No. 16-3397

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

BRENDAN DASSEY,
PETITIONER-APPELLEE,

v.

MICHAEL A. DITTMANN,
RESPONDENT-APPELLANT.

On Appeal From The United States District Court
For The Eastern District Of Wisconsin, Case No. 14-cv-1310,
The Honorable William E. Duffin, Magistrate Judge

PETITIONER-APPELLEE'S ANSWER TO RESPONDENT-APPELLANT'S PETITION FOR REHEARING OR REHEARING *EN BANC*

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DISCLOSURE STATEMENT

I, the undersigned counsel for the Petitioner-Appellee, Brendan Dassey, furnish the following list in compliance with Fed. R. App. P. 26.1 and Cir. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case:

   Brendan Dassey

2. Said party is not a corporation.

3. The names of all law firms whose partners or associates are expected to appear for the party before this Court:

   Laura H. Nirider (counsel of record) and Steven A. Drizin of the Bluhm Legal Clinic at Northwestern University Pritzker School of Law

   Robert J. Dvorak of Halling & Cayo, S.C.

4. The names of all law firms whose partners or associates have appeared for the party in the district court and are not expected to appear before this Court:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

"Although the State presents a cogent story line in its brief on appeal, it does so by picking and choosing pieces from" the confession of sixteen-year-old, mentally limited Brendan Dassey. Maj. Op. 9. In reality, the videotaped confession is a "litany of inconsistencies." Maj. Op. 41 ("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 bedposts, etc."); *id.* 59 ("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").

At times, Dassey is obviously "guessing" about what happened – including, as the Dissent acknowledges, the central *actus reus*. *E.g.* SA 67-76 (Dassey guessing that Halbach was killed by choking, stabbing, throat-slitting, punching, and even hair-cutting until police had to say: "I'm just gonna come out and ask you. Who shot her in the head?"); Maj. Op. 67; Dis. 123-24. His guesses were often proven false by physical evidence. *E.g.* R.19-23:88 (no blood, hair, or DNA from Halbach or Dassey in bedroom where rape, stabbing, throat-cutting, hair-cutting supposedly occurred). Eventually, many details, large and small, had to be fed to Dassey, based on evidence or police's beliefs. *E.g.*, SA 54 ("you went over to [Avery's] house and then he asked [you] to get his mail"); SA 54 ("you went inside"); SA 57 ("he asked you if you want some…pussy"); SA 63 ("he makes you" rape Halbach); SA 64 ("she ask[ed]

you not to do this"); SA 84 ("we know some things happened in that garage, and in that car"); SA 76 (Halbach was "shot…in the head"); SA 91 ("the license plates were taken off"); SA 92 ("he raise[d] the hood"); SA 36 ("the fire was going [already]"); R-19-24:9 ("you [saw] a hand, a foot, a head" in the fire); R.19-24:5 ("you smell[ed] something that was not too right" in the fire).[1]

There is a reason for these problems: the confession, which was the "centerpiece" of the prosecution, was involuntary. Maj. Op. 16. The three-hour interrogation featured a unique constellation of tactics: promises of leniency, *compare* SA 30 (Dassey will be "set free" if he confesses) *with U.S. v. Rutledge*, 900 F.2d 1127, 1129 (7th Cir. 1990) ("[I]f the government…promises…that if he confesses he will be set free…then the confession must go out"); dozens of assurances that police "already knew everything" and that Dassey was nonetheless "going to be all right," Maj. Op. 84-85; repeatedly fatherly posturing that made those promises more believable, Maj. Op. 79-80 (cataloguing examples, including "we're cops…but I'm not right now. I'm a father"); and relentless demands for "honesty" coupled with repeated fact-feeding, which together communicated that "honesty" meant "that which the investigators wanted to hear." Maj. Op. 56.

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[1] Counsel respectfully notes that some "vivid" details mentioned in the Dissenting Opinion, like the fire's "bad smell," were fed to Dassey. Dis. 127. Further, the Appellant's claimed "corroboration" can be explained by this fact-feeding. *Compare* Pet. 5 ("most damning" corroboration is Halbach's charred bones in bonfire pit) *with* R.19:24:441 (telling Dassey "we believe that's where Teresa was cooked"); *compare* Pet. 5 (confession corroborated by discovery of "a bullet fragment with Teresa's blood on it in Avery's garage") *with* SA 84, 86 ("we know that some things happened in that garage…remember, we got a number of shell casings that we found in that garage").

Together, this unique accumulation of tactics overbore the will of Brendan Dassey: sixteen years old, with a borderline IQ but no criminal history, who was more suggestible than 95% of the population and more socially avoidant than 99%. Maj. Op. 18. Indeed, after confessing, Brendan asked twice to return to school; and when arrested, he asked "is it only for one day?" SA 102, 157. And upon being reunited with his mother after interrogation, he immediately said he did "not really" help Avery murder Halbach and that his interrogators had "got to my head." SA 161.

Almost none of these unique and unmistakably problematic facts were addressed by the state court, which unreasonably failed to apply the totality of the circumstances test or to do so in light of the particular characteristics of this defendant, as mandated by U.S. Supreme Court law. Maj. Op. 49-52. After painstakingly analyzing these facts and appropriately applying long-established U.S. Supreme Court law, both appellate majority and district court granted habeas relief under 28 U.S.C. 2254(d)(1) and (d)(2).[2] In so doing, the *Dassey* decision followed a long line of similar cases and created no circuit splits or questions of exceptional importance. The Appellant's petition for rehearing and rehearing *en banc* should be denied.

[2] Because it granted relief on voluntariness grounds, the appellate panel did not rule on Dassey's ineffective assistance of counsel claim. Maj. Op. 103.

ARGUMENT

I. The *Dassey* decision does not create a circuit split.

The Appellant's circuit split argument reflects a misunderstanding of applicable law; a misunderstanding of what the *Dassey* court held; and a misunderstanding of what the "split" courts held.

A. The law

The Appellant claims that the *Dassey* court created a new rule in applying "special care" to analyze the voluntariness of Dassey's confession under the totality of the circumstances. Pet. 10 ("now…there is apparently a different test"). Like the state court's decision, this position is unreasonable. Many courts, for many years, have held that while the totality of the circumstances test applies to both adults and children, "the voluntariness of juvenile confessions must be evaluated with special care." *Gilbert v. Merchant*, 488 F.3d 780 (7th Cir. 2007); *Hardaway v. Young*, 302 F.3d 757 (7th Cir. 2002) ("special caution" is required for juvenile confessions); *U.S. v. Sablotny*, 21 F.3d 747, 751 (7th Cir. 1994) (special care requirement is "a long-standing principle"); *In re Gault*, 387 U.S. 1, 45, 55 (1967) ("confessions by juveniles require special caution" and "the greatest care…to assure that the admission was voluntary") (citing *Haley v. Ohio*, 332 U.S. 596, 599 (1948)). This juvenile standard is "more sensitive than that applied to adults," *Woods v. Clusen*, 794 F.2d 293, 297-98 (7th Cir. 1986), because it means "a lesser quantum of coercion would render [a juvenile's] confession involuntary." *Sablotny*, 21 F.3d at 752; *Smith v. Duckworth*, 910 F.2d 1492, 1497 (7th Cir. 1990) ("It takes less to interfere with the deliberative processes of one whose capacity for rational choice is limited"); *Gallegos v. Colorado*,

370 U.S. 49, 54 (1962) ("[N]o matter how sophisticated," a juvenile subject to police interrogation "cannot be compared" to an adult).

It is thus axiomatic that "police tactics that might be unexceptionable when employed on an adult may cross the line when employed against the less developed reason of a child." *Johnson v. Trigg*, 28 F.3d 639, 642 (7th Cir. 1994). *See also J.D.B. v. North Carolina*, 564 U.S. 261, 263 (2011) ("in the specific context of police interrogation, events that would 'leave a man cold and unimpressed can overawe and overwhelm' a teen") (citing *Haley*, 332 U.S. at 599); *id.* at 289 (Alito, J., dissenting) ("I do not dispute that many suspects who are under 18 will be more susceptible to police pressure than the average adult"). This Court has thus found tactics to be coercive when used against a sixteen-year-old, *Woods*, 794 F.2d at 298, but subsequently has held the same tactics "not to amount to coercion when applied to adults." *Sablotny*, 21 F.3d at 751. The Appellant's view that there is no difference between juvenile and adult confessions is wrong and does not warrant *en banc* rehearing.

B. The *Dassey* court's decision

In making its circuit split argument, the Appellant next asserts that the *Dassey* decision elevated certain interrogation tactics to the level of *per se* coercion. For instance: By patching together two two-word fragments from a 104-page opinion, it claims that the *Dassey* court held that "encouraging honesty" can now be "considered coercive." Pet. 8 (citing Maj. Op. 21-22). But the court held no such

thing.[3] In its analysis, the *Dassey* majority explained that the officers' repeated demands for "honesty" became problematic because, over time and in combination with other tactics, their "promise[s] of freedom became linked to the idea of truth, which became defined as that which the investigators wanted to hear," leading the suggestible Dassey to agree to whatever "narrative that the investigators would accept as the truth." Maj. Op. 56, 85 (providing 15 examples). This cumulative, fact-intensive analysis hardly raises "encouraging honesty" by itself to the level of *per se* coercion; rather, by treating this tactic as one of many that contributed towards coercion, it breaks no new ground. Maj. Op. 42 ("no single factor is determinative"); *see U.S. v. Preston*, 751 F.3d 1008, 1025 (9th Cir. 2014) (finding involuntariness where police "instructed him on the responses they would accept" by "repeatedly ask[ing] question[s], communicating that his initial responses were not what they wanted," and causing mentally retarded teen's "answer [to] shift from 'nobody came inside' to "[i]t's just like what you guys said, that guy came in," *inter alia*).

Similarly, the Appellant asserts that "police bluffs" and "implied promises" are now each independently coercive. Pet. 9. But again, the *Dassey* court held no such thing. Like the district court, the majority was troubled by the "coupling" of a specific "promise that if Dassey told the truth, he would be set free," and many additional "assurances that Dassey was going to be alright" if he confessed, with

[3] In fact, the Appellant lifted these words from the Court's summary description of the state court's opinion: "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." Maj. Op. 21-22.

claims that police "already knew" everything Dassey had done. Maj. Op. 84-86 (providing 12 examples). That message was further "linked with the plea for 'honesty'" and delivered to a mentally limited and utterly naïve youth – resulting in a cumulative message that Dassey would be "set free" and "be alright" so long as he said whatever police wanted to hear. Maj. Op. 81-85. Again, this highly cumulative, fact-bound analysis does not raise any tactic to *per se* coercion and breaks no new ground. *See Rutledge*, 900 F.2d at 1129 ("[I]f the government feeds the defendant false information that seriously distorts his choice, by promising him that if he confesses he will be set free…then the confession must go out"); *Hadley v. Williams*, 368 F.3d 747, 749 (7th Cir. 2004) (same); *Preston*, 751 F.3d at 1027 (mentally impaired teen's confession involuntary where police claimed to "already know" the truth, promised that "he could 'move on' after apologizing," and "fed him the details of the crime"); *Woods*, 794 F.2d at 295 (police said, *inter alia,* that they already "knew Woods committed the murders" and promised "things would be better" if he confessed); *A.M. v. Butler*, 360 F.3d 787 (7th Cir. 2004) (eleven-year-old told, *inter alia*, that if he confessed to murder, he could go home).[4]

[4] Nor did the majority make voluntariness "subjective" by mentioning that, as captured on tape, Brendan understood these promises to be "set free" to mean that he would go back to school after confessing. *See J.D.B.*, 131 S.Ct. at 2403 ("[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis"); *U.S. v. Stadfelt*, 689 F.3d 705, 710-11 (7th Cir. 2012) (it is "well-established voluntariness doctrine" that "the defendant's perception of what government agents have promised is an important factor in determining voluntariness") (internal citations omitted); *Sharp v. Rohling*, 793 F.3d 1216, 1235 (10th Cir. 2015) (granting habeas relief where defendant's "surprised and angry

Next, the Appellant patches together a two-word and a five-word fragment from the majority's opinion to claim that "fatherly assurances" are now "a coercive technique." Pet. 9 (citing Maj. Op. 42). Yet again, the court held no such thing. Rather, the majority described the officers' repeated false claims that "we're cops…but I'm not right now. I'm a father," Maj. Op. 79-80 (providing 8 additional examples), as a problematic "backdrop" to the interrogation's "main scaffolding," which consisted of relentless assurances that Dassey would not experience negative consequences so long as he agreed to repeat what police supposedly already knew. Maj. Op. 79-81. Once again, this cumulative analysis does not raise "fatherly assurances" to the level of *per se* coercion and breaks no new ground. *See Woods*, 794 F.2d at 297 (assurances of leniency and bluffing rendered confession involuntary where coupled with "confus[ing]" "fatherly overtures"); *Spano v. New York*, 360 U.S. 315, 323 (1959) (confession involuntary where, in combination with other tactics, police posed as "false friend" and "worried father").

Finally, the Appellant claims that the *Dassey* court erected a "stringent" "new rule" that sixteen-year-olds "need an adult ally to explain the consequences of a Miranda waiver or confession" or "to remind them not to guess at answers." Pet. 10 (citing Maj. Op. 102). But again, it miscasts the majority opinion by lifting this supposed "new rule" from a string of rhetorical questions that the majority noted a state court "might ask," depending on the circumstances, as part of its application of

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reaction" upon arrest "indicated her [confession was] not the product of free will because [it] was given on the false premise she would not go to jail").

special care. Maj. Op. 102. The part of the opinion actually discussing adult presence makes clear that no "new rule" was erected whatsoever: there, the *Dassey* court simply followed a string of cases explaining that parental absence is an important but not dispositive factor in the totality of circumstances. Maj. Op. 50-51 (citing *Gallegos*, 370 U.S. at 55; *Hardaway*, 302 F.3d at 765; *U.S. v. Bruce*, 550 F.3d 668, 673 (7th Cir. 2008); *Gilbert*, 488 F.3d at 791-92). Yet again, no new ground was broken.

C. The "split" cases

Just as the majority opinion does not establish the new rules of law that the Appellant asserts it does, neither do the Appellant's "split" cases actually evince circuit splits. To the contrary, important factual differences exist between *Dassey* and the Appellant's "split" cases, many of which involve only a single circumstance as the proffered basis for suppression. *See, e.g.*, *Lucero v. Kirby*, 133 F.3d 1299, 1311 (10th Cir. 1998) (adult petitioner's sole basis for involuntariness was "false statements about fingerprint evidence" and nothing else); *Frazier v. Cupp*, 394 U.S. 731 (1969) (adult petitioner's sole basis for involuntariness was police misrepresentations about another suspect's statements); *Sotelo v. Ind. State Prison*, 850 F.2d 1244, 1249 (7th Cir. 1988) ("fatherly" tone during adult interrogation was "not in itself enough" for involuntariness); *U.S. v. Santos-Garcia*, 313 F.3d 1073, 1079 (8th Cir. 2002) (police's "sympathetic attitude…will not render a confession involuntary" without other indicia of involuntariness). None of these holdings split with *Dassey*, which is premised on a unique – yet unmistakably coercive –

combination of facts not present in the cited cases. Indeed, some of the Appellant's cases themselves warn against trying to draw mechanical parallels between factually distinct cases. *See U.S. v. Ballard*, 586 F.2d 1060, 1063 (5th Cir. 1978) ("the [coercive] impact of any one of the aforementioned [interrogation tactics] will vary according to the circumstances under which they were performed and the state of mind of the accused"). This is hardly the making of a circuit split.

Finally, the Appellant argues that *Dassey* differs from this Circuit's voluntariness rulings in *Etherly v. Davis*, *Carter v. Thompson*, and *Hardaway v. Young*; but both district court and appellate panel easily distinguished those cases. *Hardaway* sought a *per se* rule that parental absence renders a juvenile confession involuntary, even in the absence of coercive tactics. 302 F.3d 757 (7th Cir. 2002); Maj. Op. 37-38. *Carter* involved a juvenile who, while detained at the stationhouse for 55 hours because she had nowhere else to go, similarly confessed "impromptu" in the apparent absence of police pressure. 690 F.3d 837, 844 (7th Cir. 2012). And *Etherly* involved a defendant who was truthfully told only once that if he confessed, "it would go better for him in court." 619 F.3d 654, 662 (7th Cir. 2010) (a "lone error"). This solitary moment of pressure is a far cry from the dozens of "false assurances and promises" that if Dassey confessed, he would be "set free," *see Rutledge*, 900 F.2d at 1129, and that everything would be "all right" – tactics that combined with a relentless "pattern of steering, coaxing, fact-feeding and cueing followed by rewarding the correct answer" to produce a parroted-back confession

that raises "significant doubts as to [its] reliability." Maj. Op. 101-02, 42; RSA 72. None of these cases split with *Dassey*; none warrant rehearing *en banc*.

II. This case is not of exceptional importance.

This Court's majority decision amounted to a straightforward, fact-specific application of settled law to largely undisputed facts captured on videotape. It was appropriately based on the state court's unreasonable failure to identify or apply long-held, clearly established U.S. Supreme Court law requiring special care, as well as related unreasonable factual findings. By applying the same rules that have governed police for many years, the *Dassey* decision does not alter law enforcement's task one whit. As such, this case is not of exceptional importance.

Nor does it ask anything extraordinary of police. Dassey's interrogators themselves realized during questioning that something had gone badly amiss: that Dassey was often parroting back whatever they wanted to hear. *E.g.* R:19:23:830 (asking Dassey if he was just saying "what we wanna hear, or…what you think we wanna hear"); SA 111 (after Dassey repeated his interrogators' claim that he saw Halbach's belongings burning, asking "Did you actually see those items?"); SA 45 (after Brendan changed the color of Halbach's shirt from blue to white to black, warning him "If you don't remember, say you don't remember"). The dissent similarly recognizes that at times, "it is difficult to tell whether Dassey…simply offered up the answer he believed the investigators were fishing for." Dis. 123-24 (referencing exchange in which Dassey kept incorrectly guessing the manner of killing, even suggesting hair-cutting, until investigators asked "who shot her in the

head?"). It is neither burdensome nor inappropriate to require police to take care when they notice such red flags – particularly when the person being interrogated is an impaired sixteen-year-old who, during interrogation, could not spell the word "rack" and thought he would go back to school after confessing to murder. SA 137. Such a requirement is simply common sense – and does not warrant *en banc* rehearing.[5]

III. While intensely fact-bound voluntariness claims are not exempt from habeas review, they are poor candidates for rehearing *en banc*.

The Appellant argues that the majority erred by granting relief in an AEDPA-governed habeas case. Pet. 12-13. Of course, "[m]ere disagreement with a decision by a panel of the court is not a sufficient ground for rehearing *en banc*." *Mitchell v. JCG Indus.*, 753 F.3d 695 (7th Cir. 2014) (Posner, J., concurring in denial of rehearing). But in any event, no such error occurred. As explained at length, the majority was acutely mindful of the "extremely restricted nature of habeas relief." Maj. Op. 26, 24-29. Nonetheless, under both 28 U.S.C. 2254(d)(1) and (d)(2), it found that the "state appellate court evaluate[d] the voluntariness of [Dassey's] confession in reference to the standard for adults of ordinary intelligence," rather than applying "special care." Maj. Op. 22. Even further, the state court "failed to consider some key factors at all," such as fact-feeding, Dassey's age and mental limitations, suggestibility, and the absence of an adult ally, both "individually" and "in light of the totality of the circumstances." Maj. Op. 49-52. In essence, the state court failed

[5] Leading police training firm Wicklander Zulawski & Associates, which trains interrogators in all fifty states, filed an *amicus* brief urging this Court to affirm habeas relief. Dkt. 28.

to evaluate whether the interrogation techniques "overcame the free will of this particular defendant," as the law indisputably requires. Maj. Op. 50. The Appellant objects to the majority's passing observation that the state court devoted barely two paragraphs to voluntariness, Maj. Op. 21; but that obviously was not the basis for relief. Just one sentence later, the majority agrees with the Appellant that "a state court's evaluation need not be lengthy or detailed." Maj. Op. 22. "It must," however, "meet the bare minimum requirements of Supreme Court precedent." *Id.* Here, the state court did not.

The Appellant next argues that because voluntariness claims are governed by a fact-bound test in which prior cases serve only as "broad guideposts," such claims are essentially unreviewable under AEDPA. Pet. 13. But in enacting AEDPA, Congress intended the federal courts to retain the ability to grant habeas relief when state courts unreasonably applied clearly established federal law; and neither it nor the courts have carved out any exceptions permitting state-court unreasonableness when the relevant federal law is governed by a totality of the circumstances test. Rather, "in areas of the law, such as voluntariness of confessions, in which general principles announced by the Supreme Court will out of necessity be applied to varying factual situations on a case by case basis, it is acceptable to derive clearly established federal law from these principles." *Hart v. Attorney General*, 323 F.3d 884, 894 & n.16 (11th Cir. 2003) (granting habeas relief where teenager told "honesty will not hurt you"), cert. denied sub nom. *Crist v. Hart*, 540 U.S. 1069 (2003); *Ferensic v. Birkett*, 501 F.3d 469, 479 (6th Cir. 2007)

(although petitioner's claim was subject to a "broad, totality-of-the-circumstances standard…[that] does not mean that its application cannot be unreasonable within the meaning of AEDPA").

But while the highly fact-intensive nature of the voluntariness test does not insulate unreasonable state court actions from habeas review, it does mean that such cases are poor candidates for rehearing *en banc*. "Fact-bound" cases are of "limited significance," *Mitchell*, 753 F.3d at 700 (Posner, J., concurring), because "the determination [whether a confession is voluntary] will vary with the circumstances of the case," making perfect "uniformity of decision…neither attainable nor important." *Rutledge*, 900 F.2d at 1129. Therefore, fact-bound cases like this one – which required the panel painstakingly to review and catalogue many hours' worth of interrogation tapes and transcripts, not to mention an unusually voluminous state-court record, to produce a 104-page majority opinion – are not worthy of the significant resource expenditure demanded by *en banc* rehearing. *Roberts v. Sears, Roebuck & Co.,* 723 F.2d 1324, 1348 (7th Cir. 1983) (*en banc*) (separate opinion of Posner, J.) ("[R]ehearing *en banc* imposes a heavy burden on an already overburdened court").

In sum: The result reached by district court and appellate majority was abundantly supported by U.S. Supreme Court law while duly mindful of AEDPA's constraints. No circuit splits or questions of exceptional importance have been identified that would justify the extraordinary step of rehearing such a fact-bound

case. Appellee Brendan Dassey respectfully asks this Court to deny the Appellant's petition for rehearing or rehearing *en banc*.

Respectfully submitted,

s/Laura H. Nirider
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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, 2017, I filed the foregoing Answer with the Clerk of the Court using the CM-ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: July 19, 2017.

s/Laura H. Nirider
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