

PARDON DOCKET NO. _____

Before The

WISCONSIN PARDON ADVISORY BOARD

October 2, 2019

ADVISING THE HONORABLE GOVERNOR TONY EVERS

In the Matter of

BRENDAN RAY DASSEY

PETITION FOR EXECUTIVE CLEMENCY

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Brendan Dassey, by and through his undersigned counsel Laura Nirider and Steven Drizin of the Center on Wrongful Convictions at Northwestern University Pritzker School of Law, Seth Waxman of WilmerHale, and Robert Dvorak of Halling & Cayo, hereby respectfully requests that the Governor of Wisconsin exercise his clemency powers by granting him a pardon or commutation of sentence to time served. This is Brendan's first petition for executive clemency.¹

Introduction

Brendan Dassey's convictions for first-degree intentional homicide, second-degree sexual assault, and mutilation of a corpse are convictions in which this Board can have no confidence.

In 2006, Brendan Dassey was a sixteen-year-old Mishicot High School special education student with no criminal history, an IQ of 74, and speech-language functioning in the bottom percentile. After undergoing four police interrogations in 48 hours, he found himself charged with involvement in one of the highest-profile homicides in Wisconsin history – and, subsequently, sentenced to life in prison – based on a videotaped confession about which state and federal judges, national police authorities, prosecutorial groups, and psychological experts have since expressed the gravest doubts. Indeed, his confession is disproven by the physical evidence found at the crime scene, including DNA. The confession is also marked by Brendan's utter inability to describe accurately the method by which Ms. Halbach had been killed until he was told by police that she had been shot in the head. And it is punctuated by Brendan's staggeringly guileless requests to go back to school even after agreeing to confess to murder. In the words of Chief Judge Diane Wood, Judge Ilana Rovner, and Judge Ann Williams of the United States Court of Appeals for the Seventh Circuit, the continued incarceration of Brendan Dassey represents a "profound miscarriage of justice."²

This Board can also have no confidence in the trial process that led to Brendan's conviction. Brendan's defense was marred by extreme attorney misconduct of a type rarely seen in the United States. As multiple courts have found, Appleton attorney Len Kachinsky – whose job it was to alert the trial court to the problems with Brendan's confession – instead worked with the State to secure his own client's conviction. As documented in emails and on videotape, Kachinsky pressured his client into pleading guilty by hiring a private investigator to coerce Brendan into making another, even more nonsensical statement, which was then disclosed to the State for use against Brendan. No defense attorney should behave this way; indeed, even the Wisconsin Solicitor General's Office refused to defend the substance of Kachinsky's conduct on appeal. No confidence can repose in the verdict that followed such destructive representation.

Finally, this Board can have no confidence in the justness of, or the continuing need for, Brendan Dassey's life sentence. As a general matter, juvenile life sentences like Brendan's have recently fallen

¹ Please note that undersigned counsel have not attached a complete copy of the court record to this petition, as the record contains thousands of documents; rather, in an effort to be of utmost assistance to the Board, undersigned counsel has included a USB drive that contains electronic copies of those exhibits, pieces of evidence, transcripts, decisions, and court filings most relevant to the issues set forth in this petition. Counsel will gladly provide a copy of the complete court record if it is requested. Counsel has included with this application certified copies of Brendan Dassey's criminal complaint, information, and judgments for all three convictions.

² Ex. 14 at 70.

under intense criticism due to new understandings about the reduced culpability, and inherent redeemability, of adolescents. And in Brendan’s particular case, this sentence was especially unwarranted. His criminal and juvenile records before this conviction were spotless, with no hint of violence or antisocial tendencies. Because, in part, of this clean record, prosecutors repeatedly saw fit to offer him pre-trial plea deals that would have required as few as 15 years in prison. Moreover, after his conviction, Brendan developed a near-perfect prison record that was so “exceedingly benign” as to cause Milwaukee-based Magistrate Judge William Duffin to conclude in 2016 that Brendan posed no danger to the community and to order his immediate release.³ His prison record continues without significant blemish to this day, such that Brendan earned an early transfer to a medium-security prison – Oshkosh Correctional Center – in April 2019.

As in 2016, Brendan’s team of lawyers and licensed clinical social workers has prepared a detailed re-entry plan, should his release be granted, that will ensure Brendan’s peaceful, supported, and productive return to society. Based on his team’s extensive experience reintegrating dozens of former inmates into society, this plan addresses every major component of the re-entry process, from the provision of therapeutic care to living arrangements, job skills training, and education. Supported by a strong network, and personally committed to a productive and peaceful life, Brendan is poised for success.

Like no other case in this State, and indeed few around the globe, the case of Brendan Dassey cries out for relief. Seeking clemency from the Governor is now one of the last remaining legal options available to him. Respectfully, Brendan Dassey requests executive clemency.

Procedural History

The crimes for which Brendan Dassey was convicted – first-degree intentional homicide, second-degree sexual assault, and mutilation of a corpse – occurred in Manitowoc County on October 31, 2005. Forty-three-year-old Steven Avery was arrested on November 9, 2005, and charged six days later with first-degree intentional homicide and mutilating a corpse. On March 1, 2006, Avery’s nephew, sixteen-year-old Mishicot High School special education student Brendan Dassey, was arrested and charged as Avery’s accomplice, following a series of four interrogations between February 27 and March 1, 2006. Brendan’s charges were brought directly in adult criminal court, rather than juvenile court. Because of a conflict of interest relating to Steven Avery, then-District Attorney Ken Kratz of Calumet County undertook primary responsibility for the prosecution of Brendan Dassey, assisted by the Wisconsin Department of Justice.

On May 12, 2006, the Honorable Judge Jerome L. Fox denied Brendan’s motion to suppress his confession, which was the primary evidence against him.⁴ Brendan stood trial for nine days in April 2007 before a jury composed of Dane County residents, which led to his convictions. On August 2, 2007, Judge Fox sentenced Brendan to three concurrent prison terms, with credit for 534 days spent in pretrial detention, as follows:

- For mutilation of a corpse, a sentence of six years: four in prison and two at extended supervision. This sentence has already been completely served.

³ Ex. 8.

⁴ Ex. 5.

- For second-degree sexual assault, a sentence of fourteen years: ten in prison and four at extended supervision. This ten-year term of confinement has already been completely served, and by undersigned counsel's calculation, the four-year term of extended supervision will have been completely served, via incarceration, as of mid-November 2019.
- For first-degree intentional homicide as party to the crime, a sentence of life in prison with no eligibility for extended supervision until November 1, 2048.

In January 2010, Brendan's counsel filed a post-conviction petition on the grounds of ineffective assistance of counsel and requested a new trial or, alternatively, a new suppression hearing. After holding an evidentiary hearing, Judge Fox denied that petition on December 13, 2010.⁵ In January 2013, the Wisconsin Court of Appeals affirmed, rejecting Dassey's claims that his confession was involuntary and that his pre-trial attorney, Len Kachinsky, provided ineffective assistance.⁶ Thereafter, the Wisconsin Supreme Court denied review.⁷

In October 2014, counsel for Dassey filed a petition for a writ of habeas corpus in the Eastern District of Wisconsin. On August 12, 2016, Milwaukee-based Magistrate Judge William Duffin granted Dassey's petition and vacated his conviction, finding that the state courts had acted unreasonably in failing to suppress Dassey's confession.⁸ After being advised by both the State and defendant, Judge Duffin further ordered that Brendan be released from prison because, among other reasons, Brendan did not pose any danger to society.⁹ That order was stayed by the United States Court of Appeals for the Seventh Circuit pending appeal; the appeal proceeded and, in June 2017, a panel of judges affirmed Judge Duffin's decision to vacate Brendan's conviction.¹⁰ On December 8, 2017, however, the *en banc* Court of Appeals for the Seventh Circuit, having reheard the case, reversed the grant of habeas relief by a vote of 4-3.¹¹ On February 8, 2018, Dassey filed a petition for a writ of certiorari, which was denied by the U.S. Supreme Court on June 25, 2018.¹² Brendan has no pending court proceedings at this time. As of the date of this petition, he is 29 years old and has served approximately 13 years in prison.

Brendan Dassey's Manitowoc County case number is 2006 CF 88; his Wisconsin Department of Corrections prisoner ID number is 00516985; and his date of birth is 10/19/1989.

Basis for Granting Clemency

I. This Board can have no confidence in the evidence against Brendan Dassey.

Brendan's convictions are built entirely on the confused and contradictory words of a sixteen-year-old, intellectually impaired special education student. On October 31, 2005, Teresa Halbach went missing after visiting the Avery Salvage Yard in Manitowoc County to photograph a van for sale.¹³ Days

⁵ Ex. 2, 3.

⁶ Ex. 4.

⁷ Ex. 6.

⁸ Ex. 7.

⁹ Ex. 8.

¹⁰ Ex. 9, 13.

¹¹ Ex. 14.

¹² Ex. 15.

¹³ Ex. 1 at 887, 891, 995.

later, Ms. Halbach's SUV was found parked on the fringes of the salvage yard.¹⁴ According to police, a number of charred bone fragments from Ms. Halbach's body were subsequently discovered in Steven Avery's backyard bonfire pit, and the key to her SUV was found in Avery's bedroom.¹⁵ Within days, Avery was arrested and charged with Ms. Halbach's murder.¹⁶

Four months later, on March 1, 2006, officers interrogated Avery's intellectually impaired nephew, Brendan Dassey, until he made a statement implicating himself as Avery's accomplice. In separate trials, both Avery and Dassey were convicted of first-degree intentional homicide; Dassey was also tried for and convicted of second-degree sexual assault and, under the theory that he helped Avery burn Halbach's body, mutilation of a corpse. At age sixteen, with no prior criminal record, Brendan was sentenced to life in prison. He will first be eligible for parole on November 1, 2048, when he will be 59 years old.

According to police, several of the alleged crime scenes— including the victim's SUV, Avery's bedroom, the bonfire pit behind Avery's trailer, and Avery's garage – contained considerable forensic evidence, ranging from the apparent discovery of blood in Halbach's SUV to the discovery of some of Halbach's remains in the bonfire pit.¹⁷ This forensic evidence, among other things, formed the basis of the case against Steven Avery; its validity is now being challenged by Avery in a separate proceeding. But while the crime scenes were said to contain abundant DNA and forensic evidence, none of it connected sixteen-year-old Brendan Dassey to Ms. Halbach's disappearance in any way – a striking absence of expected evidence that is all too common in false confession cases.¹⁸ Indeed, "Dassey's confession was, as a practical matter, the entirety of the evidence against him on each of the three counts."¹⁹

Brendan's confession itself is riddled with problems that render it utterly unreliable. As an initial matter, Brendan was and is precisely the kind of person whom well-accepted psychological research has identified as particularly likely to falsely confess, even when subjected to standard police interrogation tactics. He was a sixteen-year-old juvenile with a range of intellectual disabilities clustered around his inability to speak and process language – precisely the skills needed to navigate an interrogation.

As a special education student at Mishicot High School, Brendan's I.Q. of 74 fell in the borderline to below-average range.²⁰ Brendan was originally referred for special education services by his first

¹⁴ Ex. 1 at 919-24.

¹⁵ Ex. 1 at 1529-30, 1140.

¹⁶ Ex. 1 at 1327-28.

¹⁷ Ex. 1 at 967, 1097-99, 1360, 1381-82.

¹⁸ For instance, in Chicago's Englewood Four case, four teenagers were convicted of a rape-murder based on false confessions, despite the fact that DNA evidence recovered from the victim's body did not match any of them. They were exonerated more than fifteen years later when the DNA was matched to a serial predator. See Jason Meisner, *Englewood Four Get Certificates of Innocence*, Chicago Tribune, Sept. 16, 2012, available online at <https://www.chicagotribune.com/news/ct-xpm-2012-09-16-ct-met-englewood-four-innocence-0916-20120916-story.html>.

¹⁹ Ex. 7 at 89.

²⁰ Ex. 43 at 1; ex. 40 at 1.

grade teacher due to concerns in all academic skill areas.²¹ At age 13, he underwent an additional battery of testing; those tests, and additional subsequent tests, confirmed that while Brendan presented no behavior problems — in fact, he was described as “cooperative, attentive, and hardworking”²² — he had “overall well below average to below average cognitive ability,” with “significant delays in his language skills.”²³ In his September 2005 speech-language evaluation, Brendan scored in the first percentile for core language and expressive language skills; in the second percentile for receptive language and language content skills; in the third percentile for language memory; and in the fifth percentile for working memory.²⁴ Measured along these various axes, Brendan’s language abilities within a month of Halbach’s October 2005 death were those of a five- to eleven-year-old child.²⁵ Indeed, his speech-language scores make clear that

Brendan’s overall impairment level was in the most severe range, and that at 16, he was functioning like much a younger child — test results ranged from 5 years, 8 months to 11 years, 9 months. His total language score placed him at the 1st percentile, indicating that 99% of kids his age understood and used language better than he did, most of them much better.²⁶

In his 2005 IEP, special education professionals wrote that Brendan “exhibits difficulty responding clearly and concisely to others” and that “understanding age appropriate vocabulary terms remains challenging. Brendan will occasionally ask questions when he is unsure, however eye contact and participation during discussions with adults and peers is limited. Brendan’s memory specifically is affecting all areas of language.”²⁷ He was also noted to have a “flat affect” — *i.e.*, a monotonous tone of voice — and often gave one-or-two word monosyllabic answers to questions.²⁸ Perhaps because of a lack of self-confidence, Brendan scored in the bottom first percentile for social avoidance, indicating profound shyness.²⁹ At trial, psychological testing indicated that his disabilities rendered him more compliant and suggestible than 95% of the population.³⁰

An overwhelming volume of time-tested psychological research indicates that youthfulness and intellectual disability are both risk factors for false confessions. With respect to youthfulness, the U.S.

²¹ Ex. 43 at 1.

²² Ex. 43 at 2.

²³ Ex. 43 at 2; ex. 39 at 3; ex. 37 at 27; ex. 37 at 10.

²⁴ Ex. 39 at 2.

²⁵ Ex. 39 at 2.

²⁶ Ex. 46 at 2-3.

²⁷ Ex. 38, 2005 IEP at 10.

²⁸ When reviewing Brendan’s videotaped confession, former District Attorney Kratz has stated that — even though he found it “hard to separate the truths from half-truths” in Brendan’s confession — he was left with the overall conviction, after viewing it, that Brendan was nonetheless guilty because his “flat affect” and “failure to demonstrate any emotion” while describing acts of violence must have meant that Brendan was a “psychopath, mentally ill,” or “an accomplished liar.” Ken Kratz, *EVERY: THE CASE AGAINST STEVEN AVERY AND WHAT MAKING A MURDERER GETS WRONG* 105 (Alexa Stevenson ed., 2017). This misplaced belief tragically misinterprets Brendan’s severe speech-language disabilities, diagnosed by special education professionals, as evidence of guilt.

²⁹ Ex. 42 at 1, ex. 44 at 1.

³⁰ Ex. 13 at 5; ex. 45.

Supreme Court has found both that “there is mounting empirical evidence that these pressures [of custodial interrogation] can induce a frighteningly high percentage of people to confess to crimes they never committed,” and that this risk is “all the more troubling – and recent studies suggest, all the more acute – when the person being interrogated is a juvenile.”³¹ The Hon. Justice Shirley Abrahamson endorsed similar research in the seminal 2005 Wisconsin Supreme Court juvenile interrogation case *State v. Jerrell C.J.*:

Although it is difficult for many of us to understand what leads an innocent person to confess to a crime, especially a serious felony, researchers have documented that false confessions are a leading cause of the wrongful convictions of the innocent in America. When used against vulnerable suspects, standard police interrogation techniques are especially apt to lead to false confessions. Juveniles and the mentally retarded are the most vulnerable to modern psychological interrogation techniques. It follows that juveniles appear with some regularity in false confession cases.³²

With respect to intellectual disability, the U.S. Supreme Court has found that interrogations that “might be utterly ineffective against an experienced criminal” might be “overpowering to the weak of will or mind.”³³ National legal standards, set out in the American Bar Association’s Criminal Justice Mental Health Standards, reiterate the point: “Official conduct that does not constitute impermissible coercion when employed with nondisabled persons may impair the voluntariness of the statements of persons who are mentally ill or mentally retarded.”³⁴

Against this backdrop of double vulnerability – youthfulness and extreme intellectual disability, particularly in the area of speech and language – there occurred a series of audio- and videotaped interrogations so objectively problematic that one of the nation’s leading police training firms has publicly announced that it uses Brendan’s interrogation tapes to train officers nationwide “what not to do” when interrogating “juveniles and individuals with intellectual impairments.”³⁵

Four months after Steven Avery’s arrest, Brendan was interrogated by police four times over a period of 48 hours until, on March 1, 2006, he gave a statement implicating himself as Avery’s accomplice in the murder of Teresa Halbach. Police initially turned to Brendan because his cousin, Kayla Avery, had mentioned to a school counselor that she had seen him crying at a birthday party and that he had recently lost some weight. Brendan explained at trial that he had been upset because “people were calling me fat” and he “thought that my first girlfriend broke up me – with me because of my weight.”³⁶

³¹ *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011). See also Kassin, Saul et al., *Police-Induced Confessions: Risk Factors and Recommendations*, American Psychological Association White Paper (2010), available online at [https://web.williams.edu/Psychology/Faculty/Kassin/files/White%20Paper%20-%20LHB%20\(2010\).pdf](https://web.williams.edu/Psychology/Faculty/Kassin/files/White%20Paper%20-%20LHB%20(2010).pdf) (compiling research).

³² *State v. Jerrell C.J.*, 2005 WI 105 at P104, 283 Wis. 2d 145, 699 N.W.2d 110.

³³ *Stein v. New York*, 346 U.S. 156, 185 (1953); see also *Colorado v. Connelly*, 479 U.S. 157, 165 (2003) (“mental condition is surely relevant to an individual’s susceptibility to police coercion”).

³⁴ ABA Criminal Justice Mental Health Standards, Standard 7-5.8(b).

³⁵ Ex. 18 at 5.

³⁶ Ex. 1 at 2083.

Police first questioned Brendan at Mishicot High School on February 27, 2006, where they spoke to him alone in the principal's office without notifying his mother. The audiotape reflects that Brendan told them, as he had previously said, that he had gone over to his uncle's trailer for a short period on the night Halbach disappeared and, at Avery's request, stoked an already-burning bonfire with tires and a junked van seat – but saw nothing suspicious before going back home.³⁷ The interrogators responded by telling Brendan that they had found Halbach's bones "intermingled" with the burned remains of the van seat -- which the investigators testified at trial was a lie -- and insisted that "I gotta believe you did see something in that fire."³⁸ Such a use of deception has been identified as a risk factor for false confessions not only by the American Psychological Association, but also by the nation's leading interrogation trainers.³⁹

In the following minutes, investigators also used a second technique associated with false confessions by leveling a false threat at him: "We've got people at the...district attorney's office....saying that Brendan Dassey had something to do with it or the cover up of it which would mean Brendan Dassey could potentially be facing charges for that."⁴⁰ They then spent the next four interrogations explaining to Brendan how he could save himself from arrest: "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...Talk about it, we're not just going to let you high and dry, we're gonna talk to your mom after this and we'll deal with this, the best we can for your good, OK?"⁴¹ They went on to assure him that as long as he "talk[ed] about it" and "fill[ed] in those gaps," they would be "here to help ya," that they would "stand behind you" and be "in his corner," that he'd be "all right" and have "nothing to worry about," and that he'd even be "set free."⁴² The cumulative message was crystal clear: Brendan would face charges and arrest if he said nothing, but he'd receive help and freedom if he "fill[ed] in those gaps" in a manner that satisfied the interrogators. This is a pattern also commonly seen in false confession cases.⁴³

Over the balance of the four interrogations, Brendan began working to fill in those gaps by offering a series of ever-evolving stories in an effort to see what tale his investigators might accept as the "truth." By his final interrogation on March 1, 2006, and with the aid of his interrogators' repeated

³⁷ Ex. 22 at 442.

³⁸ Ex. 22 at 442.

³⁹ See Kassir, *Police-Induced Confessions: Risk Factors and Recommendations* at 12; Inbau & Reid, *Criminal Interrogations and Confessions* (using deception or false evidence "should be avoided when interrogating a youthful suspect with low social maturity or a suspect with diminished mental capacity").

⁴⁰ Ex. 22 at 442.

⁴¹ Ex. 22 at 443.

⁴² Ex. 24 at 541 *et seq.*

⁴³ See Kassir, *Police-Induced Confessions: Risk Factors and Recommendations* at 18. For example, sixteen-year-old Massachusetts false confessor Nga Truong falsely admitted to killing her young son Kyle because "all I could hear throughout those two hours [of interrogation] was that they were going to give me help if I confessed....I never thought of the consequences. I just said it because they wanted me to." International Association of Chiefs of Police, *Reducing Risks: An Executive's Guide to Effective Juvenile Interview and Interrogation* (2012) at 8, available online at <https://www.theiacp.org/sites/default/files/all/p-r/ReducingRisksAnExecutiveGuidetoEffectiveJuvenileInterviewandInterrogation.pdf>.

steering (e.g., “That makes sense. Now we believe you” after Brendan changed his account), his story culminated in a confession in which he helped Steven Avery sexually assault and murder Halbach.⁴⁴ The full interrogation transcripts and tapes are attached hereto as exhibits; and the statement of facts from Dassey’s federal appellate brief, which summarizes the broader facts of the case and the interrogations in greater detail, is also attached.⁴⁵

Brendan’s confession to the rape and murder of Teresa Halbach is utterly unreliable. As all seven judges on the United States Court of Appeals for the Seventh Circuit agreed, Dassey is obviously “guess[ing]” during his final March 1 interrogation about what happened to Halbach – including when he was trying to describe the act of killing itself.⁴⁶ Indeed, Brendan wrongly guessed that Halbach was killed by choking, stabbing, throat-slitting, punching, and even hair-cutting until he gave up: “That’s all I can remember.”⁴⁷ At that point his interrogators, who had found forensic evidence indicating that Halbach had been shot in the head, responded: “All right, I’m just gonna come out and ask you. Who shot her in the head?” at which point Brendan replied that Avery had done that.⁴⁸ “Then why didn’t you tell us that?” asked the officers, to which Brendan simply answered: “Cuz I couldn’t think of it.”⁴⁹ Perfectly illustrative of a special education student grasping at straws to describe a murder he never witnessed, this exchange is a red flag for false confession that, again, mimics other known cases.⁵⁰

Indeed, whenever Brendan wasn’t able to guess accurately, many details, large and small, had to be fed to him in order to help him generate a narrative that matched the known evidence. Walking him step-by-step through their theory of the case, the investigators told him that “you went over to [Avery’s] house and then he asked [you] to get his mail”;⁵¹ that “you went inside” Avery’s house;⁵² that Avery “tr[ied] to have sex with her or anything and she said no”;⁵³ that “he asked if you want some...pussy”;⁵⁴ that “he makes you” rape Halbach;⁵⁵ that “she ask[ed] you not to do this”;⁵⁶ that after the rape, “we know some things happened in that garage, and in that car”;⁵⁷ that Halbach was “shot...in the head”

⁴⁴ Ex. 24 at 597.

⁴⁵ Ex. 11.

⁴⁶ Ex. 14 at 16.

⁴⁷ Ex. 24 at 587.

⁴⁸ Ex. 24 at 587.

⁴⁹ Ex. 24 at 587.

⁵⁰ For example, New York juvenile false confessor Jeff Deskovic has explained how he constructed a false confession to his classmate’s murder: “I took the out that was being offered, and I made up a story based on the information they fed me during the course of the investigation.” International Association of Chiefs of Police, *Reducing Risks: An Executive’s Guide to Effective Juvenile Interview and Interrogation* (2012) at 11, available online at <https://www.theiacp.org/sites/default/files/all/p-r/ReducingRisksAnExecutiveGuidetoEffectiveJuvenileInterviewandInterrogation.pdf>.

⁵¹ Ex. 41 at 565.

⁵² Ex. 41 at 565.

⁵³ Ex. 22 at 461.

⁵⁴ Ex. 24 at 572.

⁵⁵ Ex. 24 at 574.

⁵⁶ Ex. 24 at 576.

⁵⁷ Ex. 24 at 595.

while in the garage;⁵⁸ that “the license plates were taken off” her vehicle before it was hidden;⁵⁹ that while hiding her vehicle, Avery “raise[d] the hood,” thereby leaving his DNA on the hood latch;⁶⁰ that “the fire was going [already]” when Halbach was killed;⁶¹ that “you [saw] a hand, a foot, a head” in the fire;⁶² and that “you smell[ed] something that was not too right” in the fire.⁶³

And on those occasions when he wasn’t told what to say, the details that Brendan offered by himself were hopelessly muddled and often plain wrong. Brendan accepted the investigators’ 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.⁶⁴ Similarly, Brendan agreed that Halbach’s bleeding body was placed on an automotive roller known as a “creeper” in order to transport it to the bonfire pit, but no blood or DNA was found on Avery’s creeper.⁶⁵ Left to his own devices, he couldn’t decide whether Halbach’s shirt was white⁶⁶ or black;⁶⁷ he spun a nonsensical story in which Avery built a huge bonfire before he attacked Halbach, even though he didn’t plan to burn her body;⁶⁸ and his interrogators themselves repeatedly wondered aloud if Brendan was just making things up: “Are you being honest with us? Did you actually see those items?”⁶⁹

After finally managing to confess to rape and murder, in some of the interrogation’s most disturbing moments, Brendan guilelessly asked his interrogators not once but twice to return him to school, explaining that he needed to get back because he had a project due in sixth hour.⁷⁰ When told he was under arrest, he asked in shock: “Is it only for one day?”⁷¹ These statements not only betray an utter lack of comprehension on Brendan’s part, but also are the natural fruit of the interrogation techniques used (he “[doesn’t] have to worry about things” as long as he “fill[s] in those gaps”).⁷² Again, strikingly similar statements have been documented in a number of false confession cases.⁷³

⁵⁸ Ex. 24 at 587.

⁵⁹ Ex. 24 at 601.

⁶⁰ Ex. 24 at 603.

⁶¹ Ex. 24 at 629.

⁶² Ex. 22 at 444.

⁶³ Ex. 22 at 444.

⁶⁴ Ex. 24 at 566; ex. 1 at 1278, 1301, 1407-09.

⁶⁵ Ex. 24 at 557; ex. 1 at 1390, 1918.

⁶⁶ Ex. 24 at 555.

⁶⁷ Ex. 24 at 556.

⁶⁸ Ex. 24 at 594; 596.

⁶⁹ Ex. 24 at 622.

⁷⁰ Ex. 24 at 613, 667.

⁷¹ Ex. 24 at 668.

⁷² Ex. 24 at 540-41.

⁷³ Chicago juvenile false confessor Calvin Ollins explained that he falsely confessed to a high-profile murder because “I thought I was going home...I didn’t understand the seriousness of what was going on.” Twelve-year-old Johnathan Adams from Georgia explained that he falsely confessed to murder because “I thought if I told them something they’d let me go.” Seventeen-year-old Illinois false confessor Terrill Swift explained that he “signed a confession under the belief that I was going to home later on that night.” International Association of Chiefs of Police, *Reducing Risks: An Executive’s Guide to*

After Brendan gave this confession, police searched Avery's garage and found two bullets that had apparently gone undetected during prior searches: one resting in the middle of the garage floor and one lying near the interior back wall.⁷⁴ The bullet at the back of the garage was tested and found to bear traces of Halbach's DNA on it, and then-Calumet County D.A. Ken Kratz suggested at trial that this discovery corroborated Brendan's confession.⁷⁵ But as multiple federal judges have noted, that bullet does nothing to corroborate the confession. During the interrogation, Brendan himself claimed that the shooting had happened not in the garage but outside it, in plain sight of neighbors and salvage yard customers – a totally uncorroborated and nonsensical claim.⁷⁶ His interrogators, however, had discovered a number of discarded shell casings in the garage months earlier⁷⁷ and, believing that Avery had shot Halbach there, convinced Brendan to change his story to one in which the shooting occurred inside the garage ("We know some things happened in that garage...we know that").⁷⁸ The garage bullet substantiated not Brendan's unprompted confession, therefore, but rather the interrogators' own theory – fed to him, and adopted by him because of his extreme suggestibility, on videotape.

Not only was there no evidence to corroborate Brendan's confession, but the physical evidence actually disproved significant parts of it. The confession described a sequence of sexual assault, stabbing, throat-cutting, punching, and hair-cutting that supposedly all took place in Avery's bedroom. If true, such a series of events would have resulted in an evidence-saturated crime scene impossible for even the most practiced criminal, let alone a mentally impaired teenager, to erase. But despite exhaustive searches, not a single molecule of Brendan's DNA was ever found in the bedroom, nor was a single molecule of Halbach's.⁷⁹ In fact, not a single molecule of Brendan's DNA – or a single fingerprint of his – was found at any of the supposed crime scenes, including Avery's trailer, garage, bonfire pit, and Halbach's RAV4.⁸⁰ What actually happened in the moments before Halbach's death may be unknowable; but what can be known – and certainly what has been proven – is that the terrible story the confession describes is false.

From the moment after his confession until the present day, Brendan has steadfastly insisted that his confession was false. At the end of the March 1 interrogation, police allowed Brendan's mother to enter the interrogation room and have a one-on-one conversation with her son while they stepped out. Free of his interrogators for the first time, Brendan immediately asks his mother "what'd happen if he [Avery] admits" that "I never did nothin'?"⁸¹ His mother directly asks him: "Did you?" "Not really," replies Brendan, and – referring to the interrogators – adds, "They got to my head."⁸²

Effective Juvenile Interview and Interrogation (2012) at 9, 10, available online at <https://www.theiacp.org/sites/default/files/all/p-r/ReducingRisksAnExecutiveGuidetoEffectiveJuvenileInterviewandInterrogation.pdf>.

⁷⁴ Ex. 1 at 850 (4/16/07 at 72).

⁷⁵ Ex. 1 at 850 (4/16/07 at 72).

⁷⁶ Ex. 24 at 591.

⁷⁷ Ex. 1 at 850 (4/16/07 at 72).

⁷⁸ Ex. 24 at 595.

⁷⁹ Ex. 1 at 1399, 1407-09, 2532.

⁸⁰ Ex. 1 at 1399, 1407-09, 2532.

⁸¹ Ex. 24 at 672.

⁸² Ex. 24 at 672.

Brendan repeated this recantation at every opportunity. Following his arrest, Brendan told his court-appointed lawyer that he was innocent at every meeting.⁸³ And in the weeks after his arrest, he also told his mother over recorded jail phone calls – when she asked “how you came up with...all this shit if it ain’t true” – that he had been “guessing” during the interrogation just like “I do with my homework.”⁸⁴ When asked about his interrogation at trial, 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.”⁸⁵ Even after being convicted, when asked what he wanted to tell the judge before being sentenced, Brendan said: “Just that I didn’t do it and I couldn’t do nothing like that.”⁸⁶

Brendan’s confession and convictions have been viewed with something approaching disbelief by four federal judges, all of whom supported relief for him. According to Chief Judge Diane Wood of the United States Court of Appeals for the Seventh Circuit, Brendan’s interrogation featured “[p]sychological coercion, questions to which the police furnished the answers, and ghoulish games of ‘20 Questions’ in which Brendan Dassey guessed over and over again before he landed on the ‘correct’ answer (i.e., the one the police wanted).”⁸⁷ At oral argument, she also commented that it “made my skin crawl watching that video...[Brendan] was obviously racking his brain about how he can answer in a way they will like.”⁸⁸ According to Judge Ilana Rovner, Brendan’s confession was a veritable “litany of inconsistencies – shirts that changed color, fires that began and ended at different times, garbage bags that sat in burning fires without melting, trucks that were seen in garages and then not seen in garages, bloody crime scenes without a trace of blood remaining, metal handcuffs that left no marks on the bed posts, etc.”⁸⁹ Try as she might, Judge Rovner could make no sense of Brendan’s story: “If one sits in front of the taped confession with a legal pad and tries to sketch out the details and timeline of the crime, the resulting map is a jumble of scratch-outs and arrows that grows more convoluted the more Dassey speaks.”⁹⁰ As for the coercive effect of Brendan’s interrogation, Judge Rovner likened the officers’ subtle but relentless tactics to “death by a thousand cuts.”⁹¹

For his part, Magistrate Judge William Duffin of the Eastern District of Wisconsin declared that his review of the record had led him to develop

significant doubts as to the reliability of Dassey’s confession. Crucial details evolved through repeated leading and suggestive questioning and generally stopped changing only after the investigators, in some manner, indicated to Dassey that he finally gave the answer they were looking for. Purportedly corroborative details could have been the

⁸³ Ex. 2 at 137 (1/15/10 at 137), 237 (1/15/10 at 237), 284 (1/19/10 at 11).

⁸⁴ See MAKING A MURDERER, Season One Episode 4, transcript available online at https://www.springfieldspringfield.co.uk/view_episode_scripts.php?tv-show=making-a-murderer-2015&episode=s01e04.

⁸⁵ Ex. 1 at 2120 (4/18/07 at 77).

⁸⁶ Ex. 1 at 2626 (8/2/07 at 13).

⁸⁷ Ex. 14 at 40.

⁸⁸ *En Banc* Oral Argument, *Dassey v. Dittmann* 16-3397 (September 26, 2017), available online at <http://media.ca7.uscourts.gov/oralArguments/oar.jsp?caseyear=16&casenumber=33&listCase=List+case%28s%29>

⁸⁹ Ex. 13 at 41.

⁹⁰ Ex. 13 at 59.

⁹¹ Ex. 13 at 42.

product of contamination from other sources, including the investigators' own statements and questioning, or simply logical guesses, rather than actual knowledge of the crime.⁹²

These federal judges' skepticism has long been shared by some Wisconsin judges, including the Hon. Judge Patrick Willis of Manitowoc County. In the course of presiding over Steven Avery's 2007 trial and sentencing, Judge Willis had occasion to review Brendan's interrogation video and confession. Afterwards, Judge Willis took the extraordinary step of writing and placing in Avery's case file a letter asking "any future readers" to "keep the following in mind when reading...Mr. Dassey's statements":

1. By stipulation, the court gave no consideration to the version of the facts attributed to Mr. Dassey. [...]
2. Brendan Dassey did not testify at the trial in this [Steven Avery's] case. The jury was not required to assess the credibility of any statements attributed to him.
3. Charges of first-degree sexual assault and kidnapping, which were added to the Information [against Mr. Avery] after the police interviewed Mr. Dassey, were dismissed by the State before trial.
4. The account attributed to Mr. Dassey...is based on one of his interviews with police. He was interviewed by the police on other occasions during which he gave somewhat different accounts of what happened. He also at some pointed [sic] recanted his statements admitting involvement in the crimes.
5. The physical and forensic evidence introduced at Mr. Avery's trial failed to provide corroborating support for a number of the allegations attributed to Mr. Dassey. As one significant example, there was no physical or scientific evidence demonstrating that Teresa Halbach was ever present in Mr. Avery's trailer.
6. An expert witness called on behalf of Mr. Dassey at his trial, one Dr. Gordon, and a Dr. White retained by Avery's counsel, both called into question much of the information provided by Brendan Dassey because of his intellectual limitations, his susceptibility to suggested answers, and the nature of investigative techniques used.⁹³

It is worth underscoring, as Judge Willis did, that the rape portion of Brendan's confession was so unsubstantiated that the State of Wisconsin voluntarily dismissed sexual assault charges against Avery before his trial, because there was no admissible evidence in his case that any sexual assault had ever occurred. To date, therefore, Brendan remains the only person tried for raping Teresa Halbach, even though his confession – if credited – would mean that Avery was the one who trapped, tied up, and initiated an assault on Ms. Halbach, and even though all of the DNA evidence in Avery's bedroom excluded Brendan and Halbach. Similarly, since Avery's jury acquitted him of mutilation of a corpse, Brendan remains the only person convicted of burning Halbach's body, even though his confession states that Avery planned and undertook the burning and even though portions of Halbach's incinerated remains were found in Avery's backyard bonfire pit.

Brendan's counsel raised the problems with his confession in his state-court appeals and, subsequently, in federal court. The state court denied Brendan relief, but the federal court in Milwaukee

⁹² Ex. 7 at 72-73.

⁹³ Ex. 49.

found that the state court had acted unreasonably and ordered that Brendan either be retried without his confession (i.e., without the only piece of evidence incriminating him) or released.⁹⁴ That decision was affirmed on appeal,⁹⁵ but the *en banc* U.S. Court of Appeals for the Seventh Circuit subsequently reversed the decision granting Brendan relief in a 4-3 vote.⁹⁶

This outcome is attributable to a yawning gap in confession law that forces the obvious problems with Brendan Dassey's confession to the case's legal periphery. Under the increasingly outdated view of confession law that prevailed in Brendan's appeals, courts are "not requir[ed]" to undertake an "analysis of a confession's reliability."⁹⁷ Under this view, even a defendant who definitively proves his confession false is entitled to no constitutional relief from the courts. The only operative legal question under this view is whether a confession was "coerced" – i.e. extracted from the suspect against his "free will" without reference to its truth or falsity.

In this case, four judges of the *en banc* federal court of appeals found that the state court had not been unreasonable to conclude that Brendan had not been forced to confess for three reasons: he had not been physically abused, he had been "seated on an upholstered couch" in a "comfortable setting," and police had offered him a soda during questioning.⁹⁸ Under this view of constitutional doctrine, it was acceptable for the state court to ignore the patent unreliability of Brendan's confession, as well as the manipulative tactics that characterized the interrogation — especially the continual promises of "help" as long as Brendan "fill[ed] in those gaps." Of the resulting decision, Chief Judge Diane Wood wrote in dissent: "Dassey will spend the rest of his life in prison because of the injustice this court has decided to leave unredressed."⁹⁹

This Board, however, is unconfined by the legal technicalities that were believed to tie the federal courts' hands. This Board is free to recommend that the Governor exercise his unique ability to redress an injustice that the federal courts, by the slimmest of margins, deemed themselves unable to fix. Brendan's confession is false, and his convictions should not stand.

II. This Board can have no confidence in the process leading to Brendan Dassey's conviction.

Despite the clear problems with the case against Brendan, his confession led to conviction because his trial was marked by a series of rare but serious flaws that prevented those problems from being fully and fairly aired. Those procedural flaws relate primarily, though not exclusively, to Appleton attorney Len Kachinsky's representation of Brendan before trial.

In the words of Milwaukee-based Magistrate Judge William Duffin, Kachinsky's representation of Brendan amounts to one of the most "indefensible" instances of attorney "misconduct" ever seen in this state or, indeed, around the country.¹⁰⁰ Throughout his representation of Brendan, Kachinsky proceeded under the assumption that his client was guilty – despite Brendan repeatedly telling him

⁹⁴ Ex. 7 at 90.

⁹⁵ Ex. 13.

⁹⁶ Ex. 14.

⁹⁷ Ex. 14 at 36.

⁹⁸ Ex. 4 at 4; ex. 14 at 2.

⁹⁹ Ex. 14 at 40.

¹⁰⁰ Ex. 7 at 90.

otherwise – and sought to develop evidence incriminating Brendan in order to pressure him to plead guilty and testify against Steven Avery.

Kachinsky's misconduct began shortly after his appointment as Brendan's counsel. *Days before he spoke with or met his client*, and long before he reviewed Brendan's videotaped interrogation, he began making statements to the press describing Brendan as "morally and legally responsible" and "heavily influenced by someone that can only be described as something close to evil incarnate."¹⁰¹ When Brendan finally had a chance to meet with Kachinsky on March 10, 2006, Brendan stated that he was innocent;¹⁰² Kachinsky responded by telling the press that same day that Brendan was "remorseful" and blaming Avery for "leading [Brendan] down the criminal path."¹⁰³ Throughout his representation, Kachinsky continued making similar inculpatory public statements, even while Brendan continued maintaining his innocence. Kachinsky eventually testified that his purpose in making these statements was to get his client's family "accustomed" to the idea that Brendan was going to plead guilty.¹⁰⁴

Trying to convince his lawyer to defend him, Brendan asked for a polygraph examination – a request that the nation's leading police interrogation trainers consider "an indication of possible innocence."¹⁰⁵ Brendan did take the polygraph — and one of the nation's leading polygraph experts confirmed that Brendan had passed with a very high score, "strongly indicat[ing] that Brendan was being truthful when he denied involvement in Teresa Halbach's murder."¹⁰⁶

Kachinsky, meanwhile, hired a defense investigator, Michael O'Kelly. But instead of interviewing defense witnesses before their memories faded, moving to preserve home videogame console data that might have confirmed Brendan's alibi, or consulting with interrogation and confession experts, Kachinsky and O'Kelly worked to create evidence of Brendan's *guilt*. For instance, O'Kelly developed a theory that Brendan had hidden a knife inside a junked salvage yard vehicle; incredibly, Kachinsky then emailed this tip to the prosecution, without telling Brendan or seeking his permission.¹⁰⁷ Kachinsky even told the prosecution that he thought this tip would "go a long way toward getting you" probable cause for another search of the salvage yard, although – apparently conscious that he was betraying his own client – he asked that his name be kept out of any search warrant affidavit.¹⁰⁸ Obviously, the discovery of such a knife – an item that, according to Brendan's confession, had been used to attack Halbach – would have been profoundly damning. Sure enough, the State did conduct another search following this tip; but no knife, or anything else incriminating, was found.¹⁰⁹

¹⁰¹ Ex. 2 at 1343 (1/22/10 at 228); ex. 30.

¹⁰² Ex. 2 at 137 (1/15/10 at 137), 237 (1/15/10 at 237), 284 (1/19/10 at 11).

¹⁰³ Ex. 2 at 131, 134 (1/15/10 at 131, 134); ex. 31.

¹⁰⁴ Ex. 2 at 136-37 (1/15/10 at 136-37).

¹⁰⁵ Ex. 2 at 138 (1/15/10 at 138); Inbau, Reid, Buckley, & Jayne, *Criminal Interrogation and Confessions* (3rd ed. 2013), 267.

¹⁰⁶ Ex. 53.

¹⁰⁷ Ex. 32.

¹⁰⁸ Ex. 32.

¹⁰⁹ Ex. 2 at 1203 (1/22/10 at 88).

Kachinsky and O’Kelly also devised a plan to have O’Kelly interrogate Brendan until he made further admissions, and to capture those admissions on videotape for the prosecution.¹¹⁰ As they were developing this plan, O’Kelly wrote an email to Kachinsky referring to Brendan’s family in the following terms: “This is where the devil resides in comfort. I can find no good in any member. These people are pure evil.”¹¹¹ O’Kelly went on to quote a friend as having said, “This is a one branch family tree. Cut this tree down. We need to end the gene pool here.”¹¹²

Even while he was making plans with his investigator to obtain a second confession from Brendan, Kachinsky was appearing in court to litigate whether the State would be allowed to use Brendan’s original confession against him. As Kachinsky later testified, he expected the court to admit Brendan’s confession. He decided, therefore, that O’Kelly should interrogate Brendan on the same day that the court announced its decision. As Kachinsky later admitted, he thought that the sixteen-year-old special education student would be at his most “vulnerable” after receiving such a blow.¹¹³

Hours after the court indeed issued a ruling admitting Brendan’s confession against him, therefore, O’Kelly undertook his own videotaped interrogation of Brendan in the juvenile detention center.¹¹⁴ O’Kelly began by falsely telling Brendan that he had failed his polygraph and that the results indicated that “[p]robability of deception is point 98. That’s 98%.”¹¹⁵ Building on this lie, O’Kelly then asked Brendan if he was sorry for what he did, to which Brendan responded, “I don’t know, because I didn’t do anything.”¹¹⁶ O’Kelly answered: “If you’re not sorry, I can’t help you...Do you want to spend the rest of your life in prison? You did a very bad thing.”¹¹⁷ On the other hand, O’Kelly said that if Brendan “cooperate[d],” O’Kelly would “try and help [Brendan]” so that he could “get out and have a family some day.”¹¹⁸ After Brendan continued to insist that “I didn’t do nothing,” O’Kelly replied, “Brendan, you have the details. You gave the details to the police department.” “I agreed [with] whatever they said,” Brendan answered, adding that “they told me that they knew it all what had happened already.” When O’Kelly countered that “you gave them information that they didn’t already have,” Brendan answered: “That’s ‘cause I was guessing.”¹¹⁹ Over and over again, as O’Kelly confronted him, Brendan repeatedly told him that he was innocent and that his confession was false. Remarkably, Brendan’s childishly simple but unavailing protestations – that he was only repeating what the police said, and that he added extra detail by guessing – tracked closely the legal opinions that would be issued over a decade later by Magistrate Judge Duffin and, subsequently, three judges of the Court of Appeals for the Seventh Circuit – not to mention the professional opinions of the various psychological, juvenile justice, and police interrogations experts who have given in-court testimony or written *amicus* briefs.

¹¹⁰ Ex. 33.

¹¹¹ Ex. 33.

¹¹² Ex. 33.

¹¹³ Ex. 2 at 244 (1/15/10 at 244).

¹¹⁴ Ex. 35.

¹¹⁵ Ex. 34 at 1.

¹¹⁶ Ex. 2 at 2.

¹¹⁷ Ex. 2 at 2.

¹¹⁸ Ex. 34 at 3.

¹¹⁹ Ex. 34 at 4.

After much back-and-forth, during which Brendan wrote out a statement denying involvement in the murder, O’Kelly finally succeeded in changing his client’s story. “[R]ight now we’re at the stage that I can help you,” O’Kelly told Brendan. “But I can’t help you with those words that you wrote down. Those words, I can’t help you at all. If you want to stay in prison the rest of your life, then let’s just take those words and say that’s it.”¹²⁰ Eventually, Brendan again began agreeing that he had been involved in the crime, although the story he gave was wildly different – though no more plausible or corroborated – than his original confession.¹²¹

At the end of this interrogation, Kachinsky gave O’Kelly permission to disclose the substance of Brendan’s new statement to police and arranged for Brendan to undergo a second police interrogation the very next day, despite Kachinsky’s inability to accompany his disabled client due to a scheduling conflict. At that interrogation, an uncounseled Brendan agreed to yet a third story that was so muddled and incredible that it was never used against him.¹²² D.A. Kratz, who had hoped that Brendan would clear up the confused narrative that had emerged in his first confession, later called this last interrogation a “fiasco.”¹²³

A few weeks later, in open court, Brendan asked the Hon. Judge Fox to appoint him a new lawyer.¹²⁴ When the judge directed Brendan to “[t]ell me why you want to change lawyers at this point,” Brendan responded: “Because...I think he thinks I’m guilty.”¹²⁵ Not knowing of Kachinsky’s outrageous behavior, the court denied this request. It subsequently came to Judge Fox’s attention, however, that the State Public Defender’s Office had decertified Kachinsky from handling murder cases because of his “indefensible” decision to allow Brendan to be interrogated alone, thus causing the judge to revisit the matter.¹²⁶ After being told by Brendan in court that “I think he’s not helping me very much,” the court removed Kachinsky from the case.¹²⁷ No one knew about the rest of Kachinsky’s and O’Kelly’s actions, however -- including the detention center interrogation of their own client or the knife “tip” to prosecutors -- until those actions were discovered after trial by undersigned counsel.

But while Kachinsky was removed from the case before trial started, the damage was done. Brendan’s original confession was coming into evidence against him; no one had bothered to develop a defense case; the prosecutor’s belief in Brendan’s guilt had been falsely reinforced by Brendan’s own attorney; and Brendan’s ability to trust and cooperate with defense attorneys had been nearly destroyed. In short: Because of Len Kachinsky’s actions, Brendan’s ability to defend himself was kneecapped from the very beginning. Indeed, even the Wisconsin Solicitor General’s Office refused to

¹²⁰ Ex. 34 at 5.

¹²¹ Ex. 34.

¹²² Ex. 25.

¹²³ Ex. 2 at 97.

¹²⁴ Ex. 1 at 168 (6/2/07 at 5).

¹²⁵ Ex. 1 at 168 (6/2/07 at 5).

¹²⁶ Ex. 37.

¹²⁷ Ex. 1 at 210, 219 (8/25/06 at 15, 24).

defend Kachinsky's behavior during the appeals process, instead arguing in essence that because Kachinsky's actions were so unheard-of, the law didn't provide a clearly established remedy.¹²⁸

At trial, Brendan was represented by two different court-appointed attorneys – Mark Fremgen, who had never tried a murder case before, and Raymond Edelstein. Despite gamely attempting to make the most of what was now a nearly unwinnable case, these attorneys made some key errors that further paved the road to conviction. In particular, they failed to play for the jury the final few minutes of Brendan's interrogation video in which he told his mother that he had confessed because the police "got to my head." They also failed to call any expert in police interrogations or draw the jury's attention to the many instances of coercion and fact-feeding during the interrogation. These errors were particularly egregious given that Beloit College professor Lawrence White, a police interrogation and confessions expert, had already prepared a report for Steven Avery's defense team finding Brendan's confession to be unreliable.¹²⁹ Even though Avery's legal team referred Dr. White to Brendan's attorneys before trial, they never called him to testify.

For its part, the State of Wisconsin was represented throughout these proceedings by then-Calumet County D.A. Ken Kratz, whose law license was suspended after Brendan's conviction due to a notorious sexting and abuse-of-power scandal.¹³⁰ Among other things, Kratz gave a widely criticized, televised pre-trial press conference, in which he recounted the details of Brendan's confession in graphic and sexualized detail for potential jurors to hear, all the while vouching for the confession's truth.¹³¹ He also used two conflicting theories at Avery's trial and Dassey's trial; while Brendan was tried as Avery's accomplice, Kratz told the jurors in Avery's case that only Avery was responsible. "Physical evidence, the DNA evidence, the eyewitness testimony, the scientific evidence, the big fire that Mr. Avery had, common sense all point to one person," he told the Avery jurors. "It's not a difficult decision that you have to make, because everything in this case point[s] towards one person, towards one defendant."¹³² A few months later, he prosecuted Brendan under the theory that there were in fact two perpetrators: Steven Avery and Brendan Dassey.

Finally, during Brendan's trial, prosecutors told jurors that "people who are innocent don't confess."¹³³ This, of course, is a wildly inaccurate statement and one that the prosecutors knew to be false. It is refuted by hundreds of proven false confession cases, many of which feature interrogations and confessions that closely resemble Brendan's. It is also refuted by the Wisconsin Supreme Court, which recognized in 2005's *State v. Jerrell C.J.* – a case with which the prosecution should have been familiar – that false confessions are "a leading cause of wrongful convictions" and that juveniles and the

¹²⁸ *En Banc* Oral Argument, *Dassey v. Dittmann* 16-3397 (September 26, 2017), available online at <http://media.ca7.uscourts.gov/oralArguments/oar.jsp?caseyear=16&casenumber=33&listCase=List+case%28s%29>

¹²⁹ Ex. 50.

¹³⁰ *Ex DA Ken Kratz's Law License Suspended in Sexting Scandal*, June 6, 2014, at <https://www.cbsnews.com/news/ex-da-ken-kratzs-law-license-suspended-in-sexting-scandal/>.

¹³¹ *See, e.g.*, Steven Drizin, *Theft by Press Conference*, Jan. 29, 2016, at https://www.huffpost.com/entry/theft-by-press-conference_b_9108060.

¹³² Ex. 36 at 118-19.

¹³³ Ex. 1 at 2588.

mentally impaired are particularly likely to falsely confess.¹³⁴ And it is refuted by a U.S. Supreme Court brief filed in Brendan’s case by more than sixty federal and state prosecutors, including 18 former United States Attorneys. These prosecutors told the high Court that “every experienced prosecutor knows” that “sometimes innocent people do confess” and urged the Court to overturn Brendan’s conviction and release him from prison.¹³⁵ The jurors in this case, however, never heard this reality. They heard only a poorly defended case and, deprived of the information they needed to do justice, returned a verdict that has been decried around the world.

III. This Board can have no confidence in the justness of, or the continuing need for, Brendan Dassey’s life sentence.

Following a pretrial and trial process marked by severely problematic evidence and starkly inadequate defense advocacy, Brendan Dassey was sentenced to life in prison with no parole eligibility until November 1, 2048. Having served approximately 13 years behind bars, Brendan remains incarcerated at the Oshkosh Correctional Institution, serving his remaining homicide sentence.

Even if this Board were to believe that Brendan had some degree of involvement in the crimes against Ms. Halbach, it is nonetheless clear that a sentence of life is no longer appropriate. In 2016, Judge Duffin reviewed arguments for and against Brendan Dassey’s freedom and ordered his immediate release on his own recognizance, i.e., without posting any monetary bond.¹³⁶ Judge Duffin’s decision was based not only on the weakness of the case against Brendan, but also on the absence of any prior criminal record and Brendan’s “exceedingly benign” prison record.¹³⁷ Indeed, as of 2019, Brendan’s thirteen-year prison record includes only a handful of infractions of the most minor variety imaginable: (1) taking three pieces of French toast at mealtime instead of two;¹³⁸ (2) obtaining five packets of ramen noodle soup from his “next door neighbor” because, in Brendan’s words, “I was hungry”;¹³⁹ (3) being found in possession of a stick used to stuff a teddy bear that he had handmade for his mother;¹⁴⁰ (4) being found, at age 29, in possession of a picture described as sexual in nature by prison staff;¹⁴¹ and (5) being found in possession of a checkerboard that had been repaired with Scotch tape and using a prison form to keep score during a game of checkers.¹⁴² This stunningly nonviolent record speaks volumes about Brendan’s character.

Indeed, Brendan’s gentle character has been proven time and again over the course of thirteen years’ incarceration, often under the most challenging of circumstances.¹⁴³ His prison records

¹³⁴ *State v. Jerrell C.J.*, 2005 WI 105 at P104, 283 Wis. 2d 145, 699 N.W.2d 110.

¹³⁵ Ex. 17 at 2.

¹³⁶ Magistrate Judge Duffin’s order releasing Brendan was stayed by the United States Court of Appeals for the Seventh Circuit pending resolution of the State’s appeal.

¹³⁷ Ex. 8.

¹³⁸ Ex. 47 at 112.

¹³⁹ Ex. 47 at 23, 26.

¹⁴⁰ Ex. 47 at 109.

¹⁴¹ Ex. 47 at 111.

¹⁴² Ex. 47 at 27.

¹⁴³ See, e.g., *Inviting Trouble? Attacks at Portage Prison Blamed on Staff Shortages*, Portage Daily Register (Jul. 31, 2015), available at http://www.wiscnews.com/portagedailyregister/news/local/article_7e741ff7-b393-5e85-a007-d01bd09b22b0.html (attributing severe inmate violence at Columbia

consistently describe him as a pleasant man with “excellent” institutional adjustment who always “works in a cooperative manner with staff and other offenders” and “displays responsible behavior.”¹⁴⁴ In a 2016 psychological report, his evaluators observed “smiling, light-hearted joking, and [a] pleasant demeanor.”¹⁴⁵ As documented by the Department of Corrections, he enjoys receiving “connect the dots” game books in the mail.¹⁴⁶ To both his own credit and the credit of the Wisconsin Department of Corrections, Brendan was able to earn his HSED on October 1, 2010.¹⁴⁷ In 2018, Brendan was recommended for a transfer out of maximum security and into a medium security institution, which occurred on April 3, 2019.¹⁴⁸

While incarcerated, Brendan has performed a number of jobs that demonstrate the trust placed in him by prison staff. He has been regularly asked by guards, for example, to push the wheelchairs of sick or aging inmates who needed assistance with their movement across the prison. During weekly cell cleanings, Brendan has also been tasked with helping his fellow inmates by bringing them cleaning materials; for those inmates who declined the opportunity to clean their cells, he was entrusted with the job of securely closing their cell doors. He was let out of his cell five days a week to help fold and distribute clean laundry and to scrub the prison showers with a brush. Brendan looks forward to continuing similar work activities at his new, medium-security prison.

When not working, Brendan spends his time participating in weekly visits from family and friends, responding to letters, coloring pages from coloring books, watching television and listening to the radio. While he has spent many birthdays behind bars, his outlook, attitude, and interests remain those of a younger person; for example, he is a steadfast Pokémon fan.¹⁴⁹ Brendan regularly participates in prison fundraisers held in honor of Victim Awareness Week and directs money he receives from friends and family to those charity efforts. Indeed, Brendan speaks with great pride of having donated money from his prison account to victim-focused organizations, because “it’s the right thing to do.” In order to help the reader understand more about Brendan Dassey’s personal characteristics, this petition is accompanied by a set of coloring pages that he colored in, as well as a handwritten letter from Brendan to Governor Evers.¹⁵⁰ Letters of recommendation are attached as Exhibit 57.

That Brendan’s peaceable nature justifies release is further supported by the fact that Brendan was offered plea deals before trial that would have made him eligible for release after as few as fifteen years in prison. Even after Steven Avery’s conviction, Brendan was still made a series of no-strings-attached offers that would have resulted in a decades-shorter sentence. Former D.A. Kratz has published his view that sixteen-year-old Brendan rejected those offers due to pressure from his family and added that “[l]eft to his own devices, [Brendan] never would have raped or murdered Teresa

Correctional Institution, where Petitioner Dassey is incarcerated, to staff shortages and significant overcrowding).

¹⁴⁴ Ex. 47 at 15, 17, 44, 62.

¹⁴⁵ Ex. 47 at 64-65.

¹⁴⁶ Ex. 47 at 73.

¹⁴⁷ Ex. 47 at 44.

¹⁴⁸ Ex. 47 at 76, 79.

¹⁴⁹ Ex. 55.

¹⁵⁰ Ex. 55, 56.

Halbach” absent his uncle’s influence.¹⁵¹ “Brendan is a victim in his own way,” Kratz continued, “and I have a lot of sympathy for him. I’ve said that for years. There is almost universal belief, among law enforcement, prosecution, defense, and court officials, that Brendan Dassey was no murderer.”¹⁵²

As a matter of policy, juvenile life sentences like Brendan’s are being shortened around the country, as courts, prosecutors, and others are recognizing that such sentences are out of step with the inherent redeemability and reduced culpability of children. In 2012, the U.S. Supreme Court abolished sentences of juvenile life without the possibility of parole.¹⁵³ It explained that “the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes,” for three reasons. First, children lack maturity and have an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable than adults to negative influences and outside pressures, including from their family and peers. And third, a child’s character is not as well formed as that of an adult, meaning that children are inherently capable of rehabilitation.¹⁵⁴ Since 2012, nearly 400 people previously sentenced to life in prison for crimes committed as children have been released across the nation, including in Wisconsin.¹⁵⁵ A majority of states now ban life without parole for children or have no one serving the sentence.¹⁵⁶

Should Brendan Dassey be released from prison, his legal team has arranged for a wide array of support – educational, vocational, therapeutic, and medical -- to be provided by a team of clinical social workers and others providers within the State of Wisconsin as detailed in the attached re-entry plan. The attached plan is designed to give the Governor utmost confidence that Brendan Dassey will be well supported in a peaceful and productive return to society.¹⁵⁷

IV. The exercise of clemency in a case like Brendan Dassey’s finds precedent both within Wisconsin and in other states.

The exercise of the clemency power in cases like Brendan’s – an act of profound grace and mercy – is rooted not only in the Wisconsin Constitution, but also in historical precedent.

¹⁵¹ KEN KRATZ, AVERY: THE CASE AGAINST STEVEN AVERY AND WHAT MAKING A MURDERER GETS WRONG 118-19 (Alexa Stevenson ed., 2017).

¹⁵² KEN KRATZ, AVERY: THE CASE AGAINST STEVEN AVERY AND WHAT MAKING A MURDERER GETS WRONG 118-19 (Alexa Stevenson ed., 2017).

¹⁵³ *Miller v. Alabama*, 567 U.S. 460 (2012).

¹⁵⁴ *Id.*

¹⁵⁵ Campaign for Fair Sentencing of Youth, *Tipping Point: A Majority of States Abandon Life-Without-Parole Sentences for Children* (Dec. 3, 2018), available online at <https://www.fairsentencingofyouth.org/wp-content/uploads/Tipping-Point.pdf>; Eileen Hirsch & Martha Askins, *Juvenile Lifers: Reforming Extreme Sentences* in WISCONSIN LAWYER (Jan. 2019), available online at <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=92&Issue=1&ArticleID=26778>.

¹⁵⁶ Campaign for Fair Sentencing of Youth, *Tipping Point: A Majority of States Abandon Life-Without-Parole Sentences for Children* (Dec. 3, 2018), available online at <https://www.fairsentencingofyouth.org/wp-content/uploads/Tipping-Point.pdf>.

¹⁵⁷ Ex. 48.

As detailed in the attached exhibit, at least thirty-nine individuals who had been convicted of murder, manslaughter, or attempted murder have received executive clemency in Wisconsin.¹⁵⁸ Few of these cases, notably, appear to have featured the mitigating characteristics so prominent in Brendan's case. Few of the offenders had been juveniles at the time of their crimes; none appear to have raised claims of innocence; and it does not appear that any of them had disabilities that may have affected the outcomes of their cases.

This Board can also find strong precedent in the pardon recently granted by former Virginia Governor Terry McAuliffe to 18-year-old Robert Davis, a Virginia high-schooler who falsely confessed to arson-murder during a videotaped police interrogation on February 22, 2003.¹⁵⁹ While Robert is not mentally impaired in the same way as Brendan, his interrogation is nonetheless strikingly similar to Brendan's in several ways:

- Just as Brendan was interrogated for three hours on March 1, 2006 without a parent or lawyer present, Robert was interrogated for five hours without a parent or lawyer present.¹⁶⁰
- During their interrogations, both Robert and Brendan were lied to about the nature of the evidence against them. Just as Brendan was falsely told that Ms. Halbach's remains were found intermingled with the van seat that he had touched, Robert was falsely told that his DNA had been found at the scene of the murder.¹⁶¹
- Both were also threatened with penalties if they remained silent but promised leniency if they confessed. Brendan was told that the district attorney would charge him with involvement in Halbach's murder unless he "fill[ed] in the gaps," in which case he would have "nothin' to worry about." For his part, Robert was told that he would receive "ninety years" or even the "ultimate punishment" if he didn't confess, whereas if he did confess, he would "save your life" and "get out of this" by letting the judge know that "he cooperated."¹⁶²
- Neither was able to identify the correct cause of death during their confessions. Brendan wasn't able to identify that Ms. Halbach had been shot to death, instead offering numerous other inaccurate guesses like stabbing and choking, until police had to say, "I'm just going to come out and ask you, who shot her in the head?" Similarly, Robert confessed to "clubbing" the victim in his case, but police – who had discovered the victim's body with a knife embedded in her back – had to correct him: "I'm going to bring it out as a question, but I know the answer. Did you or did you not stab that woman?"¹⁶³
- Both were misled by police into thinking that confessing (even if falsely) would lead to their release. After confessing to murder, Brendan asked his interrogators twice when

¹⁵⁸ Ex. 53.

¹⁵⁹ Ex. 54.

¹⁶⁰ Lisa Provence, *Double Recantation: Is an Innocent Man in Jail for the Crozet Murders?*, THE HOOK, June 8, 2011, available online at <http://www.readthehook.com/90677/cling-lane-confession-fugett-says-innocent-man-jailed-murder>.

¹⁶¹ Ex. 54 at 36.

¹⁶² Ex. 54 at 13, 36.

¹⁶³ Ex. 54 at 43.

he would be returned to school, and even after being placed under arrest, he asked “Is it just for one day?” Similarly, after confessing to murder, Robert asked his interrogators, “Do you think by me telling you this, it’s going to get me home tonight?” After being told that the answer was no, Robert added: “Then why am I lying about all of this to you just so I can go home?”¹⁶⁴

Facing a life term in prison if convicted at trial, Robert Davis entered a pre-trial *Alford* plea in exchange for a sentence of 23 years.¹⁶⁵ In the following years, a good deal of public attention developed around Robert’s case, including after confession experts from both the law enforcement and psychological communities explained why Robert’s interrogation was likely to produce a false confession. *Dateline NBC* also featured Robert’s case on a two-hour-long special episode.¹⁶⁶ In late 2015, after Robert had served 13 years in prison, Governor McAuliffe issued him a conditional pardon – the rough equivalent of a commutation in Wisconsin – that enabled Robert’s immediate release. As of his release, Robert had served precisely the same amount of time that Brendan has now served. Following a productive and successful year of freedom, Robert returned to Governor McAuliffe with a second petition for an absolute pardon based on actual innocence, which was granted.¹⁶⁷ Since then, Robert has remained a law-abiding, fully employed, productive member of the Charlottesville, Virginia community to this day.¹⁶⁸ Every shred of evidence in Brendan’s case – every prison report over the course of thirteen years, and a life’s worth of records before the convictions – indicates that this Board can be confident that Brendan will have similar success if he receives clemency.

Nature of Clemency Relief Sought

Brendan Dassey requests that the Board and Governor grant him a full pardon on all three convictions. Based on the extraordinary circumstances shown in this application, Brendan requests a waiver of the rule limiting pardon eligibility to those who have already been released from prison, a waiver previous administrations have permitted. If this Board requires further information in order to consider this waiver request, undersigned counsel will promptly provide it upon request.

Should the Governor decline to issue a full pardon on all three convictions, Brendan asks at least for his freedom via a commutation of his remaining sentence(s) to time served with no remaining supervision time. This Board has not, to undersigned counsel’s knowledge, adopted any rules limiting eligibility for commutations.

Undersigned counsel also notes that any form of relief that does not include a pardon of the second-degree sexual assault charge will likely require Brendan to register as a sex offender, which in turn will make his place of residence public – potentially endangering his safety, due to the high-profile nature of this case, and causing greater community disruption than necessary. Therefore, Brendan asks

¹⁶⁴ Ex. 54 at 38.

¹⁶⁵ Lisa Provence, *Double Recantation: Is an Innocent Man in Jail for the Crozet Murders?*, THE HOOK, June 8, 2011, available online at <http://www.readthehook.com/90677/cling-lane-confession-fugett-says-innocent-man-jailed-murder>.

¹⁶⁶ Lisa Provence, *13 Years Later, Robert Davis’ New Life as a Free Man*, THE HOOK, Feb. 24, 2016, available online at <https://www.c-ville.com/13-years-later-robert-davis-new-life-free-man/>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

that any commutation of his remaining sentences be accompanied by a pardon of the second-degree sexual assault charge in order to alleviate the standard registry requirements. The sentence associated with that charge will be served, again, as of November 2019, making Brendan eligible for such a pardon due to the completion of the relevant sentence. And as described more fully above, a registration requirement in this case is unnecessary given the utter absence of any evidence to suggest that a sexual assault ever happened. The second-degree sexual assault charge against Brendan was disproven by the DNA evidence in Avery's bedroom, which excluded both Teresa Halbach and Brendan, and by the absence of any marks on the headboard indicating the use of restraints as described in the confession. Indeed, as Manitowoc County Judge Willis noted, the sexual assault allegations in this case were so unsubstantiated that all sex charges were dropped against Steven Avery before his trial – despite the prominent role that he played in Brendan's "confession."

Conclusion

Brendan Dassey was a sixteen-year-old, intellectually disabled child when he was taken from his school and subjected to a uniquely and profoundly flawed legal process. That process rightly sought justice for Teresa Halbach, but it wrongly took a confused child's freedom in payment for her loss. Such a debt can never be justly repaid with the currency of innocence.

A Governor's power to pardon and commute is a remarkable tool of individual conscience. The consciences of police, prosecutors, defenders, judges – and of millions of ordinary citizens around the world -- have been roused by Brendan Dassey's imprisonment. By his prison conduct and his gentle, patient insistence on his own innocence, Brendan has shown himself to be the rare person who is worthy of clemency. Therefore, Brendan Dassey, via undersigned counsel, implores the Board and Governor to issue a pardon on all three convictions. In the alternative, he asks the Board and Governor to commute his remaining sentences and allow him, at long last, to go to back home where he belongs.

*The quality of mercy is not strain'd;
It droppeth as the gentle rain from heaven
Upon the place beneath: it is twice blest;
It blesseth him that gives and him that takes:
'Tis mightiest in the mightiest: it becomes
The throned monarch better than his crown;
His scepter shows the force of temporal power,
The attribute to awe and majesty,
Wherein doth sit the dread and fear of kings;
But mercy is above this sceptred sway;
It is enthroned in the hearts of kings,
It is an attribute to God himself;*

And earthly power doth then show likest God's

When mercy seasons justice.

--- William Shakespeare, *The Merchant of Venice*, Act 4, Scene 1.