

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

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BRENDAN DASSEY,

Petitioner,

v.

Case No. 14-CV-1310

MICHAEL A. DITTMANN,

Respondent.

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**MOTION TO SUPPLEMENT THE RECORD  
AND REQUEST TO EXPEDITE**

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Respondent Michael A. Dittmann, by undersigned counsel, files this motion to supplement the record pursuant to Fed. R. App. P. 10(e)(2)(B). In support of this motion, counsel states as follows:

1. On August 12, 2016, this Court granted Petitioner Brendan Dassey's petition for a writ of habeas corpus. (Dkt. 23.) Respondent timely filed a notice appealing the judgment on September 9, 2016. (Dkt. 25.)
2. Upon reviewing the district court's record in this case, counsel noted that relevant portions of the state court record in this 28 U.S.C. § 2254 habeas case were omitted. Specifically, the district court record is missing the following items relevant to § 2254 review of the state court's decision:

- Exhibit 1:** Transcript of Dassey's February 27, 2006 interview at the Two Rivers Police Department. This document was submitted as an exhibit at Dassey's postconviction hearing. (See state court record no. 173:90.)
- Exhibit 2:** Audio recording of Dassey's February 27, 2006 interview at Mishicot High School. The two discs containing the recording of this interview were submitted as an exhibit at the postconviction hearing. (See state court record no. 173:205.) The transcript of this interview was provided to this Court with Respondent's Answer. (See Dkt. 19-24.)
- Exhibit 3:** Audio/video recording of Dassey's February 27, 2006 interview later that afternoon at the Two Rivers Police Department. A DVD with the recording of this interview was submitted as an exhibit at the postconviction hearing. (See state court record no. 173:207.)
- Exhibit 4:** Audio recording of Dassey's squad car ride from Mishicot High School to the Manitowoc Police Department. A disc with this recording was submitted as an exhibit at the postconviction hearing. (See state court record no. 173:208.)
- Exhibit 5:** Handwritten statement of Kayla Avery, dated March 7, 2006, introduced at trial as Exhibit 163. (See state court record no. 78.)

3. Under Fed. R. App. P. 10(e)(2)(B), “[i]f anything material to either party is omitted from . . . the record by error or accident, the omission . . . may be corrected and a supplemental record may be certified and forwarded . . . by the district court before or after the record has been forwarded.”

4. An appellate court's review of a district court decision granting habeas relief properly focuses on the last reasoned state court decision, not the district court's decision. *See Mosley v. Atchison*, 689 F.3d 838, 847 (7th Cir. 2012) (district court's decision granting habeas relief is reviewed de novo); *Cullen v. Pinholster*, 563 U.S. 170, 171 (2011) (federal habeas review "focuses on what a state court knew and did").

5. Accordingly, the Seventh Circuit liberally construes Rule 10(e) in federal habeas cases to permit supplementation with materials from the state court record. The Seventh Circuit has found that Rule 10(e) allows for supplementation of the record "in the interest of completion," *Ruvalcaba v. Chandler*, 416 F.3d 555, 562 n.2 (7th Cir. 2005), where the proposed items "are helpful for context," *Crockett v. Hulick*, 542 F.3d 1183, 1188 n.3 (7th Cir. 2008), and where they are "helpful . . . in evaluating the state appellate decision," *Ruvalcaba*, 416 F.3d at 563 n.2. All three rationales apply here.

6. The district court's decision in this case referred to both February 27, 2006 interviews. (Dkt. 23:6-7.) Because neither the DVD recording nor the transcript of that day's police station interview was made a part of the district court record, this Court had to rely on testimony about the interview in discussing its contents in the Court's August 12, 2016 decision. (Dkt. 23:6-7.) Supplementing the record with the DVD and transcript of this

interview, and with the audio recordings of the February 27 school interview and March 1 squad car ride, would serve to complete the available record of the police officers' contacts with Dassey leading up to his March 1, 2006 confession.

7. The February 27 and March 1 recordings and the transcript of the police station interview provide context for understanding the March 1, 2006 interview in which Dassey made his confession. Further, they should assist the Seventh Circuit in evaluating the state appellate court's decision affirming the trial court's order denying suppression of the confession.

8. Kayla Avery's March 7, 2006 handwritten statement, introduced at trial as Exhibit 163, is relevant to the matter of the reliability of Dassey's March 1 confession. This Court's decision discussed the issue of whether Dassey's confession was reliable at length. (Dkt. 23:67-74.)

9. As a general practice, in cases in which a decision denying habeas relief is on review, the Wisconsin Department of Justice consents to prisoner motions to supplement under Rule 10(e) with materials from the state court record. That is because, again, federal appellate review in habeas is of the state court's decision, not the district court's decision. *Mosley*, 689 F.3d at 847.

Accordingly, Respondent moves this Court to supplement the record with the foregoing items from the state court record pursuant to Fed. R. App. P. 10(e)(2)(B).

Respondent also respectfully requests this Court to expedite the motion and dispose of it before October 19, 2016, the date by which the State must file its brief-in-chief in the Seventh Circuit. Therefore, the State proposes that this Court order Dassey to file his response to this motion, if any, by October 12, 2016.

Dated this 5th day of October, 2016.

Respectfully submitted,

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