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

BRIEF OF PETITIONER-APPELLEE BRENDAN DASSEY

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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:

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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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JURISDICTIONAL STATEMENT

The Appellant's jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUES

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2. Was the Wisconsin Court of Appeals' holding that Dassey's confession was voluntary an unreasonable application of federal law under 28 U.S.C. 2254(d)(1)?

3. Was the Wisconsin Court of Appeals' rejection of Dassey's attorney-conflict claim based on an unreasonable finding of fact under 28 U.S.C. 2254(d)(2)?

4. Was the Wisconsin Court of Appeals' rejection of Dassey's attorney-conflict claim contrary to federal law under 28 U.S.C. 2254(d)(1)?

INTRODUCTION

The Appellant's narrative of the rape and murder of Teresa Halbach, presented to this Court in its Statement of the Case, is spun of pure fiction.

That narrative was taken from the March 1, 2006 confession of sixteen-year-old, mentally limited Brendan Dassey. But in a meticulous, 91-page opinion, the district court found "significant doubts as to the reliability of Dassey's confession." RSA 72. Throughout the three-hour videotaped interrogation, police used leading questions to feed Brendan details based on evidence they had already found. *E.g.*, SA 36 ("We know the fire was going [when you arrived]"); SA 84 ("We know that some things happened in that garage, and in that car, we know that"); SA 76 ("Who shot her in the head?"); SA 91 ("Did Steve [Avery] take the license plates off the car?"); SA 92 ("Did he raise the hood at all or anything like that? To do something to the car?").

In the absence of evidence, police fed Brendan their own theories about what occurred. *E.g.*, SA 54 ("I think you went over to his house and then he asked [you] to get his mail."); SA 74 ("[Avery] made you do somethin' to her, didn't he? So he—he would feel better about not bein' the only person, right?"); SA 61 ("He asked if you want some, right?...If you want some pussy?"). Based on and driven by his interrogators' suggestions, Brendan's confession was more theirs than his. *See Harris v. Thompson*, 698 F.3d 609, 631 & fn. 12 (7th Cir. 2012) (noting, while

granting habeas relief, that "[i]nterrogators help create [a] false confession" by "suggesting facts of the crime…If the entire interrogation is captured on audio or video recording, then it may be possible to trace, step by step, how and when the interrogator implied or suggested the correct answers") (quotations omitted).

Many details in Brendan's confession were later proven false. Brendan accepted the police's theory that Halbach was raped in Avery's bedroom, for instance, and added that she was shackled to the wooden headboard; but the headboard bore no scratches or marks, and technicians found no DNA from Halbach or Brendan in the bedroom. SA 62; R.19-23:88. Similarly, Brendan agreed that Halbach's bleeding body was placed on a "creeper," but no blood or DNA was found on that creeper. SA 46; R.19-23:96. These discrepancies also signify unreliability. *See Harris*, 698 F.3d at 631 ("The vast majority of [proven false confessors] made statements in their interrogations that were contradicted by crime scene evidence") (quotations omitted). Indeed, no forensic evidence tied Brendan to the crime, despite one of the biggest investigations in Wisconsin history.

Many other parts of Brendan's confession simply don't make sense. By turns, the confession is riddled with contradictions (*e.g.*, Brendan initially claimed Halbach's shirt was white, but later said it was black (SA 44, 97)), nonsense (*e.g.*, Avery built a huge bonfire before he attacked Halbach, even though he didn't plan

to burn her body (SA 83, 85)), and instances in which the interrogators themselves wondered if Brendan was just making things up (*e.g.*, "Are you being honest with us? Did you actually see those items?" (SA 111)). Even the Appellant had to reshuffle the confession in order to present this Court with a coherent narrative. AB 9 fn. 3.

Brendan's efforts to tell a story that satisfied his interrogators – whether it really happened or not – did not come out of thin air. *Harris*, 698 F.3d at 631 & fn. 12 ("Interrogators help create [a] false confession by pressuring the suspect to accept a particular account"). At the outset on March 1, Brendan was told that although he might fear "get[ting] arrested," he would be "all right" and would not "have to worry," even if the case "goes to trial," as long as he "filled in" the blanks with "statements…against your own interest" that "might make you look a little bad or…like you were more involved than you wanna be looked at." SA 29. The interrogators also told Brendan that "[if], in fact, you did somethings, which we believe…it's OK. As long as you [can] be honest with us, it's OK. If you lie about it that's gonna be problems." SA 30. This message was repeated many times: "honesty here is the thing that's gonna help you"; "by you talking with us, it's, it's helping you"; "no matter what you did, we can work through that"; "the honest person is the one who's gonna get a better deal out of everything"; and "honesty is the only thing that will set you free." SA 30. "Honesty," however, plainly meant

whatever the interrogators would accept as true. *E.g.*, SA 30 ("[If], in fact, you did somethings, which we believe…it's OK. As long as you [can] be honest with us, it's OK"). Indeed, the interrogators rejected Brendan's attempts to deny involvement and told him twenty-four times that they "already knew" what he had done. RSA 78-80. The message was unmistakable, especially for a mentally limited sixteen-year-old: Brendan was "clearly led…to believe that he would not be punished for telling them the incriminating details they professed to already know." RSA 82.

Such repeated false promises of leniency render a confession involuntary. *Sprosty v. Buchler*, 79 F.3d 635, 646 (7th Cir. 1996) (false promises of leniency "prevent a suspect from making a rational choice [to confess] by distorting the alternatives among which the person under interrogation is being asked to choose"); *U.S. v. Stadfeld*, 689 F.3d 705, 709 (7th Cir. 2012) (false promises "impede the suspect in making an informed choice as to whether he was better off confessing or clamming up"); *U.S. v. Rutledge*, 900 F.2d 1127, 1129 (7th Cir. 1990) ("[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"). And it is evident that Brendan not only understood these promises to convey a specific benefit – release – but also confessed in reliance on them: After confessing to murder, Brendan asked to be returned to

school before sixth hour because he had a project due; and when told he was under arrest, he asked in shock: "Is it only for one day?" SA 102, 157. *See Sharp v. Rohling*, 793 F.3d 1216, 1235 (10th Cir. 2015) (granting habeas relief where defendant's "surprised and angry reaction when [police] 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").

The state court's finding that "no promises of leniency" were made during Brendan Dassey's March 1 interrogation was an unreasonable finding of fact under 28 U.S.C. 2254(d)(2), and its conclusion that Brendan's interrogation was voluntary was an unreasonable application of federal law under 28 U.S.C. 2254(d)(1). This is especially true given Brendan's youthfulness, borderline-disabled I.Q., and extreme suggestibility – crucial factors that may well have changed the game in the interrogation room and demand exacting scrutiny in the courts. *See J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011) (psychological literature establishes that the risk of false and involuntary confession is "all the more acute when the subject of custodial interrogation is a juvenile"); *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"); *Johnson v. Trigg*, 28 F.3d 639, 642 (7th Cir. 1994) ("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").

No fairminded jurist – much less any parent – can watch Brendan's interrogation video without seeing a naïve child whose already diminished ability to make rational choices is being grotesquely distorted by false promises. The state court's finding of voluntariness, like the confession itself, is fiction. Brendan asks this Court to affirm the district court's grant of habeas relief.

STATEMENT OF THE CASE

On October 31, 2005, Teresa Halbach disappeared after a business appointment with Steven Avery at the Avery Salvage Yard in Two Rivers, Wisconsin.[1] RSA 2. A few days later, police found her charred bone fragments in a bonfire pit outside Avery's garage, eleven shell casings from Avery's .22-caliber rifle in his garage, and her burned phone and camera in a barrel near Avery's trailer. R.19-16:223-24; R.19-17:69-70. Halbach's Toyota RAV4 was found in the salvage yard with its license plates removed, battery cables disconnected, spots of her blood in the rear cargo area, and Avery's blood near the ignition. R.19-15:169-70; R.19-17:54; R:19-17:59-60, 62-66. The RAV4's key was found in Avery's

[1] The Required Short Appendix is cited as RSA___, the Separate Appendix as SA___, the District Court Record as R.___, and the Appellant's Brief as AB___.

bedroom. R:19-16:106. Within days, Avery was arrested, and the case shot into the national headlines. R.19-16:22; R.19-26:122-23.

On February 27, 2006, the investigation turned to an unlikely subject: Avery's sixteen-year-old nephew, Brendan Dassey. Brendan was a sophomore at Mishicot High School, where he received special education services. R.19-20:77. His I.Q. of 74 fell in the borderline to below-average range, and his learning disabilities interfered with his ability to understand abstractions and idioms and rendered him more suggestible than 95% of the population. R.19-12:79, 89; R.19-22:19; R.19-22:55-56. He was passive, docile, withdrawn, and had never been in trouble with the law. R.19-12:60; R.19-13:4. Police turned to Brendan because his cousin, Kayla Avery, told a school counselor that he had recently been crying and lost weight.[2] R.19-18:190.

On February 27, Investigator Mark Wiegert and Special Agent Tom Fassbender went to Brendan's school, without his parents' knowledge, and questioned him. R.19-12:13-15. Asked about October 31, Brendan said that Avery had asked him to help load tires and a junked van seat onto a bonfire near Avery's trailer, but he saw nothing unusual before going home. R.19-24:6-7. But the

[2] The Appellant wrongly asserts that Kayla told her counselor that Brendan saw body parts in the fire. AB 2. She did not. The first person to claim that Brendan saw body parts in Avery's fire was Investigator Wiegert on February 27, 2006, as recounted *infra*. R.19-24:9.

interrogators confronted Brendan with a lie: Halbach's bones, they claimed, were found intermingled in the van seat. R.19-17:204 (officer answering "No" to "Did you find any [bone fragments] in the van seat?"). "The only way her bones were intermingled in that seat," they announced, "is if she was put on that seat or if the seat was put on top of her." R.19-24:4.

Fassbender then launched into a monologue:

> You're a kid, you know and we got, we've got people back at the sheriff's 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's killing you more than anything else...[S]ome 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…
>
> 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. 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.19-24:4. Wiegert followed: "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. OK. We know you saw something." R.19-24:9. Eventually, Brendan agreed that he had seen the very same body parts in the fire: fingers, toes, and a forehead, as well as a "belly." R.19-24:35.

Wiegert continued: "Now I've been told that you and Steve 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?" R.19-24:18. "Yeah," Brendan agreed. R.19-24:18. "Did he try to have sex with her or anything and she said no?" asked Fassbender, introducing the idea that a sexual assault occurred. R.19-24:23-24. "No," Brendan said, but he agreed that Avery "said she was pretty." R.19-24:24. The interrogators had him write out a statement; took him to a nearby police department, where he repeated his statement on videotape; and then took him to a hotel, where they questioned him a third time in an unrecorded interview. R.19-15:193.

After the interrogations of February 27, Wiegert testified that he thought Brendan might have been involved in the criminal disposal of Halbach's corpse. R.19-12:18-20; R.19-30:38.

On March 1, the officers returned to Brendan's school, Mirandized him, and drove him forty-five minutes away to the Manitowoc Police Department, where Fassbender opened with another monologue:

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…

[Y]ou were scared [that] you would be implicated in this…and that you might get arrested and stuff like that. OK? And we understand that. One of the best ways to, to 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, ahh, 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 now you've…even given points where it didn't look real good for you either…

[I]t's real obvious there's some places where some things were left out or maybe changed just a bit ta, to maybe look 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, we're there for you, um, and I, and, and we know what Steven did 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.

SA 29. Wiegert immediately continued:

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 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. You know. Honesty is the only thing that will set you free….
>
> If, in fact, you did some things, which we believe, some things 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?

SA 30. Sixteen-year-old, mentally limited Brendan nodded in agreement. SA 30. He did not, apparently, want any problems.

The following three hours were filled with scores of leading questions about Halbach's disappearance, made palatable by a clear theme: confession – or acquiescence – would carry no consequences. Brendan began by saying that he had gone to Avery's trailer before the bonfire was started. SA 36. But the interrogators rejected that story: "We're not gonna go any further in this 'cause we need to get the truth out now. We know the fire was going. 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. We 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." SA 36. Brendan agreed that the fire was indeed burning when he went to Avery's trailer. SA 37. He added that he had seen Halbach's body in her "jeep" – though she drove

a RAV4 – in Avery's garage. SA 39. The discovery of Halbach's blood in the back of her RAV4 had been widely publicized in the media. RSA 70.

Far from treating him as a witness, the interrogators pushed Brendan to implicate himself: "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." SA 41. Wiegert placed his hand on Brendan's knee in what the district court called a "compassionate and encouraging manner," RSA 76, and continued: "Brendan, were you there when this happened?...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?" SA 50. Brendan obliged again: he was riding his bike outside, he said, when he heard screams coming from Avery's trailer. SA 50-51. His interrogators praised his pliability – "OK, Brendan, you're doing a good job" – but continued to push: "I think we're pretty close to the truth. How close are we, Brendan?" "Pretty close," Brendan agreed. SA 52, 54.

Fassbender said, "There's somethin' in there we're missing…I have a feelin' he saw you, you saw him…I think you went over to his house and then he asked [you] to get his mail." SA 54. Wiegert reminded Brendan: "It's OK, Brendan. We already know." SA 54. Brendan agreed that he had indeed fetched Avery's mail. SA 54. His interrogators pushed on: "You're making this hard on us and yourself. Be honest. You went inside, didn't you?" SA 54. Yes, Brendan agreed; he went

inside. SA 54. “Did he invite you in?” they asked. Again, Brendan agreed. SA 54-55.

Brendan then said he had seen Halbach handcuffed to the headboard of Avery’s bed. SA 55. At trial, he testified that he had based this story on the popular novel *Kiss the Girls*, which describes a woman restrained on a bed during a sexual assault. R.19-21:67. Extensive forensic analysis found no DNA from Halbach in the bedroom, no DNA from Halbach or Brendan on sexual paraphernalia including handcuffs that had been recovered from Avery’s trailer, and no chafing on the wooden headboard.[3] R.19-15:214; R.19-16:17-18. But the interrogators responded: “Now I can start believing you, ok?” SA 59-60. Wiegert again grasped Brendan’s knee and continued: “Come on buddy. Let’s get this out, 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? Does he ask you? He does, doesn’t he? We know. He asks you doesn’t he?” SA 57, 59-60. Brendan agreed: Avery had asked him to assault Halbach. SA 60.

The interrogators continued: “Come on, be honest, you went back in that room. Tell us now Brendan. We know you were back there. Let’s get it all out today and this will be all over with. He asked if you want some, right?...If you

[3] The cuffs had not been wiped clean: Avery’s DNA was found on them. R.19-17:96-97.

want some pussy?" SA 61. Again, Brendan agreed: he had gone back in the room, and Avery had asked "if he wanted me to have to get some pussy." SA 61, 63. At this point, Brendan said he had refused to rape Halbach and that he "didn't do nothin'," but the officers rejected that story: "We know what happened, it's OK. What did you do? Brendan, Brendan, come on. What did you do? What does Steven make you do? It's not your fault, he makes you do it." SA 63. Finally, Brendan agreed that, at Avery's instruction, he removed all his clothes and "stuck" his "penis" "in her vagina." SA 64. Fassbender asked, "Was she saying anything, while you were doing this?…Did she ask you not to do this to her?" SA 64-65. Brendan agreed: "She told me not to do it so and told me not, to do the right thing…and tell Steven to knock it off." SA 65. Then, Brendan said, he tried to leave. SA 67.

But the interrogators pushed on: "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…We already know, don't lie to us now, OK, come on. What happens next? You're just hurting yourself," they warned, "if you lie now." SA 67. Brendan agreed yet again: he was there when she died, he said, and offered that Avery had stabbed Halbach on his bed – a claim that has not been substantiated by any forensic evidence, including analysis of Halbach's remains, Avery's bedroom, and Avery's knives. SA 67. Instead, the forensic evidence established that Halbach had

actually been shot in the head – a crucial non-public fact known only to the police and the real killer. RSA 70. So Wiegert fished for that fact: "We know he did something else to her, what else did he do to her?" SA 67. After a puzzled silence, Brendan said, "He choked her." SA 68.

The officers asked Brendan to tell the story of stabbing and choking – but he couldn't keep his story straight without help. At first, Brendan said Halbach was uncuffed, tied up, stabbed, and choked, but on the second telling he said that she was stabbed and choked, then uncuffed and tied up. SA 69-72. At several points, the interrogators had to chime in when he showed signs of not knowing what to say. Regarding the "choking," Wiegert asked: "Did she fall asleep, go unconscious?" "Go unconscious," agreed Brendan. SA 68. "Is he telling her that he's gonna kill her[?]" asked Fassbender. "That he was gonna kill her," agreed Brendan. SA 71. "When he went in there did he threaten her with the knife[?]" asked Fassbender. "That he threatened her," agreed Brendan. SA 73.

The interrogators continued: "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…What else did you guys do, come on. What he made you do Brendan, we know he made you do somethin' else. What was it? What was it? We have the evidence Brendan, we just need you ta, ta be honest with us." SA 73. "That he cut off her hair," said Brendan – "his inflection suggesting more a

question than a statement," as the district court found. SA 73; RSA 70. "OK, what else? What else was done to her head?" "That he punched her," said Brendan. SA 74. The interrogators continued: "What else? What else? He made you do somethin' to her, didn't he? So he – he would feel better about not bein' the only person, right? What did he make you do to her? What did he make you do Brendan? It's OK, what did he make you do?" "Cut her on her throat," said Brendan. SA 74-75. "What else happens to her in her head? It's extremely, extremely important [for] you to tell us this, for us to believe you. Come on Brendan, what else? We know, we just need you to tell us." SA 76. Finally, Brendan said, "That's all I can remember." SA 76. An obviously frustrated Wiegert responded, "All right, I'm just gonna come out and ask you. Who shot her in the head?" SA 76. Brendan replied, "He did." SA 76. Fassbender asked, "Then why didn't you tell us that?" SA 76. Without a trace of irony, Brendan replied, "Cuz I couldn't think of it." SA 76.

The district court called this entire exchange "perhaps the strongest indication that Dassey was…at times guessing at the answers in an attempt to provide the investigators with the information they said they already knew." RSA 70. No DNA or forensic evidence from Halbach – whether blood, saliva, or hair – was found in the Avery bedroom, despite extensive forensic sampling. R.19-23:88. Neither was any forensic trace of Brendan Dassey found there. R.19-23:88.

Brendan told the officers that the shooting occurred outside near Avery's bonfire pit, where the media had reported Halbach's remains had been found. SA 76-77; RSA 69. Knowing that eleven shell casings were found inside Avery's garage, and that blood was found in Halbach's RAV4, the investigators redirected Brendan to the garage: "[W]e know there's some things that you're not tellin' us. We need to get the accuracy about the garage and stuff like that and the car." SA 82. They continued: "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." SA 84. Brendan agreed, changing his story so that before placing Halbach's body on the fire, Avery had put her in the "jeep" inside the garage. SA 84. Avery did this, Brendan added, because he had originally intended to dispose of her body in a nearby pond, but Avery then "came up with burning her," "[s]o he set her back on the floor and then, that's when he threw her in the fire." SA 85. But "earlier you said this fire was going already," Fassbender pointed out. SA 85. Wiegert added: "[Isn't] the fire burning already when you carried her out [of the trailer]?" SA 83. Oblivious to the contradiction, Brendan agreed: "Yeah." SA 83.

They continued to push: "Tell us where she was shot…in the garage, outside, in the house?" SA 85. "In the garage," replied Brendan, echoing their admonition that "some things happened in that garage." SA 84-85. "Was she on the garage floor or in the truck?" asked Wiegert. SA 85. "Innn [*sic*] the truck," said

Brendan. SA 86. Wiegert responded: "Ah huh, come on, now where was she shot? Be honest here. The truth." SA 86. "She was on the, the garage floor," Brendan answered. SA 86. "That makes sense. Now we believe you," replied the interrogators. SA 86. Consistent with their suggestion that Halbach had been shot in the garage, a bullet with her DNA on it was later found there. R.19-16:62-66.

The interrogators pressed on, asking Brendan where Avery got the gun; he referred to "the .22," a rifle that the family knew Avery kept in his bedroom. SA 84. They asked Brendan how the body had been moved from the garage to the bonfire after the shooting; he described using a "creeper" that he knew Avery kept in his garage, though it too later tested negative for blood. SA 46; R.19-23:96. They asked Brendan: "[T]he license plates were taken off the car, who did that?" SA 90. "I don't know," replied Brendan. SA 90. "Did Steve take the license plates off the car?" Wiegert asked. SA 91. "Yeah," agreed Brendan. SA 91. They asked Brendan to describe Halbach's clothing: "[W]hat color was the shirt?" SA 97. "Black," said Brendan. SA 98. Earlier in the interrogation, he had said "a white T-shirt." SA 44.

Knowing that the battery cables in Halbach's RAV4 had been disconnected – another nonpublic fact – the investigators focused on that detail: "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." R.19-17:142; SA

92. “That he left the gun in the car,” replied Brendan. But no gun had been found in the RAV4, so Fassbender pressed on: “That’s not what I’m thinkin’ about. He did something to the car. He took the plates and he, I believe he did something else in that car. 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 the car?” SA 92. “Yeah,” replied Brendan. SA 92. “It’s OK, what did he do?” asked Wiegert. SA 92. Fassbender added: “What did he do under the hood, if that’s what he did?” SA 92. “I don’t know what he did, but I know he went under,” Brendan finally agreed. SA 92.

When the interrogators decided to take a break, Brendan guilelessly asked: “How long is this gonna take?” SA 102. “It shouldn’t take a whole lot longer,” Wiegert replied. SA 102. “Do you think I can get [back to school] before 1:29?” asked Brendan. SA 102. “Um, probably not,” Wiegert replied after a few beats; “what’s at 1:29?” SA 102. “Well, I have a project due in sixth hour,” explained Brendan. SA 102.

After the break, the interrogators returned to ask Brendan about another non-public fact: the discovery of Halbach’s cell phone, camera, and purse in a burn barrel near Avery’s trailer. “We talked a little about some things a burn barrel out front do you remember anything about that burn barrel?” SA 108-09. When Brendan replied “I don’t know,” Fassbender asked: “What happened ta her ah, her cell phone?” SA 109. He waited a few beats, then warned: “Don’t try ta ta think of

somethin' just." SA 109. "I don't know," repeated Brendan. SA 109. "Did Steven did you see whether ah a cell phone of hers? Do you know whether she had a camera?" continued Fassbender. SA 109. "No," replied Brendan. SA 109. Wiegert chimed in: "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?" SA 109. "He burnt 'em," agreed Brendan, and added, "[W]hen I passed [the burn barrel] there was like like a purse in there and stuff." SA 109-10. "What did you see?" asked Wiegert. SA 111. "Like a cell phone, camera, purse," said Brendan. SA 111. The interrogators responded with skepticism: "Are you being honest with us? Did you actually see those items?" SA 111. "Yeah," replied Brendan, nodding. SA 111.

"We know that Teresa had a, a tattoo on her stomach…Do you disagree with me when I say that?" asked Fassbender. SA 151-52. "No," replied Brendan, refusing to disagree; "but I don't know where it was." SA 152. Halbach had no tattoo. AB 18.

The interrogators concluded by asking Brendan to draw Avery's kitchen knife and a stick-figure picture of a person lying on Avery's bed. SA 135-37. After Wiegert suggested that Brendan add Avery's gun rack to the bedroom drawing, Brendan obliged and, while trying to label the picture, asked: "How do you spell rack?" "R-A-C-K," replied Wiegert. SA 137. He also asked Brendan to draw and

label a picture of Avery's garage, causing Brendan to ask: "How do you spell garage?" "G-A-R-A-G-E," replied Wiegert. SA 141.

The drawings completed, Brendan again asked: "Am I gonna be at school before school ends?" SA 156. After a pause, Fassbender answered, "Probably not. I mean we're at two thirty already, and school's over at what, three?" SA 156. "3:05," Brendan said. SA 156. Fassbender replied, "3:05 yeah. No." SA 156. Brendan continued: "What time will this be done?" SA 156. "Well, we're pretty – we're pretty much done," said Fassbender. SA 156. The officers then placed Brendan under formal arrest, at which point he responded with obvious shock: "Is it only for one day?" SA 157.

At this point, Brendan's mother Barb Tadych – who had arrived at the station during the interrogation – was allowed into the room while the officers stepped out. SA 158. Head in hands, Brendan asked her: "Where am I going?" SA 160. Her voice breaking, Barb answered, "You're goin' to juvie, that's where you're going, to a juvie jail. About 45 minutes away." SA 160. Brendan asked: "Yeah but I gotta question. What'd happen if he says something his story's different?...Like if his story's like different, like I never did nothin' or somethin'?" SA 160-61. "Did you?" asked Barb. SA 161. "Not really," answered Brendan. SA 161. "What do you mean, not really?" asked Barb. SA 161. "They got to my head,"

replied Brendan. SA 161. The officers immediately re-entered the room; Brendan fell silent. R.19-44:Disc 3 at 3:19:32.

After Brendan's formal arrest, he received counsel in the form of Len Kachinsky, a private attorney who accepted appointments from the State Public Defender's Office. The district court deemed Kachinsky's ensuing behavior "indefensible" and "an affront to the principles of justice." RSA 50, 90.

Throughout Kachinsky's representation, Brendan repeatedly told him that he was innocent and had falsely confessed. R.19-26:137-38. Because he thought Brendan should plead guilty, however, Kachinsky directed his private investigator, Michael O'Kelly, to compel Brendan to confess again. R.19-41; R.19-29:50, 91, 104. Over e-mail, Kachinsky and O'Kelly agreed that O'Kelly would interrogate Brendan in jail on May 12, 2006 – the same day on which Kachinsky expected to lose his motion to suppress Brendan's March 1 confession – because the blow of loss would render Brendan more vulnerable. R.19-26:244; R.19-29:104. Kachinsky and O'Kelly also agreed that Kachinsky would cancel his upcoming visit with Brendan to make him feel more "alone." R.19-29:87-88. Kachinsky made these plans despite receiving an e-mail in which O'Kelly called Brendan's family "truly where the devil resides in comfort. I can find no good in any member. These people are pure evil…A friend of mine suggested '*This is a one branch family tree.*

Cut this tree down. We need to end the gene pool here.'" R.19-33:1 (italics in original).

On May 12, 2006 – after the trial court did, in fact, deny the motion to suppress Brendan's March 1 confession – O'Kelly visited Brendan in jail. R.19-44; R.19-38. With videocamera rolling, he falsely told Brendan that he had failed a polygraph. R.19-38:1. When Brendan protested that he "didn't do anything" and "was only there for the fire," O'Kelly told him that he would receive no help and would "spend the rest of your life" in prison unless he confessed again, in which case he would get out in time to "have a family" in "twenty years" – a made-up number, since no plea offer was or had been on the table. R.19-38:21, 34-5; R.19-26:42, 66, 80. Under these influences, Brendan eventually did confess again. R.19-38:5-16. O'Kelly immediately telephoned Kachinsky, who arranged for Brendan to undergo a second police interrogation the next day – May 13, 2006 – which Kachinsky did not attend. R.19-42:1; R.19-30:213-17. No immunity arrangements, plea offers, or other safeguards were in place before this uncounseled interrogation; instead, Kachinsky had agreed that the State would provide "no consideration" in exchange for a second chance to interrogate. R.19-26:80; R.19-27:34-38. During that interrogation, police directed Brendan to admit guilt to his mother over the recorded jail telephones. R.19-34:39, 68-69. As instructed,

Brendan called his mother that same day. R.19-35. The following exchange ensued:

> BRENDAN: Mike [O'Kelly] and Mark [Wiegert] came up one day and took another interview with me and said because they think I was lying but…I would have to go to jail for 90 years.
> BARB: What?
> BRENDAN: Ya. But if I came out with it I would probably get I dunno like 20 or less….They asked me if I wanted to be out to have a family later on…
> BARB: …How did you answer the phone at 6 o'clock [on October 31] when [alibi witness] Mike [Kornely] called then? …What about when I got home at 5:00 you were here [at home].
> BRENDAN: Ya.
> BARB: Ya. When did you go over [to Avery's trailer]?
> BRENDAN: I went over there earlier and then came home before you did.
> BARB: Why didn't you say something to me then?
> BRENDAN: I dunno, I was too scared.
> BARB: You wouldn't have had to been scared because I would have called 911 and you wouldn't be going back over there. If you would have been here maybe she would have been alive yet. So in those statements you did all that to her too?
> BRENDAN: Some of it.

R.19-35:2-5.

Within weeks, the trial court learned only that Kachinsky had allowed his client to be interrogated by police without counsel. R.19-14:3-4. On that basis alone, it removed Kachinsky, found his performance deficient under *Strickland v. Washington*, and appointed new counsel. R.19-14:22-23. The rest of Kachinsky's disloyalty went undiscovered until the post-conviction hearing, including the events of and leading up to May 12. It was also established at the post-conviction

hearing that Kachinsky had sent an e-mail on May 5 to police and prosecutors indicating where he thought the murder weapon was hidden, without informing Brendan or obtaining his consent. R.19-40; R.19-26:236-38. The ensuing police search, however, found nothing. R.19-30:88. It was also established that Kachinsky had made pre-trial statements to the press indicating that his client was guilty, including that Brendan – who had done nothing but protest his innocence – was "remorseful," "morally and legally responsible" for Halbach's death, and that "there is, quite frankly, no defense." R.19-39:9; R.19-30:228; R.19-26:142.

At trial, Brendan's videotaped March 1 confession served as the "centerpiece" of the State's case. RSA 36. Brendan's defense counsel presented the testimony of psychologist Dr. Robert Gordon, who found Brendan to be more suggestible than 95% of the population, R.19-22:54-56, and alibi witness Mike Kornely, who testified that he had spoken to Brendan on his home phone at 6:00 PM on October 31, 2005 – while the murder was supposedly happening at Avery's trailer. R.19-20:128-34.

Brendan testified that he had helped Avery build a bonfire by putting an old van seat and tires on the fire and that he had used bleach to help Avery clean a stain in the garage which, he assumed at the time, was automotive fluid. R.19-21:31-33. After helping his uncle, he returned home. R.19-21:38-39. He testified that his confession was "made up" and "didn't really happen," and that he "didn't

really do it." R.19-21:53, 76. When asked about his interrogation, Brendan testified that he understood the officers to mean that "no matter what" he said, "I wouldn't be taken away from my family and put in jail." R.19-21:77.

During cross-examination of both Brendan and Dr. Gordon, the State used the May 13 call to show that Brendan had made admissions in the apparent absence of suggestion. R.19-30:162-64; R.19-22:123. During closing argument, the State also relied on that call to construct a murder timeline that undercut Brendan's alibi. R.19-23:56-57. At the post-conviction hearing, Brendan's trial counsel testified that the May 13 call was "damning" evidence that they "couldn't really come up with any way to defend against." R.19-28:141.

During closing, the State also argued that Brendan's confession was corroborated because he said that Halbach had been shot in the head; the RAV4's license plates had been removed; Avery had gone under the RAV4's hood; Halbach's camera and phone had been burned in a barrel; and Halbach's remains had been burned in Avery's bonfire pit. R.19-15:74; R.19-23:66-73. It also argued that the jeans he was wearing that night were in fact bleach-stained. R.19-23:70-71. The Appellant repeats these claims in its brief. AB 19. But it does not acknowledge, as the district court did, that most "purportedly corroborative details" were fed to Brendan through "repeated leading and suggestive questioning," RSA 72; that other details had been publicized for months before the

interrogation, RSA 69; or that the remaining "corroboration" – like the bleach-stained jeans – equally corroborated his assertion of innocence.

Following trial, Brendan Dassey was convicted of first-degree murder, second-degree sexual assault, and mutilation of a corpse. SA 2. He was sentenced to life in prison. SA 223.

The Appellee accepts the Appellant's recitation of the procedural history and rulings presented for review, with the following additions. Regarding Brendan's ineffective assistance claim, the Wisconsin Court of Appeals described the State's use of the May 13 call as follows: "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 admitted '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." SA 6-7.

Regarding the district court's ruling, the Appellant states that the court analyzed only three interrogation tactics before granting habeas relief: (1) "a single statement" that "from what I'm seeing…I'm thinking you're all right. Ok, you don't have to worry about things"; (2) the investigators' assertions that they "already knew what happened"; and (3) their repeated statements that "it's OK."

AB 22-23. This mischaracterizes the district court's 91-page opinion. After discussing the conditions of Brendan's interrogation, RSA 74-77, the court considered several other statements too: "no matter what you did, we can work through that"; "as long as you can, as long as you can be honest with us, it's OK. If you lie about it that's gonna be problems"; "if you helped him, it's OK, because he was telling you to do it"; "It's OK, what did he make you do?"; "it's not your fault"; "honesty is the only thing that will set you free"; and statements that after confessing, "this will be all over with." RSA 80-82. The district court also emphasized Brendan's belief that he was going back to school after confessing to murder and that he was being arrested only for one day. RSA 81-82.

SUMMARY OF ARGUMENT

Brendan Dassey asks this Court to affirm the district court's grant of habeas relief. His March 1, 2006, confession was involuntary, the product of false promises of leniency that found their mark in a sixteen-year-old, mentally limited boy. *E.g.* SA 29 (although Brendan might fear "get[ting] arrested," he would be "all right" and would not "have to worry," even if the case "goes to trial," as long as he "filled in" the blanks with "statements…against your own interest" that "might make you look a little bad or…like you were more involved than you wanna be looked at"); SA 30 ("[i]f, in fact, you did somethings, which we

believe…it's OK. As long as you [can] be honest with us, it's OK. If you lie about it that's gonna be problems"); SA 30 ("[h]onesty here Brendan is the thing that's gonna help you," "no matter what you did, we can work through that," and "by you talking with us, it's, it's helping you"). Any child in Brendan's shoes would have heard, loud and clear, that confessing would carry no consequences.

These promises prevented Brendan from rationally weighing whether to confess by falsely guaranteeing a specific benefit – release without consequences – in exchange for his acquiescence to the interrogators' leading questions. *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960) (a voluntary confession is the product of "rational intellect and a free will"); *Rutledge*, 900 F.2d at 1129 (false promises impede rational intellect by "ma[king] it…impossible for [defendant] to weigh the pros and cons of confessing and go with the balance as it appears at the time"); *Sprosty*, 79 F.3d at 646; *Stadfeld*, 689 F.3d at 709. That Brendan understood such a bargain to have been struck is evident from his belief that he would be returned to school after confessing to murder and that his arrest would last only one day. RSA 81-82; *Sharp*, 793 F.3d at 1235 (granting habeas relief where defendant's similar reaction upon arrest indicated that her will had been overborne by false promises). By finding "no promises of leniency," the state court unreasonably overlooked facts under 28 U.S.C. 2254(d)(2); and by concluding that Brendan's statement was voluntary, it unreasonably applied federal law under 28 U.S.C. 2254(d)(1).

Alternatively, Brendan asks this Court to affirm on different grounds: his conflict-ridden representation by attorney Len Kachinsky, who worked with the State to secure his conviction. Believing Brendan should plead guilty, Kachinsky told the press that Brendan was culpable even while his client protested his innocence; he told the State where he thought the knife was hidden without Brendan's knowledge (although no knife was found); and he sent an investigator to interrogate Brendan until he confessed again and then turned Brendan over to the police, alone, for more interrogation. R.19-39:9; R.19-38:1-16; R.19-40. The product of his disloyalty was used against Brendan at trial: a recorded phone call dated May 13, 2006, in which Brendan told his mother he did "some of it" because his legal team believed he was guilty and had threatened to stop helping him unless he confessed again. R.19-35:5; R.19-38:2-3. The district court deemed Kachinsky's behavior an "affront to the principles of justice." RSA 50.

The state court rejected Brendan's claim that he had received ineffective assistance of counsel under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), but in so doing, it acted contrarily to clearly established federal law under 28 U.S.C. 2254(d)(1) by applying the legal standard in *Harris v. New York*, 401 U.S. 222 (1971), a Fifth Amendment *Miranda* case, to Brendan's Sixth Amendment claim. SA 6-7. It also made an unreasonable finding of fact under 28 U.S.C. 2254(d)(2) when it concluded that the State had only used the May 13 call once at trial when it

had actually been used three times. SA 6; R.29-11:50; R.19-22:122-23; R.19-23:56-57.

ARGUMENT

I. The district court was correct to conclude that Brendan Dassey's March 1, 2006 confession was involuntary.

Confessions must be voluntarily made. *E.g.*, *Miller v. Fenton*, 474 U.S. 104, 109 (1985); *Bram v. U.S.*, 168 U.S. 532 (1897). To be voluntary, a confession must be the product of "rational intellect and a free will." *Blackburn*, 361 U.S. at 208.

A finding of involuntariness requires a predicate finding of police coercion, *Colorado v. Connelly*, 479 U.S. 157, 167 (1986); but coercion depends on who is being coerced: "In making a judgment whether the conditions of interrogation prevented the defendant from making a rational choice, the defendant's capacity for rational choice is important – and that is where such circumstances as the defendant's age [and] intelligence…come in." *Weidner v. Thieret*, 866 F.2d 958, 964 (7th Cir. 1989); *Reck v. Pate*, 367 U.S. 433, 442 (1961). Youths under 18 "categorically" exhibit special vulnerability to "influences and outside pressure." *Roper v. Simmons*, 543 U.S. 551, 567, 569 (2005). Such vulnerability can be game-changing during interrogation, which works through the application of psychological influence. *J.D.B.*, 564 U.S. at 269, 275; *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). This is why a juvenile confession demands special scrutiny: it simply takes less to overwhelm a child's will. *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); *Haley v. Ohio*, 332 U.S. 596, 599 (1948) ("That which would leave a man cold and unimpressed [during interrogation] can overawe and overwhelm a lad in his early teens"); *Hardaway v. Young*, 302 F.3d 757 (7th Cir. 2002) (clearly established federal law requires "special caution" when analyzing juvenile confessions). Thus, "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*, 28 F.3d at 642. For the same reasons, interrogation tactics are also more likely to be coercive when the defendant is mentally limited. *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"); *Stein v. New York*, 346 U.S. 156, 185 (1953); *cf. Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (mentally retarded individuals present a risk of false confession).

Brendan Dassey's youthfulness and mental limitations rendered him doubly vulnerable to coercion. *Cf.* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law & Hum. Behav. 3, 20-22 (2010) ("adolescence" and "intellectual disability" are significant risk factors for false confession). On March 1, 2006 – when he faced two interrogators with no adult by his side – Brendan was a sixteen-year-old special education student with no

criminal history, a borderline to below-average I.Q. of 74, and a profoundly suggestible personality. R.19-12:89; R.19-22:55-56. His learning disabilities interfered with his abstract language comprehension, causing him to interpret idioms, like "honesty is the only thing that will set you free," literally. R.19-12:79; R.19-22:19, 55-56. These disabilities made him think like a much younger child, as when he had to ask Wiegert how to spell the word "rack." SA 137.

Against these profound vulnerabilities, this Court must weigh the interrogators' tactics. A confession is voluntary when the totality of the circumstances show that it was the product of "rational choice" and "mental freedom." *Blackburn*, 361 U.S. at 207; *Reck*, 367 U.S. at 441-42. But false promises of leniency overwhelm a suspect's rationality by "making it…impossible for [a defendant] to weigh the pros and cons of confessing and go with the balance as it appears at the time." *Rutledge*, 900 F.2d at 1129-30; *Sprosty*, 79 F.3d at 646 (false promises "prevent a suspect from making a rational choice by distorting the alternatives among which the person under interrogation is being asked to choose"); *Stadfeld*, 689 F.3d at 709 (false promises "impede the suspect in making an informed choice as to whether he was better off confessing or clamming up"); *U.S. v. Sturdivant*, 796 F.3d 690, 698 (7th Cir. 2015) (false promises "falsely skew the calculus on which [the defendant] ma[kes] his decision to cooperate"). It is true that "a police officer may actively mislead a suspect" – but only "so long as a

rational decision remains possible." *U.S. v. Montgomery*, 555 F.3d 623, 632 (7th Cir. 2009). It follows that a truthful promise merely to bring a defendant's cooperation to the attention of the judge is not coercive, because a truthful promise does not prevent a rational choice. *U.S. v. Villalpando*, 588 F.3d 1124, 1130 (7th Cir. 2009); *U.S. v. Long*, 852 F.2d 975, 980 (7th Cir. 1988) (Easterbrook, J., concurring) (inducements to confess are unobjectionable "provided both sides are truthful and the state keeps its word"). But "if 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." *Rutledge*, 900 F.3d at 1129. This difference is drawn because "a false promise has the unique potential to make a decision to speak irrational and the resulting confession unreliable." *Villalpando*, 588 F.3d at 1128.

It is unreasonable to assert, as the state court did, that Brendan's interrogators made no false promises of leniency on March 1. SA 176. The videotape reflects many such promises, including that even if Brendan made "statements…against your own interest," then "from what I'm seeing…I'm thinkin' you're all right. OK, you don't have to worry about things"; "honesty here is the thing that's gonna help you"; "by you talking with us, it's, it's helping you"; "no matter what you did, we can work through that"; "the honest person is the one who's gonna get a better deal out of everything"; and "if, in fact, you did

somethings, which we believe…it's OK. As long as you [can] be honest with us, it's OK. If you lie about it that's gonna be problems." SA 29-30. While isolated in a police interrogation room forty-five minutes away from his school, Brendan was also told that "honesty is the only thing that will set you free" – a statement that must be read in light of Brendan's youthfulness and disability, which caused him to take idioms literally. SA 30; *see also J.D.B.*, 564 U.S. at 264-65 (it is "beyond dispute" that youth often will not feel free to leave interrogations); *Rutledge*, 900 F.3d at 1129 ("if the government [promises a defendant] that if he confesses he will be set free…then the confession must go out").

The police invoked this theme repeatedly, especially before each of Brendan's most damning admissions. Right before Brendan said that he heard Halbach screaming inside Avery's trailer, his interrogators told him, "We already know, it's OK. We gonna help you through this, alright?" SA 50. Right before Brendan said that he saw Halbach restrained in Avery's bedroom, his interrogators told him, "We know you were back there. Let's get it all out today and this will be all over with." SA 61. And right before Brendan said that he sexually assaulted Halbach, his interrogators told him, "We know what happened, it's OK…It's not your fault, he makes you do it." SA 63. Plainly, the officers overcame Brendan's reluctance only by assuring him that everything would be all right as long as he confessed. But in reality, the opposite was true: because no witness or physical

evidence linked Brendan to Halbach's rape or murder, Brendan was safe from legal jeopardy *unless* he confessed.

Such misrepresentations epitomize how false promises "ma[ke] it…impossible for [the defendant] to weigh the pros and cons of confessing and go with the balance as it appears at the time." *Rutledge*, 900 F.2d at 1129. By turning the "pros and cons of confessing" on their heads, these promises "destroyed the information that [Brendan] required for a rational choice." *Id.* at 1130. And these promises were only amplified by the officers' twenty-four assurances that they "already knew" everything Brendan had supposedly done. RSA 78-80. Such assurances indicated that nothing Brendan said could shock them into reneging on their promises – giving him *carte blanche* to say the worst things he could think of. *See U.S. v. Lall*, 607 F.3d 1277, 1285-86 (11th Cir. 2010) (finding involuntariness on habeas review where officer told 20-year-old he wouldn't be charged if he confessed); *Hopkins v. Cockrell*, 325 F.3d 579, 584-85 (5th Cir. 2003) (finding involuntariness on habeas review where interrogator told 24-year-old "their conversation was confidential"); *Henry v. Kernan*, 197 F.3d 1021, 1027 (9th Cir. 1999) (finding involuntariness on habeas review where interrogator told adult suspect "what you say can't be used against you right now").

There can be no doubt that Brendan thought he had been offered a virtual get-out-of-jail-free card. After confessing to murder, he asked, "Am I gonna be

[back] at school before school ends?" and "What time will this be done?" SA 156. Even after being formally arrested, he still thought he was not in trouble: "Is it only for one day?" SA 157. Brendan plainly believed that since he had held up his end of the bargain by confessing, the officers would hold up theirs by releasing him. *See* RSA 82 (his "reaction to being told he was under arrest clearly indicate[s] that he really did believe that, if he told the investigators what they professed to already know, he would not be arrested"); *Sharp*, 793 F.3d at 1235 (state court unreasonably found no promises of leniency because defendant's "surprised…reaction when [police] arrested her" after confessing indicated that "her incriminating statements were not the product of free will because they were given on the false premise she would not go to jail"). Even the Appellant concedes Brendan "did not fully appreciate the significance of his admissions," though it cannot explain why this might be. AB 41.

Those admissions, moreover, were often the result of what the district court called "repeated leading and suggestive questioning" – tactics which are symptomatic of involuntariness, although reliability is a separate inquiry. RSA 72; *Connelly*, 479 U.S. at 167; *Miranda*, 384 U.S. at 455 (criticizing interrogation where suspect "merely confirms the preconceived story the police seek to have him describe"); *U.S. v. Preston*, 751 F.3d 1008, 1024 (9th Cir. 2014) (mentally impaired 18-year-old's confession was involuntary on AEDPA review where

police "asked him the same questions over and over until he finally assented and adopted the details that the officers posited"). The Appellant is flagrantly wrong to characterize the interrogation as a litany of open-ended questions in which the "first" leading question was "Who shot her in the head?" AB 38. Dozens of leading questions precede that one – each advancing the story another step. *E.g.*, SA 54 ("I have a feelin' he saw you, you saw him."); SA 54 ("I think you went over to his house and then he asked [you] to get his mail."); SA 54 ("You went inside, didn't you?"); SA 61 ("You went back in that room…we know you were back there."); SA 60 ("Does he ask you [to rape Halbach]? He does, doesn't he?"); SA 61 ("He asked if you want some, right?...If you want some pussy?"); SA 67 ("You were there when she died and we know that."); SA 76 ("Who shot her in the head?"). At times, the interrogation almost resembled a macabre guessing game. *E.g.*, SA 73 ("What else did he do to her? …Come on. Something with the head.").

Any open-ended questions, in contrast, usually occurred only *after* the police introduced a new plot point and invited Brendan to embellish on it. Importantly, the details he provided without prompting either had been widely publicized, RSA 69 (listing these details, including the discovery of Halbach's remains and RAV4 on the Avery property, and corresponding media coverage), or were proven false by forensics. R.19-23:96 (no blood on creeper that supposedly held Halbach's bleeding body); R.19-23:97 (no marks or DNA on wooden headboard to which

Halbach was supposedly shackled); RSA 41 (no Halbach DNA, blood, or hair in bedroom where rape, stabbing, and hair-cutting supposedly occurred).

The involuntariness of Brendan's statement is even more apparent given his youthfulness, mental limitations, extreme suggestibility, and inexperience. *Johnson*, 28 F.3d at 642 (interrogation tactics that are "unexceptionable" when used on an adult may "cross the line" when used on a child). Indeed, Brendan's interrogators actively exploited his youthfulness and naiveté to get a confession. RSA 76. On February 27, 2006, Brendan's interrogators portrayed themselves as protective parents: "[W]e'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 promise I will not leave you high and dry." R.19-24:5. The district court observed that on March 1, police continued "suggesting that *they* were looking out for [Brendan's] interests." RSA 76; *e.g.* SA 29 ("I wanna assure you that Mark and I both are in your corner, we're on your side"); SA 36 ("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"). This transformation of interrogators into "friends" and "fathers" only made their false promises more plausible. *Spano v. New York*, 360 U.S. 315, 323 (1959) (confession involuntary where interrogator posed as "false friend" and "worried father"). Brendan, of course, had no actual parent with him, forcing him to depend on his new "friends" for guidance.

The district court emphasized that Brendan's confession was rendered involuntary by the "collective[] and cumulative[]" impact of these techniques on a mentally limited sixteen-year-old. RSA 74-84, 86. But by examining only a few tactics in isolation and refusing to engage with their cumulative impact, the Appellant makes the same error as the state court. RSA 86. The Appellant cites some adult cases, for instance, which sanctioned isolated phrases that were also used on Brendan. AB 29-31 (citing *Villalpando*, 588 F.3d at 1128-29 (interrogator saying "I'm going to go to bat for you" to a savvy adult repeat offender who was "negotiating [his] future cooperation")). This blinkered analysis, devoid of context or completeness, falls short of what the Supreme Court demands: "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 (1978) (emphasis added); *Villalpando*, 588 F.3d at 1129 (when it comes to voluntariness, the "devil is in the details"). The district court met this mandate. RSA 86-88. Lost in color-matching, the Appellant – like the state court – fails to see the entire palette.

The Appellant argues that in *Etherly v. Davis*, 619 F.3d 654 (7th Cir. 2010), this Court sanctioned "far more police pressure." AB 3. Etherly was a fifteen-year-old Gangster Disciple accused of shooting another gang member. 619 F.3d at 657. He was brought to a police station, Mirandized, and questioned from 8:00 to 8:30

AM. *Id.* at 657-58. Afterward, an officer told Etherly that "it would go better for him in court" if he helped police find the gun. *Id.* at 658. Etherly was re-Mirandized and "led the detectives" to a .38-caliber revolver consistent with the .380-caliber bullet found in the victim's body. *Id.* at 658-69. Etherly was then Mirandized a third time and gave a confession in which he explained that he "[got] the guns so the judge would know I helped them." *Id.*

This interrogation was nothing like Brendan's. A streetwise gang member, Etherly was Mirandized three times and only questioned for thirty minutes; and he led police to a gun consistent with the ballistics evidence. Most crucially, the lone promise made by police – to "inform the court of his assistance" – was *truthful*: in fact, the state did inform the judge of Etherly's cooperation. *Id.* at 658. Truthful promises are not coercive because they do not prevent a suspect from rationally weighing whether to confess. *Long*, 852 F.2d at 980 (Easterbrook, J., concurring); *Rutledge*, 900 F.2d at 1129-30. The promises made to Brendan, in contrast, were patently false.

This Court also emphasized that Etherly was not promised any "specific benefit." 619 F.3d at 663. Indeed, Etherly expected only that the "judge would know I helped"; whether this might translate into a concrete benefit was unclear. *Id.* at 658. But the video provides clear and convincing evidence that Brendan expected a very specific benefit: if he confessed, he would avoid consequences and

go back to school. SA 102 (asking to be returned to school after confessing to rape and murder); SA 157 (after being arrested, asking "is it only for one day?"). At trial, too, Brendan testified that he thought "no matter what" he said, "I wouldn't be taken away from my family and put in jail." R.19-21:77.

The Appellant also cites *Hardaway*, 302 F.3d 757, in which this Court denied habeas relief. There, fourteen-year-old Hardaway, who had been arrested nineteen times in two years, stood accused of a gang murder. *Id.* at 767. His I.Q. was average, and he had no mental infirmities. *Id.* Moreover, "police used no particularly coercive or heavy-handed interview techniques," and Hardaway "was not psychologically tricked into confessing by officers, but only confronted with truthful contradictory evidence." *Id.* at 760, 766-67. As such, Hardaway's case involved an experienced defendant who was not interrogated using false promises or coercion – the inverse of Brendan's case. Denial of habeas relief there does not translate into denial here.

In *A.M. v. Butler*, in contrast, this Court granted habeas relief where the interrogation more closely resembled Brendan's. 360 F.3d 787 (7th Cir. 2004). A.M. was eleven years old with no mental limitations; he had no criminal history and was initially regarded as a witness; and like Brendan, he was questioned repeatedly and gave various accounts before eventually admitting to stabbing an 83-year-old woman after police told him that he had lied and "needed to tell the

truth." *Id.* at 789, 792-93, 802. During A.M.'s interrogation, police touched his knees – just like Wiegert touched Brendan's – and, echoing Brendan's understanding that he was going back to school, falsely "said that if he confessed…he could go home in time for his brother's birthday party." *Id.* at 794. Like Brendan, no physical evidence tied A.M. to the bloody murder; and like Brendan, A.M. recanted as soon as his mother was allowed into the interrogation room. *Id.* at 793. There, this Court granted habeas relief, noting that these tactics "could easily lead a young boy to 'confess' to anything." *Id.* at 800. Admittedly, Brendan was five years older than *A.M.*; but his low I.Q., inability to comprehend abstract language or spell simple words like "rack," and extreme suggestibility make his mental state closer to that of *A.M.*, who had no limitations at all.

The Appellant's remaining cases primarily address physical conditions of interrogation instead of psychological tactics. AB 32 (citing *Carter v. Thompson*, 690 F.3d 837 (7th Cir. 2012) (length of detention); *Ruvalcaba v. Chandler*, 416 F.3d 555 (7th Cir. 2005) (same); *Gilbert v. Merchant*, 488 F.3d 780 (7th Cir. 2007)) (parental presence)). To argue that the false promises made to Brendan must be acceptable because other defendants were detained longer is to compare apples to oranges. If a confession was "induced" by false promises of leniency, making it "impossible for [the defendant] to weigh the pros and cons of confessing and go with the balance as it appears at the time," then the confession "must go

out" – even if the conditions of interrogation were adequate. *Rutledge*, 900 F.2d at 1129-30; *Montgomery*, 555 F.3d at 629-30. The psychological effects of false promises of leniency cannot be cured by placing a defendant on a couch or giving him a Sprite.

Finally, the Appellant argues that Brendan's confession was voluntary because he "resisted" suggestion a few times. AB 16-18. Its examples, however, reveal a pattern: When Brendan occasionally "resisted," the pressures often were not as great at those moments; and when he capitulated, his rational choice had been distorted by false promises. For instance, the Appellant argues that Brendan resisted suggestions that he shot Halbach. AB 16. That exchange, which happened 87 minutes after Brendan's admission to murder, is tellingly devoid of promises or significant pressure. SA 120 (dropping the subject after this exchange: "Did he ask you to shoot her too or did he tell you ta shoot her?" "No." "You're sure about that?" "Yeah."). The same is true of Brendan's statements concerning whether he helped Avery start the fire and whether Avery's knife had been left in the "jeep." AB 16-17; SA 121-22 ("Did you help Steven start that fire?" "No." "Are you tellin' us the truth?" "Yes."); SA 94 ("He left [the knife] in the jeep." "It's not in the jeep now, where do you think it might be?" "I['m] sure it was." "Did you see it in the jeep?" "Yeah, cuz he set it on the floor." "Where on the floor did he set it?" "In the middle of the seats." "OK.").

In fact, the Appellant's claim that Brendan resisted suggestion about the knife's whereabouts omits a significant fact: Brendan did, in fact, change the knife story to accommodate Wiegert's statement that no knife had been found in the "jeep" – but only after Wiegert turned up the pressure: "What about 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?" This time, Brendan replied: "Probably in the drawer."[4] SA 134. Emblematic of the entire interrogation, he yielded to assurances that everything would be okay as long as he accepted whatever the interrogators thought was true.

II. The district court was correct to find the state court's voluntariness ruling unreasonable under both 28 U.S.C. 2254(d)(1) and (d)(2).

In rejecting Brendan's voluntariness claim, the Wisconsin Court of Appeals adopted the trial court's determination that investigators made "no promises of leniency." SA 4. It thus made an unreasonable finding of fact under 28 U.S.C. 2254(d)(2) by ignoring clear and convincing evidence to conclude that important circumstances were not present when, in fact, they were. *Ward v. Sternes*, 334 F.3d 696, 704 (7th Cir. 2003) (unreasonable fact-finding ignores the "clear and

[4] The Appellant also describes Brendan as "resisting" Fassbender's false suggestion that Halbach had a tattoo. AB 16-18. Here, it simply misreads the transcript. Far from resisting, Brendan went along with that falsehood. SA 151-52 ("We know that Teresa had a tattoo on her stomach…Do you disagree with me when I say that?" "No, but I don't know where it was.").

convincing weight of the evidence"); *Sharp*, 793 F.3d at 1216 (granting habeas relief because state court unreasonably found that interrogators did not promise leniency); *Miller-El v. Dretke*, 545 U.S. 231, 254 (2005) (state court found facts unreasonably when it "apparently ignored" relevant testimony).

The state court unreasonably ignored the plain meaning of the interrogators' words. *See Watts v. State of Ind.*, 338 U.S. 49, 54 (1949) (when assessing voluntariness, courts may not "shut our minds to the plain significance of what here transpired"); *Lall*, 607 F.3d at 1287 (it is "utterly unreasonable to expect any uncounseled layperson…to so parse [the interrogator's] words"). Any kid in Brendan's shoes would have heard, loud and clear, that he would not be in trouble so long as he admitted guilt. SA 29-30 (while Brendan might fear "get[ting] arrested," he would be "all right" and not "have to worry" as long as he made "statements against your own interest"; "by talking with us, it's helping you…no matter what you did"; "[if], in fact, you did somethings, which we believe…it's OK. As long as you [can] be honest with us, it's OK. If you lie about it that's gonna be problems"). Brendan's belief that he was going back to school, even after confessing to murder, confirms that such a message was sent, received, and relied upon.

In contravention of the videotape, the state court found that police merely communicated that "being truthful would be in [Brendan's] best interest" in order

to "achieve a rapport" and "remind [him] of his moral duty to tell the truth." SA 4. No reasonable jurist who gave the words said to Brendan their ordinary meaning could have made such findings. *Compare State v. Turner*, 288 Neb. 249 (2014) (police invoked moral duty to confess by saying "do the right thing"); *Lacy v. State*, 345 Ark. 63, 78 (2001) (confessing is the "Christian thing to do"); *Mickey v. Ayers*, 606 F.3d 1223, 1233 (9th Cir. 2010) (rapport-building includes "small talk" about traffic and politics); *U.S. v. Thoma*, 726 F.2d 1191, 1195 (7th Cir. 1984) (same). Because the state court's factual findings were unreasonable, relief is warranted under 2254(d)(2).

The state court also unreasonably applied clearly established federal law under 28 U.S.C. 2254(d)(1) when it concluded that Brendan's confession was voluntary. If the state court had made reasonable factual findings about promises of leniency, it would have concluded that Brendan's March 1 confession was involuntary, as argued *supra*. *Pole v. Randolph*, 570 F.3d 922, 936 (7th Cir. 2009) (state court's factual error is relevant to reasonableness of legal conclusion). Further, the state court acted unreasonably by "focusing on facts in isolation and…failing to assess voluntariness under the totality of circumstances." RSA 85; *Mincey*, 437 U.S. at 401 (voluntariness analysis requires "careful evaluation of *all* the circumstances" (emphasis added)). The state court's noncumulative analysis of the circumstances ignored the way in which false promises, assurances that the

police "already knew," parental posturing, and fact-feeding *combined* to distort the rational choice of a young, intellectually limited, inexperienced defendant who was being interrogated alone. Viewed cumulatively, no fairminded jurist could fail to see that Brendan's confession was involuntary. The state court's decision to the contrary was unreasonable under 2254(d)(1).

In sum: By finding "no promises of leniency," the state court made an unreasonable finding of fact under 28 U.S.C. 2254(d)(2); and by concluding that Brendan's statement was voluntary, it unreasonably applied federal law under 28 U.S.C. 2254(d)(1). Under the resulting de novo review, the district court rightly concluded that Brendan's confession was voluntary. Brendan Dassey asks this Court to affirm the district court's grant of habeas relief.

III. Alternatively, this Court should affirm the district court's grant of habeas relief based on the misconduct of Brendan's pre-trial attorney, who helped the prosecution advance its case against Brendan.

On the heels of Brendan's confession came murder charges; and with those charges came court-appointed attorney Len Kachinsky. But Kachinsky used unpardonable methods to try to box his client into a guilty plea. He told the press that Brendan was "remorseful" and "legally and morally responsible," and that there was "no defense," even while Brendan claimed innocence and asked for a polygraph to prove it; he told police where he thought the knife was hidden, though nothing was found; and he sent his investigator to extract a videotaped confession

from Brendan and then turned him over to police, alone, for further interrogation. R.19-30:213-28; R.19-26:186-87, 236-38; R.19-40; R.19-42. Although Kachinsky was eventually removed from the case, the product of his disloyalty was still used against Brendan at trial: a recorded phone call dated May 13, 2006, in which Brendan told his mother he did "some of it" because his legal team believed he was guilty and had threatened to stop helping him unless he confessed again. R.19-35:5; R.19-38:2-3. The district court deemed this "indefensible" behavior an "affront to the principles of justice": Kachinsky abandoned his duty to defend Brendan and effectively joined the prosecution of his own client. RSA 50, 90.

Brendan raised Kachinsky's disloyalty as a conflict of interest under *Sullivan*, 446 U.S. 335, and argued in habeas that the state court's adjudication of this claim violated 28 U.S.C. 2254(d)(1) and (d)(2). SA 247. The district court's denial is reviewed de novo, *Brown v. Finnan*, 598 F.3d 416, 422 (7th Cir. 2010), and is properly raised pursuant to *Jennings v. Stephens*, 135 S. Ct. 793 (2015) (petitioner may argue for affirmance of habeas grant based on any ground supported by the record without cross-appealing, even if it involves challenging the lower court's reasoning).

A) The Wisconsin Court of Appeals' decision was contrary to clearly established federal law because it applied *Harris v. New York*'s Fifth Amendment impeachment rule to Brendan's Sixth Amendment ineffective assistance of counsel claim.

A defendant who was represented by a conflicted attorney is entitled to relief if "an actual conflict of interest adversely affected his lawyer's performance." *Sullivan*, 446 U.S. at 348. Such a defendant must show that "but for the attorney's conflict…his performance would have been different, and the forgone performance was detrimental to [the defendant's] interests." *Michener v. U.S.*, 499 Fed. Appx. 574, 578 (7th Cir. 2012); *Hall v. U.S.*, 371 F.3d 969, 974 (7th Cir. 2004) (proving adverse effect under *Sullivan* is "significantly easier than showing prejudice").

Kachinsky labored under a conflict when he worked to incriminate his own client, effectively serving two irreconcilable masters: Brendan and the State. *Thomas v. McLemore*, 2001 U.S. Dist. LEXIS 6763, at *31 (E.D. Mich. 2001) (an "obvious" conflict arises when a defense attorney "abandons his or her duty of loyalty to the client and joins the prosecution in an effort to obtain a conviction") (citations omitted); *U.S. v. Swanson*, 943 F.2d 1070, 1075 (9th Cir. 1991) (attorney's "abandonment of his duty of loyalty to his client by assisting the prosecutor also created a conflict of interest"); *Osborn v. Shillinger*, 861 F.2d 612, 629 (10th Cir. 1988) (attorney who acted "with the intention to weaken his client's case" suffered from a "conflict in loyalty"). Kachinsky's conflict adversely affected Brendan's trial – notwithstanding his removal – because at trial the State used the May 13 call, which never would have existed but for Kachinsky's disloyalty. Indeed, the jury heard Brendan telling his mother during the call that if

he confessed, he would only receive "twenty or less" years in prison and might "be out to have a family later on" – echoing O'Kelly's words from May 12. R.19-35:5. *See U.S. v. Tatum*, 943 F.2d 370, 379 (4th Cir. 1991) (granting new trial under *Sullivan* because trial was "infected" by conflict despite conflicted counsel's pre-trial withdrawal); *Rubin v. Gee*, 292 F.3d 396, 406 (4th Cir. 2002) (granting habeas relief because "a conflicted attorney can taint trial counsel").

In denying relief, the Wisconsin Court of Appeals recited *Sullivan*, but it then concluded that the May 13 call did not adversely affect Brendan's trial because "[v]oluntary statements obtained even without proper *Miranda* warnings are available to the State for the limited purposes of impeachment and rebuttal." SA 6. This principle is drawn from *Harris v. New York*, 401 U.S. 222 (1971), which addresses whether, under the Fifth Amendment Due Process clause, non-Mirandized statements are admissible in rebuttal. But *Harris* is irrelevant: the sole question concerning the call is whether its use harmed Brendan's interests at trial in violation of his Sixth Amendment right to effective counsel. *See Stadfeld*, 689 F.3d at 709 ("even the most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause" in case where confession was induced by counsel's bad advice). By applying the wrong legal standard, the state court acted contrary to

clearly established federal law under 2254(d)(1). *See Conner v. McBride,* 375 F.3d 643, 649 (7th Cir. 2004).

The district court declined to grant habeas relief, arguing that the state court's decision was not based on this error. RSA 60. But the state court's misguided reliance on *Harris* was its only and entire reason for condoning the State's use of the May 13 call at trial. SA 6. This Court should thus find that the state court acted contrary to federal law under 2254(d)(1) and review Brendan's *Sullivan* claim de novo.

B) The Wisconsin Court of Appeals made an unreasonable factual finding when it found that the State had introduced the May 13 telephone call during trial only to cross-examine Brendan, when the State used the call three times, including during closing argument to neutralize Brendan's alibi.

In discussing the May 13 call, the Wisconsin Court of Appeals found the following fact: "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.'" SA 6. This finding is unreasonable under 2254(d)(2). In reality, the May 13 call was used two other times at trial. R.19-22:122-23; R.19-23:56-57.

Pitching the call as an unprompted confession, the State used it to cross-examine not only Brendan but also his expert witness, Dr. Robert Gordon, who had testified that Brendan was highly suggestible. R.19-30:162-64; R.19-22:123. But

most significantly, the State's closing argument relied on the call to undermine Brendan's alibi. R.19-23:56-57. In Brendan's defense, Mike Kornely testified that he spoke to Brendan on his home phone at 6:00 PM on October 31, 2005 – the same time that, according to his March 1 confession, Brendan was murdering Halbach at Avery's trailer. R.19-20:128-34. During the May 13 call, Brendan's mother similarly stated that she had seen him at home at 5:00 PM. R.19-35:5. But Brendan told her that he had seen Halbach at Avery's trailer, gone home to see her and talk to Kornely, and then returned to Avery's trailer afterward. R.19-35:5. The State seized on this timeline during closing to neutralize Kornely's alibi: "[Brendan] goes home…and he talks to his mother…and Brendan clearly did talk to Mike Kornely, we have no dispute about that. But he leaves [home] and goes back [to Avery's trailer]…We know he goes back because he tells his mother in those phone conversations, ten weeks later on May 13…that he went back." R.19-23:56-57. Trial counsel later called the State's trifold use of the call "damning." R.19-28:141.

The Wisconsin Court of Appeals stated that it was "significant" that the call had only been introduced to cross-examine Brendan. SA 6. Its error is equally significant. Without an accurate understanding of that call's role at trial, the state court was unable to reasonably weigh the harm caused by Kachinsky's actions.

The district court denied relief, arguing that the state court was not wrong because it stated the call was "introduced" – not "used" – only once. RSA 59. But this reasoning renders the state court's decision nonsensical. Every piece of evidence is "introduced" only once. Such a commonplace occurrence cannot be "significant," nor can it be relevant to an assessment of that evidence's effect on trial *after* it was introduced. Rather, the state court was clearly attempting in this sentence to identify the extent to which the State relied on the call at trial. It unreasonably misapprehended the facts, thus satisfying 2254(d)(2) and entitling Brendan to de novo review of his *Sullivan* claim.

C) Under de novo review, this Court should apply *Cuyler v. Sullivan* to Kachinsky's conflict to conclude that Brendan is entitled to relief.

The Supreme Court has said in *dicta* that *Sullivan* is not clearly established law for conflicts other than concurrent representation. *Mickens v. Taylor*, 535 U.S. 162, 175 (2002). But even so, *Sullivan* is the most applicable law when the case is considered de novo outside AEDPA constraints. *See Hall*, 371 F.3d at 974 (it is "unclear" whether *Mickens* limits *Sullivan*, so this Court follows its own "controlling" precedent establishing that *Sullivan* does apply to conflicts other than concurrent representation) (citations omitted). Thus, on de novo review, this Court should analyze Kachinsky's actions under *Sullivan*.

As argued *supra*, Kachinsky's disloyalty is properly viewed as a conflict that adversely affected Brendan's trial when the State used the May 13 call to undercut

Brendan's false confession defense and alibi. Tainted by the fruit of conflict, the trial represented a "breakdown in the adversarial process" that warrants habeas relief. *Rubin*, 292 F.3d at 402. Indeed, Brendan Dassey's conviction is dogged by questions of unreliability at every turn. The district court was rightly troubled by the state court's unreasonable adjudication of this case and granted habeas relief. Petitioner-Appellee respectfully asks this Court to affirm.

Respectfully submitted this 6th day of December, 2016.

s/Laura H. Nirider
Counsel for Petitioner-Appellee Brendan Dassey

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 13,996 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(b), because this brief has been prepared in a proportionately spaced typeface using the 2013 version of Microsoft Word in 14-point Times New Roman font.

Dated: December 6, 2016

s/Laura H. Nirider
Counsel for Petitioner-Appellee Brendan Dassey

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2016, I filed the foregoing Brief 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: December 6, 2016

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