CONSTITUTIONAL LAW – HABEAS CORPUS – FREEING A MURDERER? BRENDAN DASSEY'S LEGAL FIGHT AGAINST INCARCERATION AND THE VOLUNTARINESS OF CONFESSION

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On Friday, August 12, 2016, a magistrate judge in Wisconsin granted Brendan Dassey's petition for a writ of habeas corpus,[3] potentially freeing the young man who has been incarcerated since his arrest in 2006. Dassey was charged with first-degree intentional homicide, second-degree sexual assault, and mutilation of a corpse[4] in connection with the 2005 murder of Teresa Halbach,[5] and has been serving a life sentence following his 2007 conviction.[6] Dassey's case has been widely popularized by the 2015 Netflix Documentary *Making a Murderer*, which detailed Halbach's disappearance from Stephen Avery's family salvage yard in Manitowoc, Wisconsin, and the subsequent investigation and trial proceedings against Avery and Dassey.[7]

Halbach visited the Avery property on October 31, 2005, to photograph a vehicle for *Auto Trader* magazine, but was never seen or heard from again.[8] Subsequently, a lengthy investigation ensued, and over time investigators discovered numerous pieces of physical evidence on the Avery property linking Avery to Halbach's murder.[9] Evidence included Halbach's vehicle hidden among approximately 4,000 other vehicles on the Avery property, Halbach's key in Avery's bedroom, human bone and tooth fragments in a burn barrel, and "the

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[3] Decision and Order Granting Writ of Habeas Corpus (*Decision*) at 90, Dassey v. Dittman (No. 1:14-cv-01310-WED) (Aug. 12, 2016).
[4] *Decision* at 20.
[5] *Id.* at 2.
[6] *Id.* at 36, 42.
[7] *Making a Murderer* (Netflix 2015).
[8] *Decision* at 2.
[9] *Id.* at 3.

burned remnants of electronics, a zipper, and rivets from a woman's jeans."[10] DNA analysis of the human remains was consistent with Halbach's DNA profile, and the other burned evidence was consistent with personal property that Halbach was known to own.[11] Additionally, multiple blood stains that matched Avery's DNA profile were present in Halbach's vehicle.[12] Armed with these key pieces of evidence, and other facts uncovered in the investigation, police arrested and charged Avery with Halbach's murder.[13]

The investigation into Brendan Dassey's possible involvement began months after Halbach's October disappearance, and only after investigators interviewed other family members and eyewitnesses.[14] At the time, Dassey was sixteen years old and had never been in trouble with law enforcement.[15] Dassey was known to have "intellectual deficits"[16] and "he had difficulty understanding some aspects of language and expressing himself verbally."[17]

Dassey was first interviewed by Calumet County Sherriff's Investigator Mark Wiegert and Wisconsin Department of Justice Special Agent Tom Fassbender on February 27, 2006, at his high school.[18] This interview lasted about an hour, but the audio recording quality was poor and the prosecuting attorney requested that he be interviewed again.[19] With the permission of Dassey's mother, he was interviewed a second time the same day at the police station.[20] Dassey admitted he was present at a bonfire with Avery the day Halbach disappeared, and that he saw

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[10] *Id.*
[11] *Id.*
[12] *Id.* at 4.
[13] *Id.* at 5.
[14] *Decision* at 5.
[15] *Id.*
[16] *Id.*
[17] *Id.* at 6.
[18] *Id.* at 6.
[19] *Id.*
[20] *Decision* at 6.

body parts in the fire.[21] Later that evening, Agent Fassbender met with Dassey for a third time, during which Dassey told Fassbender that "he got bleach on his pants after helping Avery clean the floor of Avery's garage on October 31."[22]

The investigators interviewed Dassey for a fourth time on March 1, 2006.[23] Dassey's mother claimed she was never asked for permission to conduct the March 1st interview.[24] Investigators picked Dassey up from school and informed him of his Miranda rights.[25] Dassey subsequently agreed to speak with investigators.[26] They then drove to his house where he gave them the bleach-stained jeans, and then proceeded to the sheriff's department.[27] Once there, an interview with Dassey began in a "soft room" that contained a small couch with soft chairs, rather than in a typical interrogation room.[28] No adult was present during the interview to represent Dassey.[29]

Throughout the duration of the March 1st interview, Dassey was reluctant to communicate and was repeatedly told by investigators, "Mark and I both are in your corner," "[f]rom what I'm seeing . . . I'm thinking you're all right," "[w]e already know what happened."[30] When Dassey failed to provide information the investigators wanted to hear, they continued to prompt him to say what they expected to hear by using suggestive language, or by admonishing him when he said something contrary to their expectation.[31] Through persistent prompting by investigators, Dassey gave multiple and conflicting accounts of what he saw or

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[21] *Id.* at 7.
[22] *Id.* at 7.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Decision* at 7-8.
[29] *Id.* at 8.
[30] *Id.* 8-9.
[31] *Id.* at 9-16.

participated in on October 31, 2005. Finally, when the investigators were satisfied with all they had heard, he was arrested.[32]

On March 7, 2006, Leonard Kachinsky was appointed as Dassey's attorney.[33] During the three weeks that followed, Kachinsky spent about one hour with Dassey and about ten hours communicating with the media about the case.[34] In his interactions with Kachinsky, Dassey professed his innocence repeatedly and asked to take a polygraph examination.[35] Kachinsky chose to hire a private investigator, Michael O'Kelly, to conduct a polygraph.[36] Kachinsky and O'Kelly ignored Dassey's claims of innocence and conducted a defense investigation founded on the assumption that they would cooperate with the prosecution in the case against Avery.[37]

Kachinsky expected to lose his previously filed motion to suppress Dassey's March 1st interview in which Dassey implicated himself in Halbach's murder.[38] Wanting to convince Dassey that a jury would find him guilty and that Dassey needed to readmit his involvement in the crimes, Kachinsky arranged for O'Kelly to interview Dassey.[39] After being painted a picture of hopelessness by O'Kelly, Dassey eventually recounted a series of events similar to what he told investigators on March 1st.[40]

On May 13, 2006, Kachinsky arranged for state investigators to interview Dassey again.[41] Kachinsky did not attend the interrogation, no plea bargain had yet been offered, and Kachinsky

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[32] *Id.* at 19.
[33] *Id.* at 21.
[34] Decision at 22-23.
[35] *Id.* at 23.
[36] *Id.*
[37] *Id.* at 24. O'Kelly developed information that lead to the possible location of evidence and Kachinsky supplied this information to the prosecution. No additional evidence against Dassey resulted from these efforts.
[38] *Id.*
[39] *Id.* at 24-25.
[40] *Decision* at 27.
[41] *Id.* at 28.

did nothing to prepare Dassey for the interrogation.[42] Once again, there were numerous discrepancies in the story Dassey told.[43] Because the investigators were unsatisfied with the contradictions, and knowing that all phone calls were recorded, Investigator Wiegert suggested that Dassey call his mother that evening from jail to tell her how he was being dishonest to them.[44] Dassey did call his mother, and in that conversation made comments that suggested he was involved in "some of [the alleged crimes]."[45] Kachinsky was ultimately decertified by the State Public Defender for allowing Dassey to be interviewed without counsel present.[46] Consequently, though he did not have to,[47] Kachinsky withdrew as Dassey's counsel, and new counsel was appointed.[48]

On April 16, 2007, Dassey's trial commenced and the prosecution's case centered on Dassey's March 1st confession.[49] Six days later Dassey was found guilty on all counts and was sentenced to life in prison for homicide, with concurrent sentences of six years of imprisonment for mutilating a corpse, and fourteen years imprisonment for sexual assault.[50] Dassey moved for post–conviction relief, but after a five day hearing in 2010, the circuit court denied relief.[51] In 2013, the Wisconsin Court of Appeals affirmed Dassey's conviction.[52] The Wisconsin Supreme Court subsequently denied Dassey's petition for review in 2013.[53]

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[42] *Id.*
[43] *Id.* at 29.
[44] *Id.* at 31.
[45] *Id.* at 33.
[46] *Decision* at 34.
[47] *Id.* at 34. The decertification was prospective only and applied only to appointment in Class A through Class D felony matters. Kachinsky could technically continue to represent Dassey.
[48] *Id.* at 35.
[49] *Id.* at 36.
[50] *Id.* at 42-43.
[51] *Id.* at 43.
[52] *Decision* at 43. *See also* State v. Dassey, 827 N.W.2d 928 (2013)
[53] *Id.* at 43.

Pursuant to 28 U.S.C.A. § 2254, Dassey filed his Petition for a Writ of Habeas Corpus on October 20, 2014, and agreed to have a magistrate judge resolve the petition.[54] In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act[55] ("AEDPA"), and in doing so, amended certain parts of § 2254, making it more difficult for a person in custody pursuant to a judgment of a state court to seek relief in federal court.[56] Per § 2254, a federal court may only grant a writ of habeas corpus when the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[57]

In his Petition for a Writ of Habeas Corpus, Dassey made two claims for relief.[58] First, Dassey argued that he was denied his Sixth Amendment right to effective assistance of counsel.[59] Second, Dassey claimed that his March 1, 2006 confession was obtained in violation of the Fifth Amendment.[60] To support his first claim of ineffective counsel, Dassey relied heavily on *Cuyler v. Sullivan* to argue he was entitled to relief because "an actual conflict of interest adversely affected his lawyer's performance."[61] Acknowledging that *Sullivan* is typically applied to cases

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[54] *Id. See* 28 U.S.C.A. § 2254 (West 2016).
[55] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.
[56] 28 U.S.C.A. § 2254 (West 2016).
[57] 28 U.S.C.A. § 2254(d) (West 2016). "Under § 2254(d)(1), a state court decision is contrary to clearly established federal law 'if the state court applies a rule different from the governing law set forth in [United States Supreme Court] cases, or if it decides a case differently than [the United States Supreme Court has] done on a set of materially indistinguishable facts.'" Decision at 44 (quoting *Bell v. Cone*, 535 U.S. 685, 694 (2002)). "Under § 2254(d)(2), a state court's 'decision involves an unreasonable determination of the facts if it rests upon fact-finding that ignores the clear and convincing weight of the evidence.'" *Id.* (quoting *Bailey v. Lemke*, 735 F.3d 945, 949-50 (7th Cir. 2013) (quoting *Goudy v. Basinger*, 604 F.3d 394, 399-400 (7th Cir. 2010) (internal quotations omitted)).
[58] Decision at 47.
[59] *Id. See* U.S. CONST. amend. VI.
[60] *Id. See* U.S. CONST. amend. V.
[61] Petitioner's Brief (*Petitioner*) at 10, No. 14-cv-1310-WED (Oct. 20, 2014) (quoting Cuyler v. Sullivan, 446 U.S. 335 (1980)).

in which an attorney represents multiple defendants, Dassey argued that "it also governs cases involving attorneys who breach the duty of loyalty,"[62] and "that no loyal attorney would have engaged in the conduct that Kachinsky did, which included compelling [Dassey] to confess to murder – despite his protestations of innocence – and [submitting] to uncounseled police interrogation with no protections in place."[63] Because of this, Dassey asserted the Wisconsin Court of Appeals erred in rejecting this argument, and furthermore that the Court of Appeals applied the wrong legal standard in doing so.[64]

Additionally, Dassey argued that even if the court concluded the Wisconsin Court of Appeals *did* apply the correct legal standard, such application was unreasonable because there could be no doubt that Kachinsky had a contrary interest to Dassey, when in fact he "took actual, real, and concrete steps to help the State and weaken his own client's defense . . . ."[65] The Wisconsin Court of Appeals, however, concluded that Kachinsky's actions were not an actual conflict.[66] Dassey maintained that existing law clearly defined what constitutes an "actual conflict of interest."[67] Although a lawyer may recommend that a client comply with and assist the State, counsel may not force the client to confess to a crime.[68] As such, Dassey argued that

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[62] *Id.* at 10 (quoting Thomas v. McLemore, No. 00-CV-71673-DT, 2001 U.S. Dist. LEXIS 6763, at *31 (E.D. Mich. Mar. 30, 2001).
[63] *Id.*
[64] *Id.* at 11. Dassey argued that the court applied a principle of law derived from *Harris v. New York*, when it concluded that "the State's use of the May 13 telephone call did not adversely affect [Dassey] . . . . " *Petitioner* at 11 (referencing Harris v. New York, 401 U.S. 222 (1971)). Dassey further contended that *Harris* addressed the issue of whether non-Mirandized statements are admissible during rebuttal, but Dassey never raised a Fifth Amendment due process argument concerning the May 13 telephone call as a *Miranda* violation. *Id.* Instead, his argument related to the call being the fruit of ineffective assistance of counsel in violation of the Sixth Amendment. *Id.*
[65] *Petitioner* at 12.
[66] *Id.*
[67] *Id. See* Mickens v. Taylor, 122 S. Ct. 1237, 1243 (2002); *see also Sullivan*, 100 S.Ct. at 1719 ("We hold that the *possibility* of conflict is insufficient to impugn a criminal conviction . . . . [A] defendant must establish that an *actual* conflict of interest adversely affected his lawyer's performance") (emphasis added). Kachinsky's conflict has never been merely theoretical or possible.
[68] *Id.* at 13.

under the Sixth Amendment, he did not receive counsel with "undivided loyalties that lie with his client," and therefore, the Court of Appeals had unreasonably applied *Sullivan.*[69]

Additionally, Dassey suggested that he incurred an "adverse effect" with an identifiable detriment under the *Sullivan* standard, which stemmed directly from Kachinsky's disloyalty.[70] Such negative effect came from the introduction of the May 13th phone call between Dassey and his mother.[71] During this phone call, Dassey told his mother that he had "done some of it," and the introduction of this call at trial, cast doubt on the authenticity of his alibi.[72] But for Kachinsky's planning and actions, beginning with O'Kelly's interview of Dassey and the subsequent interrogation of him by the State without counsel, the apparently damning phone call would not have happened.[73] Kachinsky's actions ran so contrary to his role as counsel that Dassey's case was hindered and his own counsel provided the most critical piece of evidence needed for conviction at trial.[74] Thus, Dassey maintained that the Wisconsin Court of Appeals unreasonably applied *Sullivan.*

Dassey's second claim for relief in his Petition for a Writ of Habeas Corpus was that his confession was involuntary under the Due Process Clauses of the Fifth and Fourteenth Amendments.[75] The Wisconsin Court of Appeals rejected the claim of involuntariness and determined that interrogators were merely "professing to know facts they did not actually have."[76] Dassey, however, maintained the confession was unreasonable under § 2254(d)(2).[77] Dassey pointed to fact–feeding which occurred when he provided incorrect facts about the

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[69] *Id. See* U.S. v. Ellison, 798 F.2d 1102, 1106 (7th Cir. 1986)
[70] Id. *See Michener*, 499 Fed. Appx. at 578.
[71] *Petitioner* at 14.
[72] *Id.*
[73] *Id.*
[74] *Id.* at 17.
[75] *Id.* at 19.
[76] *Id.* (quoting Wis. Ct. App. Op. at 4.) (internal quotations omitted).
[77] *Petitioner* at 19.

murder that the investigators already knew.[78] Only after Dassey was told the correct information by investigators was Dassey able to recount information about Halbach's death consistent with what investigators told him.[79] Dassey also highlighted other instances which demonstrated he was baited into revealing facts he did not already know.[80] As a result, Dassey argued that the Wisconsin Court of Appeals was "unreasonable . . . – and, indeed, had absolutely no basis in the record – to find that the officers were merely 'professing to know facts they actually did not have.'"[81]

Additionally, Dassey argued his confession was a due process violation because he was coerced into making a confession by a promise of leniency.[82] Dassey maintained that he understood the statements made by the investigators to be promises, and he believed confessing to the crimes would help him go home, even if what he said was not true.[83] According to Dassey, the Wisconsin Court of Appeals unreasonably looked past the plain meaning of the words used by his interrogators by finding them to be only "vague assertions."[84] Dassey argued that the statements themselves indicated with a finite amount of detail that by confessing he would "be set free."[85] In conjunction with this argument, Dassey maintained that considering his

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[78] *Id.*
[79] *Id.*
[80] *Id.* at 20; The videotape of the interrogation reveals that the investigators also had to explicitly lead Brendan into saying that Halbach's body was placed in the rear cargo area of her vehicle; that her body and clothing had been burned in Avery's bonfire pit; that the license plates had been removed from Halbach's vehicle; and that Halbach's cellular telephone, camera, and purse were burned separately in a barrel, among other things. (PC Ex. 87.) All of this information was known to police long before Brendan's interrogation.
[81] *Id.* at 21.
[82] *Id.*
[83] *Id.* Brendan asked his interrogators, "Am I going to be [back] at school before school ends?" and "What time will this be done?" (St. Tr. Ex. 216 at 667.) He plainly believed that since he had held up his end of the bargain by confessing, the officers would hold up theirs by releasing him. When he was told that he was being placed under arrest, moreover, he immediately recanted, telling his mother that the police had "got to my head." (St. Tr. Ex. 216 at 672.)
[84] *Petitioner* at 22.
[85] *Id.*

own mental capacity, he was even more susceptible to believing them.[86] According to Dassey, the Wisconsin Court of Appeals erred in not taking into consideration the totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation.[87] In failing to do so, the appellate court failed to apply the appropriate Supreme Court standard which, beginning with *Haley v. Ohio* and *Gallegos v. Colorado,* is well established when considering juvenile confessions.[88]

In the Memorandum in Opposition to Dassey's Petition for Writ of Habeas Corpus, the State argued that the *Sullivan* case is not "clearly established federal law with regard to a conflict of interest claim," and it would therefore "be inappropriate to grant relief under § 2254(d)(2) that the state court's decision on his *Sullivan* claim was based on an unreasonable determination of the facts."[89] Furthermore, the State pointed to *Strickland v. Washington* as the established test for determining whether counsel's performance was deficient in such a way that but for ineffective counsel, the proceedings outcome would have changed.[90]

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[86] *Id.* at 25. "[Dassey's] I.Q. of 74 fell in the borderline to below-average range; he was enrolled in some special education classes; and psychological tests indicated that he was more suggestible than 95% of the population." *Id.* (citing Tr. 5/4/2006 at 88-90; Tr. 4/24/2007 at 32-39, 51-56.)

[87] *Id.* at 23; Dickerson v. U.S., 530 U.S. 428, 434 (2000).

[88] *Id. See* Haley v. Ohio, 332 U.S. 596, 599-600 (1948) (suppressing fifteen-year-old's confession because "that which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens"); Gallegos v. Colorado, 370 U.S. 49, 54 (1962) (finding that fourteen-year-old's confession had been taken in violation of due process because a teen is "not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and ... is unable to know how to protect his own interests"); In re Gault, 387 U.S. 1, 48, 52-54 (1967) (deeming it "imperative" to question juveniles' confessions because "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children"); See also Doody v. Ryan, 649 F.3d 986, 1008 (9th Cir. 2011) (concluding that the *Haley-Gallegos-Gault* line of decisions clearly establishes that "the fact that Doody was a juvenile is of critical importance in determining the voluntariness of his confession" and reversing denial of writ of habeas corpus on voluntariness and *Miranda* grounds); Hardaway v. Young, 302 F. 757 (7th Cir. 2002) (recognizing that the *Haley-Gallegos-Gault* line of decisions represents a clearly established line of U.S. Supreme Court case law requiring "special caution when assessing the voluntariness of a juvenile confession," but denying relief under AEDPA in an "extremely close" case because the state courts had expressly cited and discussed *Haley-Gallegos-Gault*).

[89] Brief in Opposition (*Opposition)* at 5, Dassey v. Foster (No. 14-cv-01310-WED) (May 4, 2015).

[90] *Id.* at 8. *See* Strickland v. Washington, 466 U.S. 668, 89-91, 94 (1984).

The State argued that no matter who represented Dassey, the outcome of his case would not have been different.[91] *Strickland*, the State argued, is clearly established precedent, and under that standard of review, Dassey would have to show the existence of actual prejudice in order to prove that Kachinsky's representation was detrimental to the outcome.[92] Under *Sullivan*, however, no showing of prejudice is required to demonstrate a conflict of interest.[93] The State further argued that *Sullivan* could not be extended to issues concerning conflicts like that of Kachinsky and Dassey.[94] The applicability of *Sullivan* has been met with some doubt by the United States Supreme Court.[95]

According to the State, *Sullivan* only established law for claims where an attorney represents multiple defendants, but not for the unique attorney conflict claim presented by Dassey.[96] The State maintained that the applicability of *Sullivan* need not even be addressed because *Sullivan* is not clearly established federal law.[97] Consequently, the State also suggested that Dassey's choice of a *Sullivan* claim barred him from habeas corpus relief, because if *Sullivan* was not clearly established, review was not even possible.[98] As such, the State argued Dassey should have to show that his counsel actively represented conflicting interests in order to establish the constitutional predicate for his claim of ineffective assistance pursuant to *Mickens v. Taylor*.[99]

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[91] *Id.*
[92] *Id.* at 9.
[93] *Id.*
[94] *Id.*
[95] Mickens v. Taylor, 535 U.S. 162, 174-75 (2002) (expressing doubt that *Sullivan* applies to conflicts involving counsel's personal interests).
[96] *Opposition* at 12-13.
[97] *Id.* at 9.
[98] *Id.* at 10. *See Van Patten*, 552 U.S. at 125-26; *Musladin*, 549 U.S. at 76-77; *see also Means*, Federal Habeas Manual 258 § 3.28 ("Without clearly established federal law, a federal habeas court need not determine whether a state court's decision was 'contrary to' or involved an 'unreasonable application' of such law.").
[99] Mickens v. Taylor, 535 U.S. 162, 174-76 (holding that until defendant shows that his counsel *actively represented* conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance).

In response to Dassey's second claim that his confession was involuntary, the State argued that even considering the totality of the facts regarding Dassey's own personal attributes and the circumstances surrounding his confession, it was still voluntary.[100] As such, there was no use of fact feeding as a tactic for interrogation, and the officers only purported to seek facts that they did not already know.[101] In the State's view, the tactic of convincing a mentally susceptible individual to confess to actions that he may or may not have seen or participated in was "in his best interest" and "would help him," and was justified as a proper means of interrogation, not of coercion.[102] Furthermore, the State argued that the state courts properly took into account Dassey's personal characteristics when evaluating whether his confession was voluntary. The State suggested that the Supreme Court's "special caution" requirement was satisfied, though not specifically stated, and was not grounds for reversal on habeas review.[103]

In his decision and order, U.S. Magistrate Judge William E. Dufflin rejected Dassey's Sixth Amendment claim that Kachinsky's misconduct constituted a conflict of interest under *Sullivan*.[104] Instead, the court cited *Mickens'* interpretation of *Sullivan*, finding it was not intended to be applied expansively.[105] The court found that Dassey failed to explicitly identify the nature of the conflict under which Kachinsky labored.[106] Additionally, *Mickens* "made it clear that *Sullivan* was clearly established law only with respect to conflicts of interest resulting from the concurrent representation of multiple clients."[107] As a result, *Sullivan* was inapplicable, and relief under the Sixth Amendment could only possibly be found under *Strickland*.[108]

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[100] *Opposition* at 18-19.
[101] *Id.* at 21-22.
[102] *Id.* at 22-23.
[103] *Id.* at 26.
[104] *Decision* at 50.
[105] *Id.* at 51 (citing Mickens v. Taylor, 535 U.S. 162 (2002)).
[106] *Id.* at 52.
[107] *Id.* at 54 (citing *Mickens*, 535 U.S. at 175)).
[108] *Id.* at 54-55.

However, because Dassey never raised *Strickland* arguments, nor asked the court to consider his claim under *Strickland*, the court found that federal law "prohibits the court from considering whether Dassey would be entitled to habeas relief on this alternative basis.[109] Furthermore, the court found Dassey's argument that the Wisconsin Court of Appeals applied the wrong legal standard to his claim to be inadequate as well.[110]

The court ultimately proved more receptive to Dassey's claim for relief for violations of due process, but only after significant analysis. To start, the court acknowledged that "[i]n determining whether a defendant's will was overborne in a particular case, the Court [will] assess[ ] the totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation."[111] Relevant factors include: the length of the investigation, its location, its continuity, the defendant's maturity, educational background, physical condition and mental health.[112] In contrast, however, investigators may assert facts of which they do not have actual knowledge, and they may encourage honesty without promising leniency.[113]

Having acknowledged these tenants, the court considered similar cases to guide its analysis.[114] Most notably, the court considered *A.M. v. Butler*, wherein an 11–year old boy confessed to the murder of his 83–year old neighbor.[115] The boy subsequently recanted his confession, then purportedly admitted to the murder to his mother.[116] A detective continually

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[109] *Id.* at 58.
[110] Decision at 60.
[111] *Id.* at 61 (quoting Schenckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (quotation marks omitted)).
[112] *Id.* at 61-62
[113] *Id.* at 63
[114] *Id.* at 64-67
[115] *Id.* at 66 (discussing A.M. v. Butler, 360 F.3d 787 (7th Cir. 2004)).
[116] Decision at 67.

challenged the boy's statements and accused him of lying.[117] The court granted his petition for the writ.[118]

Having considered prior cases in the Seventh Circuit, the court analyzed the reliability of the confession as a factor of the "totality of the circumstances."[119] The court acknowledged that false confessions are especially likely among youthful offenders and those with low IQs.[120] Additionally, many of the details that Dassey provided had been publicly disclosed or could easily be deduced from those facts.[121] The confession was ultimately an evolution, during which details emerged over time and with questionable influence.[122] As a result, the court doubted the reliability of Dassey's confession.[123]

Involuntary confessions have long been excluded because of their inherent unreliability.[124] However, the United States Supreme Court has "detached the admissibility of a confession from its reliability and made voluntariness alone the benchmark of admissibility."[125] The court held that because guilty verdicts were returned, the court must presume that a jury found the confession reliable, and the court's doubts as to Dassey's confession were irrelevant.[126]

Finally, the court turned to an analysis of Dassey's confession, noting that the court must look at *all* relevant facts to determine if the March 1st confession was voluntary.[127] After pointing out the positive, or acceptable, environmental factors of the investigation, the court turned to factors that supported Dassey's assertions. For example, Dassey was only 16, and was

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[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.* at 68.
[121] *Decision* at 69.
[122] *Id.* at 71.
[123] *Id.* at 72.
[124] *Id.* at 73 (referencing Dickerson v. United States, 530 U.S. 428, 434 (2000).
[125] *Id.* (referencing Culombe v. Connecticut, 367 U.S. 568, 583-84 n. 25 (1965) (quoting Lisbena v. California, 314 U.S. 219, 236 (1941)).
[126] *Id.* at 74.
[127] *Decision* at 74.

questioned without the presence of a parent or adult representative.[128] While this alone is not a violation of federal law, '"in marginal cases – when it appears the officer . . . has attempted to take advantage of the suspect's youth or mental shortcomings – lack of parental or legal advice could tip the balance against admission."'[129]

Additionally, as previously discussed, Dassey received special education classes, had a low IQ, and no prior experience with law enforcement.[130] Investigators repeatedly told Dassey he had nothing to worry about, that investigators already knew what happened, and that they were his friends.[131] Investigators' repeated statements to Dassey that he would not be punished for telling them incriminating details which investigators claimed to already know clearly led Dassey to think he would not be punished for telling investigators what they wanted to hear.[132] The state court found that there were no promises of leniency, but such a finding was "against the clear and convincing weight of the evidence,"[133] and therefore, was an error central to the state court's finding that the confession was voluntary.[134]

Ultimately, because the United States District Court found the Court of Appeals' decision to be based on an unreasonable factual determination, Dassey satisfied the standard of review required under 28 U.S.C. § 2254(d)(2) and was entitled to relief.[135] In addition, the district court determined Dassey was also entitled to relief under § 2254(d)(1).[136] The district court emphasized that by focusing on facts in isolation and failing to assess the voluntariness of the confession under the totality of the circumstances, the Court of Appeals had failed to properly

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[128] *Id.* at 75.
[129] *Id.* (quoting United States v. Bruce, 550 F.3d 668, 673 (7th Cir. 2008) (quoting United States v. Wilderness, 160 F.3d 1173, 1176 (7th Cir. 1998)).
[130] *Id.* at 77.
[131] *Id.* at 77-78.
[132] *Id.* at 83.
[133] *Decision* at 83 (quoting Ward v. Sternes, 334 F.3d 696, 704 (7th Cir. 2003)).
[134] *Id.*
[135] *Id.* at 84.
[136] *Id.* at 85.

apply federal law.[137] The court determined the errors were not harmless in nature as "Dassey's confession was . . . the entirety of the case against him . . . ."[138] As a result, the court granted Dassey's petition for a writ of habeas corpus.

In a case that has been so widely popularized, if not sensationalized, over the past year, it can be difficult to separate the drama portrayed on television from the jurisprudential framework within which the American legal system operates. Habeas corpus is considered a "controversial and friction-producing issue in the relation between the federal courts and the states."[139] However, the axiom "equal justice for all" must prevail in all circumstances, no matter what public opinion of the legal system follows.

Making a Murderer has become an especially prominent topic among legal academics, media publishers, and family households across the United States. Even an untrained legal eye is quick to jump on what appears to be a glaring miscarriage of justice in almost every episode of the series. To a trained legal eye, the errors are even more blatant. As discussed above, as a result of improper representation, improper consideration of Dassey's mental capacity, and improper application of established federal law, the grounds for granting the writ of habeas corpus are defensible, if not altogether evident. Judge Dufflin's order granting the writ demonstrates a well–reasoned consideration of the arguments in favor and against Dassey's claims. Regardless of Dassey's actual guilt or innocence, it seems clear from the evidence and the arguments that Dassey was wrongfully prejudiced in his right to a fair trial.

Looking forward, individuals claiming injustice at the hands of the legal system may be inspired by Dassey, but their hopes of such a positive outcome are likely bleak. Since the

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[137] *Id.* at 85.
[138] *Id.* at 89-90.
[139] 17B CHARLES ALLEN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4261 (3d ed. 2016 update).

enactment of AEDPA in 1996, the threshold requirements for granting a writ of habeas corpus have increased significantly. In cases where the totality of the circumstances are less extreme, or where the indisputable evidence as to the exact manner in which the circumstances played out, habeas corpus claims will likely be more difficult for petitioners to prevail upon under the increased standards of review.

That aside, the judicial system as a whole must take note. Law enforcement agents must be diligent in their procurement of evidence, and judges must ensure that the law in their jurisdiction is properly applied. But for such improper execution and application our laws, perhaps the outcome would have been much different here. Although it is not for us to say whether Dassey was actually involved in the crimes of which he was accused, it is appropriate for our legal community to take note of these lessons so that the accused will always receive a fair and impartial trial.