KRATZ: I will—I will do that, Judge. Uh, Your Honor, I—I know that the Court was reading from a—a—a prepared statement. Is it possible that I can get a copy of that to, uh, amend or attach that to the order, or would the Court just prefer I indicate in the order, for reasons stated on the record.

THE COURT: Um, why don't you put, for reasons stated on the record. Or, I suppose, in the alternative, you can ask the already overworked court reporter to—to type a transcript here.

ATTORNEY KRATZ: I won't do that, Judge. I'll just, uh, draft a generic order. That's fine. Thank you.

THE COURT: All right. Um, the next item, I believe, Mr. Kachinsky, is yours. It's—it's a motion. Do you want to be heard on your motion to, uh, revise the terms of—of the bail?

ATTORNEY KACHINSKY: Um, yes, Your Honor.

ATTORNEY KRATZ: Judge, before we get into the—to the merits of that, I—I wonder if I could be heard just—just briefly on, uh—on that, uh—on that procedure. Um, because the, um—one of the factors on any motion to modify bond, uh, directs the Court to consider the, uh, strength of the State's case. Because of, uh, this morning's rulings, uh, it is the State's posi-

tion that the strength of the State's case has become, uh, significantly, uh, solidified.

Uh, let me also tell the Court that, um, and Mr., uh, Kachinsky, uh, is to be, uh, made aware of this, that additional, uh, forensic conclusions were received. Additional reports were received two days ago in our office which, again, need to be revealed to this Court under seal.

Lastly, Judge, the Manitowoc County, uh, Corporation Counsel in a similar request made by Mr. Avery, uh, made their position known, and I don't know in this case if they've been invited to do so.

With all of those factors, Judge, and with the, uh, bond modification on the State's part being at least an option, uh, I'm wondering whether the Court would grant the State, uh, an opportunity, perhaps five to seven days, to, uh, file those matters with the Court to include, in camera, uh, the additional information that, uh, we have received, uh, and if the Court would be willing, uh, to allow a, uh, more inclusive bail modification hearing again in the next five to seven days.

That seems to, uh, address those matters that I cannot relay to the Court in open court today, uh, and would provide this Court an opportunity to reflect upon, or at least consider, the relative, uh, strength of the State's case in the bail modification motion.

THE COURT: When were the—the—When was the forensic evidence of—of which you make mention received?

ATTORNEY KRATZ: The 10th. Two days ago, Judge.

THE COURT: All right. Mr. Kachinsky?

ATTORNEY KACHINSKY: Well, Your Honor, this motion was filed, I believe, on the 24th or 25th of—of April, 2006. Uh, State's aware, from having prosecuted the Avery case as well, at least as to, uh, the values of the property that's—that's involved, uh, and, uh, other factors relating to bond other than the recent forensics evidence, uh, as to whether or not the motion would be granted or not. Um, I don't know if the State's forensic evidence would add that much more to what the Court's already ruled today in terms of the admissibility of Mr. Dassey's statements.

So, it would be our—our preference that the Court, uh, proceed with the motion and—and make a ruling today.

THE COURT: Well, let me ask you, Mr. Kratz, is it your intention to, in effect, request that—that, uh, bail be revoked here and no bail be allowed at all?

ATTORNEY KRATZ: No, Judge. But I am going to be asking that bail be increased, uh, having the Court now consider the relative strength of the State's case. That's in—that's information I didn't have until three minutes ago.

THE COURT: All right. Uh, the—the Court the Court is inclined, uh—Since the State says it—it—it has received some additional information that—that have—may have a bearing on the, uh, uh—on the outcome of the motion, the Court is inclined to—to, uh to adjourn this particular motion today, Mr. Kachinsky, and—and set, uh, uh—set a near date for—for hearing on it.

Uh, I don't have my calendar with me.

ATTORNEY KRATZ: I can file my motion by Wednesday, if that's okay, Judge.

THE COURT: Okay.

ATTORNEY KRATZ: If the Court can give me five days to do that, I—I can certainly have that to the Court and Mr. Kachinsky.

THE COURT: So that would be, uh, Wednesday the 17th. Um, all right. Could, um—Well, I think what we'll—we'll—we'll do, uh, following—uh, following business in this court today is—is, uh, discuss a motion date in chambers. I have to, uh—I have to take a look at the calendar and you, gentlemen, probably do have to look at yours as well, and there's some other matters we should be discussing.

So, I am going to, uh, grant the—the State's motion to adjourn, order that, uh—order that the revised motion or information be filed by Wednesday, May 17. Um, any other matters to come before the Court today?

ATTORNEY KACHINSKY: Your Honor, perhaps, just to avoid unnecessarily calling, a—a witness, I don't know if the State disputes at all the value of the property that's involved, I could submit to the Court, uh, extra copy of the appraisals that were made and, I believe, perhaps, submitted in the Avery case.

If that's not the issue, if the issue is this additional evidence regarding the State's case, if that—at least that portion of the, uh, motion was taken care of, uh, that would, perhaps, facilitate some of the inconvenience that this delay is going to cause us.

ATTORNEY KRATZ: How about if we do this, Judge, I'm willing to share with Mr. Kachinsky my, uh—my feelings on that after going through the documents and at least alert him whether or not we'll need a witness at that next hearing.

THE COURT: Well, I—I noticed in his motion—in Mr. Kachinsky's motion—he said that he had sent you

some documentary, uh, proof as to values that he was claiming in motion.

ATTORNEY KRATZ: He—he brought some with him today as well.

THE COURT: Yeah. Well, is there any reason we can't just have those marked and be part of the record?

ATTORNEY KRATZ: No. That's fine.

THE COURT: Yeah. Let's do that. And the bailiff was kind enough to bring a calendar here so let's take a look. How about Friday? The afternoon? Friday, May 26?

ATTORNEY KRATZ: State's available, Judge.

ATTORNEY KACHINSKY: The only thing—Uh, I've got something in Chilton, but, perhaps, that can be, uh, taken care of, Your Honor.

ATTORNEY KRATZ: I'll see what I can do, Judge, to—

THE COURT: How about 1:15?

ATTORNEY KACHINSKY: Sure.

THE COURT: Anything else, gentlemen?

ATTORNEY KRATZ: Judge, I have to, uh, place on the record, and receive the Court's acquiescence, as the information that I intend to provide certainly has not been publicly disclosed and would, uh, I believe, be the kind of information that the Court, uh, likely would not want disclosed. May I file my motion to amend under seal as well?

THE COURT: All right. It—it will be received as—as an in camera motion, or at least the exhibits to the motion, and—and anything in the motion that, uh,

would be revelatory will be received as an—an—as an in camera motion.

ATTORNEY KRATZ: That's fine, Judge.

THE COURT: Anything further?

ATTORNEY KRATZ: No.

ATTORNEY KACHINSKY: And, Your Honor, the, uh, appraisal's been marked. I don't know if we're going to—I didn't see what letter you—

THE CLERK: One.

ATTORNEY KACHINSKY: As Exhibit 1.

THE COURT: Okay. The appraisal will be, uh, Exhibit 1 and it will be part of the—the motion, uh, and, uh, Mr. Kratz, do you have any objection to the appraisal?

ATTORNEY KRATZ: No.

THE COURT: I mean, you're not—

ATTORNEY KRATZ: Not to—not to its receipt for this hearing, Judge.

THE COURT: All right. All right. Anything else?

ATTORNEY KRATZ: No. Thank you, Judge.

ATTORNEY KACHINSKY: No.

THE COURT: Could I see you both in about ten minutes in chambers, please?

ATTORNEY KRATZ: Yes, Judge.

THE COURT: Thanks. We're adjourned.

(PROCEEDINGS CONCLUDED.)

APPENDIX H

CALUMET COUNTY SHERIFF'S DEPARTMENT

Complaint No.	Page
05-0157-955	525
	File Number

TYPE OF ACTIVITY: Interview of Brendan R. Dassey

DATE OF ACTIVITY: 03/01/06

REPORTING OFFICER: Inv. Mark Wiegert

[No. 14-cv-1310-WED, filed May 4, 2015 (Doc. 19-25)]

On 03/01/06 approximately 9:50 a.m., I (Inv. MARK WIEGERT of the CALUMET CO. SHERIFF'S DEPT.) along with Special Agent TOM FASSBENDER from the DEPT. OF CRIMINAL INVESTIGATION at Agent FASSBENDER did contact BARB JANDA who would be BRENDAN's mother on her cell phone. Agent FASSBENDER requested BARB's permission to speak with BRENDAN. BARB did grant him permission to speak with BRENDAN. Agent FASSBENDER also informed BARB that we would like to transport BRENDAN to the MANITOWOC CO. SHERIFF'S DEPT, where we could do a taped interview. Again BARB agreed to allow us to do that.

At approximately 10:00 a.m., we did arrive at the MISHICOT HIGH SCHOOL. We did meet with the Dean of Students and informed him of our wish to meet with BRENDAN and told him we had permission to take BRENDAN to the MANITOWOC CO. SHERIFF'S DEPT, in order to speak with him.

At approximately 10:05 a.m., BRENDAN did present himself in the office area of the high school. We asked BRENDAN to then go with us to the squad car, which was parked immediately in front of the MISHICOT HIGH SCHOOL. At this point an audiotape recording was activated.

At approximately 10:10 a.m., I did read BRENDAN his Miranda Rights from the Warning and Waiver of Rights form, which will be included in this report. BRENDAN stated he understood his rights and also stated that he wished to speak with us. We informed BRENDAN that we were going to go to the MANITOWOC CO. SHERIFF'S DEPT., and BRENDAN agreed with that decision. It should be noted that BRENDAN did sign the Waiver of Rights form and also initialed both areas, which I had read to him.

After leaving the high school, we did speak with BRENDAN about a pair of jeans, which we had previously learned about that had, what appeared to be, bleach stains on them. We asked BRENDAN if anybody was at his residence. BRENDAN stated that he did not believe so, but the residence would be open. We then asked BRENDAN if it would be okay to go to his residence and retrieve the jeans. BRENDAN agreed to go with us to his residence and retrieve the jeans.

At approximately 10:18 a.m., we did arrive at BRENDAN's residence on Avery Rd. where BRENDAN and Agent FASSBENDER went inside the residence. It should be noted at that time I did receive a phone call and was unable to go into the residence with BRENDAN and Agent FASSBENDER. At approximately 10:21 a.m., Agent FASSBENDER and BRENDAN did come out of the residence and Agent FASSBENDER had a pair of blue jeans that had several stains on them,

which appeared to be possibly bleach stains. The jeans were put in Agent FASSBENDER's trunk and secured there.

After leaving BRENDAN'S residence, we did go back en route to the MANITOWOC CO. SHERIFF'S DEPT. It should be noted that while en route to the MANITOWOC CO. SHERIFF'S DEPT, we did offer to stop for food or drink, however, BRENDAN indicated he did not wish to do so.

At approximately 10:43 a.m., we did arrive at the MANITOWOC CO. SHERIFF'S DEPT. and were allowed inside by Detective REMIKER who took us up to an interview room. Upon arrival in the interview room, I did remind BRENDAN about his Miranda Rights and he indicated he still wished to speak with us. At this time the audio portion of the recording was turned off because there was an audio and visual recording that was taking place inside of the interview room.

The following will be a transcript of the audio and videotaped portion of the interview with BRENDAN R. DASSEY:

WIEGERT: Brendan, I'm just gonna to read you this form, it's your Miranda Rights and then we'll talk about that a little bit, OK? The law requires you be advised you of the following rights:

- You have the right to remain silent
- Anything you say can and will be used against you in court
- You have the right to consult a lawyer and have him present with you while you're being questioned. If you cannot afford to hire an attorney, one will be appointed to represent you before any questioning.

- You have the right to stop answering questions at any time.

WIEGERT: Now you gotta speak up so this thing picks up your voice, OK? I just got two questions to ask you from there: Do you know and understand each of these rights, your rights, which I have explained?

BRENDAN: Yeah

WIEGERT: Understanding these rights, do you want to talk with us?

BRENDAN: Yeah

WIEGERT: OK. And I'm gonna have, I'm gonna sign here and I need you to sign by the X.

(phone rings)

WIEGERT: (apparently speaking on phone) Hello, um, call Dedering, I can't talk right now.

FASSBENDER: Thank you Brendan

WIEGERT: All right, ah, so like I told you, we're going to take a ride over to the a Manitowoc Sheriff's Dept. They've gotta a nice quiet room there, there's no kids running in and out and stuff, so, and if you play it right, who knows, maybe we'll get you back as soon as we can. If we, we all get over there as soon as we can. Um, I'm just gonna have you initial actually also um here and here, saying that I read you those and then that you agreed to talk with us, OK? (Pause) All right.

FASSBENDER: I think we told you Brendan, we talked to mom and mom is, is OK with this and good with this and she just wants to talk to ya when we're, we're done.

WIEGERT: Um, I just, one question I had for you real quick Brendan is um, those jeans that Tom had

talked to you about the other night with the bleach stains on 'em, do you still have those?

BRENDAN: Yeah

WIEGERT: Where are those?

BRENDAN: They're at my house.

WIEGERT: Do you know where in your house they would be?

BRENDAN: Yeah.

WIEGERT: Where would they be?

BRENDAN: They're, by the kitchen table.

WIEGERT: By the kitchen table, like laying on the floor or on a

BRENDAN: I looked at 'em and then put 'em on a chair

WIEGERT: They're sitting on a chair at the kitchen table?

BRENDAN: Yeah

WIEGERT: Oh OK. Is anybody at your house right now?

BRENDAN: Not that I know of, I think Bobbie was there, but he left.

WIEGERT: It's, is, is your house locked?

BRENDAN:

WIEGERT: No?

WIEGERT: Would you give us permission to go in and get those jeans?

BRENDAN: Yeah

WIEGERT: Just to grab the jeans and leave?

BRENDAN:

WIEGERT: That's a yes?

BRENDAN: Yeah.

WIEGERT: You have to speak up in here.

BRENDAN: Yeah

WIEGERT: You give us permission to go in your house and get the jeans?

BRENDAN: Yeah.

WIEGERT: OK. Well I'm just gonna make a phone call quick and let one of our guys know that they can just stop and pick those up, OK.

FASSBENDER: We're not gonna go do it? We're gonna grab

WIEGERT: Actually, we-we're this close, we could just grab 'em, how's that?

BRENDAN: Yeah.

WIEGERT: Tha-that makes more sense.

FASSBENDER: And they could meet us wherever they want to meet us.

WIEGERT: Sure

FASSBENDER: If we need 'em.

WIEGERT: We'll just go over and verify that they're there and grab um and ah then we'll call 'em and tell 'em what they look like and all that so.

WIEGERT: So, you like snow?

BRENDAN: all right

WIEGERT: Or would you rather have it warm up?

BRENDAN: …

WIEGERT: No?

BRENDAN: ……We got five in the garage

FASSBENDER: Do we turn here……..?

WIEGERT: So you can get out of school (cough) so you can get outta school. Yeah (pause) Yeah I remember being your age, waitin' for that snow day. That was a, that was a great thing.

FASSBENDER: In that last snow, did you have a snow day?

BRENDAN: No

FASSBENDER: You didn't get outta school that day?

BRENDAN: No.

FASSBENDER: On my gosh.

WIEGERT: During that blizzard, you didn't? You guys had school here?

BRENDAN: …

WIEGERT: Really?

FASSBENDER: Well mine got out. (pause) I (pause)

WIEGERT: Do you have to ride the bus to school or, that's, that's how you get to school right?

BRENDAN: Yeah

FASSBENDER: Does Blaine drive yet, Brendan?

BRENDAN: He's got his license but he ain't got a car to drive.

WIEGERT: What about you?

BRENDAN: I gotta do one more thing with the instructor

WIEGERT: You gotta do one more thing with the instructor?

BRENDAN:

WIEGERT: Looking forward to that?

BRENDAN:

WIEGERT: I'm sure you could find yourself a car out here somewhere.

FASSBENDER: (laugh)

(pause)

FASSBENDER: I imagine this drifts over pretty much.

WIEGERT: I'll bet you get some drifts in this driveway, huh?

BRENDAN: Yeah

FASSBENDER: At least the holes gettin' filled in with ice. (pause) ..bad in the winter.

WIEGERT: Um, we're out at Brendan's at 10:18 a.m. ah Brendan and I and Tom will go in and get those jeans, is that OK?

BRENDAN: Yeah

WIEGERT: OK.

(pause)

WIEGERT: OK, we're out of Brendan's residence, um he did give us the jeans 10:21 a.m. Sorry but I gotta narrate for this silly machine here.

BRENDAN: Yeah

WIEGERT: You know how it is.

FASSBENDER: Jeans were located in the kitchen area at the kitchen table area.

WIEGERT: (apparently on phone) Hey Wendy, it's Mark. Can you go um go up by John, he's not answering his cell phone. I left him a me-voicemail, an important voicemail I described everything on there, um, I can't talk about it right now, but

(pause)

OK, as soon as he's back um cuz we got that stuff. You guys don't need to pick those jeans up, we picked 'em up. Yeah. Yup. At Brendan's house. Brendan gave us permission to go get 'em, he's with us right now, so um, I pretty much got everything on his voicemail. Tell him to listen to his cell phone voicemail. An if you guys got any questions, call me back. Thank you. Bye.

FASSBENDER: Now what your quickest way?

WIEGERT: What's the quickest way to Manitowoc from here?

BRENDAN: I don't know.

WIEGERT: You don't know? OK, let's a, let's go right. Taking the interstate seems to take forever. We'll go down to B and then head in on B, that's the quickest way that I know of.

FASSBENDER: Did Travis tell you that I talked to him?

BRENDAN: Yeah.

FASSBENDER: He seems like a pretty cool kid.

BRENDAN: Yeah.

FASSBENDER: I like him. (pause) You go over there quite a bit on the weekends huh? Seems like a nice place to be. So how'd the night go in the motel room.

BRENDAN: Pretty good.

WIEGERT: If s a pretty nice place there, Fox Hills, isn't it?

BRENDAN: Yeah.

WIEGERT: Yeah. (pause) The sky, it looks like it could snow a little bit today.

FASSBENDER: I'm more worded about the a freezin' rain that's supposed to come in later. They're sayin' it's supposed to go up to 40 something today.

WIEGERT: I think they lied.

FASSBENDER: They always lie.

WIEGERT: When we get into Mishicot, we'll turn right.

FASSBENDER: Brendan, you hungry at all?

BRENDAN: Not really.

FASSBENDER: Drink, anything, bag a chips or something cuz this may you know be a little while.

BRENDAN: Naw.

FASSBENDER: OK, donut?

BRENDAN: No.

(pause)

WIEGERT: Did you ever go there to eat?

BRENDAN: Once.

WIEGERT: Once?

WIEGERT: Do you golf at all?

BRENDAN: Sometimes..

WIEGERT: Do you come out here to Fox Hills?

BRENDAN:

WIEGERT: Yeah.

FASSBENDER: Condos eh?

(pause)

WIEGERT: You eats lunch at school normally? er?

BRENDAN: Yeah.

WIEGERT: Yeah. How's the food there?

BRENDAN: Pretty good.

WIEGERT: Pretty good. (pause) I just wanna put a windmill up at my, by my house.

FASSBENDER: They probably wouldn't let ya.

WIEGERT: Probably.

FASSBENDER: City'd say that's an eyesore.

WIEGERT: So I'd move it out.

FASSBENDER: So how ya doin' Brendan since ah the last time we talked to you?

BRENDAN: Pretty good.

FASSBENDER: Everyone being decent to you?

BRENDAN: Yeah.

FASSBENDER: OK.

BRENDAN: Talked to my girlfriend like eight hours ..yesterday.

FASSBENDER: Oh yeah? Have you told her a-about this.

BRENDAN: She knows a little bit.

WIEGERT: Where does your girlfriend live?

BRENDAN: Manitowoc

WIEGERT: Manitowoc. Do you talk to her on the Internet or what?

BRENDAN: ....on the phone...

WIEGERT: You have ta speak up, I can't hear you.

BRENDAN: On MSN and the phone.

WIEGERT: On MSN and on, and on the phone. (pause) You got a Webcam or anything like that?

BRENDAN:

WIEGERT: No.

(pause)

WIEGERT: This car sounds like it's falling apart.

FASSBENDER: It's, it's not a, a very good car.

WIEGERT: Just keep on going until you get to the stop sign and turn right. (pause) Do you fish at all?

BRENDAN: Somewhat.

WIEGERT: Somewhat. Ever come down here?

BRENDAN: Once in a while.

FASSBENDER: Looks like a nice place, I don't know.

WIEGERT: It's not open anymore.

FASSBENDER: Oh isn't it?

WIEGERT: No. Used to be many a weddings there over the years. (pause) What's your girlfriend's name?

BRENDAN: Emily

WIEGERT: Emily. Do you know her last name?

BRENDAN: No.

WIEGERT: No.

FASSBENDER: When's their basketball game? Valders win? Was it yesterday or today?

WIEGERT: Ahhh, yeah they won, I think it was last night. They play, I just heard, Appleton or a Sheboygan Christians or Sheboygan Christian. I think they play them at home, I didn't catch the date though.

FASSBENDER: I wonder how bad Menasha got beat.

WIEGERT: They did?

FASSBENDER: I wonder how bad

WIEGERT: Oh.

FASSBENDER: I'm just assuming they did.

(pause)

WIEGERT: (Apparently on a telephone conversation) Hi this is Mark. Yeah. Ahh, within ten minutes. Yep. We're in, just, we're just, just coming in on B. All right. Bye.

FASSBENDER: Who was that?

WIEGERT: Det. Remiker

FASSBENDER: Now, now he's available, where the hell was he?

WIEGERT: He had called me before. He had just got in to work.

FASSBENDER: Oh. OK.

WIEGERT: We're gonna go straight through the lights. (Apparently another telephone conversation) Hi, this is Mark. No you can try again. OK. Bye. (pause) That's a big water tower. (pause) You'll turn right. And then you'll wanna grab the left lane. Turn left here.

FASSBENDER: This car will not get an award for quietest car.

(pause) (cough) (mumble)

WIEGERT: Stay in this lane, just …… (pause) ……through the lights (pause) Now as soon as this car gets by you, you'll wanna get in that left lane and we'll turn left at the lights. And you know where we are? It's right there, yeah.

FASSBENDER: Not sure where we ……

WIEGERT: Go up another, ah you coulda turned there, but a, we'll just to up to the lights and then turn right and come around. (pause) Just go right at the next, not here but go over there, park right in front. (pause) Turn right at the stop sign and we can park right in front. (pause) Right by the pickup 10:43 a.m., we're gonna go inside and use an interview room.

(pause) (whistling)

UNKNOWN VOICE: You here for the meeting?

WIEGERT: Um, actually no, I'm here for Det. Remiker, he's waiting for me now.

UNKNOWN VOICE: OK. And you are?

WIEGERT: Inv. Wiegert, Calumet Sheriff

UNKNOWN VOICE: All Right.

FASSBENDER: Does seem like it would have been a lot longer on the Interstate for some reason.

WIEGERT: Yeah, well the Interstate kinda goes out away from the lake.

FASSBENDER: Yeah.

WIEGERT: Bends out that way.

UNKNOWN VOICE: ….

WIEGERT: OK

FASSBENDER: Bathroom or anything?

BRENDAN: No.

FASSBENDER: Pizza?

WIEGERT: How was that pizza, any good?

BRENDAN:

WIEGERT: Yeah

FASSBENDER: We had one there.

WIEGERT: Yeah I guess we did, didn't we?

FASSBENDER: We were up here before. It was pretty good

……

WIEGERT: Good morning sheriff.

VOICE (Possibly sheriff's and/or Det Remiker): How ya doin'? How are ya? Behavin' Brendan? Brandon?

WIEGERT: Brendan.

VOICE: Brendan

WIEGERT: I'm sorry, let me just scoot through, there you go.

REMIKER: Good. Come on in.

(pause)

WIEGERT: This door Dave?

VOICE: Yup, take right. Up the stairs.

(pause and background voices)

WIEGERT: Mornin'

VOICE: Mornin'

VOICE: Mornin'

VOICE: Mark Anderson would like to chat with you if you had a chance.

WIEGERT: Sure, absolutely.

UNKNOWN VOICE: Mornin', good to see ya.

WIEGERT: Why don't you just, just you have a seat Brendan. Tom and I just gotta stop out for a minute and then we'll be right in, OK?

BRENDAN: (nods "yes") OK.

INV. WIEGERT: All right.

(door open & closes)

(pause)

Background Voice: You guys want coffee or anything? Water?

FASSBENDER: Soda? Water? (Brendan shakes head "no") You sure?

BRENDAN: Well water maybe (nods "yes").

FASSBENDER: OK.

(background voices)

(long pause)

WIEGERT: All right. How you doin' buddy?

BRENDAN: Good

FASSBENDER: Brendan, Brendan. Here you go.

WIEGERT: I'm just gonna shut this audio off, be- OK, 'cuz there's audio in the room (Brendan nods "yes"') here

BRENDAN: Yeah.

WIEGERT: Just so you know. OK. Um, I just wanted to just, just go over this real quick again. Do you remember these rights, your Miranda Rights that I read to you? (Brendan nods "yes")

BRENDAN: Yeah. (nods "yes")

WIEGERT: Um, you still want to talk to us.

BRENDAN: Yeah. (nods "yes")

WIEGERT: OK. Just wanted to make sure of that. (Brendan nods "yes")

FASSBENDER: Brendan, I want you ta, to relax. OK. Um, a little more comfortable here and stuff and what we'd like, you had a couple days since we last talked now which was Monday and you had a chance to reflect and breathe, I imagine, this and (Brendan nods "yes")

WIEGERT: You have a pen on you?

FASSBENDER: We, um

WIEGERT: I seem to have lost mine. Is this your only one. I

FASSBENDER- I got more here.

WIEGERT: OK

FASSBENDER: and ah, I kinda call it, it's a sense to breathe being in a way, and I'll just let you talk to us a little and um, and, and we've had also a chance for two days now to look at what you said and, and listen to the to tapes a little and stuff like that and, and we look at that and we say, well you know, Brendan gave us, honestly gave us this information, this information and that information, maybe I'll call them dots or whatever and some of the dots when we look at it say well, I think we need some matching up here, just a little tightening up or something. We, we feel that, that maybe, I think Mark and I both feel that maybe there's a, some more that you could tell us, um, that you may have held back for whatever reasons and I wanna assure you that Mark and I both are in your corner, we're on your side, and you did tell us yourself that one of the reasons you hadn't come forward yet was because you're afraid, you're scared, and, and one of the reasons you were scared was that you would be implicated in this, or people would say that you helped or did this (Brendan nods "yes")

BRENDAN: mm huh. (nods "yes")

FASSBENDER: OK, and that you might get arrested and stuff like that. OK? And we understand that. One of the best ways to, ta prove to us or more importantly, you know, the courts and stuff is that you tell the whole truth, don't leave anything out, don't make anything up because you're trying to cover something up, a little, um, and even if those statements are against your own interest, you know what I mean, that, then makes you might, i-it might make you look a little bad or make you look like you were more involved than you wanna be, aah, looked at, um, it's hard to do but it's

good from that vantage point to say hey, there's no doubt you're telling the truth because you've now given the whole story you've even given points where it didn't look real good for you either, an, and I don't know if I, if you, your understanding what I'm saying (Brendan nods "yes")

BRENDAN: mm huh. (nods "yes")

FASSBENDER: and, and that's why we kinda came here, to let you talk a little, maybe get some stuff off your mind or chest if you need to and then to tell us the whole truth, to take us through this whole thing that happened on Monday, not leaving anything out, not adding anything in, because if our guy looked at, looked at the tapes, looked at the notes, it's real obvious there's some places where some things were left out or maybe changed just a bit ta, to maybe lookin' at yourself to protect yourself a little. Um, from what I'm seeing, even if I filled those in, I'm thinkin' you're all right. OK, you don't have to worry about things. Um, w, were there for ya, um, and I, and, and we know what Steven did an, and, and we know kinda what happened to you when he did, we just need to hear the whole story from you. As soon as we get that and we're comfortable with that, I think you're gonna be a lot more comfortable with that. It's going to be a lot easier on you down the road, ah, if this goes to trial and stuff like that. We need to know that, because it's probably going to come out. Think of Steven for a second, Steven is already starting to say some things and eventually he is gonna potentially lay some crap on you and try and make it look like you are the bad person here. Um, and we don't want that, we want everything out in front so we can say yeah we knew that Steven. He told us that. So, ya, you know that you get my drift. I'm a, I know Mark has some, so I'm just going to give you an oppor-

tunity to talk to us now and, and kinda fill in those gaps for us. (Brendan nods "yes")

WIEGERT: Honesty here Brendan is the thing that's gonna help you. OK, no matter what you did, we can work through that. OK. We can't make any promises but we'll stand behind you no matter what you did. OK. Because you're being the good guy here. You're the one that's saying you know what? Maybe I made some mistakes but here's what I did. The other guy involved in this doesn't want to help himself. All he wants to do is blame everybody else. OK. And by you talking with us, it's, it's helping you. OK? Because the honest person is the one who's gonna get a better deal out of everything. You know how that works. (Brendan nods "yes")

BRENDAN: mm hm. (nods "yes")

WIEGERT: You know. Honesty is the only thing that will set you free. Right? And we know, like Tom said we know, we reviewed those tapes. We know there's some things you left out and we know there's some things that maybe weren't quite correct that you told us. OK. We've done, we've been investigating this a long time. We pretty much know everything that's why we're to talking to you again today. We really need you to be honest this time with everything, OK. If, in fact, you did somethings, which we believe, somethings may have happened that you didn't wanna tell us about. It's OK. As long as you can, as long as you be honest with us, it's OK. If you lie about it that's gonna be problems. OK. Does that sound fair? (Brendan nods "yes")

BRENDAN: mm hum (nods "yes")

WIEGERT: All right. Should we just go through that whole day, again on the 31st or how do you wanna do it?

FASSBENDER: We can that a..... try to give him a chance to just talk to us and

WIEGERT: Sure.

FASSBENDER: if he wants to go through the whole day, if he wants to fill in the pieces, that's, that's up to Brendan right now.

WIEGERT: What would you rather do?

FASSBENDER: Just wanna to talk to us and tell us and startin' with that day and how you actually came to know what happened and stuff. Cuz, I already know you were in the garage and stuff apparently cleaning up and stuff so tell us about that. (Brendan nods "yes")

BRENDAN: Well he was working on his car and like he did something wrong and then like he poked a hole in like somethin' and then it started leaking. And then later on when cuz I was helping him before I went over there a little bit

FASSBENDER: Yeah, I know

BRENDAN: and later on he needed help, I helped him move the car outta there and cleaned it up and I went back home and then that I later on I got a call from him and he wanted me to come over.

WIEGERT: Let's go back a little bit, OK. When did you first go over by Steve? (Brendan nods "yes")

BRENDAN: At like 9:00.

WIEGERT: But you said you were over in the garage helping him.

BRENDAN: Yeah.

WIEGERT: When was that?

BRENDAN: Like six, six-thirty.

WIEGERT: OK. So let's go back OK. Let's go back to around that time. You get home off the bus at about three forty-five? (Brendan nods "yes")

BRENDAN: Yeah. (nods "yes")

WIEGERT: And what do you do? Now you gotta be honest here.

BRENDAN: I walked home …….. and I go into my house.

WIEGERT: OK.

BRENDAN: and ....

WIEGERT: What did you see at that time?

BRENDAN: That she was talkin' er, her car was over there.

FASSBENDER: Where was her car?

BRENDAN: Like on the other side of the you know where you drove by our house

FASSBENDER: Uh huh.

BRENDAN: Where you turn there it was like on the other side of the road there, by the trees.

WIEGERT: And you just told, you just said something, you said she was talking

BRENDAN: Yeah.

WIEGERT: And you stopped now remember this is very important cuz we already know what happened

that day, OK. Let's just be honest here OK, Brendan. (Brendan nods "yes")

BRENDAN: Uh huh, (nods "yes")

WIEGERT: Let's get this out.

FASSBENDER: Use your memory, not what Steven told ya, not what anyone else told you, be honest, cuz we're gonna, we're gonna be able to tell when you're not being honest. I-I'm telling ya right now so. You're walkin' down the road and let's pick it up again. OK. (Brendan nods "yes")

BRENDAN: I seen him talkin' to her on his porch and that and I seen her, her jeep there and I walked in the house.

WIEGERT: So she's standing meaning she is Teresa?

BRENDAN: Uh huh. (nods "yes")

WIEGERT: Did you recognize her?

BRENDAN: Not at first.

WIEGERT: You just knew it later on when this all came out?

BRENDAN: Yeah, (nods "yes").

WIEGERT: So she's standing on his porch?

BRENDAN: Uh huh. (nods "yes")

FASSBENDER: Did Blaine see that?

BRENDAN: (shakes head "no") I don't think.

FASSBENDER: And you're sure you saw that, you sure it wasn't another time or anything like that (Brendan shakes head "no"), it was Halloween this year.

BRENDAN: (nods "yes") Yeah.

FASSBENDER: This last year? On the front porch the area?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: Do you remember what she was wearing? I know it's a long time ago, don't guess, if you remember, you can say it.

BRENDAN: (shakes head "no") I don't remember.

FASSBENDER: Do you remember how he was dressed?

BRENDAN:. I think he, er ah, white short, er, white shirt with like red shorts or somethin' like that

FASSBENDER: OK. Anytime you don't remember you say that all right? (Brendan nods "yes")

WIEGERT: Yep, don't make anything up. You don't know it, you don't know it. (Brendan nods "yes")

FASSBENDER: So then did what happened, you saw her and him on the porch and they were what? (Brendan nods "yes")

BRENDAN: They were talking.

FASSBENDER: And then what did you do?

BRENDAN: I walked in my house.

FASSBENDER: And they were just talking, were they doing anything else?' Were they screaming, fighting, talking, pushing, anything?

BRENDAN: (shakes head "no") Just talking.

FASSBENDER: OK. You went in your house and this is about quarter to four.

BRENDAN: (nods "yes") mm huh.

FASSBENDER: And then what did you do in your house. Be honest so we don't have ta go though this eight times.

BRENDAN: I went into my room and cuz my mom told me I had ta clean my room. I cleaned it a little bit and then played Playstation 2 for a little bit and it was about like 5:00 and my, my brother was on the phone with his friend.

FASSBENDER: Blaine?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: OK.

BRENDAN: And he was talking about going trick or treating with 'em and that Jason will pick him up at like seven.

FASSBENDER: And then?

BRENDAN: And then I ate and then went into the living room at and like I was like eating in the living room and watchin' TV.

FASSBENDER: And what did ya see?

WIEGERT: Honest.

BRENDAN: Like what?

FASSBENDER: Like what happened?

BRENDAN: Well then, then he called and said that he wanted help on his his car.

WIEGERT: OK, did he call you or did he come over?

BRENDAN: He called me.

WIEGERT: Wh-on your cell phone or on, on the house phone?

BRENDAN: The house phone.

WIEGERT: He calls your house phone?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: And this is about what time now?

BRENDAN: 'bout six, six-thirty

FASSBENDER: OK. And what does he say to you?

BRENDAN: He says do you wanna help me with the ta fix the car because he said that that if I would help him on his cars, he would like help me find a car.

FASSBENDER: OK.

BRENDAN: And so I did and then that's when he like cut somethin' and then it was leaking on the floor.

WIEGERT: Let's stop right there, so you he called you and asked you to help fix a car

BRENDAN: (nods "yes") mm huh.

WIEGERT: And you go over to this house?

BRENDAN: (nods "yes") mm huh.

WIEGERT: And where do you go?

BRENDAN: Into the garage

WIEGERT: And what's in the garage?

BRENDAN: His Monte.

WIEGERT: His Monte. (Brendan nods "yes") Where's that Suzuki?

BRENDAN: On the side.

FASSBENDER: Is the big garage door open?

BRENDAN: (nods "yes") mm huh.

FASSBENDER: So you walk in there and there and this is Halloween (Brendan nods "yes") OK, and what's he doing?

BRENDAN: He's workin' on his Monte.

FASSBENDER: What about the fire?

BRENDAN: Do you mean if it was started or somethin'? No it wasn't. (shakes head "no")

FASSBENDER: OK. We're not gonna go any further in this cuz we need to get the truth out now. We know the fire was going. We know that he had already had his altercation with Teresa. We don't believe there's a Monte in there. I talked to ya the other night and you said nothing about Monte you said nothing about something getting punctured and leaking out. We talked about cleaning somethin' up in that garage. You told me that you thought thinking back now there was blood. It was red in color plus you're at your house. You said six, six-thirty, I'll go that far with ya it might even been earlier. What's goin' on? Let's take it through honestly now. (Brendan nods "yes")

WIEGERT: Come on Brendan. Be honest. I told you before that's the only thing that's gonna help ya here. We already know what happened. OK. (Brendan nods "yes")

FASSBENDER: We don't get honesty here, I'm your friend right now, but I but I gotta I gotta believe in you and if I don't believe in you, I can't go to bat for you. OK. You're noddin', tell us what happened. (Brendan nods "yes")

WIEGERT: Your mom said you'd be honest with us. (Brendan nods "yes")

FASSBENDER: And she's behind you a hundred percent no matter what happens here:

WIEGERT: Yep, that's what she said, cuz she thinks you know more too.

FASSBENDER: We're in your corner. (Brendan nods "yes")

WIEGERT: We already know what happened now tell us exactly. Don't lie.

FASSBENDER: We can't say it for you Brendan, OK.

BRENDAN: Well that that morning he said that if he wanted me ta come over like at six-thirty and he had the fire started cuz he wanted to bu, ah, to burn some tires

FASSBENDER: Uh huh

BRENDAN: So he had it started and the jeep was still in there.

WIEGERT: Who's jeep?

BRENDAN: The Suzuki

WIEGERT: It was still in where?

BRENDAN: In the garage

FASSBENDER: So the Monte's not in there. (Brendan shakes head "no")

WIEGERT: OK.

FASSBENDER: Who's car was in the garage? Tell me the truth.

WIEGERT: We already know. Just tell us. It's OK.

FASSBENDER: The truth, that's its so easy to tell the truth. It's hard ta make things up.

BRENDAN: Her jeep.

FASSBENDER: That's right.

WIEGERT: Her jeep was in the ga-garage wasn't it? (Brendan nods "yes")

FASSBENDER: And you, you tell me if I'm wrong but when you were at the house, you just went over there cuz you had talked about it in the morning. Is that correct?

BRENDAN: (nods "yes") mm huh.

FASSBENDER: There was no call from Steven asking you to come over was there? And you went over, was the big door closed? (Brendan shakes head "no")

BRENDAN: (shakes head "no") mm uh.

FASSBENDER: You sure about that?

BRENDAN: (nods "yes") Yeah.

WIEGERT: So the big door is open and her truck is in there when you get over there?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: By her truck, who are we talkin' about?

BRENDAN: Well if I wanted ta come over later.

FASSBENDER: No, whose truck?

WIEGERT: Who's truck?

FASSBENDER: Is in there?

BRENDAN: Oh, the the truck?

FASSBENDER: Yeah.

BRENDAN: Her jeep.

FASSBENDER: Who's her?

BRENDAN: Teresa's

FASSBENDER: OK and that jeep is a what? Do you remember?

BRENDAN: Like what color?

FASSBENDER: Color or make?

BRENDAN: green like a greenish blue

FASSBENDER: OK.

WIEGERT: Is it drove in or is it backed into the garage?

BRENDAN: It's backed in.

WIEGERT: OK.

WIEGERT: Now, let's be honest. What did he tell you? What did he show you?

FASSBENDER: What did you see and what did he tell you?

BRENDAN: He showed me the knife and the rope.

WIEGERT: Where was she? Come on we know this already. Be honest.

BRENDAN: In the back of the jeep.

WIEGERT: She was in the back of the jeep? (Brendan nods "yes") Was she alive or dead at that time?

BRENDAN: Dead

FASSBENDER: Are you sure? (Brendan nods "yes") OK. What did you see in the back, now this is hard, but what did you see in the back of the jeep?

BRENDAN: That she was laying there with like a small blanket over her.

FASSBENDER: Do you remember where her head was?

BRENDAN: (shakes head "no") Not really.

FASSBENDER: Did she have clothes on?

BRENDAN: Yeah (nods "yes").

FASSBENDER: She was clothed.

BRENDAN: (nods "yes") Yeah.

WIEGERT: Was she tied up already? Or did you help him do that? (Brendan shakes head "no").

BRENDAN: She was tied up already.

FASSBENDER: Where? Tell me how she was tied up.

BRENDAN: Like the rope was right here around her body.

FASSBENDER: Are you sure? (Brendan nods "yes")

WIEGERT: Did Steve have any blood on him at that time?

BRENDAN: On his finger.

WIEGERT: What about on his body and his clothes?

BRENDAN: (shakes head "no") Not that I know of.

WIEGERT: Where did you see blood?

BRENDAN: Like, like right here.

WIEGERT: Where else in the garage?

BRENDAN: On the floor.

WIEGERT: A lot?

BRENDAN: Like drips.

WIEGERT: Where was it dripping from?

BRENDAN: I don't know.

WIEGERT: What did he tell you he did to her?

BRENDAN: That he stabbed her.

FASSBENDER: Let's, stop there for a second now, OK. I want to back up just a bit. I didn't mean to interrupt. That you sayin' like what time actually did you get over there now? About?

BRENDAN: Like quarter ta seven.

FASSBENDER: So it still about that same time, quarter to seven? (Brendan nods "yes") Are you sure?

BRENDAN: (nods "yes") mmm hum.

FASSBENDER: OK, did you really see those two talking on the on the porch?

BRENDAN: Yeah. (nods "yes").

FASSBENDER: You did? (Brendan nods "yes") You're 100% on that?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: OK.

WIEGERT: How did she get in the back of the jeep? Tell us that.

BRENDAN: I don't know.

WIEGERT: Did you help him?

BRENDAN: No. (shakes head "no")

WIEGERT: Let's be honest here Brendan. If you helped him, it's OK, because he was telling you to do it.

You didn't do it on your own (Brendan shakes head "no").

BRENDAN: I didn't, I didn't touch her.

WIEGERT: So you get over into the garage and the garage door is open, her truck is in the garage. Right?

BRENDAN: (nods "yes")Yeah.

WIEGERT: And what does he say to you?

FASSBENDER: Think about it and be honest.

WIEGERT: It's OK. What does he say to you?

BRENDAN: That's when he threatened me, that if I would say anything, that he like trusted me or somethin'.

WIEGERT: Why did he, why did he have you come over there? Did he need help with something? Remember we already know, but we need to hear it from you. Why did he have you come over there? He needed help, didn't he? (Brendan nods "yes") What did he need help with? Go ahead and tell us.

BRENDAN: Probably to get rid of the body.

WIEGERT: Yeah.

FASSBENDER: So, what Mark's sayin' is, did he call you or did he come to the door and say Brendan I need you. What, what did he do?

WIEGERT: He came over.

FASSBENDER: Tell us what he told or asked you to do?

BRENDAN: He said hey, Brendan, do you wanna help me do somethin'?

FASSBENDER: And, keep goin'.

BRENDAN: And, I said for what? And he is like fer somethin' to do in my garage.

FASSBENDER: OK, keep going.

BRENDAN: And, I said sure and then later I came over there and

WIEGERT: What time did he come to your house?

BRENDAN: 'bout, (pause) I can't remember.

WIEGERT: OK, but you, he comes to your house and asks you if you wanna do something, help him with something?

BRENDAN: (nods "yes") mm huh.

WIEGERT: Tell me that again.

BRENDAN: That he wanted me to come over there and help him move somethin'

WIEGERT: OK. Did he tell you what?

BRENDAN: (shakes head "no") No.

WIEGERT: Did you go over right away?

BRENDAN: No, I waited ten minutes.

WIEGERT: OK, So then you walk over and the garage door is open

BRENDAN: (nods "yes") Yeah.

WIEGERT: And what do you see again?

BRENDAN: Her jeep.

WIEGERT: OK.

FASSBENDER: And you're sure the big garage door is open? You didn't go in the little door.

BRENDAN: (shakes head "no") No.

WIEGERT: So you see her jeep and then what happens? Does he what?

BRENDAN: He opens the back door.

WIEGERT: OK and what does he say?

BRENDAN: And told me to help him.

WIEGERT: Da, do you ask him a question who is this, or, what?

BRENDAN: Yeah.

WIEGERT: OK. Tell me what he said.

BRENDAN: He said that it's a girl that he was kinda pee'd off at.

WIEGERT: Did he say, who, who it was?

BRENDAN: Teresa Halbach.

WIEGERT: Why was he pee'd off at her?

BRENDAN: I don't know.

WIEGERT: I think he probably told ya. So just he honest. We already know.

FASSBENDER: He's obviously not holding anything back from you. He had you come ta see this.

BRENDAN: We already know.

FASSBENDER: He used you for this. So bring us into the garage again. You mentioned earlier that's when he threatened you. Tell us that.

BRENDAN: That he threatened me that if I would say anything that he would stab me like she, he did ta her and that, that um, he was pissed off at her because of he wanted to get his his Blazer in the thing that like that last time she was there and he couldn't.

WIEGERT: OK. So he opens the back door of her truck (Brendan nods "yes") and tell me what you see.

BRENDAN: Her body laying there.

WIEGERT: What could you see of her?

FASSBENDER: The truth now. As hard as it tell us the truth.

BRENDAN: Her head, her body, her feet

WIEGERT: So she was not covered up? (Brendan shakes head "no") No. I didn't think so. See we already knew that. (Brendan nods "yes")

FASSBENDER: Did she have clothes on? Now be honest. If she did, she did, and if she didn't, she didn't.

BRENDAN: Sort of.

FASSBENDER: OK. What did she have on?

BRENDAN: Like a white T-shirt and that, pants

WIEGERT: What do you mean sort of? Either she had clothes on or she didn't. It's, was some of it on some of it off? What?

BRENDAN: It was like ripped.

WIEGERT: It was ripped. (Brendan nods "yes") Where was it ripped?

BRENDAN: Like right here.

WIEGERT: Was it a T-shirt or button up shirt or what kind of shirt?

BRENDAN: A button up one.

WIEGERT: What color?

BRENDAN: Like a black one.

WIEGERT: OK, before you just said there was a white T-shirt. She had that on too?

BRENDAN: (nods "yes") mm huh.

WIEGERT: Underneath that shirt?

BRENDAN: Yeah. (nods "yes")

WIEGERT: OK, and in the other interview you said it was blue. Do you remember what color it was? If you don't remember, say you don't remember.

BRENDAN: I don't remember.

WIEGERT: OK. So he threatens you and what does he say to you?

BRENDAN: That, ta help him get rid of the body.

WIEGERT: OK.

FASSBENDER: Before you mentioned trust, that he said something about trust. Tell us about that. What did he say about that?

BRENDAN: That he really likes me much and that he trusts me that I won't say nothin'.

WIEGERT: OK. So what happens next?

BRENDAN: That he told me to grab her feet so I did and

WIEGERT: mm huh.

BRENDAN: So we took her out in the back and put her in the fire pit.

WIEGERT: Was the fire burning already?

BRENDAN: Yeah.

FASSBENDER: Tell us did you carry her out there or did you use somethin' to get her back there?

BRENDAN: Well, we lifted her out of the jeep and put her on like a, like a wheeled thing.

FASSBENDER: A wheel thing, what's that?

BRENDAN: Like the things where you get under the car.

WIEGERT: A creeper?

BRENDAN: Yeah. (nods "yes")

WIEGERT: OK.

FASSBENDER: And is that creeper always kept in his garage?

BRENDAN: Well he was borrowing it from the yard or somethin' like that.

WIEGERT: What's that creeper say on it? Do you remember? (Brendan shakes head "no") What color is it?

BRENDAN: Like black and red.

WIEGERT: Black and red, OK. So you guys lift her out of the truck,

BRENDAN: mm huh. (nods "yes")

WIEGERT: And you got which part of her again?

BRENDAN: Her feet.

WIEGERT: And what is Steve carrying?

BRENDAN: Her head and her shoulders.

WIEGERT: And you put her on the creeper?

BRENDAN: Yeah. (nods "yes")

FASSBENDER: Does she have shoes on?

BRENDAN: (shakes head "no") No.

WIEGERT: Does she have, did you take her clothes off then?

BRENDAN: uh uh. (shakes head "no")

WIEGERT: Was she tied up?

BRENDAN: Yeah.

FASSBENDER: Describe that again how she was tied up, and again make it easy on yourself, just tell us the truth the first time.

WIEGERT: The hard part's over.

BRENDAN: That it was like wrapped around her like three, four times.

WIEGERT: Wrapped around where? Show us where on your body.

BRENDAN: Like, like right here.

WIEGERT: OK. What about her feet?

BRENDAN: Yeah. (nods "yes")

WIEGERT: Yeah, what?

BRENDAN: They were tied up.

WIEGERT: What were they tied up with?

BRENDAN: Rope.

WIEGERT: What kinda rope?

BRENDAN: Like, ah, like that round.

WIEGERT: Something you'd use for clothesline? That type of thing?

BRENDAN: Yeah. (nods "yes")

WIEGERT: What color was it?

BRENDAN: Like white and blue

WIEGERT: OK.

FASSBENDER: What about her hands?

BRENDAN: (shakes head "no") I don't remember.

WIEGERT: Where did you see injuries on her?

BRENDAN: Her stomach.

WIEGERT: Her stomach. What did it look like?

BRENDAN: Like she was stabbed.

FASSBENDER: I don't necessary, I gonna tell you I don't know what it looks like when someone stabbed. OK, you gotta talk to someone that doesn't realize this. Tell us what you saw.

BRENDAN: Like it was all bleeding and that.

WIEGERT: Show me where and on you that would be.

BRENDAN: Like right here.

FASSBENDER: How much blood? Was the, show me on you the extent of the stain of the blood that you saw.

BRENDAN: Like right there.

FASSBENDER: That whole area. (Brendan nods "yes") Was it pretty wet yet or dry?

BRENDAN: Like damp.

FASSBENDER: Damp. (Brendan nods "yes") Could you see flesh or just shirt?

BRENDAN: A little bit of flesh.

FASSBENDER: How many times did he say he stabbed her?

BRENDAN: Once.

WIEGERT: What else did he do ta her? We already know, be honest.

FASSBENDER: We've got enough of her to know some things that happened to her. So tell us the truth.

WIEGERT: What else did he do ta her?

BRENDAN: Raped her.

WIEGERT: Did he tell you that? (Brendan nods "yes")

FASSBENDER: Tell us about that. And where he did it.

BRENDAN: I don't know where he did but

WIEGERT: What did he say he did in his words? What did he tell you? You can, you can swear, you can use any of his language you want. Tell us exactly what he told you he did to her.

BRENDAN: That he ripped off her clothes and she refused and she tried to get away but he, he wa, he was too strong for her (pause) and he did it.

WIEGERT: He did what?

BRENDAN: Raped her.

FASSBENDER: What did he say? Did he use those words? (Brendan nods "yes")

WIEGERT: Are you sure (Brendan nods yes") cuz its usu, not usually the words he uses? Are, are if you're sure, that's OK.

BRENDAN: (nods "yes") Yeah.

WIEGERT: Where did that happen?

BRENDAN: I don't know.

WIEGERT: And she tried to get away (Brendan nods yes) but he was too strong.

BRENDAN: Yeah

WIEGERT: And then what did he do to her?

BRENDAN: Well after he was done, that's when he put her back in the jeep in the back.

FASSBENDER: Was she dead then yet or not?

WIEGERT: Brendan, were you there when this happened?

BRENDAN: No. (shakes head "no")

WIEGERT: OK. Was she dead there then or not?

BRENDAN: Yeah. (nods "yes")

FASSBENDER: How do you know that? I have a feelin' I know how you know that.

WIEGERT: We already know Brendan. We already know. Come on. Be honest with us. Be honest with us. We already know, it's, OK? We gonna help you through this, alright? (Brendan nods "yes") Tell us, how do you know that?

BRENDAN: I was outside riding my bike

WIEGERT: mm huh.

BRENDAN: And I could hear it.

WIEGERT: What could you hear?

BRENDAN: Screaming.

WIEGERT: OK. Was the door closed at that time?

BRENDAN: mm huh. (nods "yes")

WIEGERT: Did he know you were out there?

BRENDAN: No. (shakes head "no")

WIEGERT: What was the screaming like? What was she saying?

BRENDAN: Like help me.

WIEGERT: Did you know what was going on?

BRENDAN: (shakes head "no") No.

WIEGERT: What did you do?

BRENDAN: Well, I was going up to the, the driveway and get the mail.

WIEGERT: What time was that?

BRENDAN: 'bout four, four thirty

FASSBENDER: Was it light out?

BRENDAN: Yeah. (nods "yes")

FASSBENDER: OK.

WIEGERT: So you go out on your bike and you hear screaming coming from where?

BRENDAN: His house.

WIEGERT: Whose house?

BRENDAN: Steven's.

WIEGERT: The house or the garage?

BRENDAN: The house.

WIEGERT: From the house.

FASSBENDER: All right. Then what do you do?

BRENDAN: I just went to go get the mail and went in the house.

WIEGERT: So you go get the mail and you go in the house and then what?

BRENDAN: Sat down and watched TV.

WIEGERT: OK.

FASSBENDER: OK Brendan, you're doing a good job. Let's go back to when you go outside to get your bike and you gotta go get the mail and you said you heard screaming. Anymore, tell us more about what you heard. That you said help me. Was a female screaming?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: What else did you hear her say if anything?

BRENDAN: That's all I heard.

FASSBENDER: OK. Was her vehicle still there?

BRENDAN: Yeah, (nods "yes")

WIEGERT: Where is the vehicle at that time?

BRENDAN: By the big trees.

WIEGERT: OK.

FASSBENDER: Did that scare you when you heard that screaming?

BRENDAN: Sort of.

FASSBENDER: Did you go over to his house then?

BRENDAN: uh uh (shakes head "no")

FASSBENDER: Are you sure?

BRENDAN: Yeah, (nods "yes")

FASSBENDER: And you said you rode your bike down to get the mail?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: Came back and then what'd you do? Honestly. You went over to his house?

BRENDAN: (shakes head "no") No.

FASSBENDER: What'd you do?

BRENDAN: I went in ta our garage and put the bike away.

FASSBENDER: mm huh

BRENDAN: And Bryan was in there workin' on his car.

FASSBENDER: Yeah.

BRENDAN: I he, I asked him if he wants any help and he said no, that if he wanted help, he would come in and get me or somethin' so I went in the house and I sat down.

WIEGERT: Did Bryan hear the screaming too?

BRENDAN: No, he had the radio going.

WIEGERT: OK.

FASSBENDER: Did you tell Bryan?

BRENDAN: (shakes head "no") No.

FASSBENDER: OK, you went in the house and sat down, and then?

BRENDAN: I waited and then I, I watched TV for a little bit and my mom came home.

FASSBENDER: And she comes home at about what time?

BRENDAN: 'bout four thirty, five

FASSBENDER: OK.

WIEGERT: And then what happens?

BRENDAN: She asked me if anybody got the mail. I'm like yeah, I did and watched TV more and he came over and asked if she wanted help.

WIEGERT: He came over and asked you what?

BRENDAN: If I could help him move somethin'.

WIEGERT: OK.

FASSBENDER: OK, let's, to this point now, I think we're pretty close to the truth. How close are we Brendan?

BRENDAN: Pretty close.

FASSBENDER: OK, then give us the little parts that we don't have yet up ta that point. Does Steven? There's somethin' in there we're missin'. You heard her, I have a feelin' he saw you, you saw him somethin' in here that we're missin' cuz you know we're not idiots, I don't see him comin' over to the house and asking you to help him unless you knows you know somethin' so tell us what you knew that he knew.

WIEGERT: It's OK Brendan. We already know.

FASSBENDER: I think you went over to his house and then he asked him to get his mail somethin' in here is missing.

BRENDAN: Well, when I got the mail there was like a envelope in there with his name on it.

FASSBENDER: All right.

WIEGERT: OK, now we're goin' so what did you do?

BRENDAN: I knocked on the door and he answered it.

WIEGERT: Yeah, and then what?

BRENDAN: I gave it to him and then I left.

WIEGERT: Come on now. You just heard screaming over there.

FASSBENDER: You're making this hard on us and yourself.

WIEGERT: Be honest. You went inside, didn't you? (Brendan nods "yes")

FASSBENDER: Yeah.

WIEGERT: You went in the trailer?

BRENDAN: mm huh. (nods "yes")

FASSBENDER: You're noddin'.

WIEGERT: OK. Did he invite you in?

BRENDAN: Yeah.

WIEGERT: OK and where was she?

BRENDAN: In his room.

WIEGERT: OK, did you go back there and look?

BRENDAN: No. (shakes head "no")

WIEGERT: Brendan, be honest.

BRENDAN: I didn't.

WIEGERT: How do you know she was in his room?

BRENDAN: The door was open.

WIEGERT: Could you see her?

BRENDAN: (nods "yes") Yeah.

WIEGERT: Was she alive?

BRENDAN: Well she was handcuffed to a, the thing.

WIEGERT: She was handcuffed to what?

BRENDAN: The bed.

WIEGERT: Was she naked? (Brendan nods "yes") Was she alive?

BRENDAN: Yeah.

WIEGERT: How do you know?

BRENDAN: Cuz she was moving around.

WIEGERT: Was she making any noise?

(pause)

FASSBENDER: It's alright bud.

BRENDAN: Yeah.

FASSBENDER: What was' she sayin'?

BRENDAN: Screaming for help.

WIEGERT: What was handcuffed? Her hands or her legs or both?

BRENDAN: Both.

WIEGERT: And what were they handcuffed to?

BRENDAN: Like the hand like there is round poles on each side.

WIEGERT: OK.

FASSBENDER: Of his bed? (Brendan nods "yes") And you, your, your gettin' there OK. Lets back up again and did you go get the mail?

BRENDAN: Yeah.

FASSBENDER: When you went to get the mail with your bike did you hear somethin' at that time or did it happen when you came back with the mail?

(pause)

FASSBENDER: You can do it. Just tell us the truth.

BRENDAN: When I came back.

FASSBENDER: I gotta believe this is in your in your mind right now like a picture. (Brendan nods "yes") There's a video in your mind, this whole thing and you're trying to get it out and the only way you can get it out is by talking about it right now. So you came back, did you have a letter for Steven?

BRENDAN: Yeah.

FASSBENDER: Did you go ta his trailer?

BRENDAN: Yeah.

FASSBENDER: Did you hear screaming coming from inside the trailer?

BRENDAN: Yeah.

FASSBENDER: What did you do then? You had to, are you at the door or where are you? When you first hear the screaming where are you?

BRENDAN: Like by the other camper that we passed.

FASSBENDER: Way down there?

BRENDAN: mm huh.

FASSBENDER: You hear screaming half, halfway or a quarter way down that frontage road, your driveway road?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: Do you are you able to make out any of the words?

BRENDAN: (shakes head "no") No.

FASSBENDER: OK. Take me from there and be honest so we don't have ta keep backing up here. Cuz, we, we know but we need it in your words. I can't, I can't say it.

WIEGERT: Brendan, I already know. You know we know. OK. Come on buddy. Let's get this out, OK?

FASSBENDER: You're coming back with the mail, take us through it. It's the video in your head, play it for us.

WIEGERT: You come back with the mail. What happens?

BRENDAN: Well I stopped and I seen if there was any mail for me so and I seen Steven's so I went over there right away ta bring it over by 'em and I knocked like three times and then he finally came.

FASSBENDER: Are you hearing anything coming from the other side of the trailer at this time?

BRENDAN: Yeah.

FASSBENDER: What?

BRENDAN: The words, help me.

FASSBENDER: OK. That's gotta be pretty devastating, right? (Brendan nods "yes") But you still knock.

BRENDAN: mm huh.

WIEGERT: You went into the trailer then? (Brendan nods "yes")

FASSBENDER: You knock and he comes to the door. What's he look like? Is he dressed, has he got anything on him, what-what's he look like?

BRENDAN: He's got a white shirt on with red shorts and all sweaty.

FASSBENDER: He's all sweaty. (Brendan nods "yes") Any blood, at this time?

BRENDAN: (shakes head "no") No.

FASSBENDER: All right.

WIEGERT: Does he let you in the trailer?

BRENDAN: He asks me in the kitchen.

WIEGERT: He what?

BRENDAN: He walks me into the kitchen.

FASSBENDER: What does he say to you?

BRENDAN: If I want a soda.

FASSBENDER: Does he know you've heard anything? Is she still saying stuff?

BRENDAN: Yeah.

FASSBENDER: Then he walks you into the kitchen. (Brendan nods "yes") OK, play the video for us Bud, tell us what's happenin'.

WIEGERT: It's OK, tell us what happened. What did he say to you?

BRENDAN: That he never got some of that stuff so he wanted to get some.

FASSBENDER: Never got what?

BRENDAN: A girl.

WIEGERT: OK.

FASSBENDER: What'd you say just a second ago though?

WIEGERT: Repeat what you said.

BRENDAN: That he wanted to get some.

FASSBENDER: Some what?

BRENDAN: Pussy.

WIEGERT: That's what he said to you? (Brendan nods "yes") OK.

FASSBENDER: Now I can start believing you, OK? (Brendan nods "yes")

WIEGERT: So do you have a soda?

BRENDAN: mm huh. (Brendan nods "yes")

WIEGERT: Ands then what happens next?

BRENDAN: I open it and drank some.

FASSBENDER: What's he sayin' to you? (pause) It's all right. You are doing the right thing.

WIEGERT: Come on, what's he sayin'?

BRENDAN: That he wants to keep on doing it.

WIEGERT: OK.

FASSBENDER: Doing what?

BRENDAN: Raping her.

FASSBENDER: What kind of words is he use, using though? You can say those words here.

BRENDAN: That he wanted to fuck her so hard.

FASSBENDER: Yeah.

WIEGERT: Could you see her at this time?

BRENDAN: (shakes head "no") No.

WIEGERT: OK. What happens next? Remember, we already know, but we need to hear it from you, it's OK. It's not your fault What happens next?

FASSBENDER: Does he ask you?

WIEGERT: He does, doesn't he?

FASSBENDER: We know.

WIEGERT: He asks you doesn't he? (Brendan nods "yes") What does he ask you?

BRENDAN: That if I wanted the girlfriend.

FASSBENDER: Tell us how he said it.

BRENDAN: That if, if he wanted me to have to get some pussy.

FASSBENDER: Yeah, OK.

WIEGERT: And then what happens next?

BRENDAN: That he said that if I wanted to I could go get some but not right now.

WIEGERT: Come on, be honest, you went back in that room.

FASSBENDER: Tell us now Brendan.

WIEGERT: We know you were back there. Let's get it all out today and this will he all over with.

FAASSBENDER: He asked if you want some, right? (Brendan nods "yes") That's what you told us.

BRENDAN: Um huh.

FASSBENDER: If you want some pussy,

WIEGERT: Wha

FASSBENDER: What did you tell him?

BRENDAN: I said I wasn't aged and so he took me back there and showed me some.

WIEGERT: What did he show you?

BRENDAN: Her naked body.

WIEGERT: OK, was she alive?

BRENDAN: Yeah.

WIEGERT: Is she talking?.

BRENDAN: Yeah.

WIEGERT: What'd she say? (pause) What'd she sayin'? I know it's hard but you gotta tell us, what'd she say?

FASSBENDER: The video will never go away unless you can talk to us about it.

WIEGERT: Go ahead, what'd she say?

BRENDAN: She's asking Steven why he would do something like that.

FASSBENDER: Did she say anything to you? She see, does she see you?

BRENDAN: Yeah.

FASSBENDER: Does she say something to you?

BRENDAN: (shakes head "no") No.

FASSBENDER: Describe again, were you accurate when you described how she was on the bed, how is she attached, where is she, tell us that and be truthful again.

BRENDAN: That she was chained up to the bed and, 'er she's faced up.

FASSBENDER: Face up, no clothes on?

BRENDAN: (shakes head "no") Uh uh.

WIEGERT: What do you mean she's chained up, explain that.

BRENDAN: Like some handcuffs.

WIEGERT: Where are the handcuffs? On her arms or on her legs, or where?

BRENDAN: Both.

WIEGERT: OK.

FASSBENDER: Do you remember the color of the handcuffs? And the leg irons? (shakes head "no")

BRENDAN: Like regular ones.

FASSBENDER: Which would be what color?

BRENDAN: Silver.

FASSBENDER: OK.

WIEGERT: Now are her legs spread apart or are they together or tell us how it looks?

BRENDAN: Like spread apart a little bit.

WIEGERT: So you, he, he brings you back there and he shows you her (Brendan nods "yes") and what do you do? Honestly. Because we think

FASSBENDER: Very important.

WIEGERT: We know happened.

FASSBENDER: It's hard to be truthful

WIEGERT: We know what happened, it's OK. (pause) What did you do?

BRENDAN: I didn't do nothin'.

BRENDAN: Brendan, Br-Brendan, come on. What did you do?

FASSBENDER: What does Steven make you do?

WIEGERT: It's not your fault, he makes you do it.

BRENDAN: He told me ta do her.

WIEGERT: OK. What does that mean to you?

BRENDAN: Ta screw her.

WIEGERT: OK. Did you do that? Honestly?

BRENDAN: Yeah.

WIEGERT: OK.

FASSBENDER: All right, take a breath Bren, take a breath, that's very hard to admit to. Did he watch?

BRENDAN: Yeah.

FASSBENDER: You said you, tell us what you did, you take your clothes off?

BRENDAN: Yeah.

FASSBENDER: And you had intercourse with her? (Brendan nods "yes")

WIEGERT: What does intercourse mean to you?

BRENDAN: That you stuck it in her.

WIEGERT: Stuck what in her? It's OK.

BRENDAN: My penis.

WIEGERT: An where did you stick it?

BRENDAN: In her vagina.

WIEGERT: OK. (pause). How many times did you do that? How long did it take?

BRENDAN: Five minutes.

WIEGERT: OK. What did you do after that?

BRENDAN: Put my clothes back on.

WIEGERT: OK. Where is Steve at this time.

BRENDAN: Standing by the door.

WIEGERT: What does Steve do then?

BRENDAN: Told me I di, I did a good job.

FASSBENDER: Was she saying anything, while you were doing this? (Brendan shakes head "no") Why?

BRENDAN: I don't know.

FASSBENDER: Was, did she have anything over her mouth or was it clear? Tell us the truth.

BRENDAN: It was clear.

FASSBENDER: There was nothin' covering her mouth? (Brendan shakes head "no") Did she ask you not to do this to her?

BRENDAN: Yeah.

FASSBENDER: Tell me what she said.

BRENDAN: She told me not to do it so and told me not, to do the right thing.

FASSBENDER: Which was what?

BRENDAN: Not, not to do it and tell Steven to knock it off.

FASSBENDER: Did she ask you to do anything else for her?

BRENDAN: Ta uncuff her.

FASSBENDER: Go ahead. Anything else? (Brendan shakes head "no") (pause) Were these things she was saying to you while you were doing this act?

BRENDAN: Yeah

FASSBENDER: Was she kinda sayin' it softly or loud enough or what?

BRENDAN: Well she was cryin' an.

FASSBENDER: OK.

WIEGERT: After you're done and you put your clothes on, what happens next?

BRENDAN: He told me I did a good job and then he closed the door.

WIEGERT: OK.

BRENDAN: Took me in the living room, watched a little TV.

WIEGERT: Both of you did? (Brendan nods "yes")

FASSBENDER: He didn't stay in the bedroom or go back in there?

BRENDAN: (shakes head "no") Uh uh.

WIEGERT: How long did you watch TV?

BRENDAN: 'bout 15 minutes.

WIEGERT: And then what happens?

FASSBENDER: And what's he sayin' while you're watching TV? Are you discussing this situation now?

BRENDAN: Yeah.

FASSBENDER: What's he say, what did he sayin'? (pause) As hard as this is, you gotta tell us what he's sayin'.

BRENDAN: He told me that's how you do it and

WIEGERT: What else?

BRENDAN: That feels, he asked me if it felt good.

WIEGERT: Then what did you talk about, what else did you talk about?

BRENDAN: That how he was going to get rid of it.

WIEGERT: And what did he tell you?

BRENDAN: That he was going to burn her.

FASSBENDER: When you say get rid of it, what do you mean?

BRENDAN: Get rid of her body.

FASSBENDER: OK.

WIEGERT: And he says what?

BRENDAN: That he was going to burn her body after that happened.

WIEGERT: Was there anything else that you guys talk about?

BRENDAN: (shakes head "no") No.

WIEGERT: Then what happens after that?

FASSBENDER: Is she alive yet?

BRENDAN: Yeah.

FASSBENDER: OK.

WIEGERT: What happens after you were done watching TV for 15 minutes.

BRENDAN: I told him I had to leave cuz I had ta call Travis.

WIEGERT: Brendan, be honest. You were there when she died and we know that. Don't start lying now. We know you were there. What happened?

FASSBENDER: He ain't gonna lie to you, hey we know that OK.

WIEGERT: We already know, don't lie to us now, OK, come on. What happens next?

FASSBENDER: You're just hurting yourself if you lie now.

BRENDAN: Then he went in, back in there and he stabbed her.

WIEGERT: You were with him? (Brendan nods "yes") Yes?

BRENDAN: Yeah.

WIEGERT: Where did he stab her?

BRENDAN: In the stomach.

WIEGERT: What else did he do to her? (pause) He did something else, we know that. (pause) What else?

BRENDAN: So he tried, she, he tied her up.

WIEGERT: What do you mean he tied her up?

BRENDAN: So he could take her out there.

WIEGERT: Before or after he stabbed her?

BRENDAN: After.

WIEGERT: When he stabbed her, did she scream or what?

BRENDAN: Yeah.

WIEGERT: How many times did he stab her?

BRENDAN: Once.

WIEGERT: Then show me where.

BRENDAN: Right here.

WIEGERT: We know he did something else to her, what else did he do to her?

BRENDAN: He choked her.

WIEGERT: How did he do that? Tell me how he did it.

BRENDAN: With his hands,

WIEGERT: Was he on top of her?

BRENDAN: Yeah.

WIEGERT: And did he choke her until what, did she go unconscious, what, tell me.

BRENDAN: That she couldn't breathe anymore.

WIEGERT: Yeah. Did she fall asleep, go unconscious?

BRENDAN: Go unconscious.

WIEGERT: Is that before of after he stabbed her?

BRENDAN: After.

WIEGERT: So he stabs her, show me what he does. Just demonstrate for me.

FASSBENDER: Yeah, let's, you-you co-come down the roo, the hallway, he, you go with him?

BRENDAN: Yeah.

FASSBENDER: What does he tell you he's going to do at, this time, you're goin' back to the bedroom?

BRENDAN: That he was gonna tie her up, stab her and then choke like, choke her and that.

FASSBENDER: He told you this?

BRENDAN: Yeah.

FASSBENDER: And you went with him.

BRENDAN: (nods "yes")

FASSBENDER: He went into the bedroom, what does he do? Again, the video, you see it, I know you see it, what does he do?

BRENDAN: That he gr, he grabs the rope that was on the side of the bed, tied her up, stabbed her like this and jumped on her and started choking her.

FASSBENDER: Is she fighting at this time?

BRENDAN: She's trying ta move away,

FASSBENDER: Is she saying anything?

BRENDAN: Screaming.

WIEGERT: You helped to tie her up though, didn't you? (pause) Brendan, cuz he couldn't tie her up alone, there's no way. Did you help him tie her up?

BRENDAN: Yeah.

WIEGERT: OK. Tell me what you did.

(pause)

FASSBENDER: Go ahead Bud.

BRENDAN: That he was on the other side and, we had ta unhook the ch, the, the hands and tied her up.

WIEGERT: So you helped unhook her hands? And what exactly did you do? Tell me exactly what you did.

BRENDAN: I got the key for the lock and unlocked it and after a, I grabbed her arm, put it on the side and tied her up.

WIEGERT: What arm?

BRENDAN: Her le, right one.

WIEGERT: So you grab her right arm and you do what with it?

BRENDAN: Put it on the side like this. I put the rope right here.

FASSBENDER: Did you tie her up in front or behind? Did you tie her, I guess I want to say did you tie her hands up?

BRENDAN: Yeah.

FASSBENDER: In front or behind her body?

BRENDAN: In front

FASSBENDER: How? Like this or like or like this, show us.

BRENDAN: Like this.

FASSBENDER: OK. What is she saying at this time? Or is Steven telling her something? What's he telling her?

BRENDAN: She was saying to stop doing what he was.

FASSBENDER: And what's he saying?

BRENDAN: That he wouldn't.

WIEGERT: What's he saying though, I mean what's words is he using? Is he swearing at her, what is he saying?

BRENDAN: He told her to shut her mouth up.

FASSBENDER: Is he telling her that he's gonna kill her, is he telling her he's gonna let her go, what's he telling her?

BRENDAN: That he was gonna kill her.

WIEGERT: So you tie her up, then what happens?

BRENDAN: Then we get the other rope and tie her legs up.

WIEGERT: How'd you do that?

BRENDAN: Around the bottom, like where the

WIEGERT: Show me on you where he does that, where you guys do that?

BRENDAN: Right here.

WIEGERT: Who ties her legs up?

BRENDAN: He does.

WIEGERT: Do you help? Otherwise she's gonna kick.

BRENDAN: Yeah.

WIEGERT: Did you help or not, yes or no?

BRENDAN: (nods "yes") Yeah.

WIEGERT: OK, tell me how you did that.

BRENDAN: I held, I held her feet down.

WIEGERT: Held her feet down. (Brendan nods "yes") And what did Steve do?

BRENDAN: He tied her legs up.

FASSBENDER: Is this on the bed?

BRENDAN: (nods "yes") mm huh.

WIEGERT: Then what happens?

BRENDAN: He told me to grab her feet and we took her outside.

FASSBENDER: Is she still alive?

BRENDAN: No, she was unconscious er

FASSBENDER: OK, OK, you got her tied up, she's, when you're getting her tied up, is she, is she alive or has he choked her already?

BRENDAN: He choked her already.

FASSBENDER: Did he choke her when she had the handcuffs on?

BRENDAN: Yeah.

FASSBENDER: OK.

WIEGERT: When did he stab her?

BRENDAN: When, before he choked her.

FASSBENDER: Are you sure about that? (Brendan nods "yes")

WIEGERT: So she's laying there, handcuffs on, and that's when Steve, stabs her?

BRENDAN: mm huh. (nods "yes")

WIEGERT: And then, then he chokes her after that?

BRENDAN: Yeah.

WIEGERT: Are you sure? (Brendan nods "yes")

FASSBENDER: Where exactly did he stab her again?

BRENDAN: In the stomach.

FASSBENDER: Was it the chest or the stomach?

BRENDAN: Well sort of in the ribs.

FASSBENDER: An what did he use to stab her?

BRENDAN: A knife.

FASSBENDER: Where did he get the knife from?

BRENDAN: From the kitchen.

FASSBENDER: And what, how big was the knife, show us.

BRENDAN: 'bout like that.

FASSBENDER: About that big and he got it out of the kitchen. When he went in there, did he threaten her with the knife, did he just go right and do it, what did he do?

BRENDAN: That he threatened her.

FASSBENDER: Tell us what he said.

BRENDAN: That he was gonna kill her by stabbing her and not lettin' her go.

WIEGERT: What else did he do to her? We know something else was done. Tell us and what else did you do? Come on. Something with the head. Brendan?

BRENDAN: Huh?

FASSBENDER: ....can't

WIEGERT: What else did you guys do, come on.

FASSBENDER: What he made you do Brendan, we know he made you do somethin' else.

WIEGERT: What was it? (pause) What was it?

FASSBENDER: We have the evidence Brendan, we just need you ta, ta be honest with us.

BRENDAN: That he cut off her hair.

WIEGERT: He cut off her hair? In the house?

BRENDAN: mm huh.

WIEGERT: Why did he do that? Was she alive?

BRENDAN: No.

WIEGERT: What did he do with the hair?

BRENDAN: He set it down on the counter.

WIEGERT: The counter where?

BRENDAN: Like a dresser.

FASSBENDER: What did he use to cut the hair off with?

BRENDAN: The knife.

FASSBENDER: Was she alive? (Brendan shakes head "no")

FASSBENDER: Did he say why he did that?

BRENDAN: No.

WIEGERT: OK, what else?

FASSBENDER: What else was done to her head?

BRENDAN: That he punched her.

WIEGERT: What else? (pause) What else?

FASSBENDER: He made you do somethin' to her, didn't he? So he-he would feel better about not bein' the only person, right? (Brendan nods "yes") Yeah.

WIEGERT: nun huh.

FASSBENDER: What did he make you do to her?

(pause)

WIEGERT: What did he make you do Brendan? It's OK, what did he make you do?

BRENDAN: Cut her.

WIEGERT: Cut her where?

BRENDAN: On her throat.

WIEGERT: Cut her throat? Te-when did that happen?

BRENDAN: Before he picked her off the bed?

WIEGERT: So she was alive yet right? (Brendan nods "yes")

WIEGERT: So she's alive and you cut her throat?

BRENDAN: mm huh.

WIEGERT: Was that before or after Steve stabbed her?

BRENDAN: After.

WIEGERT: It was after Steve stabbed her?

BRENDAN: (nods "yes") mm-huh.

WIEGERT: Was she a-how do you know she was alive? (pause) Tell me. When you cut her throat, how do you know she was alive?

BRENDAN: She was breathing a little bit.

WIEGERT: She was breathing a little bit. Did Steve tell you to do that?

BRENDAN: Yeah.

(Fassbender and Wiegert speaking at the same time-cannot understand)

FASSBENDER: How'd he tell you to do, how'd he tell you to do that? What'd he say?

BRENDAN: To go across her throat and pull it back.

FASSBENDER: Did he say why he wanted you to do that?

BRENDAN: No. (shakes head "no")

WIEGERT: Which-knife did you use?

BRENDAN: The same one he stabbed her with.

FASSBENDER: And how many times did he stab her again?

BRENDAN: Once

FASSBENDER: Are you sure about that? (Brendan nods "yes")

WIEGERT: So Steve stabs her first and then you cut her neck? (Brendan nods "yes") What else happens to her in her bed?

FASSBENDER: It's extremely, extremely important you tell us this, for us to believe you.

WIEGERT: Come on Brendan, what else?

(pause)

FASSBENDER: We know, we just need you to tell us.

BRENDAN: That's all I can remember.

WIEGERT: All right, I'm just gonna come out and ask you. Who shot her in the head?

BRENDAN: He did.

FASSBENDER: Then why didn't you tell us that?

BRENDAN: Cuz I couldn't think of it.

FASSBENDER: Now you remember it? (Brendan nods "yes") Tell us about that then.

BRENDAN: That he shot her with his .22.

WIEGERT: You were there though?

BRENDAN: Yeah.

WIEGERT: Where did this happen?

BRENDAN: Outside.

WIEGERT: Ouside? Before? Tell me when it happened?

BRENDAN: When we brung her outside ta throw her in the fire.

WIEGERT: OK. So let's back up, OK? So I wanna go through this OK. So he stabs her (Brendan nods "yes") and chokes her?

BRENDAN: mm huh.

WIEGERT: And then you do what?

BRENDAN: I help tie her up.

WIEGERT: OK. And then what?

BRENDAN: Then we

WIEGERT: You cut her throat somewhere in there?

BRENDAN: Yeah.

WIEGERT? Yes?

BRENDAN: Yeah.

WIEGERT: And then what?

BRENDAN: Cut off 'er, some of her hair.

WIEGERT: OK.

BRENDAN: Then we brung her outside and shot her.

WIEGERT: Was she alive when you shot her?

BRENDAN: I don't know.

WIEGERT: Where did you shoot her?

BRENDAN: In the head.

WIEGERT: Who shot her?

BRENDAN: He did.

FASSBENDER: How many times?

BRENDAN: Twice.

FASSBENDER: In her body too or where, else? (pause) How many times do you shoot her Brendan?

BRENDAN: Twice.

FASSBENDER: Total? Not just in the head. (pause) Do you shoot her elsewhere? Honestly?

BRENDAN: In the stomach.

FASSBENDER: How many times did you shoot her when he handed you the gun?

BRENDAN: Zero.

WIEGERT: Where did?

BRENDAN: Cuz I couldn't shoot no more.

WIEGERT: What do you mean couldn't shoot no more?

BRENDAN: Cuz we used to have a cat that was like somethin' was wrong with 'em and we had to shoot 'em because we didn't want to pay for the bills.

WIEGERT: mm huh.

BRENDAN: And my mom told me not to watch when hers nows ex-boyfriend

WIEGERT: mm huh.

BRENDAN: Shot it, shot 'em and I couldn't watch.

WIEGERT: mm huh.

FASSBENDER: Brendan, we're in the bedroom yet, OK? (Brendan nods "yes") She's handcuffed yet right? (Brendan nods "yes") And you're tellin' me if, obviously

correct me if I'm wrong, what we heard. (Brendan nods "yes") While she's handcuffed and alive, he stabs her.

BRENDAN: (nods "yes") mm huh.

FASSBENDER: Chokes her? Right? (Brendan nods "yes") Is that right?

BRENDAN: (nods "yes") mm huh.

FASSBENDER: And then he has you cut her neck?

BRENDAN: Yeah.

FASSBENDER: And then you cut some hair off (Brendan nods "yes") Is it after that, that she, does she look like she's dead then? Or is she not dead?

BRENDAN: It looks like she's dead.

FASSBENDER: You don't, do you see any breathing left?

BRENDAN: (shakes his head "no") No.

FASSBENDER: Is it then that you take the handcuffs off, and tie her up?

BRENDAN: Yeah.

FASSBENDER: You can remember. So you think after she, she looks like she's dead then you, you guys tie her up? (Brendan nods "yes") Then what do you do? How do you get her outside? Is this when you carry her? (Brendan nods "yes") When you say you carried her?

BRENDAN: Yeah.

FASSBENDER: What part of her body did you carry?

BRENDAN: The feet.

FASSBENDER: And Steven did what?

BRENDAN: He carried the head.

FASSBENDER: And what door did you go out of?

BRENDAN: That one where the cement a stairs are.

FASSBENDER: And that's located in proximity to what inside, is it near his bedroom, far away?

BRENDAN: Near

FASSBENDER: Is the bathroom near there?

BRENDAN: Yeah, straight across.

FASSBENDER: Straight across from that door? (Brendan nods "yes")

WIEGERT: Where did you take her then?

BRENDAN: Take her outside on the side of the garage and shoot her.

WIEGERT: Take her outside of the garage and shoot her?

BRENDAN: On the side of it, yeah.

WIEGERT: OK, and then what do you do with her?

FASSBENDER: Is it dark out?

BRENDAN: Like a little bit.

WIEGERT: What'd you do then?

BRENDAN: Then we, he puts the gun on the ground and we carry her into the fire.

WIEGERT: How many times did you shoot her? (pause) Tell me again, how many times did you shoot her?

BRENDAN: Three.

WIEGERT: And where, where did he shoot her?

BRENDAN: In the head, stomach, and the heart.

WIEGERT: Do you know what side of the head?

BRENDAN: (shakes head "no") No.

WIEGERT: So you take her out of that house by the cement steps, you carry her to the side of the garage?

BRENDAN: mm huh. (nods "yes")

WIEGERT: Was she ever in the garage?

BRENDAN: No. (shakes head "no").

WIEGERT: OK, so you carry her to the side of the garage (Brendan nods "yes") and you guys shoot 'er, and Steve shoots her or you shoot her?

BRENDAN: He does.

WIEGERT: Who's he?

BRENDAN: Steven.

WIEGERT: And who does Steven shoot?

BRENDAN: Her.

WIEGERT: What's her name?

BRENDAN: Teresa.

WIEGERT: OK. And he shoots her three times (Brendan nods "yes") and then what do you do?

BRENDAN: We carry her to the fire.

WIEGERT: OK, what time is it about?

BRENDAN: About 6:00; 6:30.

WIEGERT: OK.

FASSBENDER: Did he say, w-what did he say while he was shooting her? Or just before he shot her?

BRENDAN: That we had to hurry up before he had some people coming over.

FASSBENDER: Was the car still out front?

BRENDAN: Yeah.

FASSBENDER: OK, we're gonna take ya where Mark just took ya and we know there's some, some things that you're, you're not tellin' us. We need to get the accuracy about the garage and stuff like that and the car.

WIEGERT: How does the car get in the garage?

BRENDAN: He drives it in there.

WIEGERT: After he puts her on the fire or before?

BRENDAN: After.

WIEGERT: OK, so lets go back to outside, you carry her over, she's naked, right? (Brendan nods "yes") And you put her on the fire?

BRENDAN: mm huh.

WIEGERT: And what do you do when she's on the fire?

BRENDAN: We threw some tires on top of her and some branches.

WIEGERT: You threw tires and branches on her (Brendan nods "yes"), and then what?

BRENDAN: We just let it burn.

WIEGERT: Well who started the fire?

BRENDAN: He did.

WIEGERT: Who's he?

BRENDAN: Steven.

WIEGERT: What did he start it with?

BRENDAN: Some gas.

FASSBENDER: When did he start it?

BRENDAN: Before I got there.

FASSBENDER: OK.

WIEGERT: Wh-wh-what do you mean, before you got there? You carry her out, is the fire burning already when you carried her out?

BRENDAN: Yeah. (nods "yes")

WIEGERT: So you throw her on top of the fire?

BRENDAN: (nods "yes") mm huh.

FASSBENDER: This fire is going when you go knock on the door?

BRENDAN: Yeah.

FASSBENDER: That's what you mean by before you got there?

BRENDAN: (nods "yes") mm huh.

WIEGERT: Does he say why the fire's burning?

BRENDAN: (shakes head "no") No.

WIEGERT: So, you when you carried her out of the house, and you put 'er by the garage, and Steve shoots her, then you put her on top of the fire that's already going?

BRENDAN: nun huh. (nods "yes")

WIEGERT: OK, and then what do you do from there, go ahead.

BRENDAN: That, he wanted me ta

WIEGERT: He wanted you to what?

BRENDAN: Go in the garage and help him move um, move the jeep down into the pit.

WIEGERT: OK, so she's there burning, what do you put on top of her or do you put something on top of her in the fire?

BRENDAN: Just the branches and the tires.

WIEGERT: Branches and the tires. Let's go back a few minutes. Where did you get the gun from, or where did Steven get the gun from?

BRENDAN: From out of his room.

WIEGERT: Of his, what room?

BRENDAN: The bedroom.

WIEGERT: Where does he get the shells from, do you know?

BRENDAN: (shakes head "no") Uh uh.

WIEGERT: OK, and which gun was it?

BRENDAN: The .22.

WIEGERT: OK.

FASSBENDER: OK Brendan, we gotta, I think, I think you're doin' a real good job up to this point of ah coming forward and stuff, but you bring her out of the house, you just said that ah, after you put her on the, on the fire, then, then you wanted to get the car, help get the car out of the garage and stuff. (Brendan nods "yes") Again, we have, w-we know that some things happened in that garage, and in that car, we know that. You need to tell us about this so we know you're tellin'

us the truth. I'm not gonna tell you what to say, you need to tell us.

BRENDAN: That he, he was gonna put

WIEGERT: Do not sign it, do not serve it.

BRENDAN: He was gonna put her in the je-in the back of the jeep

WIEGERT: Do not sign it, do not serve it.

BRENDAN: An we were gonna take her down in the pit and throw 'er in that water.

FASSBENDER: OK.

BRENDAN: We, he came up with burning her. So he set her back on the floor and then, that's when he threw her in the fire.

FASSBENDER: OK, now let's back up, so M-Mark can hear this too. You bring her out of the house, you, you're gonna take, you took her in the garage? (Brendan nods "yes") Tell me what happened again so Mark can hear this.

BRENDAN: Well he put her in the back of the jeep and he said he was gonna go down in the pit and throw her in the water in the pond and that's when he came up with burning her.

WIEGERT: Who?

FASSBENDER: Earlier you said this fire was going already.

BRENDAN: Yeah. (nods "yes")

FASSBENDER: It was? (Brendan nods "yes")

WIEGERT: So you take her, when is she shot then?

FASSBENDER: Tell us where she was shot?

BRENDAN: In the head.

FASSBENDER: No, I mean where, in the garage

BRENDAN: Oh.

FASSBENDER: Outside, in the house?

BRENDAN: In the garage.

FASSBENDER: OK.

WIEGERT: Was she on the garage floor or was she in the truck?

BRENDAN: Innn the truck.

WIEGERT: Ah huh, come on, now where was she shot? Be honest here.

FASSBENDER: The truth.

BRENDAN: In the garage.

WIEGERT: Before she was put in the truck or after?

BRENDAN: After.

FASSBENDER: So she's in the truck and that's when he shoots her? (Brendan nods "yes") How many times? (pause) Remember weeee got a number of shell casings that we found in that garage. I'm not gonna tell ya how many but you need to tell me how many times, about, that she was shot.

WIEGERT: We know you shot her too. Is that right? (Brendan shakes head "no") Then who did?

BRENDAN: I don't know.

WIEGERT: Who shot her?

BRENDAN: I didn't even touch the gun.

WIEGERT: OK. How many times did Steven shoot her?

BRENDAN: About ten.

FASSBENDER: And she was in the back of the truck or the SUV that whole time that he shot her?

BRENDAN: She was on the, the garage floor.

WIEGERT: She was on the garage floor, OK.

FASSBENDER: All right.

WIEGERT: That makes sense. Now we believe you.

FASSBENDER: Yeah. So you bring her out of the ca-or the trailer, right? (Brendan nods "yes") And do you take her right into the garage?

BRENDAN: mm huh.

FASSBENDER: And where you place her, where'd you set her down?

BRENDAN: Down on the floor where the lawn mower was sittin' a little bit.

FASSBENDER: Is the jeep in there already or not?

BRENDAN: Yeah.

FASSBENDER: When did he take that or go out and put that in there?

BRENDAN: Whe-he, where'd he put the, the jeep?

FASSBENDER: Yeah, when did he put her vehicle in the garage?

BRENDAN: Beeefore.

FASSBENDER: The truth, (pause) the truth. Was the jeep in there already before you even went to her house, or his house?

BRENDAN: No.

FASSBENDER: No. (Brendan shakes head "no") OK, so when did he do it?

BRENDAN: When he set her down on the, the ground, 'er in the garage.

WIEGERT: So you bring her into the garage, you set her on the garage floor?

BRENDAN: (nods "yes") mm huh.

WIEGERT: And then what happens?

BRENDAN: He backs up the jeep and we put her in the back. Then he says that he knows a better way, that he would burn 'er.

WIEGERT: OK, then what?

BRENDAN: We set 'er on the floor and he shoots her ten times maybe. Go put her on the fire.

FASSBENDER: Did he say why he shot her again?

BRENDAN: (shakes head "no") No.

FASSBENDER: Was he mad at this time?

BRENDAN: Yeah.

WIEGERT: So let me just back up again, so you bring her into the garage, you put her in the truck initially?

BRENDAN: (nods "yes") mm huh.

WIEGERT: Then you take her out of the truck?

BRENDAN: (nods "yes") mm huh.

WIEGERT: And then he shoots her? (Brendan nods "yes") And then what?

BRENDAN: We grab her and we put her in and take her over the fire and throw her on.

WIEGERT: And the fires already burning?

BRENDAN: (nods "yes") mm huh.

WIEGERT: And after you put her in the fire, what do you do with the fire?

BRENDAN: We threw some tires and some more branches on.

WIEGERT: OK.

FASSBENDER: How did you get her to the fire again.

BRENDAN: We a, used that a thing.

FASSBENDER: Ah, what's a thing?

BRENDAN: The thing we used ta get un-under the car?

FASSBENDER: You did use that. (Brendan nods "yes") You didn't carry her out there.

BRENDAN: (shakes head "no") mm uh.

WIEGERT: So you loaded her on the creeper? (Brendan nods "yes") Is that what it's called?

BRENDAN: Yeah.

WIEGERT: And you slid that out to where?

BRENDAN: Ta the fire.

WIEGERT: OK. And then you threw her in the fire.

BRENDAN: (nods "yes") uh huh.

WIEGERT: And then what did you do with the creeper? (pause) It's OK, what'd you do with it?

BRENDAN: Put it back in the garage.

WIEGERT: Is that in the garage now you think?

BRENDAN: I don't know.

WIEGERT: OK.

FASSBENDER: And that was what color again?

BRENDAN: Black and red.

WIEGERT: After she's in the fire, what do you guys do next?

BRENDAN: Go take the jeep down in the pit.

FASSBENDER: Tell us how.

BRENDAN: He drove it down there and

FASSBENDER: Were you in the jeep with him?

BRENDAN: (nods "yes") mm huh.

FASSBENDER: OK, tell us how you got down there.

BRENDAN: He drove.

FASSBENDER: Truthfully.

BRENDAN: He drove down there and he put it back by the trees and covered it with branches and a hood.

FASSBENDER: How did you get down there? What route did you take?

BRENDAN: Past Chuckie's house.

FASSBENDER You did go past Chuckie's?

BRENDAN: (nods "yes") mm huh.

FASSBENDER: Did Chuckie see you guys?

BRENDAN: (shakes head "no") I don't know.

FASSBENDER: OK.

WIEGERT: Who put the stuff on the car?

BRENDAN: We both did.

WIEGERT: Who put the hood on the car?

BRENDAN: He had one side and I had the other.

WIEGERT: OK. After he put the car there, what do you do next?

BRENDAN: We walk out.

WIEGERT: With, how's, the license plates were taken off the car, who did that?

BRENDAN: I don't know.

WIEGERT: Did you do that?

BRENDAN: (shakes head "no") No.

WIEGERT: Did Steve do that?

BRENDAN: Yeah.

WIEGERT: Well then why'd you say you don't know? Did Steve take the license plates off the car?

BRENDAN: (nods "yes") Yeah.

WIEGERT: And which way do you walk back?

BRENDAN: The long way.

WIEGERT: Which is which way?

BRENDAN: We were, were like right to the pond and you keep on going and then you take a right and you go up the hill.

WIEGERT: Whose got the key for the vehicle at that time?

BRENDAN: He did.

WIEGERT: OK, where do you go when you get back up by his house, where do you go?

BRENDAN: Back into his house.

WIEGERT: And what does he do with the key?

BRENDAN: Puts it in his, his room.

WIEGERT: Where in his room does he put it?

BRENDAN: Like under his dresser or somethin'.

WIEGERT: Where did you see him put it?

BRENDAN: In his dresser drawer.

WIEGERT: In his dresser drawer, can you explain where that is?

BRENDAN: Like the second one down, like in the middle row.

WIEGERT: In the drawer?

BRENDAN: (nods "yes") mm huh.

WIEGERT: OK. OK.

FASSBENDER: Go ba, I wanna back ya just a bit, you're down at the car, and you're hiding the car, right? (Brendan nods "yes") Do you recall him taking the plates off?

BRENDAN: Yeah.

FASSBENDER: OK, what else did he do, he did somethin' else, you need to tell us what he did, after that car is parked there. It's extremely important. (pause) Before you guys leave that car.

BRENDAN: That he left the gun in the car.

FASSBENDER: That's not what I'm thinkin' about. He did something to that car. He took the plates and he, I believe he did something else in that car, (pause),

BRENDAN: I don't know.

FASSBENDER: OK. Did he, did he, did he go and look at the engine, did he raise the hood at all or anything like that? To do something to that car?

BRENDAN: Yeah.

FASSBENDER: What was that? (pause)

WIEGERT: What did he do, Brendan?

WIEGERT: It's OK, what did he do?

FASSBENDER: What did he do under the hood, if that's what he did? (pause)

BRENDAN: I don't know what he did, but I know he went under.

FASSBENDER: He did raise the hood? (Brendan nods "yes") You remember that?

BRENDAN: Yeah.

WIEGERT: While he was raising the hood, did you take that license, plates off?

BRENDAN: (shakes head "no") No.

WIEGERT: Who did?

BRENDAN: He did.

WIEGERT: OK.

FASSBENDER: What did he do with the license plates after that?

BRENDAN: I don't know.

WIEGERT: But you were with him, what did you guys do with 'em?

BRENDAN: He took 'em off....

WIEGERT: And where did he put 'em?

BRENDAN: He had 'em in his house but I don't know after where he put 'em.

WIEGERT: You saw him put 'em in the house? (Brendan nods "yes") And you also saw him do what? Put the key

BRENDAN: Yeah

WIEGERT: Where'd

BRENDAN: In his dresser

WIEGERT: He put the key?

BRENDAN: In his dresser.

WIEGERT: In his dresser. Where was the knife that he used, 'er you used. Where'd that knife go?

BRENDAN: He left it in the jeep.

WIEGERT: He what?

BRENDAN: He left it in the jeep.

WIEGERT: It's not in the jeep now, where do you think it might be?

BRENDAN: I sure it was.

WIEGERT: Did you see it in the jeep?

BRENDAN: Yeah, cuz he set it on the floor.

WIEGERT: Where on the floor did he set it?

BRENDAN: In the middle of the seats.

WIEGERT: OK.

FASSBENDER: At anytime, er wh-what time during this whole thing did a, did you get hurt?

BRENDAN: (shakes head "no") mm uh.

FASSBENDER: Or did he get hurt? Or injured?

BRENDAN: While we were moving the car or somethin'?

WIEGERT: Anytime during this, did he get injured?

BRENDAN: Just that scratch, that's all I know.

WIEGERT: What scratch?

BRENDAN: On his finger.

WIEGERT: Which finger was it on, do you remember?

BRENDAN: mmm, probably this one.

FASSBENDER: Was it bleeding?

BRENDAN: It was just' bleeding a little bit.

WIEGERT: How'd he get that scratch?

(pause)

BRENDAN: Probably when he was under the hood.

WIEGERT: So after you come up to his house, you go back into the trailer, is that right?

BRENDAN: Yeah.

WIEGERT: And then what happens when you get in the trailer?

BRENDAN: He wanted to talk to me about, about her.

WIEGERT: OK, what did he talk about?

FASSBENDER: And be honest, tell us everything he said.

WIEGERT: What did he say?

BRENDAN: That (pause) he was glad that I helped him and that.

WIEGERT: Did he give you anything for helping?

BRENDAN: (shakes head "no") No.

WIEGERT: So he said that he's glad that you helped. (Brendan nods "yes") Did he talk about Teresa at all?

BRENDAN: Not really, (shakes head "no")

WIEGERT: Um, when, when you get the bleach on you, let's talk about that, he thanks you for helping him and then what do you guys do?

BRENDAN: Well that's when my mom called.

WIEGERT: Where did your mom call?

BRENDAN: From the house.

WIEGERT: From your house, (Brendan nods "yes") to where?

BRENDAN: Ta on a cell phone.

WIEGERT: OK. And what did she want?

BRENDAN: That I had to be home by ten.

WIEGERT: OK. What time is it when he, when your mom calls?

BRENDAN: Like 9:30.

WIEGERT: OK, so what do you do between 9:30 and ten.

BRENDAN: We watch TV a little bit, talked, about that he was glad that I helped him cuz he couldn't do it by his self.

WIEGERT: When do you clean the place up?

BRENDAN: Like at 9:50.

WIEGERT: Tell me what you do?

BRENDAN: He took the, the bedsheets, took 'em outside and he burnt 'em.

WIEGERT: Took the bedsheets outside and he burnt 'em, (Brendan nods "yes") OK.

FASSBENDER: W-was there blood on the bedsheets?

BRENDAN: Yeah.

FASSBENDER: Was it a lot of blood?

BRENDAN: 'bout a stain like that big.

FASSBENDER: OK.

WIEGERT: What else did he do?

BRENDAN: He hid the, that's when he hid the key and then

WIEGERT: And where'd he hide the key?

BRENDAN: In the dresser.

WIEGERT: OK. And that was the key for what?

BRENDAN: The jeep.

WIEGERT: Whose jeep?

BRENDAN: Teresa's.

WIEGERT: OK. And what else did you guys do?

(pause)

FASSBENDER: Where's her clothes at this time?

BRENDAN: In the garage.

FASSBENDER: So how'd they get out in the garage?

BRENDAN: When we went out there ta clean up that, the blood.

WIEGERT: When did you do that?

BRENDAN: Like at 9:50.

FASSBENDER: So you and Steven do what at 9:50 then?

BRENDAN: We cleaned that up and then he told me to go throw that on the fire.

WIEGERT: Throw what on the fire?

BRENDAN: The clothes, that's full of, the st, the blood that was like cleaned up.

WIEGERT:. What did the clothes look like? (pause) Start with the pants, you remember what color the pants were?

BRENDAN: (shakes head "no") mm uh

WIEGERT: OK, wh-what about the shirt, what color was the shirt?

BRENDAN: Black.

WIEGERT: What about did you have 'er bra and panties too?

BRENDAN: (shakes head "no") mm uh.

WIEGERT: Where were those?

BRENDAN: I don't know.

WIEGERT: So you took it outside and threw it on the fire.

BRENDAN: Yeah. (nods "yes")

WIEGERT: OK.

FASSBENDER: Now the shirt, earlier you told us the shirt had blood on it, had a hole in it, was that not true then?

BRENDAN: No.

FASSBENDER: So that wasn't true? (Brendan shakes head "no") (pause) So what'd ya do in the ki-garage now? What kind of cleaning, what do you do, how do you do it?

BRENDAN: We threw gas on it so lie could get it off. Then he tried paint thinner and then he went to bleach to get it off and like, he like, probably like, he went like he was spraying it like. I thought he got it on the floor and it splashed up on my pants or somethin'.

WIEGERT: How much bleach, no let me go back. How much blood was there on the floor, quite a bit?

BRENDAN: (nods "yes") mm huh.

WIEGERT: Where would it have been?

BRENDAN: Like by the lawn mower and where the jeeps' tire was.

WIEGERT: So if you had to say, some dimensions like 2 x 2, 2 feet by 2 feet, 10 X 10, how much blood do you think was there?

BRENDAN: By 2 x 2.

WIEGERT: 2 x 2 (Brendan nods "yes")

FASSBENDER: By the rear wheel of the jeep you said?

BRENDAN: Yeah. (nods "yes")

WIEGERT: And the jeep was backed in?

BRENDAN: (nods "yes") mm huh.

WIEGERT: By the rear wheel of the jeep. OK

FASSBENDER: Were there multiple spots that you cleaned in the garage or just one?

BRENDAN: Two.

FASSBENDER: If we took you to that garage, would you be able to show us where?

BRENDAN: Yeah.

FASSBENDER: OK.

WIEGERT: Where'd you get the bleach from?

BRENDAN: In his house by, in his bathroom.

WIEGERT: Were you there when his girlfriend called, Jodi?

BRENDAN: (shakes head "no") No.

FASSBENDER: Was Steven bleeding?

BRENDAN: On his finger, that's it

FASSBENDER: Did Steven know he was bleeding?

BRENDAN: Yeah.

FASSBENDER: Did he make any comments about that?

BRENDAN: Well he just went in the bathroom, he got a band-aid, when he went in to get the bleach.

FASSBENDER: What did Steven say he was gonna do with her car?

BRENDAN: That he was gonna crush it.

FASSBENDER: Did he say when he was gonna try and do that?

BRENDAN: (shakes head "no") No. He said he woulda, actually the sooner, he said the sooner the better.

WIEGERT: You need a break, any soda or somethin'?

BRENDAN: I got water here.

WIEGERT: OK. We can get you a soda if you want one. Would you like one? (Brendan nods "yes") What kind?

BRENDAN: Coke.

WIEGERT: Coke OK.

FASSBENDER: Before we get that, does anyone else know this?

BRENDAN: (shakes head "no") No.

FASSBENDER: Has Steven told you that someone else knows?

BRENDAN: (shakes head "no") Not that I know of.

WIEGERT: How about Chuck? (Brendan shakes head "no") Does Chuck know?

BRENDAN: (shakes head "no") No.

WIEGERT: OK, we'll take a little break.

FASSBENDER: And take a breath.

WIEGERT: We'll be right back, OK?

(pause) (door opens & closes)

FASSBENDER: We got some food up here, sandwich or anything, you want somethin'? (Brendan

shakes head “no”) Are you sure? (Brendan nods “yes”) Bathroom? (Brendan shakes head “no”) Nothin’. Just a soda? (Brendan nods “yes”) All right Bud, hang in there.

(door opens & closes)

(pause - break)

(long pause) (door opens)

FASSBENDER: Here you go bud.

BRENDAN: Thank you.

(door closes) (long pause)

(door opens)

FASSBENDER: Would you like ta ah have a sandwich or anything? (Brendan shakes head “no”) You sure?

BRENDAN: Not hungry.

FASSBENDER: OK, (Brendan nods “yes”) if you want something, just let somebody know.

BRENDAN: (nods “yes) OK.

(door closes) (long pause)

(door opens)

FASSBENDER: Doing OK? (Brendan nods “yes”) Need anything? (Brendan shakes head “no”) Need to go to the bathroom?

BRENDAN: (shakes head “no”) mh uh

FASSBENDER: Got your soda? (Brendan nods “yes”)

BRENDAN: uh huh

FASSBENDER: Want somethin' to eat? (Brendan shakes head "no") You sure?

BRENDAN: Ain't hungry.

FASSBENDER: No. Anything at all?

BRENDAN: (shakes head "no") mh uh

FASSBENDER: You all right? (Brendan, nods "yes") OK.

(door closes) (long pause)

(door opens)

WIEGERT: Hey, Brendan, you-need ta use the bathroom or anything? (Brendan shakes head "no") You sure? (Brendan shakes head "no") Need anything else?

BRENDAN: (shakes head "no") mh uh

WIEGERT: Sandwich or anything? (Brendan shakes head "no") Did ya get your soda?

BRENDAN: (nods "yes") Yeah.

WIEGERT: OK. We'll be in about two minutes, OK?

BRENDAN: I gotta question though.

WIEGERT: Sure.

BRENDAN: How long is this gonna take?

WIEGERT: It shouldn't take a whole lot longer.

BRENDAN: Do you think I can get there before one twenty-nine?'

WIEGERT: Um, probably not.

BRENDAN: Oh.

WIEGERT: What's at one twenty-nine?

BRENDAN: Well, I have a project due in sixth hour.

WIEGERT: OK. We'll worry about that later, OK? (Brendan nods "yes") All right. I'll be back in a few minutes, OK?

BRENDAN: OK.

(door closes) (long pause)

(door opens)

WIEGERT: So do you need to use the bathroom or anything? (Brendan shakes head "no") No. Your good? (Brendan nods "yes") OK.

FASSBENDER: How ya feeling Brendan?

BRENDAN: (nods "yes") Pretty good.

FASSBENDER: Pretty good. (Brendan nods "yes") Got a lot of stuff off your chest, huh.

BRENDAN: (nods "yes") uh huh

FASSBENDER: A lot more stuff a lot of the truth. (Brendan, nods "yes") Ah, what we do when, when we leave the room we kinda talk about stuff to make sure that we think we're we're all in the same page and that, that we're gettin' it you know the truth, the whole truth (Brendan nods "yes") and, and then we, we you know we think you're doin' pretty good so far but there's some areas that we have ta revisit, OK, (Brendan nods "yes") and then some other questions. And and again don't make us work so hard for this, don't make yourself work so hard for this, just get the truth out right away, cuz again we, we have a pretty good knowledge of what happened there. (Brendan nods "yes") All right?

BRENDAN: (nods "yes") mh huh

FASSBENDER: I wanna revisit when you went when you got home from school. (Brendan nods "yes") OK? You were with Blaine, is that correct?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: OK, and you said you walked down th the road to your house, (Brendan nods "yes") and you said that you saw Steven on the porch.

BRENDAN: (nods "yes") uh huh

FASSBENDER: Mark and I are havin' a problem with that. Now if, I'm not, I'm not sayin' that I'm gonna put words in your mouth so we're havin' a problem with that. You know Blaine not seeing it and stuff like that and and the time period cuz its quarter to four and and we're real familiar with time periods here and when she got there and stuff. Is there somethin' you need to tell us about that? When you got home what did you see before you went into your house? Did you even go in your house or did ya go over to Steven's. (cough) Talk to us about what happened there cuz the time periods aren't addin' up bud.

BRENDAN: Well I don't know if Blaine seen it but I never asked him about it. So I don't know if he seen it or not.

FASSBENDER: Again, er, whether Blaine saw it or not, the time periods aren't adding up. They're not equaling out. We know when Teresa got there. (Brendan nods "yes") Um, and, and I know I guarantee ya Teresa's not standing on that porch when you come home from school. I ju I don't see that. Um, I don't even ya I have a problem with the car sittin' out front yet at this time either. That cars sittin' out front other people er at would have seen that car, you know. Somethin' is not adding up here and you need to tell us

the truth. Did this all start right when you came home from school? You need to tell me, you need to be honest with me. I can't tell ya, I I can't tell you these things. I can tell ya we don't believe you because there's some things that are wrong but you've gotta tell me the truth. This is you know gettin' serious here now, OK.? (Brendan nods "yes") Tell me what happened when you got home.

BRENDAN: I got off the bus. I walked down the road and when I got to that thing, ah, the other house I just sittin' there for nothin'. I could see her jeep in the garage just sittin' there and I didn't see Steven and her on the the porch.

WIEGERT: You, you did or you didn't?

BRENDAN: I didn't.

FASSBENDER: Did not, OK.

BRENDAN: And I just walked up to the house

FASSBENDER: Ta who's house?

BRENDAN: Mine and Blaine's, went into the garage to get the key to open the door cuz we always lock it when we, we leave and we went in and Blaine grabbed the phone right away and I waited for like 30 minutes waited for him to get off the phone with Jason so I can call Travis ta see what he was doing that night and I waited so I watched TV and that's when I went out to get the mail.

FASSBENDER: OK. So I'm gonna take you through this now that you've said it, you got off the bus, came down, the road and you said you saw Teresa's vehicle in Steven's garage?

BRENDAN: (nods "yes") uh huh

FASSBENDER: How did you see that?

BRENDAN: With the front end of the the door.

FASSBENDER: With what?

BRENDAN: The front end was outta the door, (nods "yes")

FASSBENDER: The front end was outta the door. So the big door was open I take it?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: OK and you did not see Teresa or Steven?

BRENDAN: (shakes head "no") No.

FASSBENDER: OK and then you said you went into your house.

BRENDAN: (nods "yes") uh huh

FASSBENDER: Did you, did you go over to Steven's at that time?

BRENDAN: (shakes head "no") No.

FASSBENDER: And you went over to your house and the the way you were telling me you about twenty minutes half hour yet away because Blaine used the phone?

BRENDAN:. (nods "yes") Yeah.

FASSBENDER: And so then you went down and got the mail?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: So you're in your house for about ah twenty minutes a half hour?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: And you went down ta get the mail? (Brendan nods "yes")

BRENDAN: Well I called Travis first.

FASSBENDER: You called Travis first. (Brendan nods "yes") OK. How long did ya talk to Travis?

BRENDAN: 'bout ten, fifteen minutes

FASSBENDER: And after you're done talkin' to Travis, what did you do?

BRENDAN: Went out to go get the mail

FASSBENDER: And did you take a bike like you said?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: And then you're coming back from the mail, is is that when you, tell me what happened then again?

BRENDAN: That's when I went to get the mail and I came back, I was lookin' at it when I was riding the bike and I seen Steven's mail in there and I went over by him and I knocked on the door.

FASSBENDER: OK and you heard stuff coming from there?

BRENDAN: (nods "yes") mm huh

FASSBENDER: Again, what did you hear coming from there?

BRENDAN: Screaming like help me and that

FASSBENDER: OK and then you said before you knocked on his door.

BRENDAN: (nods "yes") uh huh

FASSBENDER: And you said you had ta knock

BRENDAN: three times (nods "yes")

FASSBENDER: three times and it took how long for Steven to get to the door about?

BRENDAN: about five minutes

FASSBENDER: about five minutes. While you were standing at the door, did you continue to hear things comin' from the inside?

BRENDAN: Yeah. (nods "yes")

FASSBENDER: Steven came ta the door and took you into the kitchen you said right?

BRENDAN: Yeah. (nods "yes")

FASSBENDER: OK. About what time do ya think this is? Thinkin' back now on your time periods when you got home how long it took for these phone calls and stuff.

BRENDAN: About five, five-thirty

FASSBENDER: OK, when you knock when you actually knock on Steven's door was the big garage door still open? Do you remember?'

BRENDAN: (shakes head "no") No.

FASSBENDER: You don't remember (Brendan shakes head "no") or it wasn't open?'

BRENDAN: I don't remember.

FASSBENDER: OK. Was Teresa Halbach's vehicle sittin' out in the driveway when you knocked on the door?

BRENDAN: No.

FASSBENDER: OK. So that's a little different than what you initially told us, is that right?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: All right. Do you do you remember Steven making any phone calls or getting any phone calls during this evening? During that evening?

BRENDAN: Like one or two of 'em.

FASSBENDER: He made or he got?

BRENDAN: He got.

FASSBENDER: Who were they from?

BRENDAN: Jodi.

FASSBENDER: OK. What, can you tell me what the context your side of the conversation was? What did you hear?

BRENDAN: He was like saying that he cares about her and that.

FASSBENDER: So you said maybe a couple of phone calls, when did the first call happen about?

BRENDAN: 'bout five thirty, five

FASSBENDER: About five, five-thirty, is that what you're saying? (Brendan nods "yes") And what phone did he talk on?

BRENDAN: His cell phone.

FASSBENDER: OK and then when did the second call happen?

BRENDAN: 'bout ten minutes after that

FASSBENDER: OK and then who was that call from do you think?

BRENDAN: Jodi again.

FASSBENDER: You think so. (Brendan nods "yes") OK. Do you recall if um, Steve called anyone?

BRENDAN: (shakes head "no") uh uh

FASSBENDER: OK. We talked last er Monday we talked a little about some things a burn barrel out front do you remember anything about that burn barrel? It's ah you might wanna be a little more truthful about now.

BRENDAN: That it was full of stuff.

FASSBENDER: Was it burning?

BRENDAN: Yeah.

FASSBENDER: Did you put some things in that burn barrel that night?

BRENDAN: (shakes head "no") No.

FASSBENDER: What happened to Teresa's other personal effects? I mean ah a woman usually has a purse right? (Brendan nods "yes") Tell us what happened ta that? '

BRENDAN: I don't know what happened to it.

FASSBENDER: What happened ta her ah, her cell phone? (short pause) Don't try ta ta think of somethin' just.

BRENDAN: I don't know.

FASSBENDER: Did Steven did you see whether ah a cell phone of hers?

BRENDAN: (shakes head "no") No.

FASSBENDER: Do you know whether she had a camera?

BRENDAN: (shakes head "no") No.

FASSBENDER: Did Steven tell ya what he did with those things?

BRENDAN: (shakes head "no") No.

FASSBENDER: I need ya to tell us the truth.

BRENDAN: (nods "yes") Yeah.

FASSBENDER: What did he do with her her possessions?

BRENDAN: I don't know.

WIEGERT: Brendan, it's OK to tell us OK. It's really important that you continue being honest with us. OK, don't start lying now. If you know what happened to a cell phone or a camera or her purse, you need to tell us. OK? (Brendan nods "yes) The hard parts over. Do you know what happened ta those items?

BRENDAN: He burnt 'em.

WIEGERT: How do you know?

BRENDAN: Because when I passed it there was like like a purse in there and stuff.

WIEGERT: When you passed what?

BRENDAN: The burning barrel.

WIEGERT: Did ya look inside? (Brendan nods "yes") Why did ya look inside?

BRENDAN: Cuz it was full.

WIEGERT: What else was in there?

BRENDAN: Like garbage bags, some

WIEGERT: Did you put those things in the burning barrel?

BRENDAN: (shakes head "no") No.

WIEGERT: Did you actually see those items in the burning barrel?

BRENDAN: (nods "yes") Yeah.

WIEGERT: Tell me what you saw in there exactly.

BRENDAN: Like they were buried underneath ah, garbage, a garbage bag that was

WIEGERT: How do you know, or how could you see them if they were underneath a garbage bag?

BRENDAN: Because the garbage bag was like on top like that far off the top.

WIEGERT: OK, so we have the barrel, (Brendan nods "yes") OK. Why don't you look at me for a second, OK. We've got the barrel.

BRENDAN: (nods "yes") mm huh

WIEGERT: OK and here's is the top of the barrel (Brendan nods "yes") and the garbage bag is on top?

BRENDAN: (nods "yes") Yeah.

WIEGERT: And where are those items you said you saw?

BRENDAN: Like right underneath there.

WIEGERT: Underneath the bag?

BRENDAN: (nods "yes") Yeah.

WIEGERT: Well, how would you see that?

BRENDAN: Well, if the bags like that far off the you know the top of the thing you can see though underneath it.

WIEGERT: You could see underneath it? (Brendan nods "yes") What did you see?

BRENDAN: like a cell phone, camera, purse

WIEGERT: Are you being honest with us?

BRENDAN: (nods "yes")Yeah.

WIEGERT: Did you actually see those items?

BRENDAN: (nods "yes")Yeah.

WIEGERT: When did you see them?

BRENDAN: When I came over there with the mail.

WIEGERT: Before you went into the house (Brendan nods "yes") or after you went into the house?

BRENDAN: Before I went into the house.

WIEGERT: Why did you look in there?

BRENDAN: Because it was full and it usually ain't.

WIEGERT: OK.

FASSBENDER: Did you see Steven, when you came home from school or at anytime up until the point you went in ta Steven's house, did you see him go to the burning barrel with anything?

BRENDAN: (shakes head "no") No.

FASSBENDER: Are you sure?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: After you went into the house, did Steven go to the burning barrel at any time?

BRENDAN: (shakes head "no") Not that I know of.

WIEGERT/

FASSBENDER: ….sorry……..use this one……thanks

FASSBENDER: All right. Now we got, we got some other points that we're gonna talk about here. You go there, you get into Steven's house. Now I don't want you to hold back any language or how he told you anything or how he presented himself to you when this stuff happened when he took ya into the kitchen, just kinda tell me what he told you again and how he told you.

BRENDAN: He asked me if I wanted ta fuck the girl and if I wanted to try it. I said ta that I ain't old enough that ta have a kid yet so he said yeah, do you wanna try it though? I'm like not right now and he just kept on egging me on.

FASSBENDER: OK and, and did he say anything else to you while he was egging you on? How did he egg you on?

BRENDAN: He's like come on try it for me.

FASSBENDER: And had you been back in the bedroom area yet at this time or no?

BRENDAN: (shakes head "no") No.

FASSBENDER: What? what ah, tell me again what he told you was back there? Who or what?

BRENDAN: That Teresa Halbach was back there. That she was on the bed naked with she was chained up ta the bed.

FASSBENDER: Could you hear her back there yet?

BRENDAN: Yeah.

FASSBENDER: And what kinda things was she saying again?

BRENDAN: Like help me and not ta tell Steven not ta do this anymore.

FASSBENDER: Did Steven say that he had already done that or not?

BRENDAN: Yeah.

FASSBENDER: What did he say he did to her?

BRENDAN: That he had sex with her.

FASSBENDER: How did he say it?

BRENDAN: That he fucked her.

FASSBENDER: At anytime that night, did you see Steven have sex with her?

BRENDAN: (shakes head "no") No.

FASSBENDER: Are you sure about that?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: Because we know now that you did and he watched while you did it. Did you watch once or while he did it?

BRENDAN: (shakes head "no") No.

WIEGERT: Did he do anything else ta her sexually?

BRENDAN: (shakes head "no") No.

WIEGERT: Stick anything in her anything like that?

BRENDAN: (shakes head "no") No.

WIEGERT: OK.

FASSBENDER: OK. You told us about going in there and having sex with her that she was handcuffed and, and chained, OK? Ultimately and then you said you left the bedroom for a period of time and, and he talked ta you in the living room, right?

BRENDAN: Yeah.

FASSBENDER: Again just ta remind us what kinda things was he saying ta you out in the living room?

BRENDAN: That, that he was saying that I did a good job and that he was proud of me.

FASSBENDER: OK, how long were you in the living room about?

BRENDAN: About five minutes, five, ten.

FASSBENDER: And then after you're in the living room, where did ya go?

BRENDAN: Back in there.

FASSBENDER: OK and tell me and think, think about the video in your head OK. You went back in the bedroom and go through what happened again.

BRENDAN: We went in there, we tied her up and he stabbed her and he told me ta cut her throat and cut her hair off and then when we were done like that we took off the handcuffs and we took her outside ta the jeep, stuck her in the back, he said he would rather burn her than stick her back in there and we put her on the floor and then he shot her ten times and then we threw her in the fire.

FASSBENDER: OK, we'll there's some points that we're gonna go over there on that, OK? (Brendan nods "yes") In the ah, well in the bedroom, and he had you cut the hair off you said right?

BRENDAN: (nods "yes") mm huh

FASSBENDER: Where did ya put the hair?

BRENDAN: On the dresser.

FASSBENDER: Again tell us why he wanted you to do that?

BRENDAN: I don't know.

FASSBENDER: What happened ta the hair after?

BRENDAN: I never touched it.

FASSBENDER: Do you know where it went?

BRENDAN: (shakes head "no") No.

FASSBENDER: Has he ever told you what he did with that hair?

BRENDAN: (shakes head "no") No.

FASSBENDER: Brendan, you sure?

BRENDAN: (nods "yes") Yeah.

WIEGERT: Do you have any of that hair at home?

BRENDAN: (shakes head "no") No.

WIEGERT: Are you sure?

BRENDAN: (nods "yes") Yeah.

WIEGERT: Cuz you know we'll find it if you do. (Brendan nods "yes")

FASSBENDER: And that would not be good for you. If we find you're lying or find things that you don't tell us about, I can't believe you then. If you tell me you're sorry this happened, then I won't believe you. .....

BRENDAN: I don't got none of the hair.

FASSBENDER: Pardon?

BRENDAN: I don't got none of the hair, (shakes head "no")

WIEGERT: Don't got none of the hair. Did you get any blood on you?

BRENDAN: (shakes head "no") No.

FASSBENDER: OK, so you tie her up (Brendan nods "yes") and you told us before you think she's dead at this time (Brendan nods "yes") and you guys, you and Steven carry her out that back door and into the garage. (Brendan nods "yes") When you're in the garage where do you place her immediately?

BRENDAN: In the jeep

FASSBENDER: Right into the jeep or did you set her on the floor or

BRENDAN: Right in the jeep.

FASSBENDER: Right into the jeep. (Brendan nods "yes") How does Steven get the rifle?

BRENDAN: When he set her down, when we set her down on, on the ground, he went into the house and grabbed it.

WIEGERT: Was it a rifle or was it a handgun?

BRENDAN: It was a rifle.

WIEGERT: And where did he find that rifle, do you know?

BRENDAN: In his ro, his bedroom.

FASSBENDER: Where was it in the bedroom?

BRENDAN: Hanging on the wall.

FASSBENDER: What wall?

BRENDAN: Like where the door is there's like a, like a gun rack up there.

FASSBENDER: OK, in relation to his bed where would it be?

BRENDAN: like on the le-left side wall

FASSBENDER: If I'm laying in his bed, where is the where are the where is his gun?

BRENDAN: Like, say like this is his bedroom and his bed was like right here, it would be on that wall.

FASSBENDER: Let's say his bed is your bed or his bed there on the couch

BRENDAN: Yeah.

FASSBENDER: and you're sleeping what way?

BRENDAN: You'd you fa your feet would face that way

FASSBENDER: Oh

BRENDAN: and your the guns would be right on that side.

WIEGERT: If I asked you to draw me a few pictures, do you think you could do that?

BRENDAN: (nods "yes") Yeah.

WIEGERT: As to what the bedroom if you'd put things in the bedroom (Brendan nods "yes") and like put her on the bed how she was, could you do that?

BRENDAN: (nods "yes") Yeah.

WIEGERT: OK, ……

FASSBENDER: Now we gotta get some other papers um around,

WIEGERT: ……I'll grab some papers, OK? (Brendan nods "yes") All right?

FASSBENDER: A clipboard or somethin'

(door closes)

(pause)

(door opens)

REMIKER: …….

WIEGERT: Yeah.

(door opens and closes)

(pause)

(door opens and closes)

WIEGERT: Could you draw some pictures? Is that OK or are there some things you wanna talk

FASSBENDER: We'll talk for a bit.

WIEGERT: OK.

FASSBENDER: Then we'll get ta those pictures.

WIEGERT: All right.

FASSBENDER: If that's all right?

WIEGERT: That's fine.

FASSBENDER: Um, Brendan, when you guys got her into the ga the garage you said that you placed her right into the back of the, the her vehicle right?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: And then he said that he, how did it come about that he wanted ta do what he wanted to do? Tell me that.

BRENDAN: He told me that he was gonna throw her in the, the pond and he said that he would rather burn her because it's a lot faster to get rid of all the evidence.

FASSBENDER: And earlier you said that the fire was going on at this time?

BRENDAN: (nods "yes") mh huh

FASSBENDER: Mark and I have a little trouble understanding why he's got this big fire going if he was actually talking about putting her into the pond.

BRENDAN: Cuz that night me and Blaine were gonna invite some friends over for ah a bonfire and he was probably getting' it ready and then that day I got a call from Travis that said that he couldn't come and Blaine got a call from his friend that he that they couldn't come.

FASSBENDER: Are you telling me that it wasn't until you guys were in the garage that he said that he was gonna burn her?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: And you're sure that, are you sure about that?

BRENDAN: (nods "yes") uh huh

FASSBENDER: OK, then you said that you took her outta the, the of the back of the ah her vehicle. (Brendan nods "yes") Did you help him do that?

BRENDAN: (nods "yes") mh huh

FASSBENDER: And then you said that he went and got the a gun. Right?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: And he came back in? (Brendan nods "yes") What did he do?

BRENDAN: He shot her ten times.

FASSBENDER: Tell me where he shot her.

BRENDAN: Like in the head and some in the belly and the stomach.

FASSBENDER: How many times did he shoot her in the head?

BRENDAN: Like three times.

FASSBENDER: Tell me where in the head. What sides?

BRENDAN: Like the left side I think it was.

FASSBENDER: The left side of her head (Brendan nods "yes") and the when he shot her in the body, where in the body again?

BRENDAN: Like right here.

FASSBENDER: OK, what was he saying when he was doing this if anything? What was his demeanor? Was he calm, was he, what, what was he doing?

BRENDAN: He was calm.

FASSBENDER: What was he saying to you?

BRENDAN: That he, he was sorry for me ta see that stuff.

FASSBENDER: Did he ask you to shoot her too or did he tell you ta shoot her?

BRENDAN: No.

FASSBENDER: You're sure about that?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: When you got home from school, do you remember if a fire was going then?

BRENDAN: (shakes head "no") uh uh, I didn't look.

FASSBENDER: When you knocked on the door to go in, was the fire going then?

BRENDAN: eh eh, yeah. (nods "yes")

FASSBENDER: OK. When you knocked on the door to go into Steven's trailer, was it still light out?

BRENDAN: Yeah. (nods "yes")

FASSBENDER: OK. You mentioned, then you took her, her back out, you shot her, did anything else happen in this garage that, that is noteworthy cuz remember, remember we've, we've seen the garage we've got the evidence from the garage, um, did you guys do anything else with her out in the garage?

BRENDAN: (shakes head "no") No.

FASSBENDER: Anything with those ropes or bindings or anything like that?

BRENDAN: (shakes head "no") No.

FASSBENDER: You took her out ta the fire and you're sure you used this creeper thing, right?

BRENDAN: Yeah, (nods "yes")

FASSBENDER: That's what you said. (Brendan nods "yes") Did you carry her on that creeper thing or did you actually push it out there, you guys? Do you know what I mean?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: You could push someone on there and you can carry that thing or did you actually roll it?

BRENDAN: We carried it.

FASSBENDER: OK. Kinda, what would that be similar to, kinda like a um do you know what I'm thinking of?

BRENDAN: The thing that the ambulance.

FASSBENDER: Yeah. (Brendan nods "yes") So you carried it like that?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: And was she still unclothed at that time?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: OK.

WIEGERT: Like what time was that?

BRENDAN: 'bout five thirty.

WIEGERT: Was it light out or dark out?

BRENDAN: Light.

FASSBENDER: And then you put her on the fire you said, (Brendan nods "yes") and you put other stuff over that over her you said.

BRENDAN: (nods "yes") Yeah.

FASSBENDER: Did you help Steven start that fire?

BRENDAN: (shakes head "no") No.

FASSBENDER: Are you tellin' us the truth?

BRENDAN: (nods "yes")Yes.

FASSBENDER: Is it at this time that, what do you do after you put her on the on the fire?

BRENDAN: We put the tires on there and the branches.

FASSBENDER: Where'd that stuff come from?

BRENDAN: He had it there already.

FASSBENDER: He did. (Brendan nods "yes") OK, now the fires going, she's on there, tell, tell, tell me what you're gonna what you're doin' now or what you guys do. I mean it's only five thirty right now, what are you guys doin'.

BRENDAN: After we put the tires and the branches on, we went to the house and went in there for a little bit and we went out and he was gonna take the jeep down in the pit so he did and that's when we covered it with branches and the hood.

FASSBENDER: Did you guys go out by the fire some more that night?

BRENDAN: (shakes head "no") No.

FASSBENDER: Where did this, this car seat come from?

(pause)

BRENDAN: We got that.

FASSBENDER: Tell me how you guys got that.

BRENDAN: I went over to my house and got the, the golf cart and got, he went to go pick 'em up and we went over to get the car seat, and we put it by the fire, and waited for it to burn down, and we threw it on there, and we went to, to the jeep.

FASSBENDER: OK so you, you went and got this car seat. Did you get anything else wh- when you had the golf cart.

BRENDAN: Well old cabinet.

FASSBENDER: Where'd you get that from?

BRENDAN: Frommm in the back of our garage.

FASSBENDER: Whose garage?

BRENDAN: Ours. Cuz we were using it to put it in the garage.

FASSBENDER: Anything else that you went and gathered up with the golf cart?

BRENDAN: Just the tires and the wood, and the seat and the

FASSBENDER: OK, so, so you got more tires?

BRENDAN: Yeah, (nods "yes")

FASSBENDER: And more wood?

BRENDAN: mm huh. (nods "yes")

FASSBENDER: And w-what did you do with all that stuff?

BRENDAN: We put it in the fire.

FASSBENDER: OK. Last night you mentioned, or Monday you mentioned, um, Steven getting' some other things out of the garage. What were those things again?

BRENDAN: The clothes.

FASSBENDER: But I mean somethings that you might use to

BRENDAN: Oh the shovel and the rake? (nods "yes")

FASSBENDER: Right. Did he get anything else like that outta the garage?

BRENDAN: (shakes head "no") No just them two.

FASSBENDER: And what did he use those for?

BRENDAN: To like pile, so he can get it smooth so he can fit the, the rest of the stuff in there.

FASSBENDER: Did you help him with that? Did you use the rake and the shovel at all?

BRENDAN: (shakes head "no") No.

FASSBENDER: Are you sure about that?

BRENDAN: (nods "yes") Yeah.

WIEGERT: Tell me again what he was doing with the rake.

BRENDAN: He was like pushing the stuff around so he can put more stuff on it so it's even.

WIEGERT: Show me what he was doing, you showed me the other day. Can you show me again?

BRENDAN: Like going like this.

WIEGERT: Going like that? What kinda stuff was he pushing around?

BRENDAN: Like the wood and that.

WIEGERT: Was he pushing her around at all?

BRENDAN: (shakes head "no") uh uh. ……..we're .... a cabinet.

FASSBENDER: Were you able to see her in the fire?

BRENDAN: Just the forehead and the hands and the feet and a little bit of belly.

FASSBENDER: OK. Sometime during that evening, um, did someone come down to Steven's trailer or in that area?

BRENDAN: (shakes head "no") No.

FASSBENDER: You don't you remember seeing, do you remember seeing anyone come down there, an-an-and talk to Steven for a bit?

BRENDAN: (shakes head "no") No.

FASSBENDER: Do you know if anyone else saw anything?

BRENDAN: (shakes head "no") No.

FASSBBNDER: How much time did you think it took from when you cut her on the neck to the time you guys got her out in the garage?

BRENDAN: 'bout ten minutes.

FASSBENDER: After, after the fire was, and she was put in fire, what time did you go home to your place that night?

BRENDAN: About 9:30.

FASSBENDER: Did you come back out at all that night?

BRENDAN: (shakes head "no") uh uh.

FASSBENDER: Was Steven out there when you went home?

BRENDAN: Yeah. Cuz he said he was gonna watch the fire until it burnt down a little bit more.

FASSBENDER: What did you guys do with Teresa's body after that, after it was burned?

BRENDAN: I don't know, I didn't, I didn't do nothin' with it.

FASSBENDER: Did Steven do anything with it?

BRENDAN: Yeah, but I don't know what.

FASSBENDER: How do you, what do you mean by yes, but you don't know what?

BRENDAN: Like he tried to bury it or somethin'.

FASSBENDER: How'd he do that?

BRENDAN: With the shovel.

FASSBENDER: Did he take some of her body out of that fire pit?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: He did. How tell me how he did that.

BRENDAN: Like when the bones were left behind, he would like try to take the shovel and try to break the bones apart and he would bury 'em, like right in front of the fire almost.

WIEGERT: What do you mean he'd bury them right by the fire?

BRENDAN: Like he dug a hole and he'd put the bones in there and he buried it.

WIEGERT: Where in relation to the fire?

BRENDAN: Like two, three feet away.

WIEGERT: Which way from the fire?

BRENDAN: Like towards the garage.

WIEGERT: OK.

FASSBENDER: Did you see him do that?

BRENDAN: (shakes head "no") I just heard that.

FASSBENDER: Heard it from who?

BRENDAN: Him.

FASSBENDER: Oh. So he told you that he used the shovel to break up bones?

BRENDAN: Yeah. (nods "yes")

FASSBENDER: And then buried some of the bones? (Brendan nods "yes") Did he take some of her bones some, anywhere else?

BRENDAN: On the other side of the, like that, there was like in the back of the yard, there was like this steep hill there, like in the pit, there was some there that he threw there.

FASSBENDER: OK, we're gonna, we're in a little bit, we're gonna have you draw on some sketches and stuff and we're a, we're gonna wanna these places. How do you know that there were some bones there?

BRENDAN: He told me that he threw some there.

FASSBENDER: Did he tell you how he did that?

BRENDAN: He had 'em in a bucket.

FASSBENDER: And what I'm understanding is then in the back of both your yards or his yards, down toward into the pit, over that area?

BRENDAN: In like Radandt's pit.

FASSBENDER: Oh, Radandt's pit, (Brendan nods "yes") not into your ah, (Brendan shakes head "no") the salvage yard area? (Brendan shakes head "no") You think you'll be able to show us that?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: Anything else that you did with the bones (Brendan shakes head "no") that he told you or that you helped him, di-did you help him do any of this?

BRENDAN: (shakes head "no") No.

FASSBENDER: Did he have anymore fires that week?

BRENDAN: (shakes head "no") Not that I know of.

FASSBENDER: We talked about Monday night about, um, bad smells and stuff, do you remember any smells coming from that fire, after she was put on there?

BRENDAN: Just that it smelled bad.

FASSBENDER: You remember that? (Brendan nods "yes")

FASSBENDER: Did Steve call Chuck that night? Do you recall?

BRENDAN: (shakes head "no") I don't know.

FASSBENDER: Did Steve make any other phone calls? I know I asked this once before, but

BRENDAN: (shakes head "no") No.

FASSBENDER: Or tell you about making any other phone calls.

BRENDAN: Just that someone called him.

FASSBENDER: OK

WIEGERT: What was Steve wearing when you, you first got to his house?

BRENDAN: A white shirt and red shorts.

WIEGERT: OK. You told us before that Jodi called a couple times, right?

BRENDAN: (nods "yes") mm huh.

WIEGERT: What were you doing when Jodi called?

BRENDAN: Sittin' on the couch watching TV.

WIEGERT: What was Steve doing?

BRENDAN: Sittin' on the computer chair.

WIEGERT: Was that before of after you had sex with Teresa?

BRENDAN: After.

WIEGERT: Was Teresa still alive when Jodi called?

BRENDAN: (shakes head "no") N-no.

WIEGERT: No. (Brendan shakes head "no") So Jodi calls, you had already killed Teresa? Is that correct?

BRENDAN: (nods "yes") Yeah.

WIEGERT: Do you remember what time Jodi called about?

BRENDAN: (shakes head "no") uh uh.

WIEGERT: Why did you guys cut her hair?

BRENDAN: I don't know.

WIEGERT: Did Steve ever say why he wanted you to do that?

BRENDAN: (shakes head "no") No.

WIEGERT: Do you know if he kept any of it?

BRENDAN: I don't know.

WIEGERT: Where was her underwear?

BRENDAN: (shakes head "no") I don't know.

WIEGERT: Brendan, it's important, you've been honest so far, you need to be honest all the way through here, OK?

BRENDAN: I don't know where they are.

WIEGERT: You don't know where the underwear are? I mean, do you have it? If a you do, it's OK. We understand that.

BRENDAN: I don't got it.

WIEGERT: Did Steve have it?

BRENDAN: I don't know.

WIEGERT: Do you think he might have kept it?

BRENDAN: Yeah.

WIEGERT: Why do you think that? (pause) Did he tell you that?

BRENDAN: No.

WIEGERT: You said that you had cut her throat. (Brendan nods "yes") Here's the thing Brendan, when you cut somebody's throat, they bleed a lot, (Brendan nods "yes") OK? Am I right?

BRENDAN: (nods "yes") Yeah.

WIEGERT: She bleed a lot, (Brendan nods "yes") so I know you had blood on ya, it's pretty much impossible not to. Did you have blood on you?

BRENDAN: (shakes head "no") No.

WEIGERT: None at all?

BRENDAN: (shakes head "no") uh uh.

WIEGERT: What about when you moved her?

BRENDAN: (shakes head "no") No.

WIEGERT: What were you wearing at the time?

BRENDAN: Them pants and a jacket.

WIEGERT: What jacket?

BRENDAN: My old blue one.

WIEGERT: Your old blue jacket? What does it say anything on it?

BRENDAN: It ah the Friar Tuck symbol on it.

WIEGERT: Friar Tuck symbol?

BRENDAN: mm huh.

WIEGERT: Where's that jacket now?

BRENDAN: Probably in the closet when you walk in the house, behind the door.

WIEGERT: What were you wearing for a shirt?

BRENDAN: I don't remember. (shakes head "no")

WIEGERT: What kinda shoes?

BRENDAN: My o, my old red ones.

WIEGERT: Were they tenny shoes or what?

BRENDAN: There just like these but they're red.

WIEGERT: OK.

BRENDAN: and white

WIEGERT: Do you know what brand they are?

BRENDAN: (shakes head "no") N-no.

WIEGERT: You don't' know that brand name.

BRENDAN: (shakes head "no") uh uh.

WIEGERT: Nike or Adidas, somethin' like that?

BRENDAN: (shakes head "no") No

WIEGERT: OK.

BRENDAN: I think they're Starters.

WIEGERT:' You think they're what?

BRENDAN: Starters.

WIEGERT: Starters, OK. (pause) When this is all going on, did Steve say anything about Teresa?

BRENDAN: (shakes head "no") No.

WIEGERT: You told us two days ago that Steve was angry. Was that true?

BRENDAN: No.

WIEGERT: So Steve was not angry? (Brendan shakes head "no") So why do you think he did this to Teresa?

BRENDAN: Maybe because he wanted to go back to jail.

WIEGERT: Did he ever tell you that?

BRENDAN: No, that's what I was thinking.

WIEGERT: OK.

BRENDAN: Too, maybe liked it in there and the real world was probably too noisy for him, or too, too big for him or something'.

WIEGERT: In the garage, in Steve's garage, there were some wires hanging from the rafters, you remember those?

BRENDAN: Yeah.

WIEGERT: Did you guys use those for anything?

BRENDAN: (shakes head "no") No.

WIEGERT: Are you being honest with me now?

BRENDAN: (nods "yes") Yeah.

WIEGERT: Very important you be honest here. (Brendan nods "yes") Did you ever use those for anything?

BRENDAN: (shakes head "no") No.

WIEGERT: Did you use anything else on Teresa, (Brendan shakes head "no") other than rope?

BRENDAN: (shakes head "no") No.

WIEGERT: OK. Want to draw me a few pictures? (Brendan nods "yes") OK.

FASSBENDER: Brendan, when she's on the bed, was there a lot of blood?

BRENDAN: (nods "yes")Yeah.

FASSBENDER: Do you recall when the sheets were taken off the bed and stuff that the blood had soaked through to the mattress pad at all? Or mattress?

BRENDAN: I don't know.

FASSBENDER: You don't know, did you see or not?

BRENDAN: (shakes head "no ") No.

FASSBENDER: You sure that she wasn't taken out to the garage alive and some of the stuff was done to her out there?

BRENDAN: (shakes head "no") No.

FASSBENDER: Hanging from a rafter, 'er anything like that?

BRENDAN: (shakes head "no") mm uh.

FASSBENDER: Now the worst is over, you're not gonna shock us or anything by tellin' us if that happened. Cuz I-I just have a feeling that something may, may be there. Talk to me.

BRENDAN: Nothin' happened in there.

FASSBENDER: It all happened in the bedroom you said. (Brendan nods "yes") You're positive of that.

BRENDAN: (nods "yes") Yeah.

FASSBENDER: Keep in mind that you know, Steven's gonna have his time to tell his story too. Right?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: He's not gonna say anything different?

BRENDAN: (shakes head "no") uh uh.

WIEGERT: Did you turn the mattress over or anything like that?

BRENDAN: (shakes head "no") No.

FASSBENDER: The cleaning of the house, w-ah Brendan, did, did a Steven do some cleaning in the house?

BRENDAN: I don't know that. (shakes head "no")

FASSBENDER: You know what I mean by cleaning in the house. Right?

BRENDAN: Yeah.

FASSBENDER: Did he vacuum?

BRENDAN: Not while I was there.

FASSBENDER: He didn't? Did he wipe anything down?

BRENDAN: Not that I know of. (shakes head "no")

FASSBENDER: Did he do any laundry? Did he wash some clothes?

BRENDAN: I don't know.

WIEGERT: Wn-What about the knife, where is the knife, be honest with me, where's the knife? It's OK, we need to get that OK? Help us out, where's the knife?

BRENDAN: Probably in the drawer.

WIEGERT: In which drawer?

BRENDAN: His knife drawer.

WIEGERT: And where's that?

BRENDAN: In the kitchen.

WIEGERT: Is it probably in there, or do you know it's in there.

BRENDAN: That's where I think it is.

WIEGERT: Why do you think it's in there?

BRENDAN: Cuz he wouldn't let that knife go.

WIEGERT: Cuz he wouldn't let the knife go. How do you know that?

BRENDAN: Cuz it was a pretty nice knife.

WIEGERT: Did he tell you that? (Brendan nods "yes")

WIEGERT: Did he wash it off or anything or wipe it off or what did he do with the knife?

BRENDAN: He wiped it off.

WIEGERT: What did he use to do that with?

BRENDAN: Paper towel.

WIEGERT: What happened to the paper towel?

BRENDAN: He burnt it.

WIEGERT: Can you describe the knife for us?

BRENDAN: Well it was like that long.

WIEGERT: OK.

BRENDAN: Big head on it like that.

WIEGERT: Big head on it (Brendan nods "yes") What kinda, I mean was it like a, a steak knife or like something you'd use for a deer?

BRENDAN: Somethin' like that like a deer.

WIEGERT: OK, what color was the handle?

BRENDAN: Black.

WIEGERT: Black. And it was a, could you draw that? You think you could draw the knife?

BRENDAN: (nods "yes") Yeah.

WIEGERT: Why don't you do that, draw me the knife.

(pause)

(door closes)

FASSBENDER: Thank you.

(door opens)

(pause)

BRENDAN: …….like that.

WIEGERT: OK, the handle was just like this.

BRENDAN: Yeah.

WIEGERT: OK, and this was black. (Brendan nods "yes")

BRENDAN: mm huh.

WIEGERT: OK, why don't you sign your name to that.

BRENDAN: The whole thing?

WIEGERT: Sure. Actually, write it. OK. Um, put the date on there too. It's one, correction 3/1/03, '06, um, I'm all mixed up with dates today, aren't I? (Brendan, nods "yes"). Um the time is ah 1:44 p.m. OK. I'm gonna ask you if you'd be would you be willing to draw the bedroom out for us?

BRENDAN: (nods "yes") mm huh.

WIEGERT: OK.

FASSBENDER: If you saw the knife again, would you be able to identify it?

BRENDAN: (nods "yes")Yeah.

WIEGERT: Why don't you draw out the bedroom, put the bed on there and show me where the dresser and everything was, the best that you can, and where the door was and all that.

BRENDAN: It's kinda like the door was like right here.

WIEGERT: OK. Why

BRENDAN: Should I label it?

WIEGERT: Why don't you label it, yep.

FASSBENDER: While you're doin' that Brendan, anything else unique about that knife?

BRENDAN: (shakes head "no") No.

WIEGERT: Draw her on the bed.

BRENDAN: Should I draw the pillows?

WIEGERT: mm huh.

(pause)

WIEGERT: You can do a stick person, that's fine, and how she was laying on there. (pause) OK and where were the handcuffs?

BRENDAN: Like, they were like that.

WIEGERT: And we have some leg cuffs too you said?

BRENDAN: Yeah.

WIEGERT: OK. Where else, w-what other things are in the bedroom, draw what else was in there. (pause) OK. Anything else you remember? (pause) And that's a closet? And that's a dresser?

BRENDAN: (nods "yes") mm huh.

WIEGERT: OK, anything else?

BRENDAN: And like the gu, the gun holder thing was like right here on the wall.

WIEGERT: OK. Why don't ya label that in. Gun rack maybe or.

BRENDAN: How do you spell rack?

WIEGERT: R-A C-K. OK. Anything else? (Brendan shakes head "no") Wh-where was the key, where'd you put the key, or where did Steven put the key?

BRENDAN: In that middle a drawer.

WIEGERT: OK. Why don't you put the key there. Anything else you remember in there? (Brendan shakes head "no")

BRENDAN: Well I think there was like a nightstand right there so.

WIEGERT: OK, why don't you draw that.

BRENDAN: With a lamp on it.

WIEGERT: OK. Why don't ya label that. (pause) OK, um, anything else? (Brendan shakes head "no") Where'd you put her hair?

BRENDAN: Like right here.

WIEGERT: OK, why don't you label that. How much hair do you think you cut off of her?

BRENDAN: About three inches.

WIEGERT: Three inches. What part of the, of her hair?

BRENDAN: The back.

WIEGERT: OK. Anything else in there? (Brendan shakes head "no") OK, why don't you sign it, sign your name. (pause) And we'll date it and time it again. (pause) Ah, let see 1:48. OK, and there's one more thing I'm gonna have you draw would be the um, the garage. (Brendan nods "yes") OK. Why don't you draw the garage out. (pause) OK, where's the big door?

BRENDAN: Right here.

WIEGERT: OK, you wanna label that? Was there a small entry door in there? OK, where, where was her truck parked?

BRENDAN: Like that area.

WIEGERT: OK, and it was sticking out the door you said? (Brendan nods "yes") When you brought 'er outside which door did you bring her through?

BRENDAN: Right here, this little crack.

WIEGERT: And you said you put her in the truck first, (Brendan nods "yes") is that correct? (Brendan nods "yes")

WIEGERT: And then what did you do after that?

BRENDAN: We set her down, like right here.

WIEGERT: OK, why don't you draw her body in the area you set her down. OK, um, is that where, what'd you do to her when you put her there? Or what did Steven do?

BRENDAN: He went in the house?

WIEGERT: Who went in th house?

BRENDAN: He did and got the gun.

WIEGERT: OK, and then he did what?

BRENDAN: Shot her.

WIEGERT: OK. Do you know where the empty casings were?

BRENDAN: (shakes head "no") mm uh

WIEGERT: Why don't ya label some other things in there, like a, what else was in that garage. (pause) OK, was there a snowmobile anywhere in there?

BRENDAN: Yeah, there was one here.

WIEGERT: OK, wanna label that?

FASSBENDER: Brendan, I don't know if we asked ya, the gun was, you said it was a .22, was that a single shot or what type of gun was it, do you remember?

BRENDAN: Yeah, single. (nods "yes")

FASSBENDER: It was a single shot, not a semi-automatic?

BRENDAN: (shakes head "no") mm uh

WIEGERT: Why don't you draw where the blood stains would have been.

BRENDAN: Like right here, about.

WIEGERT: And what did those blood stains come from? Like when she was laying there or

BRENDAN: Yeah, while she was laying there.

WIEGERT: You know did he, when he shot her you said how many times.

BRENDAN: Ten.

WIEGERT: Do you know did he hit her every time?

BRENDAN: (shakes head "no") I don't know.

WIEGERT: OK. Did he hit anything else in the garage at all?

BRENDAN: (shakes head "no") uh uh

FASSBENDER: Where was he standing when he shot her?

BRENDAN: Right here.

WIEGERT: Why don't you put an X there and put his initials there. And where were you standing?

BRENDAN: Right over here.

WIEGERT: OK put your initials there. Was there blood anywhere else?

BRENDAN: (shakes head "no") No.

WIEGERT: What about behind the vehicle or anything like that?

BRENDAN: (shakes head "no") No.

WIEGERT: No? All right, why don't you sign it. (door opens) (pause) (door closes) And put the time in. 1:51 looks like. OK. Um, looks good to me.

FASSBENDER: All right, but, did you want him ta maybe draw the fire pit, or sketch of the fire pit in the back

WIEGERT: Yeah that's a good idea.

FASSBENDER: .....

WIEGERT: Can you do that? (Brendan nods "yes") We did it the other day so let's, let's try that. Give that back ta ya.

BRENDAN: So like, should I draw like the garage you think there a little bit

WIEGERT: Ya put a little bit of the garage.

BRENDAN: There's that little area

WIEGERT: mm huh.

BRENDAN: It's open.

WIEGERT: How long has that fire pit been there?

BRENDAN: 'bout four or five months.

WIEGERT: OK. And where did you put her body?

BRENDAN: Right here.

WIEGERT: Draw it in there. (pause) OK. Um, was there, was the dog there yet at that time?

BRENDAN: Yeah, a, the dog was like right over here.

WIEGERT: Dr-draw the doghouse then, where the doghouse was. And label that too. OK why don't you label what that was.

BRENDAN: How do you spell garage?

WIEGERT: G-A-R-

BRENDAN: Yeah

WIEGERT: A-G-E. OK, um, where'd you get the brush from?

BRENDAN: From the field.

WIEGERT: OK. You said that he had taken some bones (Brendan nods "yes") and put them in a five gallon pail then he dumped 'em.

BRENDAN: Yeah.

WIEGERT: Where would that be? Which way?

BRENDAN: Probably like, his house was like be a little bit right here

WIEGERT: mm huh.

BRENDAN: It would be like over here somewhere.

WIEGERT: OK. Did you actually see him do that?

BRENDAN: (shakes head "no") uh uh.

WIEGERT: How do you know he did that?

BRENDAN: He told me that he put 'em I a bucket and he p-threw 'em over there.

WIEGERT: OK. OK, anything else you wanna add in there? (Brendan shakes head "no") OK, why don't you sign that. (pause)

BRENDAN: Well when we got the seat, we put it right, we set it down right like here.

WIEGERT: Did you sit there and watch the fire burn or anything like that?

BRENDAN: (shakes head "no") uh uh

WIEGERT: You just set it there?

BRENDAN: 53?

WIEGERT: That's pretty good. OK.

FASSBENDER: Brendan, gots a few more questions to cover here, (Brendan nods "yes") then the worst is over, as far as um the questions. Can you describe Steven's house for me? The color and stuff like that.

BRENDAN: It's like a red and the top is like silver and the bottom is like cement.

FASSBENDER: OK, and where's his house located in relation to say your house.

BRENDAN: Like how far away from ours?

FASSBENDER: How far away, what direction if you know.

BRENDAN: I don't know what direction, but it's about little like 'bout 350 feet away.

FASSBENDER: OK. If you come out your front door, that you can't get into now cuz its not shoveled, what direction would be left, right straight, back?

BRENDAN: Left. (nods "yes").

FASSBENDER: To the left. OK, and then his garage, how would you describe his garage?

BRENDAN: The same red and the top was black.

FASSBENDER: OK and how many garage doors are on it?

BRENDAN: One

FASSBENDER: Big garage doors.

BRENDAN: There's only one big one and one small one.

FASSBENDER: OK.

BRENDAN: And there's like three windows.

FASSBENDER: OK. Any of those windows facing your house?

BRENDAN: Just one.

FASSBENDER: OK, and then the location, and now you drew it here so it's pretty obvious, (Brendan nods "yes") that the location of the burn pit is, is where? In relation to the garage and his house, etc?

BRENDAN: In-n-n like where he used to park his car, like

FASSBENDER: The burn pit, we-where

BRENDAN: Oh the burn pit?

FASSBENDER: Yeah, what you drew here. Where is that in relation to the garage?

BRENDAN: Straight back from the garage, like in the back o-by the window.

FASSBENDER: OK. Um, we've got the, we've got the gun, (Brendan nods "yes") now is there any reason that your DNA or fingerprints would be on that gun?

BRENDAN: (shakes head "no") mm uh, I never touched it.

FASSBENDER: Can you tell me why, i-if Teresa was, was dead when she was in the garage, why you would shoot or, why he would shoot a dead body.

BRENDAN: I don't know. Probably to make sure she's dead or somethin'.

FASSBENDER: Did he say anything, why he shot her?

BRENDAN: (shakes head "no") No.

FASSBENDER: You're just sayin', yo-your guess is that to make sure was dead.

BRENDAN: (nods "yes") Yeah.

FASSBENDER: You sure he didn't say anything?

BRENDAN: (shakes head "no") uh uh.

FASSBENDER: Was he pretty calm about this?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: Just gonna revisit one thing, when you're in the bedroom, an-an-and you cut her throat, (Brendan nods "yes") previously you said that you thought she was alive. (Brendan nods "yes") Is that still your thought on that?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: And why was that?

BRENDAN: Cuz she was breathing a little bit. She was like trying ta, ta not tryin' to breathe as hard as she could, from screamin', screaming a lot.

WIEGERT: She was screaming a lot or wasn't?

BRENDAN: She was.

FASSBENDER: When you cut her throat, was she screaming?

BRENDAN: mm uh (shakes head "no")

FASSBENDER: No. When you cut her throat.

BRENDAN: Cuz when you scream a lot, you like, your, your breathing goes up or somethin'.

WIEGERT: .....explain that a little bit, you said she was screaming a lot. When, was she screaming a lot?

BRENDAN: Like

WIEGERT: While you doing it, after you were doing it, before you did it?

BRENDAN: Before.

FASSBENDER: When you cut her throat, what was she doing? If anything?

BRENDAN: Like screaming for help and crying.

FASSBENDER: I wanna-wanna get that straight, she was screaming for help and crying when you cut her throat?

BRENDAN: (nods "yes") Yeah.

FASSBENDER: When did Steven choke her? Or strangle her?

BRENDAN: Like a little bit after that.

WIEGERT: Well lets, lets just go back a little bit OK? Tell us what exactly happened to her, what order it happened in. You said there were basically three things prior to you guys shooting her. Explain those in, in the order that it happened.

BRENDAN: Starting with when we got in the room?

FASSBENDER: OK.

WIEGERT: Yeah, what you guys did to her.

BRENDAN: We had sex with her.

WIEGERT: OK.

BRENDAN: Then he stabbed her.

WIEGERT: Then who stabbed her?

BRENDAN: He did.

WIEGERT: Who's he?

BRENDAN: Steven.

WIEGERT: OK, and then what?

BRENDAN: Then I cut her throat.

WIEGERT: OK.

BRENDAN: And then he choked her and I cut off her hair.

WIEGERT: OK. So he choked her after you cut her throat?

BRENDAN: (nods "yes") mm huh.

WIEGERT: OK, kinda show me like on your throat where you cut her.

BRENDAN: Like right here.

WIEGERT: How deep?

BRENDAN: Just as long as the knife went through.

WIEGERT: OK.

FASSBENDER: With your finger, show me how deep you went into her throat.

BRENDAN: About that much.

FASSBENDER: I mean like, like this like that, like that, like that.

BRENDAN: Like that.

FASSBENDER: About that far? (nods "yes")

WIEGERT: When Steven stabbed her, tell me again where he stabbed her.

BRENDAN: Like right here.

WIEGERT: How far in did the knife go?

FASSBENDER: Again with your hands, if you can.

BRENDAN: About like that.

WIEGERT: OK. (Brendan nods "yes") And then he, tell me how he choked her. Where was he when he choked her?

BRENDAN: On the side of the bed.

WIEGERT: On the side of the bed. (Brendan nods "yes")

FASSBENDER: With your hands, show me what, pretend that her neck is there, whatever, show me how he did it.

BRENDAN: Like this.

FASSBENDER: How long?

BRENDAN: 'bout two, three minutes.

WIEGERT: He must have had a lot of blood on his hands then huh? (Brendan nods "yes") How did he get that off his hands?

BRENDAN: Washin' it off.

WIEGERT: Where?

BRENDAN: In the sink.

WIEGERT: Which sink?

BRENDAN: In the bathroom.

WIEGERT: Did he wipe any blood up with anything? (Brendan shakes head "no")

BRENDAN: Just that paper towel that he dried his hands with.

FASSBENDER: After you cut her throat, was she still alive?

BRENDAN: Barely.

FASSBENDER: And how do you know that?

BRENDAN: Cuz she was breathing like little bit.

WIEGERT: When do you think she quit breathing?

BRENDAN: When we were bringing her outside.

WIEGERT: Outside, what do you mean outside where?

BRENDAN: Out in the garage.

WIEGERT: How do you know she quit breathing then?

BRENDAN: Cuz her belly wasn't moving.

WIEGERT: Cuz her belly wasn't moving? (Brendan nods "yes") OK.

FASSBENDER: You talked about getting a car seat and a cabinet. (Brendan nods "yes") Whose idea was that?

BRENDAN: His.

FASSBENDER: When you went and got it, put it by the fire, did you throw it on the fire when it was time to throw it on the fire?

BRENDAN: (nods "yes") uh huh. With hi-him.

FASSBENDER: Pardon?

BRENDAN: He helped me throw it on there.

FASSBENDER: The car seat?

BRENDAN: (nods "yes") uh huh.

FASSBENDER: Who throw the cabinet on the fire?

BRENDAN: He did.

FASSBENDER: Did you throw anything on the fire?

BRENDAN: Just that wood that we found.

FASSBENDER: In the, in the um salvage yard, there is a skidsteer, you know what that is?

BRENDAN: Ah, it's ta flatten cars out.

FASSBENDER: Not the crusher, but a skidsteer. It's a, it's like a little tractor thing that has a bucket or forks on the front of it.

BRENDAN: Oh yeah. (nods "yes")

FASSBENDER: You know where that, you know what that is?

BRENDAN: Yeah. (nods "yes")

FASSBENDER: Did you guys or Steven use that at all?

BRENDAN: (shake's head "no") uh uh.

FASSBENDER: Did Steven use that to ah dig his fire pit? Do you know?

BRENDAN: (shakes head "no") Uh I don't know that.

FASSBENDER: I gotta hard, oh go ahead

WIEGERT: OK. Did you go up north with everybody after you guys couldn't come back to your house?

BRENDAN: uh huh. (nods "yes")

WIEGERT: Did you and Steve talk about this up north?

BRENDAN: uh uh. (shakes head "no")

WIEGERT: You sure?

BRENDAN: (nods "yes") Yeah.

WIEGERT: How was Steven acting when you got up north?

BRENDAN: Like he was trying to runaway, trying ta, trying to figure out when, how to get away from the cops.

WIEGERT: Did he ever ask you to go with him?

BRENDAN: No. (shakes head "no")

WIEGERT: Did he ever make any threats to you?

BRENDAN: No. (shakes head "no")

WIEGERT: Did he tell you anything about this as far as, what did he tell you after this?

BRENDAN: He didn't tell me nothin', (shakes head "no") he was just trying to leave.

WIEGERT: OK

BRENDAN: And then grandpa said that if you, you, if you're gonna try to leave, then that means you did it. (pause) So he sat back down.

FASSBENDER: Anyone else in the family, up north, say anything to him like that or about that type of stuff?

BRENDAN: uh uh (shakes head "no")

FASSBENDER: You said um, (pause) I-I've got some tough questions for you OK? (Brendan nods "yes") Ah, but just be honest. I need you to, to the best of your memory, describe Teresa's body to me.

BRENDAN: Like before we a put her in there, in the fire?

FASSBENDER: Yes.

FASSBENDER: Probably when she was alive, did she have any scars, marks, tattoos, stuff like that, that you can remember?

BRENDAN: I don't remember any tattoos.

FASSBENDER: Any scars you remember?

BRENDAN: (shakes head "no") Not that I seen.

FASSBENDER: Did she have pubic hair?

BRENDAN: Yeah. (nods "yes")

FASSBENDER: Do you remember what color her hair was?

BRENDAN: Brown.

FASSBENDER: Do you remember her breasts? Were they, were they, did she have big breasts, small breasts?

BRENDAN: Medium.

FASSBENDER: Anything peculiar about her breasts?

BRENDAN: No. (shakes head "no")

FASSBENDER: Do you ah, remember what color eyes she had or anything like that?

BRENDAN: uh uh. (shakes head "no")

FASSBENDER: Any piercings, any jewelry on her?

BRENDAN: (shakes head "no") No.

FASSBENDER: You remember any jewelry, earrings, anything like that?

BRENDAN: (shakes head "no") No.

FASSBENDER: Watch? (Brendan shakes head "no") (pause) Any items like that?

WIEGERT: Not other than that no. I just got one thing on the end.

FASSBENDER: OK. (pause) We know that Teresa had a, a tattoo on her stomach, do you remember that?

BRENDAN: (shakes head "no") uh uh

FASSBENDER: Do you disagree with me when I say that?

BRENDAN: No but I don't know where it was.

FASSBENDER: OK.

WIEGERT: Had you ever seen Teresa before that day.

BRENDAN: uh uh (shakes head "no")

FASSBENDER: I just had my ending ...may be sooner than that.

WIEGERT: Probably. Um, Brendan, how do you feel about this now?

BRENDAN: Really sad.

WIEGERT: Tell me why you feel really sad.

BRENDAN: That I helped 'em and I shouldn't of, and sorry for her family that she lost their daughter.

WIEGERT: How does Steven feel about this after, do you know?

BRENDAN: mm uh (shakes head "no")

WIEGERT: If you could change things, what would you change?

BRENDAN: I woulda probably tried to stop 'em.

FASSBENDER: Steven, er Steven. Brendan, look at me. W-Why did you do this? Why did you do your part of it?

BRENDAN: I don't know.

FASSBENDER: I'm giving you the opportunity to tell me why you did this.

(pause)

WIEGERT: Everybody has a reason for doing things. What was your reason for this?

BRENDAN: Cuz I wanted ta see how it felt.

WIEGERT: See how what felt?

BRENDAN: Sex.

FASSBENDER: During this whole thing, did you ever think about trying to stop Steven?

BRENDAN: Yeah.

FASSBENDER: Why didn't you?

BRENDAN: Cuz I thought he would try ta like, try ta kill me.

FASSBENDER: Mark just asked you a little while ago, if he ever threatened you. Now earlier you had said, Monday, you talked about something like that and now you said no. What's the truth?

BRENDAN: He didn't threaten me, I just thought that he was, he coulda, cuz he's bigger than me, that he could probably beat me up and that.

FASSBENDER: So you telling us now that he never threatened you?

BRENDAN: (shakes head "no") No.

FASSBENDER: And you admit you knew this that you had told us that Monday?

BRENDAN: Yeah.

FASSBENDER: But now you sayin' that didn't happen? (Brendan nods "yes") Did Steve say anything

else to you, offer you anything for doing this or keeping your mouth shut (Brendan shakes head "no") or anything like that?

BRENDAN: (shakes head "no") No.

FASSBENDER: Did he tell you anything about sayin' anything about this to anyone? (Brendan shakes head "no") He just let you go into the, the bed that night and didn't say anything to you like about this?

BRENDAN: uh uh (shakes head "no")

FASSBENDER: Did you ever thank about callin' the police?

BRENDAN: Sometime

FASSBENDER: Yeah? (Brendan nods "yes")

WIEGERT: Did you ever think about us coming over to talk with you? Did you worry about that at all?

BRENDAN: (nods "yes") Yeah. I was scared the first time I had ta go, a, when I was up north talkin' to them people.

WIEGERT: nun huh.

BRENDAN: I was sweating a lot.

FASSBENDER: Had Steven told you some things to tell, to say to the police?

BRENDAN: He just told me not to say anything, that a, that his lawyer said not to say anything.

FASSBENDER: If Steven tells us that you did all of this, that, that yo-you ha-had started it and had killed her and stuff, is that true?

BRENDAN: (shakes head "no") No.

WIEGERT: Don't forget your Pepsi down there. (Brendan nods "yes") We're gonna step out for a couple of more minutes OK? (Brendan nods "yes")

FASSBENDER: Do you need to use the restroom?

BRENDAN: (shakes head "no") uh uh.

FASSBENDER: Do you want somethin' to eat?

BRENDAN: It don't matter.

WIEGERT: How about a sandwich?

FASSBENDER: Looks like you're a little hungry.

WIEGERT: Should we get you a sandwich?

BRENDAN: (nods "yes") Yeah.

WIEGERT: OK

(pause)

(voices speaking in background)

(door opens)

WIEGERT: Brendan there you go.

BRENDAN: Thank you.

WIEGERT: Your welcome.

(door closes)

(pause)

(long pause)

(door opens)

DENNIS JACOBS: Do you need anything? No bathroom, no nothin'? Do you wanna cookie or somethin', another sandwich? (Brendan shakes head "no")

BRENDAN: No.

DENNIS JACOBS: OK, they'll be with you shortly. (Brendan nods "yes")

(door closes)

(long pause)

(door opens and closes)

FASSBENDER: Hey bud, do you need anything? There's another sandwich out there. You sure? (Brendan shakes head "no")

BRENDAN: (nods "yes") mm huh

FASSBENDER: You ate that whole pizza the other night, and you sure you don't want another sandwich? (Brendan shakes head "no")

BRENDAN: All right.

FASSBENDER: It's gonna be just a bit, OK?

BRENDAN: Am I gonna be at school before school ends?

FASSBENDER: Probably not. I mean we're at two thirty already, and schools over at what, three? (Brendan nods "yes")

BRENDAN: 3:05

FASSBENDER: 3:05 yeah. No.

BRENDAN: What time will this be done?

FASSBENDER: Well, we're pretty, we're pretty much done. We have a couple follow up things ta ask ya, but its pretty much done.

BRENDAN: (nods "yes") Yeah.

FASSBENDER: …….considering er what we had mentioned earlier we would like ta maybe go out ta the

property so you can point out some of these things and where some of this stuff was.

BRENDAN: (nods "yes") Yeah.

FASSBENDER: OK?

BRENDAN: (nods "yes") OK.

(door closes)

(long pause)

(door opens and closes)

FASSBENDER: Brendan,

WIEGERT: Go ahead.

FASSBENDER: What do you think's gonna happen? What do you think should happen right now?

BRENDAN: I don't know.

FASSBENDER: You know obviously that we're police officers. OK. (Brendan nods "yes") And be because of what you told us, we're gonna have ta arrest you. Did you kinda figure that was coming? For for what you did we we can't let you go right now. The law will not let us. And so you're not gonna be able to go home tonight. All right?

BRENDAN: Does my mom know?

FASSBENDER: Your mom knows.

WIEGERT: Your mom is here, OK? (Brendan nods "yes") Would you like ta talk to her?

BRENDAN: Yeah.

FASSBENDER: Do you have .... before we bring her in, do you have any other questions right now? (Brendan shakes head "no") You do understand that you're under arrest now? (Brendan nods "yes")

BRENDAN: So could I call my girlfriend and tell her that I couldn't come today?

FASSBENDER: We'll give ya an opportunity ta to do that, OK? (Brendan nods "yes") Did you kinda, and be honestly the after telling us what you told us you kinda figured this was coining? (Brendan nods "yes") Yeah? (Brendan nods "yes")

BRENDAN: Is it only for one day or?

WIEGERT: We don't know that at this time, but let me tell ya something Brendan, you did the right thing. OK. (Brendan nods "yes") By being honest, you can at least sleep at night right now. Cuz, I'm sure you've had some difficulty with that. (Brendan nods "yes") So you did the right thing here, by telling us what happened. OK. (Brendan nods "yes") Just remember that in the future, OK, you need to be honest. (Brendan nods "yes")

FASSBENDER: Your cooperation and help with us is gonna work in your favor. I can't say what its gonna do or where your gonna end up but its gonna work in your favor and we appreciate your continued cooperation. (Brendan nods "yes") We talked to your mom about going out to the house and going in the house and gettin' a few items and about you going out there with us and her and um pointing out those areas that we wanted ya to point out. Is that all right? (Brendan nods "yes") OK.

WIEGERT: Do you know where those shoes are that you were wearing that day? The red shoes?

BRENDAN: (nods "yes") l think they're in the closet.

WIEGERT: OK, what about the jacket?

BRENDAN: In the closet.

WIEGERT: OK. All right. We'll have your mom come in for a few minutes, OK? All right.

(door opens and closes)

(pause)

(door opens and closes)

BARB JANDA: Why didn't you tell me? Huh?

FASSBENDER: Barbara give me your coffee, it's in your hands right now.

BARB JANDA: Huh? Did he make you do it? (Brendan nods "yes") I woulda walked out. That's what I woulda did. (crying during pause) Why didn't you just tell 'em, no? Huh?

BRENDAN: I don't know.

BARB JANDA: You knew it was wrong, right? (Brendan nods "yes") (pause) Do you know you can't come home? Do you know where you're going? (pause)

BRENDAN: How long is it though?

BARB JANDA: I don't know. I do not know. (pause) Do I have ta get some him an attorney, or will they do it for me?

FASSBENDER: The court will assign one for him or the state will pay for his attorney if he can't pay for it, but obviously you have a right at any time to try and get him one or get him one.

BARB JANDA: I tried for a public defender not too long ago and I couldn't get cuz I've got a house.

FASSBENDER: Well there's different, different ways that they determine you know based on, on what you've been arrested for and stuff like that there's dif-

ferent levels of, of money that you need, you need they, they will determine and I don't know what that is or how they determine that.

(pause)

BARB JANDA:Are you gonna be OK, are you sure? Huh. Look at me. Why didn't you tell me? Stuff like that is not no secret. I don't care if he told you if he said ta keep it a secret, it's still not a secret. I don't keep secrets from yous. Do I? Don't worry about my belly, I haven't eaten in two days.

FASSBENDER: I didn't even hear it. Did you want a sandwich, Barb?

BARB JANDA: No.

FASSBENDER: We have some here.

BARB JANDA: No. I'd probably just throw it up anyhow. Am I gonna be able ta see him? Later on after he gets where he's gotta go?

FASSBENDER: I don't know ah on their policies and when they allow visitation and stuff like that. We can check with Mark, he's gonna know Sheboygan's polices or whatever. With, with juveniles there's probably a good chance but I just don't wanna say right now.

FASSBENDER ON THE PHONE: Hello, Tom here. Good how are you?

BARB JANDA: Why.

BRENDAN: ……..

BARB JANDA: Huh?

FASSBENDER ON THE PHONE: It's on for tomorrow?

BARB JANDA: What?

BRENDAN: ……..

BARB JANDA: I said why?

FASSBENDER ON THE PHONE: OK.

BARB JANDA: mh huh. What did he do to you to make you do it?

BRENDAN: Nothin'

BARB JANDA: Did he force you to do it? (Brendan shakes head "no")

FASSBENDER ON THE PHONE: All right if, if we go in tomorrow and I think we need someone, I'll call you. All right?

BARB JANDA: mh huh.

FAS SBENDER ON THE PHONE: All right, thanks. Bye.

BRENDAN: ……..

BARB JANDA: mh.

BRENDAN: You don't want to.

BARB JANDA: What?

BRENDAN: I didn't want to.

BARB JANDA: Ohh. (door opens and closes) Are you regrettin' it now? (pause) You had a whole life ahead of you Brendan. Just because he's so demanding, doesn't mean you gotta do the stuff he says. Right?

BRENDAN: Where am I going?

BARB JANDA: Where do you think you're going?

BRENDAN: I don't know?

BARB JANDA: You're goin' to juvie, that's where you're going, to a juvie jail. About 45 minutes away.

BRENDAN: Yeh but I gotta question?

BARB JANDA: What's that?

BRENDAN: What'd happen if he says something his story's different? Wh-he says he, he admits to doing it?

BARB JANDA: What do you mean?

BRENDAN: Like if his story's like different, like I never did nothin' or somethin'.

BARB JANDA: Did you? Huh?

BRENDAN: Not really.

BARB JANDA: What do you mean not really?

BRENDAN: They got to my head.

BARB JANDA: Huh?

BRENDAN: .....say anything.

BARB JANDA: What do you mean by that? (pause) What do you mean by that Brendan? (pause) I have a question for yous two. Is there any way that I can talk to him. Not him, the other one.

WIEGERT: As in Steve you mean?

BARB JANDA: Yes.

WIEGERT: The only way we can have you talk to him is if he calls you or if its, you know, you go there for visiting.

BARB JANDA: I won't go there and visit.

WIEGERT: OK. That's the only way. I-I have no other way of, you know, I-I can't hook you up to him or anything like that. I'm not allowed to do that. If he calls you, you can do what you want or if you go there for visiting, you know that's up to you.

BARB JANDA: Were you pressuring him?

WIEGERT: Who are you talking about?

BARB JANDA: Him.

WIEGERT: What do you mean, pressuring him?

BARB JANDA: In talking to him.

WIEGERT: No we told him we needed to know the truth. We've been doing this job a long time Barb and we can tell when people aren't telling the truth. And, in my opinion, he'd never be able to live with himself if he didn't tell somebody. There's no way, he could've live with that. Nobody could live with that. I think Brendan knows that.

WIEGERT: Brendan, you need to use the bathroom or anything? (Brendan shakes head "no")

BARB JANDA: When are you going out to my house then?

WIEGERT: As soon as we can leave here, we'll go out there. I don't think we're gonna bring Brendan out there though. I-I just don't think that's a good idea. I don't think he needs to be exposed to that or be out there anymore. (door opens and closes) It's not gonna do him any good.

BARB JANDA: So what you're sayin' is if, when he gets out, it wouldn't be a good idea for him to be there, at all.

WIEGERT: I-You know, I can't tell you where for you guys to live, but what do you think? Do you think it's a good idea for him to next where this stuff occurred?

BARB JANDA: I-I don't wanna be there, but I can't afford another place.

WIEGERT: I know.

BARB JANDA: I mean that's $80,000 I owe yet.

WIEGERT: I understand.

WIEGERT: It's a shitty, shitty spot to be in.

BARB JANDA: And nobody's gonna buy it.

WIEGERT: You're in a bad spot an-and I wish I had some answers for you. If there's somethin' I can do to help ya, I certainly will. (pause) Maybe you should look into movin' the house.

BARB JANDA: I can't afford it.

WIEGERT: We-who knows, you don't even know what it'll cost, depends on where you move it.

BARB JANDA: Quite a bit. (pause) An extra $16,000 for another basement. (pause) So what did you all help him with? Can I ask? Will you tell me? Brendan? Did you do it willingly? Huh? (Brendan shakes head "no") (pause) He did tell me one time, Steven, he told me that probably one or two of my kids would not graduate.

WIEGERT: Steven told you that?

BARB JANDA: Yeah. This was before this all even happened. So he must have had it all planned.

WIEGERT: That's very possible, very possible. (pause)

BARB JANDA: You don't know how much hatred I got right now.

WIEGERT: You're right, I don't. I can only imagine. I-I can't even put myself in your shoes Barb, I can't.

BARB JANDA: My oldest son is gonna flip. I can't even tell him. I can't.

WIEGERT: I think you better because

BARB JANDA: I can't, he's on a heart monitor now.

WIEGERT: This is gonna be on the media tonight.

BARB JANDA: Oh god.

WIEGERT: There's no way to stop it.

BARB JANDA: He's not gonna be on, is he?

WIEGERT: Brendan?

BARB JANDA: Yeah.

WIEGERT: No.

BARB JANDA: Well they can't anyhow.

WIEGERT: No, he's not gonna be on.

BARB JANDA: How long do we have to stay here?

WIEGERT: Well, as soon as you guys are done talkin'.

BARB JANDA: No and he's not talking too much so.

WIEGERT: You know, I can leave you alone but this is all recorded and videotaped, do you understand that?

BARB JANDA: I don't care.

WIEGERT: OK. All right, do you want to be left alone with him for five minutes or it doesn't matter at this point?

BARB JANDA: It doesn't matter.

WIEGERT: OK.

BARB JANDA: I just don't know if I'm really able to handle it.

WIEGERT: You have to. Barb you have to. You've got other children you've gotta worry about.

BARB JANDA: I know.

WIEGERT: And you got Brendan to worry about too. Brendan's gonna need you through this. (pause) OK, let's go. Barb, is this yours?

BARB JANDA: Yeah.

WIEGERT: Let's go in the other room. Brendan, I'll be back OK?

(door opens and closes)

(pause)

(door opens and closes)

FASSBENDER: Did you want another water Brendan? (Brendan shakes head "no")

(long pause)

(door opens)

WIEGERT: She wants to give him a hug.

BARB JANDA: Stand up.

(background voices)

(door opens and closes)

(pause)

(door opens and closes)

JACOBS: Brendan, my name is Dennis Jacobs and I-I'm a detective with Manitowoc County. Do you have any weapons or anything on you?

BRENDAN: Just some stuff that I can give to my mom, like a CD player and that.

JACOBS: Th-that wouldn't be a weapon though. You have like a little pocket knife anything like that?

BRENDAN: (shakes head "no") No.

JACOBS: Can you stand up, I just want to pat you down, real quick, just to make sure. Well that's nothing that gonna hurt me an, OK that's fine. OK. There's nothin', nothin' else in your pockets at all? OK. You have a shirt, you have a pocket up here.

BRENDAN: No.

JACOBS: OK, you can have a seat.

BRENDAN: …….do somethin?

JACOBS: Yeah, yo-you can put it back in your pockets too if you want, it's up to you. Whatever you wanna do. Actually if you wanna listen to your headphones, you can go ahead and do that too.

(door closes)

(music playing in background during pause)

(door opens)

WIEGERT: Brendan, this what's gonna happen, OK. We're gonna take ya downstairs (door closes) and they're gonna fingerprint ya and stuff here, (Brendan nods "yes") OK, and then you'll be taken over to down to Sheboygan Co. Jail. (Brendan nods "yes") OK? (Brendan nods "yes") So, is that your's?

BRENDAN: (nods "yes") mm huh.

WIEGERT: Where did ya have it, in your pocket? Holy Christmas. All right. Why don't we go. OK. Bring that along.

FASSBENDER: ……..side or

WIEGERT: OK……..

FASSBENDER: Are we going outside?

WIEGERT: No.

(door closes)

This is the end of the interview with BRENDAN DASSEY at MANITOWOC CO. SHERIFF'S DEPT.

Inv. Mark Wiegert

Calumet Co. Sheriffs Dept.

MW/sk/ds

CC: District Attorney

APPENDIX I

CALUMET COUNTY SHERIFF'S DEPARTMENT

Complaint No.	Page
05-0157-955	439
	File Number

TYPE OF ACTIVITY: **Interview of:**
Brendan R. Dassey, DOB 10/19/89
12930A Avery Rd.
Two Rivers, WI
Phone: 755-8715

DATE OF ACTIVITY: **02/27/06 at approximately 12:30 p.m.**

REPORTING OFFICER: **Inv. Mark Wiegert**

[No. 14-cv-1310-WED, filed May 4, 2015 (Doc. 19-24)]

On 02/27/06, I (Inv. WIEGERT of the CALUMET CO. SHERIFF'S DEPT.) along with Special Agent TOM FASSBENDER from the DEPT. OF CRIMINAL INVESTIGATION went to the MISHICOT HIGH SCHOOL to meet with BRENDAN DASSEY. Upon arrival, BRENDAN did present himself into a conference room where we met with him. Prior to meeting with BRENDAN, we did inform BRENDAN that he was not under arrest, did not have to answer any questions and did not need to speak with us. BRENDAN indicated he understood this and agreed to talk with us. It should be noted that the entire interview of BRENDAN was put on audiotape. BRENDAN was advised that the interview would be audiotaped.

The following is a brief synopsis of the first interview with BRENDAN DASSEY:

BRENDAN stated that on Halloween, 10/31/05, he had gotten off the bus at 3:45 p.m. and had seen her jeep down at STEVEN' s house. BRENDAN stated he had gone into his house and played Playstation for two or three hours. BRENDAN stated he then ate and at approximately 8:00 p.m., he received a phone call from STEVEN. STEVEN had asked BRENDAN if he wanted to come over and have a fire and BRENDAN stated he did. BRENDAN stated STEVEN told him to bring the golf cart, which he stated he did. According to BRENDAN, they went driving around the yard to pick up several items. BRENDAN stated they dropped off the car seat by the fire and then went to get some wood and an old cabinet and then went back to the fire to throw the seat on the fire. BRENDAN stated they then waited for the fire to go down and threw wood and an old cabinet on the fire. BRENDAN stated at that time he saw the toes before they put the wood and the cabinet on the fire. BRENDAN states STEVEN saw him and that STEVEN realized he had seen the toes and STEVEN told BRENDAN not to say anything. According to BRENDAN, STEVEN had told him that he (meaning STEVEN) had stabbed her (meaning TERESA) in the stomach in the pit and that he took the knife and put it under the seat of her jeep.

We asked BRENDAN why STEVEN had done this to which BRENDAN stated STEVEN had said that he was angry. BRENDAN also told us that STEVEN told him that STEVEN had used a rope to tie her up in the Jeep. BRENDAN stated that STEVEN had threatened him. BRENDAN also told us that he saw the fingers, the belly and the forehead of TERESA in the fire. BRENDAN stated he believed that the body was all together and was underneath some tires and branches.

STEVEN had told BRENDAN that he hid the vehicle in the pit back in the tree area and put some tree branches on the top of it and put the car hood on the top of it. BRENDAN also told us that STEVEN had gone into the garage and had taken some clothes and put them in the fire. BRENDAN described the clothes as a blue shirt and some pants. BRENDAN stated there was blood on the shirt and there was a hole in the stomach area. BRENDAN stated STEVEN had told BRENDAN that it was TERESA's shirt.

BRENDAN stated to us that when they were up north at the cabin, STEVEN told BRENDAN that he was going to get a car and try to get it as far away as he could.

That was a brief synopsis of the interview.

The following will be a transcription of the audiotaped interview:

FASSBENDER: Mark's obviously laying out a tape recorder on the table um we'd like to tape the interview, um OK, no problem with that, if that's all right. Um, you're not under arrest, you know that. You're free to go at anytime you want. Ah, just listen to us, you don't have to answer any questions if you don't want to and stuff like that OK? Um and I, I would really appreciate if you would just kinda relax and open up with us. We're not here ta, ta jump in your face or get into ya or anything like that. I know that may have happened before and stuff like that, we're, we're not here to do that. We're here more ta maybe let you talk or talk to you a little about how you've been feeling lately and stuff. I, I have a feeling there's some things on your mind and I just want to give you that opportunity to talk about um. I want you to talk to us, talk about what you're thinking about, feeling maybe. I

know something's bothering ya, and you know that, and it's gotta be laying real real heavy on ya.

WIEGERT: You've had a tough go of it lately I'd imagine huh?

BRENDAN: Yeah

WIEGERT: We definitely understand that.

FASSBENDER: We're not here to hurt anyone, we just, you know if you, you got a chance to meet Teresa's mother and stuff, you've got to know them a little and you'd know that they were decent people too, and just like I think your brother's are and your mom is and people don't realize that because all the bad press and stuff. And that's all we're, we're thinking about, just to bring justice, no matter how hard or how much it hurts. Ah, for, for Teresa. This feels pretty awkward, but go ahead and tell us what's been bothering ya.

BRENDAN: That he's, that he's gone and I can't see him

FASSBENDER: That Steve is gone? You're pretty close with Steve?

BRENDAN: I helped him fix his cars and that

FASSBENDER: mmhuh, I kinda figured that was part of it. Were you probably the closest to him as opposed ta like your brothers and stuff?

BRENDAN: Well me and Blaine were .....

FASSBENDER: Yeah, Blaine would hang around Steven a lot too? Have you been able to go up and visit him at all?

BRENDAN: Well I tried, but I, I couldn't get in cuz I didn't have my like identity cards.

FASSBENDER: Oh. You talk to him on the phone much?

BRENDAN: No.

FASSBENDER: How's your mom doing?

BRENDAN: Pretty good.

FASSBENDER: Anything else bothering you?

BRENDAN: Not really.

FASSBENDER: No. Brendan, we know that, that Halloween and stuff you were with him and, and helped him tend to a fire and stuff like that behind the garage and stuff and, anything that you saw that night that's been bothering ya? And if you built the fire, and we believe that's, that's where Teresa was cooked. And if you were out there by the fire and stuff, and by your own words you went and got that, that seat out of a, the vehicle seat remember that one, brought it over and someone put it on the fire, did you put that seat on the fire or him?

BRENDAN: We both did.

FASSBENDER: What did you both grab it and put it, put it in the fire? What did you see in the fire?

BRENDAN: Some branches……..a cabinet and some tires……..

FASSBENDER: mmhuh. Did you see any body parts?

BRENDAN:

FASSBENDER: You know if you think you saw something in the fire, and it's bo, starting to bother you, or you're feelin' bad about it, the only way it's ever gonna end is if you talk about it. I, I gotta believe you did see something in the fire. You wanna know why I believe

that? Because Teresa's bones were intermingled in that seat. And the only way her bones were intermingled in that seat is if she was put on that seat or if the seat was put on top of her.

FASSBENDER: As I said, we're not gonna say you did and we're not gonna say you didn't, we're not here to… We're here to give you the opportunity to come forward, to talk to us about what you did see, encountered out there that night. We want to know, a lot, a lot of the reason that we're doing this is because, how old are you 16, 17? You're a kid, you know and we got, we've got people back at the sheriffs dept., district attorney's office, and their lookin' at this now saying there's no way that Brendan Dassey was out there and didn't see something. They're talking about trying to link Brendan Dassey with this event. They're not saying that Brendan did it, they're saying that Brendan had something to do with it or the cover up of it which would mean Brendan Dassey could potentially be facing charges for that. And Mark & I are both going well ah he's a kid, he had nothing to do with this, and whether Steve got him out there to help build a fire and he inadvertently saw some things that's what it would be, it wouldn't be that Brendan act-actually helped him dispose of this body. And I'm looking at you Brendan and I know you saw something and that's what killing you more than anything else, knowing that Steven did this, it hurts. Whether it was an accident that Steven did it by, however it happened, he's, he's gotta deal with that. Truthfully, I don't believe Steven intended to kill her. I don't know how it happened, only Steven knows how it happened, and potentially you. Do you know how it happened? What did you see in that fire?

BRENDAN: ……some black……some garbage bag on there.

FASSBENDER: Umhm, and what was in the garbage bag?

BRENDAN: ……

FAASSBENDER: ……..garbage bag and they were plastic? Plastic melts pretty quick right……

BRENDAN: Well, I would burn the garbage

FASSBENDER: Where did you get those bags from?

BRENDAN: …….from his garage ... he was saving it for a bonfire.

FASSBENDER: mmhuh.

BRENDAN: Cuz we invited some friends over but they cancelled.

FASSBENDER: Yeah, I know how hard this is, you know that you saw him put some garbage bags on, but I can look, I can't see in your eye, but by your look I can tell you know of something, you saw something or somebody, somethin's laying heavy on ya. We wouldn't be here bothering you if we didn't know that. We've gotten a lot of information and you know some people don't care, some people back there say no we'll just charge him. We said no, let us talk to him, give him the opportunity to come forward with the information that he has, and get it off of his chest. Now make it look, you can make it look however you want, ... really care, ……tell us what you knew that way you don't have to feel bad for Steven you have to tell the truth. You have no choice in that, someone had killed someone and like I said I don't think Steven intended to do it, but it happened. He still has to pay the price for that……I hope you understand that. He didn't do the right thing. How are you going to live with your-

self the rest of your life knowing what you know. And I've got ... kids somewhat your age, I'm lookin' at you and I see you in him and I see him in you, I really do, and I know how that would hurt me too. I know how much he would hurt because of what he did know and how, how he felt for the person and what he saw and what he knows. I'm not here, like I said I'm not here to.....I'm not, I here to give you the opportunity to get this off your chest. Mark and I, yeah we're cops, we're investigators and stuff like that, but I'm not right now. I'm a father that has a kid your age too. I wanna be here for you. There's nothing I'd like more than to come over and give you a hug cuz I know you're hurtin'. Yes I do wanna give justice to, to this and to the Halbachs too. You wanna tell me what you saw and what you heard, cuz I know that something is, it's intensely bothering you. Talk about it, we're not just going to let you high and dry, we're gonna talk to your mom after this and we'll deal with this, the best we can for your good OK? I promise I will not let you high and dry, I'll stand behind you.

WIEGERT: We both will Brendan. We're here to help ya.

BRENDAN: Well I know that he.....

FASSBENDER: ... and that's nice to know. It's not something that, that I mean we knew that. I'm more interested in what you probably saw in that fire or something. We know she was put in that fire, there's no doubt about it. The evidence speaks for itself. And you were out there with him. And unfortunately I'm afraid you saw something that you wished you never would have seen. You know, I mean, and that's what we need to know. We get that off your chest and we can move forward. That's the important thing we need

to, to get out right now, for you. Cuz you're having a tough go of it, and it's not just cuz' you can't see Steve but what you saw. Did you see a hand, a foot, something in that fire? Her bones? Did you smell something that was not too right?

BRENDAN: Well we weren't there for long ..... picking up the stuff.

FASSBENDER: You were both there, you and Steven? Was it just you going around with the cart to get the stuff?

BRENDAN: Yeah.

FASSBENDER: Tell me this, when, when you, I mean you, you got home from school and stuff, w-were you there when the fire started or did you come out after the fire was going pretty good?

BRENDAN: He had it started .....

FASSBENDER: And then were there tires on it before you got out there?

BRENDAN: No just branches .....

FASSBENDER: And then what time did you go in the house that night about?

BRENDAN: About 10:30.

FASSBENDER: And was he still out there then?

BRENDAN: He was out there till like.....my brother came home and said he.....

FASSBENDER: And what brother is that?

BRENDAN: Blaine.

WIEGERT: You said you went in at 10:00 or 10:30?

BRENDAN: 10:30.

WIEGERT: All right.

FASSBENDER: And that same night, did you help him push a vehicle somewhere too?

BRENDAN: Yeah I did ……..

FASSBENDER: And what did you do with that, was that a Suzuki? And where did you push that?

BRENDAN: He had it outside, I just pushed it into the garage.

FASSBENDER: His garage?

BRENDAN: Yeah.

FASSBENDER: And what else was in that garage at that time?

BRENDAN: His moped.

FASSBENDER: He had a moped in there? Anything else?

BRENDAN: …….snowmobile…..…….his lawnmower.

FASSBENDER: No other vehicle? (PAUSE). Can you tell me some other things?

BRENDAN: ……

FASSBENDER: You saw? Didn't see anything in that fire?

WIEGERT: What was in the garbage bags?

BRENDAN: Paper plates, soda bottles

WIEGERT: Were they heavy?

BRENDAN: …..

FASSBENDER: Did you help carry them out or?

BRENDAN: .....I carried one out.

FASSBENDER: Out of the house or garage?

FASSBENDER: What else is botherin' ya?

BRENDAN: Trying to find a girlfriend.

FASSBENDER: mmhuh. .....

BRENDAN: Tried to get a hold of ... girlfriend.

FASSBENDER: Did you just breakup?

BRENDAN: ……she broke up with me.

FASSBENDER: Did she say why? Nothing to do with this, is it?

BRENDAN: ….

FASSBENDER: Well I hope you're gettin' over that. Just a girl, you'll find others, right? Talk to your mom about it at all? Did she say the same thing, find other girls?

BRENDAN: …..My mom told me that times heal.

FASSBENDER: True, time will, time will heal.

WIEGERT: Brendan, we know that Steve told you to say certain things when the police came and talked to you OK, I know that. We've been told that. What did Steve tell you to tell us?

BRENDAN: ……not to say stuff.

WIEGERT: What kind of stuff?

BRENDAN: Like don't talk …….

WIEGERT: Did he tell you what to say?

BRENDAN:

WIEGERT: I heard that he did. I heard, and I was told Brendan Steve told you what to say and what not

to say, because it was you and him out by that fire. I know you and him knew what was going on there. It's really important that you be honest here OK? Everybody gets an opportunity with Tom and I OK, and we want to give you that opportunity to be honest. We want to help you through this. Obviously it's bothering you, this whole thing is bothering you and the rest of your family, but you'll never ever get over it unless you're honest about it, cuz this will bug you 'til the day that you die, unless you're honest about it. But we wanna go back and tell people that, you know, Brendan told us what he knew. We wanna be able to tell people that Brendan was honest, he's not like Steve, he's honest, he's a good guy. He's gonna go places in this life. But in order for us to do that, you need to be honest with us and so far you're not being 100 percent honest. OK. Tom and I have been doing this job a long, long time, longer than you've been alive, and our experience and our knowledge in this job tells us that you're not being totally honest with us and there's no way that you're going to get over this and move on in your life without being honest.

FASSBENDER: You know Steven said there wasn't a fire that night. He denied that, denied that and denied that until enough witnesses came forward and said that had they seen a fire…..…….you know that.

WIEGERT: Steve doesn't care about you right now, he cares about himself.

FASSBENDER: Unfortunately that's all Steven cares about. He left you to hang out to dry. He told you what to say when you got off the bus and what you saw. You know what you saw……You're the only one that we talked to between the other brothers, Blaine, Bobby, Bryan, that is inconsistent with what they said.

Part of it's because of that cuz you like Steven, you're trying to help him, but you're misguided that way and you're trying to help him out with what you know happened and did see. I think you're starting to be honest with us about some things right now.

BRENDAN: Well, when we were up north ... he was trying to hide when the cops came and grandpa……

WIEGERT: What else did he tell you?

BRENDAN: That he said he was gonna get in the car and try to get away as far as he could.

FASSBENDER: ……Anyone else by the fire by you that night?.....all night. I think there's a reason for that like Steven felt he, ah, could trust you to not say-anything…....fire…….and asked you to…..using your love, and taking advantage of that.

WIEGERT: To cover up for hurting that girl, that girl didn't do nothin'. How would you feel if that was your sister?

BRENDAN: ….

WIEGERT: That burn pit Brendan was no bigger than this table. OK. You know how big it was. I find it quite difficult to believe that if there was a body in that Brendan that you wouldn't have seen something like a hand, or a foot, a head, hair, something. OK. We know you saw something. And maybe you've tried to block it out but it's really important that you remember. Think back.

FASSBENDER: I'm really…..……by the garage, by the house, by the fire pit. I know you saw something. … Mark and I both can go back to the district attorney and say, ah, … Dassey ... came forward and finally told

us. Can imagine how this was weighing on him? They'll understand that.

WIBGERT: We'll go to bat for ya, but you have to be honest with us.

FASSBENDER: Tell us the truth, exactly.

BRENDAN: …….

FASSBENDER: Can you get close? Can you get close ... to telling us the truth.

WIEGERT: It's OK to tell us.

FASSBENDER: It's OK, it's a big step …… a step toward feeling better about yourself, to recovery, to not crying at night because of this stuff happen-in'……what you saw. I promise you I'll not let you hang out there alone, but we've gotta have the truth. The truth is gonna be terrible…..…….your mom……..

WIEGERT: We're not gonna run back and tell your grandma and grandpa what you told us or anything like that. OK.

FASSBENDER: …….

WIEGERT: Let's talk about it.

FASSBENDER: ..Talk to us Brendan if you want this resolved.

BRENDAN: ……..some clothes like a blue shirt, some pants ...

WIEGERT: Where did he get the clothes from?

BRENDAN: His garage.

WIEGERT: Where in the garage?

BRENDAN: …….

WIEGERT: Where in the garage were they?

BRENDAN: ... in the back.

WIEGERT: Back and on the side?

FASSBENDER: Was her car still in there when you went in there? Tell us the truth.

BRENDAN:

FASSBENDER: OK. Did you see some undergarments or anything like that? Bra?

WIEGERT: How about any shoes?

BRENDAN: ……

WIEGERT: Was there blood on those clothes? Be honest Brendan. We know. We already know you know. Help us out. Think of yourself here help that family out.

FASSBENDER: It's gonna be all right, OK.

WIEGERT: Was there blood on those clothes?

BRENDAN: A little bit

WIEGERT: OK. Where was the blood?

BRENDAN: Like …….

WIEGERT: Blood on the shirt?

BRENDAN: ……..

FASSBENDER: You're startin' to, you're starting to get it out now OK. It'll be all right …… get it all out, it doesn't do any good to get half of it out.

BRENDAN: ……..the fire……said he was gonna bury it and start……

FASSBENDER: When the fire pit got full, he was gonna bury that whole pit and start, did he have somewhere else? Where ……..

BRENDAN: ……..

FASSBENDER: Ohh. So you had to move it from behind the garage to behind the house. Did he say why? Did you know why?

BRENDAN: …….

WIEGERT: Where did he tell you those clothes came from?

BRENDAN: He said that they were……..

WIEGERT: You kinda knew better though, don't ya?

FASSBENDER: You now know better, they were girl clothes, weren't they?

WIEGERT: Were they in a bag or anything?

BRENDAN: They were ……. bag.

FASSBENDER: ...pants and shirt and anything else you saw... Had blood on the shirt?

WIEGERT: Where on the shirt was the blood? Where on the shirt was the blood?

BRENDON: …

WIEGERT: Was it a button down shirt?

FASSBENDER: Remember what kind of pants were they blue jean pants or ...

BRENDAN: ……..

WIEGERT: What else did he get out of the garage? Be honest OK.

BRENDAN: ….He had a shovel, ...

WIEGERT: OK

BRENDAN: and a rake ..... he took.

FASSBENDER: Go ahead

BRENDAN: ……..

FASSBENDER: What did he do with the shovel?

BRENDAN: ……..

FASSBENDER: Let's go to the parts that……clothes…..talk about…..…whenever he talked …. got a feelin' that you saw something in the fire that you're trying to just ……..

WIEGERT: It's not your fault. Remember that.

FASSBENDER: Yeah, it's not your fault……Like I said, Mark and I are not going to leave you high and dry. I got a very, very important appointment at 3:00 today. Well I ain't leavin' for the appointment until I'm sure you're taken care of…..telling the truth……get this off your chest and get it out in the open ... so go ahead and talk to us about what you saw in the fire are killin' you right now…..……..what you see. Go ahead, go ahead. ……..you've got to do this for yourself. I know you feel that it's gonna hurt Steven, but it's actually, actually gonna help Steven come to grips with what he needs to do. More important, this could help you. How long you thing … are going to put up with this ... You know we found some flesh in that fire too. We know you saw some flesh. We found it after all that burned. I know you saw it ... Tell us. You don't have to worry about……..you won't have to prove that in court. (phone rings) Tell us what you saw. You saw some body parts ... You're shaking your head ... tell us what you saw...

BRENDAN: …..

FASSBENDER: You all right? You all right? What other parts did you see?

BRENDAN: Toes.

FASSBENDER: ... part of a foot too? What other parts of the body ... Did you see part of the arm, the legs? I know. It's all right ... Did you see part of her head? Skull?

BRENDAN: I seen…..

FASSBENDER: Okay ... a human body … did you say anything to Steven? .... Was he hoping you didn't see that or what?

BRENDAN: ……

FASSBENDER: Where? The body parts that you saw, were they on top of tires or underneath the tires, or?

BRENDAN: ……..

FASSBENDER: Pardon?

BRENDAN: ….. bottom of tires.

FASSBENDER: Underneath the bottom of the tires.

BRENDAN: …..

FASSBENDER: Could you smell them?

BRENDAN: No …

FASSBENDER: All right, we got, we got a lot of important stuff out there now. Take a breath. Let's go over th-the parts that you mentioned, OK, so you mentioned toes, fingers, parts of hand and feet and then what you thought maybe was stomach area or midsection or torso. Did you see any parts of the legs …. parts

of the legs or arms. You sure you didn't see her, her, now this is very hard, it's eas, not easy but it easier to say your saw a toe or a finger, but when you start saying to me or I saw a head or a face or hair or you know stuff like that, that's when it hurts though but I find it very hard that you didn't see a skull or the head. Did you see part of the head or face or skull?

BRENDON: …….somewhat.

FASSBENDER: Somewhat?

WIEGERT: I know this is hard Brendan, but can you describe what you saw when you mean somewhat?

BRANDAN: Like her forehead.

WIEGERT: Did you seen any hair?

FASSBENDER: When you say her forehead was it white bone already or was there still flesh on it?

BRENDAN: ……..a little it of flesch.

FASSBENDER: A little bit of flesch.

WIEGERT: Were all the body parts connected yet?

BRENDAN: ……

WIEGERT: Yes? Did you say yes or no? I'm not sure.

BRENDAN: Yeah.

WIEGERT: Yes.

FASSBENDER: So all the body parts were pretty much connected then when you saw the toes, which means they were probably connected to the feet yet, correct? Which means the feet, foot is connected to both the legs, so I'm just going to ask this question, you're saying that you seen body part. You're pretty much, you're seeing a body? Is that accurrate? You saw her body in there?

WIEGERT: Would you say yes or no for me BRENDAN?

BRENDAN: Yes.

FASSBENDER: And then the shovel and the rake were used to do, to do what?

BRENDAN: …….

FASSBENDER: Now you can tell me if you actually think ... you see that?

BRENDAN: Yeah.

FASSBENDER: But you did. And you never said anything to him. Have you told this to anyone? And is that what's been bothering you a lot?

BRENDAN: Yes

FASSBENDER: And, and I understand that, that's normal because you've done nothing wrong.

WIEGERT: Brendan, I'm going to ask you a difficult question, OK? Did you help him put that body in the fire? If you did it's OK.

BRENDAN: ……

FASSBENDER: Was the body in the fire before you got out to the fire?

BRENDAN: There was like branches ……..

WIEGERT: When did you see it, when you first went out there or when?

BRENDAN: Like if …….

WIEGERT: So, let's just go through you, what time did you go out there?

BRENDAN: 8:00, 9:00

WIEGERT: What time?

BRENDAN: 9:00

WIEGERT: OK. So at 9:00 you go out and you go right by the fire?

BRENDAN: ….

WIEGERT: Yes?

BRENDAN: …..

WIEGERT: OK, and you see what exactly, explain to me exactly what you saw at 9:00

BRENDAN: Branches, tires, tires, like a garbage bag, and ……..

WIEGERT: So you went there at 9:00, you see the branches, the tires, the garbage, it's all on the fire already? Is it burning already?

BRENDAN: Yeah.

WIEGERT: And then you go get the car seat?

BRENDAN: Yeah.

WIEGERT: And how do you get that?

BRENDAN: We put it in the back of the golf cart.

FASSB ENDER: Who's golf cart?

BRENDAN: ….

FASSBENDER: Jodi's?

WIEGERT: No, Barb's.

FASSBENDER: Barb Janda, oh yeah.

WIEGERT: OK, so you go get the, the seat and then what do you do?

BRENDAN: .... the big pit fire and then we got there and threw it on it

FASSBENDER: During this process, is he moving the rake, shoveling to mix things up and stir things?

BRENDAN: .....

WIEGERT: So then after you throw the seat on, what happens, when do you see the body parts?

BRENDAN: Like when he's pushing it on there.

WIEGERT: He's pushing what on there?

BRENDAN: …… car seat

WIEGERT: OK. Tell me again what do you see in that fire?

BRENDAN: I …….....

WIEGERT: First you see the feet? And then what?

BRENDAN: Then I looked around a little bit and I seen…….

WIEGERT: You saw the hands and the forehead. And then what did you see?

BRENDAN: ……

FASSBENDER: So you went and got some wood, came back and he … then what did you see?

BRENDAN: ……..

FASSBENDER: When did you, did you ever see the body again then? What parts did you see this time?

BRENDAN: ……..

WIEGERT: What else did you see?

BRENDAN: That's it.

WIEGERT: When did he, when did he put the clothes on the fire?

BRENDAN: ……

FASSBENDER: So you were still there where he went in the garage. Did you go in the garage with him to get the clothes? He brought em out?

FASSBENDER: Now earlier you said the clothes were not in the back on the far side, how did you tell that?

BRENDAN: Cuz he usually has them back there….....

FASSBENDER: Are you sure you didn't go in the garage with him to get the clothes?

WIEGERT: Now I-I've been told that you and STE-VE talked about the body in there, OK, that's what I was told, and I believe that. You guys did talk about it, didn't ya?

BRENDAN: Yeah.

WIEGERT: What did he tell you?

BRENDAN: That I shouldn't say....

WIEGERT: OK. So you tell me how that conversation went. What did you say to him?

BRENDAN: I said why did you do it because ……..and he's like……..and told me not to say nothing.

WIEGERT: Did you know who it was?

FASSBENDER: Did he say who it was?

BRENDAN: ……

WIEGERT: So he said he got angry?

BRENDAN:

WIEGERT: Did he say how he did it?

BRENDAN:

WIEGERT: Did you ask him?

BRENDAN:

WIEGERT: What exactly did he say? He said he, you saw the bones and you said to him why did you do it? Or did you ask him if it was a body or how did that go?

BRENDAN: Why did he do it?

WIEGERT: OK and he said exactly what?

BRENDAN: That he, that he ……..

WIEGERT: Did he tell you where he did it?

BRENDAN:

WIEGERT: What did he tell you about the truck?

FASSBENDER: You saw her car didn't ya? Her RAV4. Where was it when you saw it?

BRENDAN: On the other side of the street…

FASSBENDER: Where did you see it later? Was it in his garage later? Did you see it in his garage?

BRENDAN: ……

FASSBENDER: When was the first time you went out again?

BRENDAN: At night

FASSBENDER: At night about 9:00 you said?

WIEGERT: Where was the truck then?

BRENDAN: ……..

FASSBENDER: Let's back up to when you go out there, did he tell you about Teresa right away or did you actually see the body before he told you?

BRENDAN: I seen the body.

FASSBENDER: And he knew you saw it, did you say something to him then or did he say something to you?

BRENDAN: ……is what he said..…….

WIEGERT: And he also said what?

BRENDAN: He got angry and stuff

WIEGERT: And what else did he say?

FASSBENDER: Did he say how it happened, it's important.

FASSBENDER: I can't believe that he wouldn't have told you how it happened and how did he kill her…..

BRENDAN: ……..

WIEGERT: How do you know that?

BRENDAN: Because ……..

WIEGERT: I also heard that he told you how he did it, that's that's true isn't it?

BRENDON: Yeah

WIEGERT: Tell me what he told you.

BRENDON: ……. car…the…jeep….

WIEGERT: What did he tell you he did in the jeep?

BRENDAN: That he tied her up and stabbed her.

WIEGERT: Where did he say he did this?

BRENDAN: ……..

WIEGERT: What else did he tell you?

BRENDAN: He said how he tried to hide it

WIEGERT: How did he try to hide it, what did he tell you?

BRENDON: He tried to cover it with branches, a car hood

WIEGERT: The car you're talking about, her truck? Her jeep, he tried to cover it with what?

BRENDAN: Branches, a car hood

WIEGERT: Did he say anything about shooting her. Tell me again how he said he killed her.

BRENDAN: He said he tied her up and stabbed her.

WIEGERT: Did he say where he stabbed her?

BRENDAN: ……..

FAS SB ENDER: Did he say how he got, did he say he took her into the pit or did he kill her out by the garage or his house?

BRENDAN:

WIEGERT: Is that what he told you, he took her into the pit?

WIEGERT: Yes?

BRENDAN: Yes.

WIEGERT: And he stabbed her where, in the truck you said?

BRENDAN:

WIEGERT: Where's the knife that he used to stab her?

BRENDAN: In the truck under the seat.

WIEGERT: Did he show you that knife?

FASSBENDER: How do you know that was……. instead of the truck?

BRENDAN: …….

WIEGERT: We can't discuss that. How do you know it's in there?

BRENDAN: ……..

WIEGERT: Did he take you down and show you the jeep? Did he tell you how he got the jeep down there?

BRENDAN: He drove it there.

WIEGERT: Which way did he drive it?

BRENDAN: Chuckie's way.

WIEGERT: Past Chuckie's house?

FASSBENDER: Does Chuck know about this?

WIEGERT: Do you think Chuck knows about this?

BRENDAN: Probably

WIEGERT: Why do you think that?

BRENDAN: …….

WIEGERT: You think anybody helped him?

BRENDAN:

WIEGERT: Did he tell you when he did this?

FASSBENDER: Before you got home from school or after … Did he say anything?

BRENDAN:

FASSBENDER: When you got home you said you saw her truck out by the driveway. But did you see, did you see her? And when I say you got home, I mean from school, all right, and that was at what time do you usually get home?

BRENDAN: 3:45

FAASSBENDER: Did you notice anything else, was there a fire burning out in front of the house in the burn barrel? So you see the vehicle, you go inside and you said you played Nintendo and stuff and the next time you came out was around 9:00 ta… the fire. Going back to Mark's line of questioning, what was he gonna do with the car?

BRENDAN: Probably crush it.

FASSBENDER: Probably or did he tell you that?

BRENDAN: ……

WIEGERT: Did he ever tell you what he was gonna do with the car? Did he tell you anything else about the car besides that he put branches on it and, and a hood on it. Did he tell you if he did anything with the license plates?

FASSBENDER: Where did he say he hid the knife in the car?……crush it.…something specific about that ...

BRENDON: ... under the seat

FASSBENDER: He put the knife under the seat. He told you that?

BRENDAN:

FASSBENDER: Did he, he said he got mad. Did he say why he got mad?

BRENDAN:

FASSBENDER: Did he try to have sex with her or anything and she said no and

BRENDAN: ……..

WIEGERT: Did he ever tell you that, it's very important, OK, cuz we had heard that he might have told you that.

BRENDAN:

WIEGERT: No? Yes or no?

BRENDAN: No.

WIEGERT: What else did he tell you about her?

BRENDAN: That she was kinda pretty.

FASSBENDER: How was he acting at the time and stuff?

BRENDAN: …..shook his head…..

WIEGERT: Did you see any blood on him at all?

BRENDAN: ……..

FASSBENDER: Was he hurt? ·

BRENDAN: …….

FASSBENDER: Did you see any abrasions at all, bandaged up at all anywhere? Did he tell you that he hurt himself or she hurt him….

BRENDAN: He said he cut his finger

FASSBENDER: He said he cut his finger on what?

BRENDON: By the garage……he cut his finger on glass…..

WIEGERT: Did he say what he did with his clothes? Cuz there had to be blood on his clothes.

BRENDAN:

WIEGERT: Are you sure? I heard he told you something about that. I heard he told you how he cleaned

things up. Be honest now, if he didn't it's OK but if he did, you need to tell us.

BRENDAN: …

WIEGERT: You didn't see it, did he tell you about it?

BRENDAN:

WIEGERT: No? Say yes or no.

BRENDAN: No.

WIEGERT: OK

FASSBENDER: We had heard that he cut himself during the .... Did he say that or not? What did he say cuttin' himself during it?

BRENDAN: ……hurt himself

FASSBENDER: Did he say where he cut himself?

BRENDAN: …….

FASSBENDER: On the knife that he used to kill her, yes or no.

BRENDAN: Yeah

WIEGERT: Tell us what he told you exactly?

WIEGERT: That's OK, go ahead.

BRENDAN: That

WIEGERT: Go ahead.

FASSBENDER: Take a second, it's all right

WIEGERT: He said that he cut himself, while he was stabbing her? Yes or no.

BRENDAN: Yes

WIEGERT: Tell just try to go through in your mind exactly what he told you about him cutting himself. Put it in your own words.

BRENDAN: ….he……he said……..

WIEGERT: OK. Is everything you're telling me today, Brendan, the truth? Yes or no.

BRENDAN: Yes

WIEGERT: I have to ask you another difficult question. It's very important, that you to be honest with me. OK? Did you have anything to do with the death of Teresa Halbach?

BRENDAN: No.

WIEGERT: Tell me who did.

BRENDAN: Steve.

WIEGERT: And Steven did it by how again, tell me that again.

BRENDAN: That he stabbed her.

FASSBENDER: OK. Had he told you that? Yes or no?

BRENDAN: Yes

FASSBENDER: Did he say he had had a gun with a…….at all?

WIEGERT: Did you ask him about a gun?

WIEGERT: And he told you that he did this in her truck?

BRENDAN: Yeah.

WIEGERT: And he tied her up first?

BRENDAN: Yes.

WIEGERT: Yes?

BRENDAN: Yes.

WIEGERT: And then he stabbed her inside the truck.

BRENDAN: Yeah

WIEGERT: And he told you put the truck in the pit?

BRENDAN: Yes.

WIEGERT: And how did he get the truck in the pit again, tell me that.

BRENDAN: He drove it.

WIEGERT: He drove it which way?

BRENDAN: Chuck's way, Chuck's, past Chuck's house.

WIEGERT: Did Chuck see him?

BRENDAN: …..

WIEGERT: Honestly?

WIEGERT: Did he say if Chuck seen him?

WIEGERT: Did he say if anybody else saw him?

WIEGERT: Did he tell you what he was gonna do with her truck?

BRENDAN: That he might crush it

WIEGERT: That he might

BRENDAN: Start it on fire.

WIEGERT: He might crush it or start it on fire?

BRENDAN:

WIEGERT: Did he tell you how he got her bloody clothes?

WIEGERT: Did he tell you those were her clothes?

BRENDAN: …..

WIEGERT: Honestly?

BRENDAN: Yeah

WIEGERT: What did he tell you?

BRENDAN: That I should keep my mouth shut, they were hers

WIEGERT: Did he threaten you?

BRENDAN: Sort of.

FASSBENDER: What did he say?

WIEGERT: Tell me

BRENDAN: ……..stab me too.

WIEGERT: Or else he would stab you too?

BRENDAN: Yeah

WIEGERT: Go back to the clothes, he said that those were whose clothes?

BRENDAN: Teresa Halbach.

WIEGERT: Do you want to take a little break, get a soda? You need something to drink?

BRENDAN: No.

FASSBENDER: What kind? Do you want something? …….

BRENDAN: No.

WIEGERT: I'd like to take a little break, would you mind if we took a five minute break, is that OK, if you just sit here and relax for a bit?

BRENDAN: OK.

FASSBENDER: When we come back, would you mind ah writing out a statement for us? We may even write it for you if you want, but we prefer you write it out for us, OK?

WIEGERT: You did the right thing Brendan, OK.

FASSBENDER: As hard as it was. Yeah ..... not you could ..... all right?

WIEGERT: We'll be right back OK?

FASSBENDER: Take a short break. I got Brendan a Pepsi and just to recover a little.

WIEGERT: It is now 1330 hours and Brendan you remember you are not under arrest, right? You can stop answering questions at any time. Right? Yes?

BRENDAN: Yeah.

WIEGERT: And you can walk out anytime you want. Right?

BRENDAN: Yeah.

FASSBENDER: How are you feeling? How

BRENDAN: Yeah.

FASSBENDER: You feel a little bit better that you got this out?

WIEGERT: Did you tell anybody else about this Brendan? Nobody?

FASSBENDER: Brendan. We asked right before we, we gave you your break, we asked you if you would write out a statement for this and you said yes. Is that still true?

BRENDAN: Yeah.

FASSBENDER: OK. We're gonna ask that you do that then and Mark's brought some statement forms and he's gonna to explain that to you and ah, we're going to ask you to pretty much write what you told us and what you saw and then make sure above everything else it's the truth. OK. Cuz you can imagine that people may try to question you on that. So just make sure it's the truth and you have nothing to worry about. OK?

BRENDAN: OK.

WIEGERT: I just had a quick question, Brendan. Everything you told us prior to this about Steve and the body and the car. What day was that? Do you remember?

BRENDAN: October 31st

WIEGERT: OK.

BRENDAN: OK.

WIEGERT: I'm gonna give you this statement form here. It's pretty self-explanatory. I'm, I'm gonna let you use the pen there. You put the date in here. We'll just go line by line.

BRENDAN: What's the date today?

WIEGERT: Twenty-seventh.

FASSBENDER: Seventh.

WIEGERT: And the place where we're at right now (pause) which is Mishicot High School. The time you start this will be 1333. OK that's close enough. Actually let's circle. Is it a.m. or p.m.? p.m. OK. And then print your name, it says I, the undersigned. Print your name with middle initial.

BRENDAN: Is that cursive?

WIEGERT: I'm sorry.

BRENDAN: Is that cursive or?

WIEGERT: Um, not cur, I don't, I don't remember. It's been a long time since I've had school. Instead of, instead of writing it

FASSBENDER: Not cursive.

WIEGERT: Print it

FASSBENDER: Not cursive.

WIEGERT: long time .... in school. You have kids. What's your middle initial? Put that in there. OK. And then your home address? We'll put your phone number in there. How old you are and what's your date of birth. What do hereby make this following statement to, we'll put it ah, Investigator, and I'll spell my last name for you.

FASSBENDER: It's on the card.

WIEGERT: Oh yeah. That's, that's close enough, put a dot there, you can abbreviate if you want, and then you can just put my last name in there. Then we'll put Agent, A.G.E.N.T.

FASSBENDER: And then Fassbender which is on the card right next…….

WIEGERT: You can write right over the other writing. It's not a problem. First identified himself as, ah we identified ourselves as what, before. Detectives?

BRENDAN: How do you spell that?

WIEGERT: D.E.T.E.C.T.I.V.E.S. And we'll just go down to this line, and we're just gonna have you write in there exactly what you told us before. OK. And I think you should start out with, and this is totally up to

you how you want to do it, but maybe start out with when you got off the bus and then what did you see when you walked home. And then what did you do? OK? And what date it was. Put on there like on this date I saw this.

FASSBENDER: Make yourself comfortable.

(Pause)

WIEGERT: Take as much time as and as much space as you need. There's a lot of pages there.

(Long pause during statement being written)

WIEGERT: Are you finished or have more to go yet.

FASSBENDER: You can just tear that top sheet off and continue on the second….

WIEGERT: What's that? You're done. OK. Can I take a look at it? OK. Tell you what I'll do is I'll just read it and then you tell me if that's what you want in there. OK. You, you've written this yourself Brendan? Is that true? Yes or no?

BRENDAN: Yes.

WIEGERT: OK, then I'm just going to read it and read what you wrote. OK?

Is I got off the bus at 3:45 and seen her jeep down at Steven's house. Then I went in my house and played Playstation 2 for three hours and then I eat at 8:00 and I watch TV and then got a phone call from Steven, if I wanted to come over to have a fire and I did and he told me to bring the golf cart and I did. So then we went driving around the yard and got to pick up the stuff around the house. Then we dropped the seats by the fire and went to get the wood and the cabinet and then went back to throw the seat on the fire and then we

waited for it to go down and throw on the wood and cabinet. Then I seen the toes before we throw the wood and cabinet on the fire. When we did that he seen me that I seen the toes he told me not to say anything and he told me that he stabbed her in the stomach in the pit and he took the knife and put it under the seat in her jeep. Is that your statement Brendan?

BRENDAN: Yes.

WIEGERT: Um, did you want to add anything in there about where he stabbed her and why he told you he stabbed her?

BRENDAN: …. Why he stabbed her.

WIEGERT: You told me before that she was, that he was

BRENDAN: He was angry.

WIEGERT: angry

BRENDAN: Yeah.

WIEGERT: Did you wanna add that into your statement? Yes or no?

BRENDAN: Yes.

WIEGERT: OK.

FASSBENDER: We both may ask you some questions like that ah and then ah, you want to add it to your statement, you can do so. Based on what you told us there some things that we feel you should probably add to your statement, but that's up, that's up to you.

WIEGERT: Did he say what he was angry about?

WIEGERT: Not at all. That's a yes or no.

BRENDAN: No.

WIEGERT: No?

WIEGERT: And you told me before that be said he did something else to her, you said he tied her up and he stabbed her in the truck. Is that right?

BRENDAN: Yeah.

WIEGERT: Do you wanna add that to your statement? OK.

FASSBENDER: What did he use to tie her up with, did he say?

BRENDAN: Rope

FASSBENDER: Rope

WIEGERT: Did he say anything about duct tape?

BRENDAN: ….

WIEGERT: No.

(pause)

FASSBENDER: You told us that he talked to you about not talking and that he threatened you. That would probably be a good thing to add to your statement if you'd like, specifically what he said to you.

(Pause)

WIEGERT: You also told us that he said she was pretty. Do you wanna add that in the statement? Yes or no?

BRENDAN: Yes.

(pause)

FASSBENDER: Brendan, I think you did a real good job about writing. You were, you were a little more detailed about what you saw in the fire and it was getting very difficult to write that, but I think it's im-

portant that you write not to just to tell what us the things that you saw in the fire about her and the clothing. Is that all right?

BRENDAN: Yeah.

FASSBENDER: OK, thank you.

(pause)

FASSBENDER: Brendan, I just got a question and I think Mark's gonna have some too. We didn't ask this before. Did he say anything about cutting her up or anything like that or did he put her body in there whole.....?

BRENDAN: He didn't say nothing.

FASSBENDER: Brendan, you told us earlier that what you saw was the whole body right? OK. Could you indicate that the body appeared to be whole or however you want to put it in your words. And where it was located, you had said under certain items.

(pause)

WIEGERT: Did he say where he got the knife from, Brendan? Or who's knife it was? Did he say where he got it from? No?

BRENDAN: No.

WIEGERT: When he was telling you about how he stabbed her, was he laughing, enjoying it, or how was he putting it to you.

BRENDAN: He was just staring at the ground.

WIEGERT: Did he say he was sorry or anything? He just stared at the ground. Is that what you said? Yes or no.

BRENDAN: Yeah.

WIEGERT: OK.

FASSBENDER: Another thing that you had talked to us about is where he put the vehicle in the pit and what he did to the vehicle. He talked about how he hid it. Could you add that? ……

(pause)

WIEGERT: Did he tell you where he put her in the truck?

BRENDAN: No.

WIEGERT: OK. Now let me read, this would be page two that you added here. Is that correct Brendan?

BRENDAN: Yeah.

WIEGERT: I'll read this. Is that okay?

BRENDAN: Yeah.

WIEGERT: He was angry and that's why he did it. He told me he used rope to tie her up in the jeep and that's when he stabbed her. When he told me not to say anything, he threatened me a little bit. He said that she was pretty to him. I seen the fingers and the belly and the forehead in the fire. The body looked like it was together and it was under some tires and branches. He hid the vehicle in the pit back in the tree area.

WIEGERT: Can you, if you wish, add in there how he hid the vehicle? Did he put something on top of it? And if he did, what did he put on top of it?

(pause)

FASSBENDER: Then you told us that he put some clothing on there. Can you add what you saw as it relates to that clothing? What you told us.

(pause)

WIEGERT: OK, I'm gonna take that again and I'm gonna read what you just added Brendan. Is that okay?

BRENDAN: Yeah.

WIEGERT: He hid the vehicle in the pit back in the tree area. He put some tree branches on the top of it and put the car hood on the top of it too. He put some clothes in the fire that was blue shirt and some pants.

WIEGERT: Did you see anything on that shirt at all?

BRENDAN: Some blood.

WIEGERT: Some what?

BRENDAN: Blood

WIEGERT: OK, you wanna add that on there if you will?

FASSBENDER: You must have talked about something else.....to that shirt.

WIEGERT: Did he tell you who's shirt it was? Whose pants it was?

BRENDAN: Yeah.

WIEGERT: Whose did he tell you it was?

BRENDAN: Teresa's

WIEGERT: OK.

(pause)

FASSBENDER: Did he tell ya anything about a, a, any of her other possessions like I imagine a woman would have a purse, she probably had her cell phone, a

camera to take pictures. Did he tell you what he did with those things?

BRENDAN: …….

FASSBENDER: Are you sure?

BRENDAN: Yeah.

FASSBENDER: What about, like the key to her car and stuff like that .... in there? OK.

WIEGERT: How about a camera? Did he say anything about a camera?

BRENDAN: No.

WIEGERT: No? OK.

WIEGERT: Let me just read this last part that you added to the statement. OK.

BRENDAN: Yeah.

WIEGERT: Some clothes in the fire pit that was a blue shirt and some pants. On the shirt there was a blood on it and there was a hole in it in the stomach area and he said it was Teresa's shirt.

WIEGERT: OK.

FASSBENDER: Is there anything that you haven't told us that you think you need to tell us? That he said or that you saw.

BRENDAN: No.

FASSBENDER: You mentioned when he was up in there ..... that, that ah, he wanted to hide or leave and he that he said something to the effect, you said that he just wanted to go and get out of there and ..... get far away as he could, right? Would it be all right if you added that?

WIEGERT: OK.

FASSBENDER: That's when the police were coming out there .....

(pause)

BRENDAN: .....finished.

WIEGERT: Let me take a look at it, if I could. I'm gonna continue reading what Brendan just added.

WIEGERT: He said he was going to go and leave the house and try to get as far as far as he could.

WIEGERT: OK

FASSBENDER: Brendan, this is your statement, the written part of it. I'm mean obviously we recorded you and have taken notes. Is there anything you want to add to that statement on, on how you felt during all this, how you feel. Feel free to add anything you want as it relates to that.

WIEGERT: Do you want to add anything? OK. (pause) Feel free to go to the next page if you have to.

(pause)

WIEGERT: OK, I'm gonna read to what you just added to the second page.

WIEGERT: I felt sad that I had to be there and to be sorry for her family.

WIEGERT: Brendan, did we promise you anything prior to writing this statement?

BRENDAN: Yeah.

WIEGERT: What did we promise you?

BRENDAN: That I could leave whenever, whenever I wanted, and I didn't have to answer any questions.

WIEGERT: Right.

FASSBENDER: Did we threaten you at all?

BRENDAN: No.

FASSBENDER: Was your statement made of your own free will?

(side one of tape ended, tape turned over for side two)

WIEGERT: Do you want to add that in your statement? Yes or no.

BRENDAN: Yes.

WIEGERT: OK.

(pause)

WIEGERT: I, I'll read what you added to the statement. Is that okay?

BRENDAN: Yeah.

WIEGERT: I make this statement and I did not get threatened to write it out and I What is that word?

BRENDAN: Could

WIEGERT: and I could leave when I wanted to and I didn't have to answer any questions.

WIEGERT: Is that true?

BRENDAN: Yeah.

WIEGERT: OK. What I'm gonna have you do Brenden, I'm gonna have you number the pages. This would be number one and the next page would be number two and then I'm gonna have you sign here. It says signature of person giving voluntary statement. If you could sign there. And I guess you could use script on this one. I've learned something new myself today.

FASSBENDER: What's it called, Brendan?

BRENDAN: Cursive

FASSBENDER: Cursive

WIEGERT: Cursive, is that what it was? All right. And then I'm going to sign it here and Tom will sign it there. I don't know where I got script from.

FASSBENDER: It's just a new word for ya.

WIEGERT: It must be.

FASSBENDER: Brendan, before I neglect to do this, I want to say that I'm extremely proud of you and what, what you did had to be very, very difficult and you're one hell of a kid because that had ta be the hardest thing you probably ever done in your life and I don't know if I could even feel what you hadda just do and I, I truly believe you're one hell of a kid. And you need to believe that too, okay, no matter what anyone says.

WIEGERT: And that goes for both of us. We both believe that.

FASSBENDER: You told the truth. That's very hard for you to do.

WIEGERT: Do you feel better that you got that off your chest a little bit?

BRENDAN: Yeah.

FASSBENDER: I need to ask you one more question. We asked you before if you had told anyone about this. I think you need to really, you need to be honest one more time for me. Did you tell your mom?

BRENDAN: No.

FASSBENDER: Are you sure?

BRENDAN: Yeah.

FASSBENDER: Because everything you've told us today obviously can be used in court. You understand that, right?

BRENDAN: Yeah.

FASSBENDER: And people are gonna look at your statement and stuff like that and they're gonna do some diggin' of their own and stuff and if they find out that you didn't tell us the truth about somethin' in all likelihood, you're gonna hear about it. You understand that. So you need to tell us everything now so there are no surprises and no secrets. Understand?

BRENDAN: Yeah.

FASSBENDER: Is there anything else?

BRENDAN: No.

WIEGERT: Did you tell any of your brothers?

WIEGERT: Any of your friends at school here?

BRENDAN: No.

WIEGERT: You hang out with, I know one kid in particular, who's that?

BRENDAN: Travis Fabian.

WIEGERT: Yeah. Did you tell Travis about this?

BRENDAN: No.

FASSBENDER: During the last several months were you afraid that Steven was gonna get out?

BRENDAN: Not really.

FASSBENDER: No. If ah, now that you've made this statement, are you afraid that he would get out, for your own safety?

BRENDAN: I don't think he's gonna get out

FASSBENDER: I know but if he did would, because of what he said to you, would you be afraid?

BRENDAN: Yeah.

FASSBENDER: OK. Do you, um, why, I don't think we really have much choice, I think that I'm gonna do it no matter what you say. We need to call your mom, because I think she needs to be here, ah, t-to take you home.

WIEGERT: You don't, do you want to go back to class?

BRENDAN: No.

WIEGERT: I think maybe you wanna go home and rest a little bit. This couldn't a been easy. Well I'll tell you what, I need you to sign the second page. We'll call your ma and have her come here. OK?

FASSBENDER: Do you, do you agree with that?

BRENDAN: Well, I would like ta go to 8th hour.

FASSBENDER: Would you?

BRENDAN: Yeah.

WIEGERT: What time does that start?

BRENDAN: At 12:17.

WIEGERT: 12:17.

BRENDAN: I mean 2, 2:17.

WIEGERT: OK.

FASSBENDER: We have no problem with that. Are you all right? You all right? You're not gonna do anything to yourself or hurt yourself or anything like that. Right?

WIEGERT: Time we ended is 2:10 p.m.

FASSBENDER: Brendan, look at me. You all right? OK. You understand that we do need to talk to you're mom though. To let her know. So she can talk to you about this and you can talk to her or your dad, I don't care who, one of, one of your, one of your parents. Would you prefer your mom or your dad?

BRENDAN: My mom.

FASSBENDER: OK.

WIEGERT: Is she at work right now?

BRENDAN: Yeah.

WIEGERT: What time does she work 'till.

BRENDAN: Five.

WIEGERT: Five.

FASSBENDER: What's that number? Do you have her work phone number or her cell phone number?

BRENDAN: Her cell phone is 973

FASSBENDER: Nine?

BRENDAN: 1740…

WIEGERT: Where does she work again?

BRENDAN: Woodland Face Veneer

WIEGERT: Woodland Face Veneer. That's in Two Rivers, right? Could you put the date in there again?

WIEGERT: Good job. Do you have any questions, buddy? You sure? About how anything' s gonna go or anything like that er. If you have any questions, now is a good time.

BRENDAN: I don't have a question.

WIEGERT: No questions. OK.

FASSBENDER: Anytime, I want you to take those cards with ya. Anytime you do, you give us, either of us, a call. .....you to talk.

WIEGERT: I'm gonna, I'm gonna put my cell phone number on here, OK? But you gotta do me a favor. You can't give that ta anybody else except your mom if she wants it. OK? I answer that 24 hours a day, seven days a week, so if it's tonight at 3:00 in the morning and you can't sleep and you need somebody to talk to or if you forgot to tell me something or if you just need someone to talk to, you call me. If it's Saturday night, 8:00 at night needing someone to talk to, you call me. Anytime of the day or night, OK? If you just need somebody to come pick ya up, give you a ride somewhere, get you out of the house, I'd be willing to do that for ya too, OK? That's yours and this is Tom's. Do you have any questions? OK. Should we let you go back to 8th hour class, is that what you wanna do?

BRENDAN: Yeah.

WIEGERT: What class do you have?

BRENDAN: Earth science

WIEGERT: Earth science, what's that about?

BRENDAN: It's about rock and those kinda.....

WIEGERT: Do you like that class?

BRENDAN: Yeah.

WIEGERT: OK.

FASSBENDER: This is yours. I don't know if you throw it in your locker or whatever, but you're obviously free to take this so again, um, again we're, we're not gonna leave ya high and dry. We'll talk to your mom about this we wanna be there if ya need something. If

you feel you need to talk to someone, counseling or anything like that, a counselor, there's nothin' wrong with that. Absolutely nothin' wrong with that. OK? You let her know and you call us.

BRENDAN: OK.

WIEGERT: Do you feel like you wanna hurt yourself or anything at this time? No? OK.

FASSBENDER: You should be proud of yourself.

WIEGERT: You should be.

FASSBENDER: I certainly would be if I was your parents.

FASSBENDER: Okay. It's the most difficult thing that you just did.

WIEGERT: I'm proud of you.

FASSBENDER: All right, bud?

WIEGERT: You need something, call us. OK? All right. Why don't you take those along.

FASSBENDER: I go get your Dean of Students and then .....

WIEGERT: We're ending the interview at 1414 hours.

This is the end of the interview.

I then requested BRENDAN to fill out a written statement which BRENDAN did and signed both of the written statements. It should be noted there are two pages of written statements.

After BRENDAN finished with the written statement, Special Agent FASSBENDER contacted BRENDAN's mother, BARBARA, and requested that she come to the high school to meet with us. It should be noted that BRENDAN requested that he be able to go

back to his eighth hour class, which he was allowed to do. BRENDAN's mother, BARBARA, did show up at the school at which time an interview was conducted with BARBARA. For more information on that interview, please see Special Agent FASSBENDER's report.

At approximately 1500 hours, BRENDAN did return to the conference room. We then asked BARBARA and BRENDAN if they would be willing to go to TWO RIVERS POLICE DEPT. with us to do a second videotaped interview. Both BRENDAN and BARBARA agreed. We then gave them a ride to the TWO RIVERS POLICE DEPT. We arrived at the TWO RIVERS POLICE DEPT. at approximately 1515 hours. Upon arrival at the police department, we asked BRENDAN and BARBARA if BRENDAN would like BARBARA to sit in the room during the interview and also asked BARBARA if she wished to sit in the interview. BARBARA stated that it was not necessary for her to sit in the interview room, and BRENDAN stated he did not care if his mother was there or not.

At approximately 1521 hours, Special Agent FASSBENDER and I met with BRENDAN alone in the interview room at TWO RIVERS POLICE DEPT. Prior to speaking with BRENDAN, we did read him his Miranda Rights from a waiver form that was provided to us by TWO RIVERS POLICE DEPT. BRENDAN agreed to waive his rights and speak with us and signed the Miranda form. It should be noted that I did read him the Miranda form and explained it to him. BRENDAN did initial both areas of the Miranda form. A copy of that form will be included with this report.

At that time, we did begin interviewing BRENDAN and informed him that the interview was being taped.

For more information on the second interview of BRENDAN, please see the videotape.

After finishing the interview with BRENDAN, we did take BRENDAN back to the MISHICOT FIRE STATION where we met with several other detectives. We did make arrangements for BARBARA and BRENDAN to stay at FOX HILLS RESORT on the night of 02/27/06 for their safety.

Investigation continues.

Inv. Mark Wiegert
Calumet Co. Sheriff's Dept.
MW/sk

CC: District Attorney