

# Brendan Dassey vs. Michael Dittman 7th Circuit Court of Appeals – Oral Arguments February 14th 2017

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**Judge Rovner:** Good morning everyone, our first case of the day is 163397, Brendan Dassey vs. Michael Dittman, and good morning Mr. Berg.

**Luke Berg:** May I please the court? Brendan Dassey chose to confess, to release those terrible images of Teresa Halbach, that were haunting him. The investigators encouraged him to get it out but did not imply any improper pressure.

**Judge Rovner:** Mr. Berg, help me with this, if a police officer says to someone who is being interrogated let's get it all out today and this will be all over, I have a two-part question for you. The first part is what would the average person think this means, would that person think I can go home it's done now the second part of the question is I want you to imagine it is not an average person, but a 16-year-old with a very, very low IQ, who is extremely suggestible and I would very much like you to concentrate on the suggestible.

**Luke Berg:** I think neither an average person nor Dassey would interpret that statement as meaning that he could go home.

**Judge Rovner:** What if there were twenty such statements, thirty such statements?

**Luke Berg:** Ah, there are multiple reasons why none of those statements communicated to Dassey that he could leave. Number one, nothing the investigators said actually promised a specific benefit in exchange for

cooperation. Courts consistently reject false promise theories, when there hasn't been a very specific offer. Second the only specific things the officers said were warnings, they said we can't make you any promises and anything you say, can be used against you those warnings were there to prevent Dassey from misinterpreting anything else that the officers said. Third.

**Judge Rovner:** Well ah, do you think someone with Brendan's intellect, understands that quote *'the truth will set you free'* is an idiom, particularly when one is sitting in a, a police interrogation room, um haven't you know we said many times, the government cannot promise a suspect that if he confesses he will be set free, set free'?

**Luke Berg:** That statement is frequently understood to be an idiom and I don't think that Br, Dassey, even Dassey I don't think he would have taken that statement to mean that he can actually walk free, we have evidence in this case, ahh that his will was not overborne, we have his demeanour, he also volunteered many details in response to open ended questions, but most importantly perhaps he resisted the officers over 35 times, on 6 different topics, they asked 6 questions, on 4 separate occasions, about whether he actually shot Teresa, he consistently said no. They asked 15 questions on 6 separate occasions, about whether the fire was going when he already got over there, he consistently said it was and that Avery started it. They asked 8 questions in a row about whether he and Avery used the wires in the garage for anything, he consistently said no, they asked 7 questions in a row about what happened to Teresa's hair, he consistently said I don't know I don't have it. They also challenged his answer with respect of the knife, and they suggested falsely that Teresa had a tattoo, he did not give in to either of these suggestions either.

**Judge Rovner:** When the police officer said we're cops, we're investigators, and stuff like that but, right now I'm a father that has a kid your age too, I wish I could hug you and I will not leave you high and dry. Do you think those untruths cross the line?

**Luke Berg:** No, not at all.

**Judge Rovner:** Oh in other words 'I'm not a cop right now' isn't that just a blatant lie?

**Luke Berg:** This was an interview, the context is very important, so the difference between an interview and an interrogation is crucial. When the officers went into the interview, they assumed that Dassey was simply a witness, and they communicated this to him the first time that they talked to him on February 27th. They said 'there are some officers that think maybe you helped Avery participate, we don't think you did participate, we think maybe you saw some things, but we think you weren't involved' so their statements must be understood in that light. They thought he was a witness and they told him that.

**Judge Williams:** So your position is that, each of these incidents are segregated and finite and distinct, and that he would not still remember those statements, that they were acting as a father?

**Luke Berg:** Ah I'm not sure I understand the question.

**Judge Williams:** Well, ah the different, the different sessions, you're saying that February 27th when he said they were acting as officers, but as fathers, and you're saying that then he was just being interviewed as a witness, so are you saying then that, that ended at the next session, that that wouldn't carry over at all to the next session?

**Luke Berg:** No, that was still true at the March 1st interview, they still thought he was a witness at that point, and that he hadn't participated. Uh and so.

**Judge Williams:** So this aura, what I'm trying to get at is this aura suggesting that they were fathers, is something that just didn't dissipate.

**Luke Berg:** The idea that they thought he was a witness didn't dissipate, so all of their statements of 'it's ok, we're on your side' that must all be understood in the context of what they thought, because they communicated that.

**Judge Williams:** Well how did the investigators not act coercively when they clearly showed frustration when he resisted or disagreed with key details and then offered praise, such as 'now we believe you'.

**Luke Berg:** Um I think if you watch the video, the, they showed very little frustration or praise, they were ultimately concerned about the truth, they wanted to get the truth out, and it was very clear at the beginning that Dassey was lying to them.

**Judge Rovner:** In the ex.

**Judge Williams:** And there were, and I did look at the tape, and there were times to me, that they seemed to be frustrated with his answers and his resistance.

**Luke Berg:** Their main concern was the truth, the main message they sent to Dassey was, 'be honest, tell the truth, don't make anything up' they cautioned him repeatedly, 'don't guess, don't make anything up, if you don't know it, you don't know it' they didn't want him to make things up they wanted the truth and.

**Judge Rovner:** In the examples that you cited of non-coercive confessions, ah you did it on pages 31 and 33 of the brief, ah and elsewhere are there any examples of juveniles who had been evaluated by a psychologist and found to

be particularly suggestible? Are there any such cases and if so I would appreciate a cite.

**Luke Berg:** Etherly we think is the closest.

**Judge Rovner:** Say it again.

**Luke Berg:** Etherly we think is the closest case, I don't know if there was a test for suggestibility, but Etherly was 15 years old and he was illiterate and he had lower intellectual functioning than Dassey did, ah I also think I read the testimony about suggestibility and I think it's highly suspect, I think they did a very good job on cross examination of poking holes in the suggestibility analysis that was done in this case. But the test that was done for suggestibility, was something like, ah, ah complicated story, ah from England was read to Dassey and he had to recount the details from it, and then they told him when he was wrong, but, ah we know that Dassey doesn't have a good memory for book knowledge and so it could have been he just couldn't have remembered the things that were told to him.

**Judge Rovner:** Your brief states, that only a few times did the investigators ask questions that assumed a detail ah that Dassey had either not provided or hinted at, ah the example the brief gives, is of course the question 'who shot her in the head?' it seems to me that it only takes one incident, one incident of planting information to taint a confession, especially in a vulnerable suspect and the vital piece of information in this case of course was that oh poor Teresa had been shot in the head before she was burned. After several unsuccessful attempts, however, to get Dassey to acknowledge the gunshot to the head, by hinting that something had happened to her head, um the investigators finally came out and they revealed the key part of information that only the murderer would have known, I guess what I am trying to get at here, in short, is isn't once enough?

**Luke Berg:** It's an entirely appropriate interview tactic to confront a suspect with the details that investigators know about the crime, this court has said that repeatedly Sturdivant, Hardaway, those are just a couple of examples.

**Judge Rovner:** After he had gone through this litany of 'we, we cut her hair, we did various things, the police officer finally comes out and says 'ALRIGHT she was shot in the head?' you know 'who shot her in the head?' You think that's alright?

**Luke Berg:** I think yes, I think it's entirely appropriate for an investigator to confront a suspect with what they know about the crime, now obviously its preferable for the suspects to come out with it on their own, but it's not always possible, and it makes a lot of sense why Dassey couldn't think about that fact at that moment, the conversation that they were having was about what happened in the bedroom, the investigators didn't know where Teresa was shot

at that point, they didn't find out till later, that she was shot in the garage. So, when they started asking about the head, Dassey couldn't think of the shooting, because his mind was on the bedroom and that where all the other things happened. So

**Judge Williams:** So, I wanna ask you some questions, regarding the Wisconsin Appellate Court decision, you, but first you agree, that age is a relevant factor in determining whether a confession is voluntary?

**Luke Berg:** I do but.

**Judge Williams:** And, and the Supreme Court said in Gaul and other cases, that juvenile confessions must be evaluated with special care, so I want to know exactly where the Wisconsin Appellate Court decision, says or considers Dassey's age and where it was given special care?

**Luke Berg:** Ah Dassey's age is listed in the opinion.

**Judge Williams:** Yah its listed, but in special care is more than just listing, don't you think?

**Luke Berg:** Ahh the Wisconsin Court of Appeals opinion was also based on the trials courts finding, ah and that was a lot more explicit, about Dassey's age.

**Judge Williams:** And exactly what was said that the appellate court made reference to in their decision? In terms of the trial court, I'm just saying listing the factor doesn't necessarily mean special care.

**Luke Berg:** There's no evidence that it did not consider age, it clearly was aware of age, it mentioned it, this court in Carter said 'we're never going to review a State court opinion simply because it lists a factor in the facts section of an opinion, doesn't read it in the analysis, so on Habeas you can't assume the court of appeals didn't consider age, it clearly was aware of age, it said it was basing its opinion on the trial court's decision and the trial court's decision spent a lot of time on age. So, I think it on Habeas especially you can't assume that the Wisconsin Court of Appeals did not consider age.

**Judge Rovner:** Can we talk about ah ineffective assistance of counsel, because if the reasoning of Sullivan is that a lawyer cannot serve two masters, then doesn't this situation apply, I mean it's clear that Kachinsky and his investigator saw it as their duty to get him to confess, ah so that that confession could be used against Steven Avery.

**Luke Berg:** It's important to remember that we are on Habeas here, oh it's Important to remember we're on Habeas review here, all that matters is clearly established Supreme Court case law, the Supreme Court said in Mickens,



'Sullivan is only clearly established law, for multiple concurrent conflicts, that's not even alleged here, so that's the end of the Sullivan claim as far as we're concerned.

**Judge Rovner:** What's wha.

**Judge Hamilton:** Can I go back to the confession for a moment, um during the videotaped confession, ah Mr Dassey comes out with a lot of details that he supplies, um the opposing side, has explained that as um, as details that had been publicised, I'm wondering if you have any response to that general point, and whether we have any record concerning which of those facts that he ultimately volunteered without suggestion, um might or might not of come from um publicity.

**Luke Berg:** I think there's a few minor points, a few facts that we know has been released by the police officers, but the vast majority of them had not.

**Judge Hamilton:** Do we have a record about that somewhere?

**Luke Berg:** Not that I could find, no.

**Judge Hamilton:** Ok, um, and then I also wanted to ask you and I, I realise this gets fairly grizzly, given the condition of the body when it was discovered, but is, was there physical evidence of a rape or of a wound to the throat.

**Luke Berg:** Ah no because the body was totally destroyed.

**Judge Hamilton:** So those come only from Dassey's confession?

**Luke Berg:** That's right, yes.

**Judge Hamilton:** And would not have been publicised ahead of time?

**Luke Berg:** That's right yes.

**Judge Hamilton:** And with respect to the Wisconsin Court of Appeals, um opinion, um, you say the court referring the district court, the trial court found that investigators used normal speaking tones, that's correct.

**Luke Berg:** Right.

**Judge Hamilton:** No hectoring, that's correct.

**Luke Berg:** Right.

**Judge Hamilton:** No threats.

**Luke Berg:** Right.

**Judge Hamilton:** That's correct. When they say no promises of leniency, now, ah, um, obviously, there were vague promises of leniency, right?

**Luke Berg:** Ah I think in context there weren't even implications of leniency, two reasons, one they went into the interview thinking he was a witness, and communicated that to him, second, they thought based on what Dassey told them to the extent that he participated, Avery made him do it, by threatening to stab him like he had stabbed Teresa. So, their statements it's not your fault, he made you do it, its ok, a lot of those were premised on those two things, they thought he was a witness and if he participated he was forced into it.

**Judge Hamilton:** Well, look, I think we all know, that the police are allowed to induce confessions by some misdirection and deception.

**Luke Berg:** Right

**Judge Hamilton:** In essence out and out fraud, fraudulent promises as in some extreme cases such as 'this will be a confidential discussion for example just between us, those kinds of things can cause problems. If the Wisconsin Court of Appeals had written no legally relevant promises of leniency, I think that would probably be accurate here, um that not quite what they said I, I.

**Luke Berg:** I think that's clearly what they were referring too, an in any event I don't think there were even implied promises of leniency, even if they were, ah, there were specific warnings that contradicted any implications, 'we can't make any promises' they said that explicitly, and we have evidence that his will was not overborne, he resisted the officers multiple times, he volunteered many details, you can see his demeanour, ah, so no I don't think there were even implied promises here.

**Judge Rovner:** Was the May 13th interview not introduced at trial, because there was a ruling to that effect, or because the government chose not to do so?

**Luke Berg:** Um I'm not sure the answer to that.

**Judge Rovner:** Hmm, um, because for all the reasons that the May 13th interview was unreliable, doesn't it also make the phone call between Brendan and his mother unreliable?

**Luke Berg:** Ah, no I don't think so, that phone call occurred, from his own will, he chose to make the call, he was warned that it was recorded.

**Judge Rovner:** After, the police officers.

**Luke Berg:** The police were not present at the time of the phone call.

**Judge Rovner:** Of course not, but the police officers, ah had said to him, ah we think you should call your mother before we talk to her, ah you don't want to be lying to your mom.

**Luke Berg:** Ah I mean we, no I don't I still think it was voluntary, entirely voluntary as it was out of the presence of police, we also have his statements to his cousin, which weren't even preceded by any...

**Judge Rovner:** Of course which she recanted.

**Luke Berg:** Yeh but if you watch her testimony, she's crying on the stand and it's very clear that she's lying.

**Judge Rovner:** Alright.

**Judge Williams:** Just let me ask, one other question about Etherly cause your relying on that, but isn't that distinguishable from our situation, because the investigators there only made one truthful promise to the juvenile, that they, they tell the judge about cooperation, and our situation is different.

**Luke Berg:** Certainly it's different in that respect, but we think it's the closest analogue that we have in terms of Supreme Court cases, we think Fare is the closest analogue that we have, but let me just reiterate we are on Habeas review right, so your gonna have factors that cut in different directions, in every case, many factors in this case, that cut in the State courts favour, where that's true reasonable minds, can certainly differ, reasonable minds could definitely conclude that Dassey's confession was voluntary, he was mirandized even though he didn't have to be, he was interviewed for only 3 hours, in the middle of the day, he was offered food and breaks, both his mother and he consented to the interview, he signed a Miranda waiver, he resisted the officers multiple times, there's just no evidence that his will was overborne, if anything there's evidence to the contrary, and all of the precedent supports the State here, it doesn't support Dassey.

**Judge Rovner:** And things like we don't think you have anything to worry about, we're in your corner, we already know, just tell us its ok, we're gonna help you through this, no matter what you did, we can work through it, its ok as long as you can be honest, if you lie about that, that's going to be a problem, if you helped him its ok because he was telling you to do it, this will all be over with, honesty is the only thing that will set you free, and I could go on, and on.

**Luke Berg:** None of those statements are specific promises, that's what the cases require, they were directly contradicted by a statement 'we can't make



you any promises' in context it is very clear that none of those statements even implied leniency cause they thought he was a witness, and thought he had been threatened to participate, fourth we know that his will was not overborne, because we have evidence of it, he resisted the officers, he provided many details and his demeanour doesn't look intimidated or threatened on the video.

**Judge Rovner:** Ok

**Luke Berg:** I would like to save my 3 seconds.

**Judge Rovner:** Your half a second, don't you worry I'm going to give you, I'm going to give you time, thank you, ok, um, Ms Nirider.

**Laura Nirider:** Good morning your honours, may I please the court, Laura Nirider for petitioner appellee, Brendan Dassey. I will start if I may with the voluntariness issue and then move to ineffective assistance of counsel, but before I do Judge Hamilton you had asked a question about whether there was a record built on the media stories, that had been in circulation prior to Brendan Dassey's confession, there was an extensive record built in State post-conviction proceedings, that is referenced in the district court opinion in this case, at RSA 69.

16 year old, mentally limited Brendan Dassey confessed in reliance, on a false promise of leniency, that was unreasonably over looked by the State courts in violation of section 2254D2, that promise was quote 'you're scared that you might get arrested' but quote 'I'm thinking you're alright ok, you don't have to worry about things' they told him this was true even if he gave quote 'statements against your own interest, that make you look more involved' and they gave him a free pass to confess to the worst, we already know what happened they said, and still they offered him leniency, this message was repeated not once, not twice, but in a cumulative drumbeat over and over and was referenced before each major admission in the case.

**Judge Hamilton:** Ms Nirider, have any sp, cases held confessions involuntary without much more specific promises of leniency?

**Laura Nirider:** Well your honour, I think AM vs Butler is instructive here, there quite parallel.

**Judge Hamilton:** That's the 11-year-old?

**Laura Nirider:** Yes, he's an 11-year-old.

**Judge Hamilton:** Anything else?

**Laura Nirider:** Another case?

**Judge Hamilton:** Ahhmm

**Laura Nirider:** Well I think AM is the most analogous case here, even though he is 11, Brendan Dassey is 16 with an IQ of 73, has a 10th grader who can't even spell the word rack, and the promises and their effects are strikingly similar, AM thinks he's going to go home, he thinks he's going to go to a birthday party, and Brendan Dassey thinks he's going to go back to school, and why does he think those things, again this drumbeat of promises, that proceeds every major admission at separate appendix 54, the police tell Brendan 'I think you went over there to Steven Avery's house' and they parrot that with 'it's ok Brendan we already know' and Brendan parrots it back.

**Judge Rovner:** I want to ask you, ah did Brendan appellate counsel give any reason for not asserting ah an ineffective assistance claim under Strickland?

**Laura Nirider:** We were Brendan's appellate counsel your honour and the reason we raised this claim under Cuyler vs Sullivan was what we found when we did the research in the case law, we found languages, excuse me we found cases like Osborne vs Schillinger in the 10th Circuit, US vs Swanson in the 9th, Thomas from the Eastern district of Michigan, which speak about attorneys aiding the State using the language of conflict, using the language of attorneys who feel as though they are operating under duties that flow both to the prosecution and to their own client, those cases speak in the language of conflict, which is why we raised this as a Cuyler issue. To return.

**Judge Rovner:** I, I really want to talk about Strickland and Sullivan a bit more.

**Laura Nirider:** Please.

**Judge Rovner:** Because ah even though the trial court found that Kachinsky's ah performance was deficient under Strickland, um you know, ah, ah you chose to pursue the matter under Sullivan rather than Strickland, I mean of course Sullivan provides a more forgiving standard because it doesn't require a defendant to ah demonstrate, ah prejudice, but of course you've got Mickens, so I, I, I oh think we need some help there.

**Laura Nirider:** Certainly your honour to speak to Mickens, ah first of all, we've raised a D2 and a D1 claim, with respect to our D2 claims, there is no need under the text of the statute to show clearly established federal law in order to clear the threshold of 2254D, and then on 2254A review, this court is free to apply the Sullivan standard, that's what this court held in the Hall case, it noted that Mickens in dicta, was unclear about whether Sullivan applies broadly to various different types of conflicts, therefore this court said it relies on its own precedence, and would move forward applying Sullivan to different kinds of conflicts.

**Judge Williams:** I wanna ask you about some of the evidence introduced into the State court, I wanna make sure I have the record clear, other than his enrolment in regular high school classes, um was there anything else presented to show that he was not intellectually or emotionally limited? For example, the high school he went to, did it offer special education classes, was he enrolled in any of those classes?

**Laura Nirider:** There was a record billed in State court on that your honour, ah Brendan Dassey had an IQ of 73, that, that was testimony at the suppression hearing, he received special education support services, so while, he was in mainstream classes, he received special extra services.

**Judge Williams:** So was there an IEP done on him?

**Laura Nirider:** There's not an IEP in the record your honour.

**Judge Williams:** And were the investigators aware of his intellectual or emotional limitations, and if not was that necessary?

**Laura Nirider:** They certainly knew his age your honour, and they had been present at his school, that where they first picked him up, um I don't know whether they knew his precise IQ score, but it's not necessary....

**Judge Williams:** Or whether, he was getting those kind of support services.

**Laura Nirider:** That's not in the record, but it's not important here whether they knew, this, the question of voluntariness, is not a referendum on the state of mind of the officers, the question is what message was sent to Brendan Dassey. And did it overbear his will, and when we have someone like Brendan with his slew of limitations, staggeringly suggestible, more suggestible than 95% of the population, a concrete thinker, the kind of person likely to interpret idioms like 'honesty will set you free' literally, the repeated drumbeat of messages that were sent to him, clearly, clearly, overbore his will.

**Judge Hamilton:** And what about, look I've watched the whole thing, I don't see a will being overborne, and what I see also are Miranda warnings, 'we can use this against you' and um 'we can't make any promises' right?

**Laura Nirider:** They do say those things.

**Judge Hamilton:** So we've got all of that, and we've got um, um, and vague promises about the benefits of being honest. Right? And I don't see any case law comparable that would let us say, this was contrary to clearly established federal law on voluntariness.

**Laura Nirider:** Well your honour, several points, we have a D2, in fact the district court, granted us relief, primarily on D2 grounds, so again clearly established federal law.

**Judge Hamilton:** On the statement that no promises of leniency were made.

**Laura Nirider:** On the finding of no promises that's correct.

**Judge Hamilton:** Ok could you address the exchange I had with Mr Berg that, whether these are legally relevant promises when its these vague assurances.

**Laura Nirider:** These are absolutely relevant legally promises your honour, it's true that the case law requires, a specific promise to be made, but if you survey the case law, you can see the difference between what has been approved by this court and what happened for Brendan Dassey in Rutledge.

**Judge Hamilton:** So what's the best Supreme Court authority showing that this was an unreasonable finding?

**Laura Nirider:** The best Supreme Court authority is Blackburn which establishes that a confession has to be the product of rational choice, keyword there being rational, that notion has been amplified by this court to mean the product of free will that has not been distorted by a false presentation of the consequences of confessing.

**Judge Rovner:** Was there any objection to the admission of the phone call, ah to Brendan's mother, in the trial court?

**Laura Nirider:** There was not your honour and there was a good reason for that, um Mr Kachinsky did not turn over the evidence related to the provenance of that call, including the video tape of Michael O'Kelly interrogating Brendan Dassey on May 12th, he did not produce that to successor counsel, so trial counsel was totally unaware, of how that phone call had been brought about. That only came out in post-conviction proceedings.

**Judge Rovner:** If Kachinsky's significantly, if his significantly ah deficient behaviour, was enough to get the May 13th interrogation thrown out, why wasn't it enough, ah to get the phone call to Dassey's mother thrown out, under a fruit of the poisonous tree argument?

**Laura Nirider:** If you're, if I understand you to be asking your honour, why didn't trial counsel make that motion, it's precisely because they didn't know the pressures that Mr Kachinsky and his investigator had applied to Brendan Dassey on May 12th. None of that had been turned over to them, they were in the dark and at post-conviction was the first time that they confronted that series of facts, that series of events, that in fact led up to the phone call, and they called

the admission of that phone call 'damning' they understood that it was difficult, that it was a challenge for their case, but they didn't have the information they needed, to make the proper motion to exclude it at the time as the fruit of ineffective assistance of counsel.

**Judge Williams:** Let me ask you this, how are the investigators statements that everything will be ok coercive or promises of leniency rather than simply false promises of net benefits?

**Laura Nirder:** Well your honour they didn't just say, everything will be ok, they told him, they started out the whole interrogation, 'we know you're scared of arrest, but you've got nothing to worry about, as long as you fill in those blanks with statements against your own interest, I'm thinking you're alright, you're ok' that's enough for a 16 year old developmentally disabled child, like Brendan Dassey, that's enough to produce in him an understanding that he was going to go back to school after confessing to rape and murder, which is exactly what we see on the video tape, unmistakable evidence that he confessed on reliance on these false promises.

**Judge Hamilton:** Those promises.

**Judge Williams:** So what counsel's saying is that you are asking us to weigh factors differently than the state court did, isn't that what you are really doing?

**Laura Nirder:** That is not what we are asking your honour, we are proceeding under D2 as well as D1, so under D2 we are attacking the State courts unreasonable finding of fact that no promises were made, it's not a reweighing issue at all, that's the fact why this is very much a different case, than Hardaway and Murdoch and other reweighing cases that this court has seen and our D1 claim too I believe is not a reweighing claim because it goes to the way in which the reweighing, the way in which the factors were originally assessed by the State court, the State court found no promises of leniency, so it never considered the true totality here, it never considered the way in which these promises interfaced with Brendan's vulnerability, his suggestibility, his concrete thinking, they never put themselves in the shoes of Brendan Dassey and thought how would I react to that, if I were Brendan Dassey, so that mix has never been weighed before until the district court in this case.

**Judge Rovner:** You had a question.

**Judge Hamilton:** I did, um what was the source of the confession to cutting Miss Halbach's throat after raping her?

**Laura Nirider:** I'm not sure I understand your question source?

**Judge Hamilton:** It's not, it's not news sources, is it?

**Laura Nirider:** No your honour.

**Judge Hamilton:** So it's either Dassey's memory or imagination?

**Laura Nirider:** It's not in the media you are correct, it's either his memory or his imagination, and as the district court found it's that sequence of the interrogation in which the interrogators are trying to get him to say.

**Judge Hamilton:** Well it's clear that he's been very resistant up to that point, um he's been very reluctant, he's telling a contradictory story that doesn't make any sense, and they are calling him on it, it comes out very slowly and painfully, but he volunteers it.

**Laura Nirider:** Your honour, I would respectfully disagree, every step of that confession, every new fact, every primary plot point, is a result of suggestion, now it's true that after the interrogators introduce a plot point, they allow Brendan to embellish, until the story veers from what they think probably happened.

**Judge Hamilton:** A plot point like what, you went inside?

**Laura Nirider:** You went inside the house, yes.

**Judge Hamilton:** And then you're holding them responsible for all the details, that come after that?

**Laura Nirider:** I'm not holding them responsible your honour, but I'm pointing out, that what happened was they used false promises of leniency combined with fact feeding at every crucial step of the story.

**Judge Hamilton:** What, what's the fact feeding, I guess I'm having trouble with that, in the early stages of the interview.

**Laura Nirider:** Absolutely, 'I think you went over to Steven Avery's house, at separate appendix 54, 'you went back in that room' separate appendix 61, 'does he ask you to rape Halbach', separate appendix 60, 'you were there when she died' separate appendix 67, step by step by step, now your honour is correct, this isn't sequential, it isn't over the course of 5 minutes, after they give him each step they allow him to try to tell a story on his own and what does he do in those moments? He provides information that is provably untrue, he describes after they put him in the trailer, he describes, looking down that hallway, and seeing Miss Halbach shackled to a wooden head board but that wooden head board we know has no scratches on it, has no marks, nothing that would be consistent with this horrible story of a woman being raped while she was shackled to it, there's this whole account they allow him to spin, where he's trying to guess how she was killed, this account of throat cutting and, stabbing and hair cutting, a



bloody scene that would be almost impossible to clean up from, but there's not a trace of forensic evidence Teresa Halbach in that bedroom, much less Brendan Dassey.

So, these moments where they are allowing him to spin on his own, are provably untrue, or they are like clockwork from the media, it's when things begin to spin off the rails too much, that they bring him back?

**Judge Hamilton:** What came from the media?

**Laura Nirider:** Many things your honour, ah the fact that her RAV4 was found on the salvage yard property, the fact that she was there that day, the fact that her bones were found in the bonfire pit behind Steven Avery's house, many aspects like that, which many people in the state of Wisconsin knew, and of course it was established in the state post-conviction record, that of course Brendan and his family were watching the news about what was happening to their relative, and to their home.

**Judge Rovner:** Let me take you to closing arguments for a moment, because in closing arguments, the State asserted that an innocent person ah would not confess. Now I want to ask you something, can the State do this, we know of course that many many innocent people have confessed to crimes they haven't committed, is that a permissible argument?

**Laura Nirider:** Well your honour, certainly not appropriate in this case to suggest that nobody falsely confesses or in any case, because we know that to be factually untrue, in fact we have an Amicus Brief, exactly to that effect, establishing, that false confessions happen under circumstances just like this, to kids just like Brendan they're textured, they can be textured with detail, there are examples in the Amicus Brief of cases like the Central Park Five other famous cases where young defendants gave interlocking detailed confessions that sounded true that were later proven false. Um so we know that, we know that not to be true, and I would also like to point out in the Amicus Brief I think it speaks volumes, that the law enforcement interrogation trainers who joined the Amicus Brief say they use this interrogation video as an example of what not to do, that's how unreasonable the State court decision was in this case, trainers use this video, to show not what to do.

**Judge Hamilton:** You're not suggesting the constitutional standards are best practices of an Amicus?

**Laura Nirider:** I'm not your honour, I'm not.

**Judge Rovner:** Um I want to take you back, um, we, we, touched on it, but I, I, I think I for one need a bit more because in making ah your argument about

Kachinsky's conflict of interest, please um, address Mickens vs Taylor in a bit more um ah a bit more.

**Laura Nirider:** Certainly your honour, with respect to Mr Kachinsky's ineffective assistance of counsel we have raised both a D2 and a D1 claim, so let's address first the D2 claim.

**Judge Rovner:** Yes.

**Laura Nirider:** Here, Mickens is not, essentially, Mickens is not an issue with respect of the D2 claim because under D2 there is no requirement that clearly established federal law be identified, to cross the 2254D threshold, so if we pass through that threshold with the D2 then this court finds itself under 2254A conducting a 'de novo' review of the ineffective assistance of counsel claim. In that case this court is free to apply the Sullivan standard, notwithstanding Mickens, that what this court said in the Ha, suggested in the Hall case, in which it noted that the Mickens dicta 'is unclear we don't know exactly what's prescribed and what's not, we're going to rely on our own precedent, which applies Cuyler vs Sullivan to a variety of different conflicts.

**Judge Williams:** Counsel says that the mention in the appellate court's decision of age was sufficient, you don't agree with that view.

**Laura Nirider:** I don't agree with that.

**Judge Williams:** Because it made reference to the underlying trial courts finding, that the court really didn't need to do anything more.

**Laura Nirider:** I don't agree with that view your honour, particularly again with respect to the D2 violation here, we have a State trial court, that found no promises of leniency, we have a Wisconsin appellate court that adopted that finding, and then premised on that erroneous factual finding, they weighed the remaining factors, didn't sufficiently account for the fact that he is 16 years old, didn't address the way in which this message of leniency would be heard by a 16 year old with developmental disabilities, there is no need when you have someone like Brendan Dassey, you don't have to make explicit statements like 'you're going to go to prison but for less time' you don't need to do that with someone like Brendan Dassey it's enough to say 'everything is going to be ok you have nothing to worry about'.

**Judge Rovner:** Is there any physical evidence at all that ties Dassey to the murder?

**Laura Nirider:** That ties Dassey to the murder, no your honour, there is nothing that did not come, from the fact feeding that occurred during this interrogation, I, I expect you will hear, the State suggest that he led them to a bullet in the

garage, that's not the case, if you watch as I'm sure your honour has, when you watch the video tape, in this case Brendan has the shooting at first happening outside by the bonfire pit, and the officers say to him, because they know, they found 10 shell casings in that garage already, they say to him 'no no Brendan we know somethings happened in that garage, we need to get the honesty about the garage' that's when he moves the murder into the garage, then they researched the garage and discover this bullet, that corroborates not Brendan Dassey's account, but the interrogators account.

**Judge Williams:** And the issue of her bag and phone and camera that were missing, that was provided by the investigators.

**Laura Nirider:** Absolutely your honour, that's one of the classic examples of this interrogation of fact feeding, the sequence of events in which they teach him, they teach him the answer that there looking for, when he cannot come up with this information, they end up feeding him the specific facts, her purse, her camera, her cell phone were in the burn barrel only then does he regurgitate it back, if there are no further questions, we would ask the district court, excuse me we would ask the court of appeals to affirm.

**Judge Rovner:** Thank you. Mr Berg, would you please give Mr Berg 3 more minutes on top of whatever he had left.

**Luke Berg:** I want to start with Judge Hamilton's question about what is the most relevant Supreme Court case, the most relevant Supreme Court case is Fare, Fare, Michael C V Fare, there the court held, that a 16-year-old can make a voluntary statement even without the presence of a friendly adult, the police there made statements that were similar to those here and the Supreme Court said those statements were far from threatening or coercive.

**Judge Rovner:** Isn't that the 16-year-old that had a lot of um experience with uh um, the police?

**Luke Berg:** I think he had more experience than Dassey did that's true.

**Judge Rovner:** Dassey had none.

**Luke Berg:** So that's a factor that cuts in the other direction, but there are other factors that cut the other way, so in Fare the police arrested the 16-year-old, Dassey wasn't under arrest and they also denied his request to see his probation officer, nothing like that happened here. Again, I think it's the closest Supreme Court case it's not perfectly on point obviously, there's going to be factors that cut in different directions in every case, ah I second wanna just recap our 4 points. Nothing the officers said here was a specific promise, that's what the cases require, there was a specific warning to the contrary and warnings.

**Judge Rovner:** And if you have, in other words you can have 100 fairly specific promises not specific you can have totality of all of this and and and it will never reach.

**Luke Berg:** No court has ever held that, and we're on Habeas review here, so there has to be clearly established law, to establish that principle and there is none, also the specific warnings contradicted any implications from any of those vague statements, the context explains all of those vague statements, and we have specific evidence that Dassey's will was not overborne, now I want to address briefly your questioning about Sullivan ah counsel for the opposing side, cited Hall of the United States that was a de novo case so its ok to try and extend Sullivan in de novo cases but we're on Habeas again so all that matters is clearly established law, and Mickens clearly says Sullivan is not clearly established for anything but concurrent multiple representation, ah I'll make one final point and then I want to sit down, I think.

**Judge Rovner:** What if we don't want you too?

**Luke Berg:** Unless there is more questions, unless there's more questions, I think the details that Dassey provided that are most telling are his memories of Teresa, because that's what you would expect would be burned into this mind, none of them were suggested by the officers, he remembers her screaming, help me and seeing her naked and chained up to the bed, he remembers her crying and pleading with him to stop while he raped her, he remembers her breathing after Avery stabbed her in the stomach, and that she's still struggling to breathe after he cut her throat, he remembers that her belly wasn't moving, as they carried her out to the garage, and he remembers the awful smell as her body burned, none of those memories were planted, they were raw and real, Dassey wanted to get them out and he did so voluntarily, I would ask this court to reverse the district courts unprecedented order.

**Judge Rovner:** I wanna thank both sides, ah both the government and um Mr Dasseys lawyers, for a case very well briefed, and very well argued, thank you for the assistance you that have given the three of us and the case will be taken under advisement, thank you.