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No. 16-3397

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

BRENDAN DASSEY,
PETITIONER-APPELLEE,

v.

MICHAEL A. DITTMANN,
RESPONDENT-APPELLANT.

On Appeal From The United States District Court
For The Eastern District Of Wisconsin, Case No. 14-cv-1310,
The Honorable William E. Duffin, Magistrate Judge

REPLY BRIEF OF RESPONDENT-APPELLANT, MICHAEL A. DITTMANN

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 4

I. Dassey's Confession Was Entirely Voluntary, So The State Court's Finding Easily Withstands AEDPA's Deferential Review 4

II. Dassey Concedes That The Supreme Court Has Never Recognized A *Sullivan* Claim Like His, Precluding Relief Under AEDPA 21

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

A.M. v. Butler,
360 F.3d 787 (7th Cir. 2004) 15, 16

Burt v. Titlow,
134 S. Ct. 10 (2013) 6

Carter v. Thompson,
690 F.3d 837 (7th Cir. 2012) 5

Cuyler v. Sullivan,
446 U.S. 335 (1980) 21, 24

Etherly v. Davis,
619 F.3d 654 (7th Cir. 2010) .... *passim*

Fare v. Michael C.,
442 U.S. 707 (1979) .... *passim*

Fikes v. Alabama,
352 U.S. 191 (1957) 6

Gilbert v. Merchant,
488 F.3d 780 (7th Cir. 2007) 5

Hall v. United States,
371 F.3d 969 (7th Cir. 2004) 23

Hardaway v. Young,
302 F.3d 757 (7th Cir. 2002) 3, 5, 6

Henry v. Kernan,
197 F.3d 1021 (9th Cir. 1999) 9

Holland v. McGinnis,
963 F.2d 1044 (7th Cir. 1992) 5

Hopkins v. Cockrell,
325 F.3d 579 (5th Cir. 2003) 9

Johnson v. Trigg,
28 F.3d 639 (7th Cir. 1994) 5

Kansas v. Ventris,
556 U.S. 586 (2009) 22

Lyons v. Oklahoma,
322 U.S. 596 (1944) 6, 18, 20

Mickens v. Taylor,
535 U.S. 162 (2002) 21, 23

Minnesota v. Murphy,
465 U.S. 420 (1984) 6, 16

Missouri v. Seibert,
542 U.S. 600 (2004) 3, 6

O'Quinn v. Spiller,
806 F.3d 974 (7th Cir. 2015) 4, 6, 9

Rhodes v. Dittmann,
783 F.3d 669 (7th Cir. 2015) 22

Ruvalcaba v. Chandler,
416 F.3d 555 (7th Cir. 2005) 5, 8, 14

Samaron Corp. v. United of Omaha Life Ins. Co.,
822 F.3d 361 (7th Cir. 2016) 21

Sharp v. Rohling,
793 F.3d 1216 (10th Cir. 2015) 8, 13

Sotelo v. Ind. State Prison,
850 F.2d 1244 (7th Cir. 1988) 4

Strickland v. Washington,
466 U.S. 668 (1984) 23

U.S. ex rel. Riley v. Franzen,
653 F.2d 1153 (7th Cir. 1981) 5

United States v. Lall,
607 F.3d 1277 (11th Cir. 2010) 8

United States v. Montgomery,
555 F.3d 623 (7th Cir. 2009) 8

United States v. Preston,
751 F.3d 1008 (9th Cir. 2014) 9

United States v. Rutledge,
900 F.2d 1127 (7th Cir. 1990) 5, 7

United States v. Sturdivant,
796 F.3d 690 (7th Cir. 2015) 1

United States v. Villalpando,
588 F.3d 1124 (7th Cir. 2009) 5, 7, 8, 12

White v. Woodall,
134 S. Ct. 1697 (2014) 6, 13

Williams v. Taylor,
529 U.S. 362 (2000) 21

Yarborough v. Alvarado,
541 U.S. 652 (2004) 4, 6, 9

Statutes

28 U.S.C. § 2254 21

Treatises

Wayne R. LaFave, et al., Crim. Pro. (4th ed.) 5, 12

INTRODUCTION

Brendan Dassey spent four long months guilt-ridden over his participation in Teresa Halbach's brutal rape and murder. He lost "about 40 pounds" and "would just stare into space and start crying … uncontrollably." R.19-18:189–90. But he could not hold it all in. Two months after his crimes, Dassey revealed to his cousin that he had seen Halbach "pinned up in the bedroom" and had seen "body parts in a fire behind Avery's garage." R.19-17:13–14; 19-18:193–94.

Overcome by guilt, Dassey eventually admitted everything to the police on March 1, in an entirely voluntary confession. The investigators began that interview assuming Dassey was simply "a witness to something horrific," R.19-19:9, but it quickly became apparent that he was far more. When the investigators realized that parts of his story would be "very hard to admit," SA 63, they encouraged him to "get it all out" and "over with," SA 61, so that the "video in [his] head" would "go away," SA 57, 61. At points they "confronted [Dassey] with various details," *United States v. Sturdivant*, 796 F.3d 690, 692 (7th Cir. 2015), and when they sensed he was withholding the next part of his story, they pushed back and told him to be completely honest. As with many difficult admissions, the truth did not come all at once, but little-by-little, in fits of honesty, as Dassey slowly replayed and released the "video in [his] head." SA 57.

By the end of the interview, the pieces Dassey had provided wove a rich and detailed account. *See* Opening Br. 4–9. He described the colors he saw, SA 33 (Avery's "white shirt" and "red shorts"); SA 45 (Halbach's "white T-shirt" and "black" or "blue"

"button up" shirt);[1] SA 62 ("silver" handcuffs); SA 48 ("white and blue" rope); SA 135 ("black" handled knife); SA 46 ("black and red" mechanic's creeper), the sounds he heard, SA 50–51 (Halbach was "screaming" "help me"), the conversations he had, *e.g.*, SA 112 (Avery "asked … if [Dassey] wanted [to] fuck the girl"); SA 65 (Halbach "told [him] not to do it"); SA 65 (Avery said "[he] did a good job"); SA 95 (Avery "was glad that [Dassey] helped him"), the general timing of various events, *e.g.*, SA 51 (Dassey got the mail "[a]bout four, four thirty"); SA 107 (Avery took "about five minutes" to come to the door); SA 64 (Dassey raped Halbach for "five minutes"); SA 66 (Avery and Dassey watched TV for "[a]bout 15 minutes"), his motivations, SA 153 (he "wanted [to] see how [sex] felt"), and, most importantly, his observations of Teresa Halbach, SA 61–63 (she was "naked," "chained up to the bed," legs "spread apart a little bit"); SA 65 ("[S]he was cryin[g]."); SA 75 ("She was [still] breathing a little bit."); SA 148 (her "belly wasn't moving"); SA 127 (her body "smelled bad" as it burned).

Physical evidence corroborated many of these details. Dassey said Halbach was "chained up" to Avery's bed with "regular" handcuffs, SA 62; the police found handcuffs and leg irons in Avery's bedroom, R.19-16:17–18. Dassey said Avery shot Halbach "on the [ ] garage floor," SA 86; the police found a bullet fragment with Halbach's DNA on it in Avery's garage, R.19-16:62–66, 203–11; 19-17:74–76. Dassey said they used a mechanic's creeper to carry Halbach's body to the fire, SA 46; the police found a Black Jack creeper, R.19-16:60. Dassey said Avery used a "shovel and [a] rake" to

[1] Dassey's description of Halbach's clothes was not "contradict[ory]," Resp. Br. 3, 19; he simply said she wore *two* shirts. SA 45.

"push[ ] … around" the fire, SA 123–24; the police found a charred shovel and rake, R.19-17:190–93. Dassey said Avery got a "scratch" "on his finger," SA 94–95; Avery had a cut on his right hand, R.19-16:22–23. Dassey said they cleaned up blood stains with "paint thinner," and "bleach" from "[Avery's] bathroom," SA 98–99; the police found an empty bleach bottle in Avery's bathroom, R.19-16:19–20, paint thinner in his garage, R.19-16:59, and Dassey's bleach-stained jeans, R.19-15:174–75. Dassey said Avery put Halbach's car key "[i]n his dresser drawer," SA 91; the police found the key in Avery's bedroom, R.19-16:106.

Dassey now claims that the police fed him a false story and coerced him to adopt it by making false promises of leniency, sufficient to overcome his will. This claim has no basis in either fact or law. On the facts, the investigators clearly explained to Dassey that they "[could not] make any promises," SA 30, properly *Mirandized* him, and made no promises whatsoever. Opening Br. 34–37. As for the law, neither the district-court order nor the Response Brief identifies a single case—not one—finding a confession involuntary based upon "false promises of leniency" in circumstances similar to those here, on AEDPA or de novo review. RSA 77–83; Resp. Br. 32–46. And the few cases that the Response Brief adds to those already cited in the Opening Brief support the State's position. *See infra* pp. 8–9. In all—given the "rar[ity]" with which courts find *Mirandized* statements involuntary, *Missouri v. Seibert*, 542 U.S. 600, 609 (2004) (plurality), combined with AEDPA's "stringent" standard of review, *Hardaway v. Young*, 302 F.3d 757, 759 (7th Cir. 2002), combined with the extra "leeway" given to state courts for "ad hoc, fact-sensitive balancing

test[s]," Opening Br. 34 (quoting *O'Quinn v. Spiller*, 806 F.3d 974, 977 (7th Cir. 2015); *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)), combined with the absence of cases supporting the district court's holding, RSA 77–83; Resp. Br. 32–46; *infra* pp. 7–8, combined with substantial caselaw to the contrary, Opening Br. 28–33—the district court's order plainly cannot stand.

ARGUMENT

I. Dassey's Confession Was Entirely Voluntary, So The State Court's Finding Easily Withstands AEDPA's Deferential Review

A. The State's Opening Brief explained that the Wisconsin Court of Appeals' voluntariness finding was not only reasonable under AEDPA, it was entirely correct. The circumstances of Dassey's interview were unremarkable: the investigators obtained his mother's permission, conducted the interview in the middle of the day, used a standard-sized room with a couch, and offered food, beverages, and breaks. Opening Br. 34–36. Although Dassey was not in custody, or even a suspect, the investigators *Mirandized* him and recalled the warnings before asking questions. Opening Br. 35. During the three-hour interview (including breaks), the investigators spoke calmly, asked mostly open-ended questions, and did not threaten or intimidate Dassey. Opening Br. 35.

The State established that this Court has repeatedly upheld all of the techniques the investigators used. It was entirely permissible for the investigators to "encourage honesty," build "rapport," and "profess[ ] to know facts they actually did not have," SA 4. Opening Br. 29, 36 (citing *Etherly v. Davis*, 619 F.3d 654, 663 (7th Cir. 2010); *Sotelo v. Ind. State Prison*, 850 F.2d 1244, 1249 (7th Cir. 1988); *Holland v.*

McGinnis, 963 F.2d 1044, 1051 (7th Cir. 1992)). Importantly, the investigators never promised leniency and even explicitly told Dassey, "[w]e can't make any promises." SA 30. Nothing else they said offered a "*specific benefit* … in exchange for [ ] cooperation" amounting to "outright fraud." Opening Br. 29–30, 36–37, 39–41 (citing *Etherly*, 619 F.3d at 663–64; *United States v. Rutledge*, 900 F.2d 1127, 1131 (7th Cir. 1990)). The State provided many examples of similar non-specific statements held not to be "false promises of leniency." Opening Br. 29–30, 36–37, 39–41 (discussing *Fare v. Michael C.*, 442 U.S. 707, 727 (1979); *Etherly*, 619 F.3d at 658; *United States v. Villalpando*, 588 F.3d 1124, 1130 (7th Cir. 2009); *Rutledge*, 900 F.2d at 1128; and 2 Wayne R. LaFave, et al., Crim. Pro. § 6.2(c) at nn.104–05, 111–17 and text (4th ed.)).

The State also demonstrated that Dassey's age and mental abilities did not change the ultimate conclusion, by comparing the circumstances of Dassey's interrogation with those of many other juveniles, including minors with borderline intellectual disabilities. This Court has frequently upheld juvenile confessions where the police applied much more pressure than they did here. Opening Br. 31–33 (discussing *Carter v. Thompson*, 690 F.3d 837 (7th Cir. 2012); *Etherly*, 619 F.3d 654; *Gilbert v. Merchant*, 488 F.3d 780 (7th Cir. 2007); *Ruvalcaba v. Chandler*, 416 F.3d 555 (7th Cir. 2005); *Hardaway*, 302 F.3d 757; *Johnson v. Trigg*, 28 F.3d 639 (7th Cir. 1994); *U.S. ex rel. Riley v. Franzen*, 653 F.2d 1153 (7th Cir. 1981)).

The State then explained that the content of Dassey's confession confirmed its voluntariness, given the many times he resisted police suggestions and given the vast

amount of detail he provided in response to open-ended questions. Opening Br. 13–18, 30–31, 37–38 (citing *Minnesota v. Murphy*, 465 U.S. 420, 438 (1984); *Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944); *Fikes v. Alabama*, 352 U.S. 191, 195 (1957)).

Throughout, the State emphasized AEDPA's "stringent standard of review" and that state courts have extra "leeway" to apply "ad hoc, fact-sensitive balancing test[s]." Opening Br. 27, 34 (citing *Hardaway*, 302 F.3d at 759, 767–68; *O'Quinn*, 806 F.3d at 977; *Yarborough*, 541 U.S. at 664).

B. In his response, Dassey offers his theory of the interrogation, while ignoring the many hurdles he must overcome to prevail under AEDPA. He does not acknowledge that courts "rare[ly]" find "that a self-incriminating statement was 'compelled'" when "law enforcement authorities adhered to the dictates of *Miranda*," as they did here. *Seibert*, 542 U.S. at 609 (plurality) (citation omitted); SA 14–16, 28. Layered on top of that already high bar is AEDPA's "stringent standard of review," *Hardaway*, 302 F.3d at 759; Opening Br. 34, yet Dassey's short discussion of AEDPA does little more than assert that the state court's findings were "unreasonable," Resp. Br. 46–49. Nor does he respond to the principle that while AEDPA's standards are normally "difficult to meet," state courts have even "more leeway" to apply "ad hoc, fact-sensitive balancing test[s]," Opening Br. 34 (quoting *Burt v. Titlow*, 134 S. Ct. 10, 16 (2013); *O'Quinn*, 806 F.3d at 977; *Yarborough*, 541 U.S. at 664). He overlooks that only *Supreme Court* decisions count as "clearly established Federal law" under AEDPA, Opening Br. 27; *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014), never once citing the most analogous Supreme Court case, *Fare*, 442 U.S. 707, which the State

cited repeatedly, *see* Opening Br. 30, 31, 36, 39. Finally, he does not dispute that the environment of the interview (room, time, location, etc.) was entirely unobjectionable.

The issues Dassey does raise fall into four categories. First, he argues that the investigators did, in fact, falsely promise leniency. Second, he emphasizes his youth and mental abilities and disputes which of this Court's juvenile confession cases is most similar. Third, he disagrees that the content of his confession confirms its voluntariness. Fourth, and finally, he raises various factual objections to show that his confession was actually false. He is wrong on each point.

1. With respect to false promises of leniency, Dassey concedes that the rule is as described in the State's Opening Brief: only a "*specific benefit* … promised in *exchange* for … cooperation" can amount to "fraud," *Etherly*, 619 F.3d at 663–64 (emphases added). *See* Opening Br. 29–30, 36–37, 39–41; *accord* Resp. Br. 5, 30 ("These promises … guarantee[d] a specific benefit."), 42 (arguing that Dassey "expected a very specific benefit."). As the State explained, courts frequently hold non-specific or vague remarks *not* to be false promises, and thus unobjectionable. Opening Br. 29–30, 36–37, 39–41 (citing *Fare*, 442 U.S. 707; *Etherly*, 619 F.3d at 658; *Villalpando*, 588 F.3d at 1130; *Rutledge*, 900 F.2d at 1128)

Dassey does not respond with a single case finding a "false promise of leniency" from statements similar to the investigators' here. Nor does he meaningfully engage this Court's cases finding similar vague statements noncoercive. *E.g.*, *Rutledge*, 900 F.2d at 1128 ("all cooperation is helpful"); *Villalpando*, 588 F.3d at 1129 ("I'm going to go to bat for you."). And he does not even mention the most analogous Supreme

Court case, *Fare*, 442 U.S. 707, where the Court "held that a sixteen-year-old [can] make a statement intelligently and voluntarily, even without the presence of a friendly adult," *Ruvalcaba*, 416 F.3d at 561, and found comments similar to the investigators' "far from threatening or coercive," *Fare*, 442 U.S. at 727. Instead, Dassey derides the State for "color-matching," attempting to evade his lack of supporting caselaw. Resp. Br. 41.

The few cases that Dassey does cite do not support his position, and, instead, emphasize that only *explicit*, *specific* promises warrant closer review. In *United States v. Montgomery*, for example, an officer mistakenly told a suspect that he would "not … get 10 years," even though he actually "faced a mandatory minimum sentence of fifteen years." 555 F.3d 623, 628 (7th Cir. 2009). This Court held that the officer's "speculation about sentencing" was not a false promise because it "w[as] not tied to any confession," *id.* at 629; in other words, the officer did not "promise[ ] a lighter sentence … *in exchange* for a confession," *id.* at 632 (emphasis added). In *Sharp v. Rohling*, the police made a *very specific* assurance. After confessing to witnessing two others "attack, threaten with an axe, hog-tie, gag, and beat" someone (but before admitting her own involvement), the suspect asked the officer "if she was going to jail." 793 F.3d 1216, 1233–34 (10th Cir. 2015). The officer responded, "No, no, no, no, no, no, no, no, [no, no]." *Id.* at 1234 (brackets in original). Similarly, in *United States v. Lall*, the interrogating officer "explicitly assured [a suspect] that anything he said would not be used to prosecute him." 607 F.3d 1277, 1281, 1287 (11th Cir. 2010).

Importantly, none of these cases involved an unambiguous statement from the police that they "[could not] make any promises." SA 30 (emphasis added).[2]

With respect to the facts of this case, Dassey spins his own version of events, but cannot identify *any* specific promise that the investigators made, let alone with such certainty to overcome the state court's contrary factual finding on AEDPA review. *See Yarborough*, 541 U.S. at 664; *O'Quinn*, 806 F.3d at 977. Dassey has no responses for the investigators' caution that they "[could not] make any promises," SA 30, or for the *Miranda* warnings that "anything" Dassey said "can … be used against" him, which Dassey twice acknowledged. SA 15, 28. The State explained in its Opening Brief that the comments the district court focused on—Investigator Fassbender's comment, "you don't have to worry about things," and the multiple times the investigators said "[i]t's ok" and "we already know," RSA 77–83—do not meet the "specific promise" standard, *see* Opening Br. 40–41.

In recounting his version of events, Dassey does not use the investigators' words in the same way as the district court, but instead cobbles together his own patchwork of quotes, Resp. Br. 4, 29, 47 (citing SA 29). That Dassey and the district

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[2] The remaining cases Dassey cites, Resp. Br. 37–38, address a situation not alleged here—a clear false statement that the conversation was confidential. In *Hopkins v. Cockrell*, after a suspect endured "fifteen days in isolation and eight interrogations," an officer who was a "close friend" came in "to just 'talk'" and "assured [the suspect] that their conversation was confidential." 325 F.3d 579, 581, 584 (5th Cir. 2003). In *Henry v. Kernan*, the officers "deliberately violated [the suspect's] *Miranda* rights" by interrupting his "unequivocal[ ] request[ ] [for] an attorney" with questions, finally saying, "'Listen, what you tell us we can't use against you right now.'" 197 F.3d 1021, 1026–27 (9th Cir. 1999). And in *United States v. Preston*, the police "promised [the suspect] that they would not 'tell [his confession] to anybody,' and [his] statement would never leave the U.S. Attorney's file." 751 F.3d 1008, 1014 (9th Cir. 2014).

court cannot agree which statements combine "collectively" into a false promise only illustrates that there was no *specific* promise. And many of the quotes that Dassey relies upon are taken out of context and out of order.

Critically, Dassey omits that the investigators interviewed Dassey assuming he was just a witness. R.19-19:9. They had communicated this to him just days earlier, when they first spoke to him on February 27. Fassbender told Dassey that "people back at the sheriff's dept. … [think you] had something to do with it." R.19-24:4. Fassbender then explained their contrary view: "[Investigator Wiegert] [and] I are both going well ah he's a kid, he had nothing to do with this." R.19-24:4. Maybe "[Avery] got him out there to help build a fire and he inadvertently saw some things," but "it wouldn't be that [Dassey] actually helped him dispose of this body." R.19-24:4.

The investigators' statements on March 1 must be understood in this context. Fassbender began the interview by explaining that they thought Dassey "held back" in his prior statements out of fear of "be[ing] implicated" or "get[ting] arrested and stuff like that." SA 29. Fassbender then said, "Ok? And we understand that"—implying that those were very real possibilities. SA 29. He then explained that "the best way[ ] to … prove to us … [and] the courts … is that you tell the whole truth, don't leave anything out, don't make anything up … even if those statements are against your own interest … [or] might make you look a little bad or … more involved than you wanna be." SA 29. Again, these comments warned Dassey that the "courts" might get involved and that anything he said might be "against [his] own interest." SA 29. Fassbender encouraged Dassey to be honest *anyway* so that there would be "no doubt

[he was] telling the truth." SA 29. After Dassey acknowledged this point about honesty, Fassbender repeated that they thought "some things were left out or maybe changed *just a bit*." SA 29 (emphasis added). He then said, "*from what I'm seeing*, even if I filled those in, *I'm thinkin'* you're all right. Ok, you don't have to worry about things." SA 29 (emphases added). Fassbender carefully hedged these comments because he did not know what Dassey would tell them. He then said, "we know what [*Avery*] did [and] … *kinda* what happened to you … we just need to hear the whole story …. As soon as we get that … *I think* you're gonna be a lot more comfortable … if this goes to trial"—presumably referring to Avery's trial—"because it's probably going to come out." SA 29 (emphases added).

So, contrary to Dassey's account, the investigators *did not* communicate to him that "he would be 'all right' … even if the case 'goes to trial,' as long as he 'filled in' the blanks with 'statements … against [his] own interest.'" Resp. Br. 4, 29, 47 (citing SA 29). Rather, they urged him to "tell the whole truth," *even if* it might be "against [his] own interest," because the truth was "probably going to come out" anyway in Avery's "trial." SA 29.

Dassey also references various additional quotes that he claims show "many [false] promises [of leniency]," Resp. Br. 35–36, but he identifies no *specific* promises amounting to fraud, as the caselaw requires. For example, he invokes the remark that "the honest person is the one who's gonna get a better deal out of everything." Resp. Br. 35 (citing SA 29–30). This did not promise anything, *see Fare*, 442 U.S. at 727, but even if it did, it would have been *true*. Dassey was offered multiple deals,

both before and during his trial, *see* R.19-28:139, 226–27, one of which his counsel called a "very good offer," R.19-28:257, and multiple of which he recommended Dassey accept, R.19-28:213–15. Even Dassey concedes that "truthful promises are not coercive." Resp. Br. 42. Dassey also refers to the investigators' comments, "honesty here is the thing that's gonna help you" and "by talking with us, it's helping you," Resp. Br. 35 (citing SA 29–30), but the Supreme Court found nearly identical assertions "far from threatening or coercive," even when made to 16-year-olds, *Fare*, 442 U.S. at 727 ("a cooperative attitude would be to [the suspect's] benefit"). Even the district court admitted that the comment, "honesty is the only thing that will set you free," Resp. Br. 36 (quoting SA 30), is "just an idiom … and routinely understood not to be taken literally." RSA 81. And the statement, "Let's get it all out today and this will all be over with," Resp. Br. 36 (quoting SA 61), quite clearly refers to overcoming the immediate emotional and moral difficulty of confessing the truth, not to any future criminal charges. Dassey also mentions the investigators' remarks that "no matter what you did, we can work through that" and "we'll stand behind you no matter what you did," *E.g.*, Resp. Br. 35 (citing SA 30). Yet sandwiched directly between these two statements, the investigators said explicitly that they could not "make any promises." SA 30. Regardless, this Court has held that vague assurances like these are not false promises. *E.g.*, *Villalpando*, 588 F.3d at 1129 (officer stating that she would "go to bat" for the suspect and try to "work this out" was not a "solid offer of leniency"); *accord* LaFave, *supra*, § 6.2(c) at nn.111–17 and text (collecting cases).

Dassey briefly repeats the district court's theory that the investigators' statements "collectively and cumulatively" produced a false promise of leniency, even though "no single statement … in isolation" crossed the line. RSA 84; Resp. Br. 41. But the reason that "no single statement" was a promise of leniency, RSA 86, Resp. Br. 41, is because the investigators never offered a "*specific benefit* … in *exchange* for … cooperation," *Etherly*, 619 F.3d at 663–64 (emphases added). The accumulation of nonspecific statements does not change the analysis, especially on the facts of this case. And, in any event, neither the district court nor the Response Brief cites a single case—much less a Supreme Court case—applying a "cumulative effect" analysis to find a *specific* promise of leniency. That is the end of the analysis under AEDPA. *White*, 134 S. Ct. at 1702.

Dassey also argues that his reactions—in particular, his questions about when he could get back to school, SA 156–57—leave "no doubt" that he "thought he had been offered a virtual get-of-jail-free card." Resp. Br. 37. Yet Dassey's reaction is nothing like that of the suspect in the Tenth Circuit's decision in *Sharp*, which Dassey invokes repeatedly. Resp. Br. 6, 30, 38. The officer there unequivocally "promised [the suspect that] she would not go to jail." 793 F.3d at 1233–35; *supra* p. 8. When he nevertheless arrested her, she was "surprised and angry," said "[t]his is bullshit," and "accused [the officer] of lying and trickery" because she "thought her cooperation would make her a witness, not a defendant." *Id.* at 1221, 1235. Here, when informed that he was going to be arrested, Dassey's first reaction was, "Does my mom know?" SA 157. Shortly thereafter, the investigators asked whether he "underst[ood] that [he

was] under arrest." SA 157. Dassey nodded "yes" and requested to call his girlfriend to "tell her [he] couldn't come." SA 157. The investigators then said, "Did you kinda … figure[ ] this was coming?" SA 157. Dassey nodded yes, and nodded again when asked for confirmation. SA 157. Only then did Dassey ask, "Is it only for one day?" SA 157. As the State pointed out in its Opening Brief, the fact that Dassey did not fully appreciate the gravity of his crimes is consistent with his own telling of how he committed them. Opening Br. 41–42 (noting that he described drinking a soda and watching TV in the middle of the rape and murder). Dassey's failure to grasp the seriousness of his crimes is certainly not "eviden[ce]" that he "understood [ ] a bargain to have been struck." Resp. 30.

2. With respect to Dassey's age and mental abilities, the Supreme Court has "held that a sixteen-year-old [can] make a statement intelligently and voluntarily, even without the presence of a friendly adult." *Ruvalcaba*, 416 F.3d at 561 (citing *Fare*, 442 U.S. at 725); Opening Br. 31. Although Dassey had low-average-to-borderline IQ, he was in "mostly regular-track high school classes." SA 4; Opening Br. 35–36. Both Dassey and his mother consented to the interview, SA 2, and Dassey's mother declined to accompany Dassey to the prior interview just days earlier, SA 2. Opening Br. 36. Indeed, Dassey's interview had far less police pressure than many other juvenile cases where this Court has upheld confessions. *Supra* p. 5.

Dassey repeatedly points to his youth and mental faculties, Resp. Br. 6, 32–33, 40, but he has no serious response to this Court's caselaw dealing with interrogation of similarly situated defendants. Particularly problematic for Dassey is *Etherly*,

Opening Br. 31–32, where this Court upheld on habeas review the confession of a 15-year-old, illiterate defendant with "borderline intellectual functioning" who was taken from his home at 5:30 a.m. and interrogated without a parent present. 619 F.3d at 657–58, 664. Dassey seeks to distinguish *Etherly* on grounds that the defendant was, in his words, a "streetwise gang member," and was questioned for only 30 minutes. Resp. Br. 42. Dassey's editorializing notwithstanding, Etherly, like Dassey, had no prior experience with the criminal justice system. 619 F.3d at 659. And Etherly was *15* years old, *illiterate*, took "special education classes since the second grade," "only attended school through his freshman year of high school, and only then … with a special tutor," and "[s]till … failed all his courses." 619 F.3d at 657–58. The length of Etherly's interview is a red herring. Dassey has not argued that the length of his interview supports his position—indeed, he made his confession within the first hour. SA 268 Part 1. In short, *Etherly* is the most analogous case.

Dassey seeks to dismiss the State's remaining cases because they "address physical conditions of interrogation instead of psychological tactics." Resp. Br. 44–45. But coercion is measured under the "totality of all the surrounding circumstances," *see* Opening Br. 28–29, 31, so the State gave examples where the total pressure was greater than it was here, regardless of whether the pressure came from an arrest, the time of day, the length of a detention or interrogation, or a refusal to honor a request to see a parent. Opening Br. 37; *supra* p. 5.

Dassey argues that *A.M. v. Butler*, 360 F.3d 787 (7th Cir. 2004), most "closely resemble[s]" this case, Resp. Br. 43–44, but that case is not remotely comparable.

A.M. was *11 years old*, 360 F.3d at 792; Dassey was 16, RSA 5. A.M. was *illegally arrested* and had "no way of leaving the police station," 360 F.3d at 797–99; Dassey was neither arrested nor in custody, SA 170. A.M.'s interrogation was un-*Mirandized*, 360 F.3d at 796; Dassey was read *Miranda* warnings and reminded of them before questioning, SA 14–16, 28. A.M. claimed that a police officer "pounded on his knees, told him his fingerprints were on the murder weapon, and said that if he confessed, God and the police would forgive him and he could go home in time for his brother's birthday party," 360 F.3d at 794; the investigators here "used normal speaking tones, with no hectoring, threats or promises of leniency," SA 4. The way "[Investigator] Wiegert touched [Dassey's knees]" is not even similar to—much less "just like"—an officer "pound[ing] on [an 11-year-old's] knees" while "curs[ing] and yell[ing]" at him. Resp. Br. 44; SA 268 Part 1 at 37:19; 360 F.3d at 794. And the officers here made no promises that Dassey could "go home" "if he confessed." 360 F.3d at 794.

3. The State also explained that Dassey's resistance to many of the investigators' questions, Opening Br. 16–18, "strongly suggest[ed]" his will was not overborne, Opening Br. 30, 37–38 (quoting *Murphy*, 465 U.S. at 438). Dassey does not respond to most of the State's examples, but asserts generically that "the pressures … were not as great at those moments." Resp. Br. 45. As an example, Dassey states, misleadingly, that the investigators "dropp[ed] the subject" of whether Dassey shot Halbach after only two questions, "87 minutes after [Dassey's] admission to murder." Resp. Br. 45. But that "exchange" was the *fourth* time the investigators raised the topic, *see* Opening Br. 16, and their previous questions were much more assertive, SA 78 ("How

many times did you shoot her when he handed you the gun?"); SA 86 ("We know you shot her too. Is that right?"). Similarly, Dassey mentions only one of the *six* times the investigators asked when the fire was started. *Compare* Resp. Br. 45, *with* Opening Br. 17. And he ignores entirely the investigators' questions about wires in the garage, where they repeated the same question *eight* times *in a row*, yet Dassey never acquiesced. *See* Opening Br. 17–18, 37–38.

Dassey challenges the State's characterization of his answers about the knife and whether Halbach had a tattoo, Resp. Br. 46 and n.4, but he is wrong on both points. The State did not "omit[ ] [the] significant fact" that Dassey "changed [his] story" about the knife, Resp. Br. 46, because Dassey did not change his story. The investigators first asked, "Where'd that knife go?" when discussing where Dassey saw Avery put various things. SA 93–94. Dassey insisted that Avery left it in Halbach's car. Opening Br. 16. Much later, the investigators asked, "where's the knife?" (as in, *now*). SA 134. Dassey guessed, "[p]robably in the drawer" "[c]uz [Avery] wouldn't let that knife go." SA 134. Nor did the State "misread[ ] the transcript" with respect to the investigators' false assertion (to test Dassey's suggestibility) that Halbach had a tattoo. Resp. Br. 46 n.4; Opening Br. 18. True, Dassey did not "disagree with" the investigator, but he also did not "adopt[ ] and agree[ ] with the assertion," R.19-20:20–21; he answered consistently that he did not remember a tattoo, and if she had one, he "[did not] know where it was." SA 151–52.

Relatedly, the State argued that Dassey's confession was more likely to be voluntary because he supplied most of the details in response to open-ended, rather than

leading, questions. Opening Br. 13–14, 30–31, 38; *see Lyons*, 322 U.S. at 605. Dassey calls the State's characterization "flagrantly wrong" because the question, "Who shot her in the head?" was not the "first" leading question. Resp. Br. 39. But that was not the State's argument. Rather, the State explained that "Who shot her in the head?" was the "first leading question *with a detail that Dassey had not already suggested*." Opening Br. 38 (emphasis added). The State acknowledged that the investigators occasionally "guessed at details that seemed likely" and specifically addressed many of the instances Dassey gives. *Compare* Resp. Br. 39, *with* Opening Br. 14–15.

In all of these instances, the investigators simply asked the obvious question based on what Dassey had already told them. After Dassey admitted that Avery "stabbed" and "raped" Halbach, SA 40, 49, and that he heard "screaming" inside Avery's trailer, SA 50, but also claimed that Avery "came over" and "asked if" Dassey "could help him move somethin[g]," SA 53–54, the investigators said, "I think you went over to his house" or "he saw you, you saw him," SA 54 (cited at Resp. Br. 39), because "I don't see him comin[g] over to the house and asking you to help him unless [he] knows you know somethin[g]," SA 54. After Dassey admitted that he "knocked on [Avery's] door" and "gave [a letter] to him," but also claimed he "left" despite the "screaming" in the background, the investigators asked, "You went inside, didn't you?" SA 54 (cited at Resp. Br. 39); Opening Br. 14. After Dassey said that Halbach was naked and handcuffed in Avery's bedroom, SA 55–56, and that Avery had a conversation with him about raping her, SA 59–60, the investigators asked, "Does he ask you?" SA 60 (cited at Resp. Br. 39); Opening Br. 15. And this question, in particular,

directly followed a non-verbal answer that is not reflected in the transcript. *See* Opening Br. 15. So the question, "Who shot her in the head?" truly was the first question "that assumed a detail that Dassey had neither provided nor hinted at." Opening Br. 16.

Dassey argues that his answers leading up to the question of who shot Halbach in the head are a "strong[ ] indication that Dassey was … guessing," but he is simply wrong. Resp. Br. 17, 39 (citations omitted). First, the fact that Dassey "couldn't think of [the shooting]," Resp. Br. 17, is not surprising because the immediately preceding questions were focused on what happened in Avery's bedroom. *See* SA 73. But Avery shot Halbach later, in the garage, after multiple intervening events. SA 86; Opening Br. 6–8. Second, Dassey resisted the officers repeatedly on the very same topic, answering consistently that *he* never shot Halbach. *Supra* pp. 16–17. Finally, the investigators did not know that Halbach was shot in the garage until Dassey told them. R.19-19:26; 19-20:53–54; 19-30:137–38. In fact, the police conducted an additional search of the garage based on his confession, and even Dassey concedes that the police "later found" the bullet with Halbach's DNA on it as a result. Resp. Br. 19; R.19-16:56, 62–65; 19-20:53–54.

More generally, Dassey has no answer for the point that he supplied a vast amount of detail that the investigators never suggested, including the colors he saw, sounds he heard, conversations he had, the timing of various events, his motivations, and his observations of Teresa Halbach. *Supra* pp. 1–2. The fact that he volunteered all these details in response to open-ended questions makes his confession much more

likely to be voluntary than if he had given entirely yes-and-no answers to leading questions. Opening Br. 30–31, 38; *see Lyons*, 322 U.S. at 605.

4. In addition to arguing that his confession was induced by false promises, Dassey also attempts to show that his confession was *false*. Resp. Br. 2, 56. The parties agree that the reliability of a confession is not relevant to voluntariness, *see* Resp. Br. 38, but some of the Response Brief's factual errors warrant a response.

Dassey claims that he learned most of the details in his confession from outside sources, such as "media coverage," Resp. Br. 39, a novel, Resp. Br. 14, or "family kn[owledge]," Resp. Br. 19, but his explanations strain credulity. For example, he says his description of Halbach handcuffed to the bed came from the novel, "*Kiss the Girls*." Resp. Br. 14. But Dassey first mentioned handcuffs in response to an unrelated question, "Was she alive?" SA 55 (Answer: "Well she was handcuffed to a, the thing."). His unanticipated response is much more consistent with drawing on memory than pulling details from a novel to guess at a question that was never asked. Regardless, Dassey does not explain the source of most of the vivid details he supplied (colors, sounds, etc.). *Supra* pp. 1–2.

Dassey also argues that some of the details of his confession were later "proven false" by the absence of blood or DNA evidence, Resp. Br. 39, but this lack of physical evidence does not "prove" anything. Nor is it even surprising. The stabbing was not "substantiated by any forensic evidence," Resp. Br. 15, in part because Dassey and Avery destroyed Halbach's body and clothes, SA 121. As to the lack of blood in the bedroom, Resp. Br. 17, Dassey and Avery burned the bedsheets, SA 96. As to lack of

blood on the mechanic's creeper, Resp. Br. 39, Avery had multiple days to clean it off, RSA 2, perhaps in the same way he tried to clean the bloodstains in the garage, SA 98. As to the absence of Halbach's DNA on the handcuffs, Resp. Br. 14, Avery could have wiped them off, as he did the knife, SA 134–35.[3]

II. Dassey Concedes That The Supreme Court Has Never Recognized A *Sullivan* Claim Like His, Precluding Relief Under AEDPA

Dassey argues in the alternative that his pretrial counsel labored under a conflict of interest, contrary to *Cuyler v. Sullivan*, 446 U.S. 335 (1980), by pressuring him into making a second confession in a misguided attempt to secure a favorable plea deal. R.19-26:122–23; Opening Br. 44–45.

A. This claim is categorically unavailable under AEDPA, because, as Dassey concedes, "[t]he Supreme Court has said … that *Sullivan* is not clearly established law for conflicts other than concurrent representation." Resp. Br. 55 (citing *Mickens v. Taylor*, 535 U.S. 162, 175 (2002)); Opening Br. 45–47; RSA 50–60. Given *Mickens*' clear and correct statement, the state court's rejection of Dassey's *Sullivan* claim cannot possibly be "contrary to, or involve[ ] an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1); *see Williams v. Taylor*, 529 U.S. 362, 380 (2000). Relatedly, this was also the basis for the district court's denial of Dassey's *Sullivan* claim, RSA 54–58, and Dassey's failure to address the district court's reasoning constitutes forfeiture. *Samaron Corp. v. United of Omaha Life Ins. Co.*, 822 F.3d 361, 363 (7th Cir. 2016).

[3] Avery may have left his DNA on the handcuffs by touching them after wiping them off. Resp. Br. 14 n.3.

B. Dassey raises two alleged problems with the state court's analysis of his novel *Sullivan* claim. These arguments are irrelevant because the sort of *Sullivan* claim he seeks to raise is simply not available on AEDPA review. *See Rhodes v. Dittmann*, 783 F.3d 669, 675 (7th Cir. 2015) ("Section 2254(d) focuses on the ultimate decision of the state court, not on parts of a written opinion that … are not necessary to the outcome."). In any event, Dassey's allegations of error are wrong.

Dassey first asserts that the state court erred by referring to a *Fifth* Amendment impeachment rule when analyzing Dassey's *Sixth* Amendment claim. Resp. Br. 50–53; SA 6. But the state court simply drew an analogy to show that evidence obtained in violation of constitutional rights can often still be used for impeachment purposes. *See Kansas v. Ventris*, 556 U.S. 586, 593 (2009). Whether or not this comparison was correct, it was not the primary basis for the state court's rejection of Dassey's claim, as the district court concluded. RSA 60; Opening Br. 47–48. The state court denied Dassey's *Sullivan* claim because it found no "actual conflict" and "no viable link" to "any demonstrable detriment." SA 6–7. Regardless, an inapt analogy in a state court opinion is not a basis for habeas relief. *Rhodes*, 783 F.3d at 675.

The second alleged error relates to a phone call Dassey made to his mother after the uncounseled confession. Resp. Br. 53–55; Opening Br. 44–45. Dassey argues that the state court made an unreasonable factual determination by stating that the call was "introduced … only to rebut Dassey's testimony on direct," SA 6, when, in fact, the State used the call three times, including during closing. Resp. Br. 53–54. But the state court did not say that the May 13 call was "used" only to cross-examine

Dassey; it said that the call was "*introduced*" only for that purpose. SA 6. As the district court correctly observed: "Evidence introduced for only one purpose might be used multiple times …. What the court of appeals said was accurate and not unreasonable." RSA 59.

C. Even if de novo review were somehow warranted, Dassey's *Sullivan* claim still fails. In *Mickens*, the Supreme Court explained that *Sullivan* "does not clearly establish, or *indeed even support* … expansive application." 535 U.S. at 175 (emphasis added); Opening Br. 46. *Sullivan*'s "limited[ ] presumption of prejudice," *Strickland v. Washington*, 466 U.S. 668, 692 (1984), was warranted for conflicts involving "multiple concurrent representation" given "the high probability of prejudice … and *the difficulty of proving that prejudice*" in those situations, *Mickens*, 535 U.S. at 175 (emphasis added). That concern does not apply when the alleged "conflict" is simply that a defense lawyer made poor decisions that aided the prosecution. Resp. Br. 49–50.[4] *Strickland* is adequate to handle such situations, thus the "prophylaxis" of *Sullivan* is unnecessary. *Mickens*, 535 U.S. at 176.[5] Notably, Dassey does not even argue that prejudice is "difficult" to "measure" in this context, *Strickland*, 466 U.S. at 692, which means that *Sullivan* is not available to him, even under de novo review.

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[4] *Hall v. United States*, 371 F.3d 969 (7th Cir. 2004), is not to the contrary. *Hall* applied *Sullivan* to a claim of successive representation, *id.* at 973, a standard attorney-conflict situation like multiple representation. Dassey's other cases, Resp. Br. 51, are all nonbinding and readily distinguishable. *See* RSA 52–54.

[5] As argued, a *Strickland* claim is procedurally foreclosed. Opening Br. 45 n.6. Regardless, any such claim would fail for lack of prejudice, which is why Dassey argued under *Sullivan* in the first place. R. 19-4:50–51; 1-2:13.

And even if Dassey could somehow show an "actual conflict" under *Sullivan*, *but see* Opening Br. 47–48, he cannot show an adverse effect. *Sullivan*, 446 U.S. at 348–50; Opening Br. 48–49. Dassey's pre-trial counsel was replaced by conflict-free counsel eight months before trial, and the uncounseled confession was not admitted at trial. Opening Br. 48; SA 7. The only even arguable effect at trial was through Dassey's voluntary call to his mother, but the use of this call was too far removed from pretrial counsel's actions to warrant a new trial. Opening Br. 48–49.

CONCLUSION

The judgment of the District Court should be reversed.

Dated: December 21, 2016

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CERTIFICATE OF COMPLIANCE

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

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(c) because this brief contains 7,000 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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Dated: December 21, 2016

/s/ Luke N. Berg
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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2016, I filed the foregoing Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: December 21, 2016

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