

STATE OF WISCONSIN

CIRCUIT COURT

MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 2005-CF-381

STEVEN A. AVERY,

Defendant.

DEFENDANT'S MEMORANDUM ON BRENDAN DASSEY STATEMENTS

Steven Avery, by his counsel, BUTING & WILLIAMS, S.C., by Attorney Jerome F. Buting, and HURLEY, BURISH & STANTON, S.C., by Attorney Dean A. Strang, hereby files with this Court a memorandum discussing, and attaching as exhibits, the statements Brendan Dassey, Avery's nephew, made to the police on February 27, March 1, and May 13, 2006. Avery believes these statements will be relevant at his sentencing hearing because the prosecutor has publicly indicated an intention to offer the recent Brendan Dassey conviction as evidence of Steven Avery's character.¹ Further, the PSI writer in this case also relies heavily on the one

¹Special Prosecutor Ken Kratz, April 25, 2007, post-verdict press conference in *State of Wisconsin v. Brendan Dassey*, Case No. 2006 CF 88.

statement of Brendan that has been made public, apparently unaware that earlier and later recorded statements of Brendan told an entirely different story.²

Despite the jury verdict in his case, Avery denies that he killed Teresa Halbach or that he participated in any of the inculpatory acts contained within Brendan Dassey's various statements.

INTRODUCTION

The State chose not to introduce any of Brendan Dassey's statements at Avery's jury trial and has not previously supplied them for this Court to review. Instead, at broadcast news conferences on March 1 and March 2, 2006, the State presented only one version of the statements made by Dassey, and did so in a narrative fashion that distorted the content of the statement itself and the manner in which it was obtained.

Avery was not a party in the Brendan Dassey trial and had no say as to whether all or part of the police statements should be produced. Only a portion of one of Brendan's statements was introduced at Brendan's own trial. Three other statements were completely withheld from that jury. The isolated segment of Brendan's statement presented at his trial left an inaccurate picture of how his

²The PSI writer even goes so far as to consider the "fact" that Avery sexually assaulted Halbach as an aggravated factor justifying her harsh recommendation, when not only was there no evidence of a sexual assault introduced at Avery's trial, but the charge was actually dismissed before the trial began.

statements came about and whether or not they were truthful and reliable accounts of actual events. With this memorandum Avery attaches complete and accurate copies of the video or audio recordings³ of all police interrogations of Brendan Dassey on February 27, March 1, and May 13, 2006, together with police-prepared transcripts of each statement, so that this Court has a more complete picture of what Brendan actually said in each version, and how those statements were obtained by the law enforcement agents.

In addition, Avery attaches a report from Dr. Lawrence T. White, who is an expert on the issue of false or unreliable confessions and police interrogation techniques.⁴ Dr. White reviewed records of Brendan Dassey's level of mental functioning as well as all of the police recordings of their interrogations of Brendan.

Dr. White concludes:

[T]here are reasons to believe that Brendan Dassey's statements may not be wholly reliable or truly voluntary. Brendan is a vulnerable individual due to his low intelligence, poor memory skills, and passive demeanor. The police repeatedly pressured Brendan to provide them with details that conformed to their theory of the crime. Brendan's statements were often inconsistent, ambivalent, and self-contradictory. In sum, there are many reasons to question the trustworthiness and voluntariness of Brendan Dassey's so-called "confession."

Exhibit 1 at, p. 20.

³The first police recording on February 27, 2006, was obtained during an interview at the Mishicot High School, and is in audio format only. All remaining interviews were videotaped.

⁴A summary of Dr. White's proposed expert testimony was provided to the State on January 5, 2007, but because the State did not introduce Brendan's statements at Avery's trial he did not testify.

At the Brendan Dassey trial, the State introduced a portion of the videotaped interrogation of Brendan on March 1. For reasons unknown to Avery and his counsel, the parties jointly stipulated that the remaining approximately 40-minute segment of the video was not relevant and thus it was not played for the jury. As discussed further below, this segment showed Brendan had such a detached understanding of the police interrogation that he thought he could simply go back to school after having admitted raping, killing and mutilating the body of Teresa Halbach. This unplayed segment also contains Brendan's first recantation of the "confession" he had just given, when he is heard telling his mother (who had been brought into the room only at the end) "they got to my head." Barb Janda is then heard confronting Investigator Wiegert: "were you pressuring him?," which Wiegert denied. This exchange reveals that at the first contact with someone other than a police officer Brendan Dassey explained that the police "got to his head" to extract the statements on March 1. Brendan's jury never saw this portion of that interview.

Brendan's defense attorneys did try to introduce the February 27 and May 13 interrogations, but the state successfully fought to keep them from Brendan's jury. Thus Brendan's jury was not told that Brendan had undergone several hours of questioning just two days before March 1, during which he was threatened with prosecution and cajoled with promises that the police would not leave him "high

and dry” if he told them what they wanted to hear, that the police believed Steven Avery was responsible for Teresa Halbach’s death, and that Brendan was not at fault at all, and that Brendan was told by his interrogator that he “could make it look however you want.”

Also absent from the Brendan Dassey trial was any expert opinion about the specific interrogation techniques the police used against Brendan. The single expert called by the defense, Dr. Gordon, was only qualified by the court to discuss Brendan’s intellectual limitations and to express an opinion about his suggestibility. He did not offer any testimony about the coercive nature of the interrogation techniques used. Avery’s expert, Dr. White, on the other hand, has been qualified in other cases to discuss the psychological effect of such interrogation practices, and he was prepared to do so in Avery’s trial if Brendan had testified.

Dr. White points out in his report that studies have shown that false statements can be produced *either* because an individual is psychologically vulnerable *or* because the police employ psychological pressure techniques during an interrogation. See Exhibit 1, at 3. Most importantly, however, Dr. White also notes that studies show that false statements “are especially likely when a vulnerable individual is subjected to psychological pressure by police investigators.” (*Id.*). Thus the combination of *both* factors increases the risk that a false confession may result.

That is precisely the circumstance in this case, where Brendan Dassey, a vulnerable, intellectually limited juvenile with no experience with the criminal justice system, was subjected to expert police interrogation techniques specifically designed to create psychologically stressful situations and to increase suggestibility and compliance to the demands of authority figures. Exhibit 1 at 4. Dr. White would have described for the jury the “Reid Technique” and its modern variants, which was the type of interrogation employed by the police against Brendan Dassey. Dr White reports:

There is widespread agreement among social scientists that modern interrogation techniques are remarkably effective in eliciting true confessions from guilty suspects. Unfortunately, these techniques are so powerful that they can sometimes induce innocent suspects to make unreliable statements or even to confess to crimes they did not commit.

Exhibit 1, at 7.

Thus the Brendan Dassey jury not only did not hear all of the statements that Brendan made to the police so it could judge fully what he said and how they came about, but they also were deprived of the kind of expert testimony necessary to assist them in understanding how certain police questioning techniques may have affected the reliability of what Brendan told the police, and indeed whether any of his various statements were “false confessions.”

Not only was the Brendan Dassey jury deprived of the full picture of Brendan’s statements, the State actually manipulated the evidence presented so as

to present a factually contradictory theory of the crime. The State avoided any mention of Brendan's other statements at other times, including his later May 13 statement in which he changed the very site of the murder after forensic test results disproved the truthfulness of the March 1 story. By entirely avoiding Brendan's May 13 statement, the State argued that Brendan's March 1 statement was the truth as to how and where Halbach was killed. The State sold that bill of goods to Brendan's jury knowing that just one month earlier they had argued a very different theory to Avery's jury.

The State argued to Avery's jury that, contrary to Brendan's March 1 story, Halbach was killed *in the garage*, and that "only one man" was responsible for her death - and that man was Avery. Yet to Brendan's jury the State argued that Halbach was stabbed and *killed in Avery's bedroom*, according to Brendan's March 1 statement, and that *both* Avery and Brendan were responsible for her death. The State's duplicitous and inconsistent arguments violated both defendants' due process rights and ought to give this Court pause as to the integrity and credibility of this whole prosecution.

Several courts have found a violation of due process when the prosecution argues two inconsistent theories to separate juries in co-defendants' cases. In *Thompson v. Calderon*, 120 F.3d 1045, 1058-59 (9th Cir. 1997) (en banc), *vacated on other grounds*, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998), the court found a

violation of due process when the state argued at Thompson's trial that he alone committed a murder, while arguing at a subsequent trial that another defendant actually committed the same murder. Similarly in *Smith v. Groose*, 205 F.3d 1045, 1049 (8th Cir. 2000), the court found a violation of due process where the prosecution used one statement of a witness and argued it was the "truth" in the trial of one defendant, then offered a contradictory statement of the same witness as the "truth" in a subsequent trial of a co-defendant. "In short, what the State claimed to be true in Smith's case it rejected in [the co-defendant's] case, and vice versa." *Id.* at 1050. The Eighth Circuit found that tactic to be a "foul blow," and reversed the conviction while noting that the state's "duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for the truth." *Id.* at 1051.

The State argued to Brendan's jury that they should believe the March 1 story to be true because it contained so much detail, some of which apparently fit the facts. But as will be seen below, much of the important detail that did match any of the case facts was actually supplied to Brendan by the interrogators in their leading and suggestive questions. Many other "facts" contained in the March 1 statement were disproved by forensic evidence from the crime lab. This includes the lack of any hair, blood or DNA evidence in Avery's bedroom or trailer that would have been left from the brutal, bloody stabbing and throat-slitting Brendan described, the

absence of Halbach's DNA on handcuffs which did contain the DNA of Avery and another person (not Brendan) and thus could not have simply been wiped clean, and the absence of any scratch marks on the bed's headboard which one would expect were a strong, healthy 25-year old woman truly shackled to the bed and struggling for her life.

The State also argued, incorrectly, to Brendan's jury that Brendan supplied specific detailed facts that only the real killer would have known. Most prominently, the prosecutor argued that Brendan volunteered the information that Avery had gone under the hood of the RAV-4 to do something, and later a DNA test of the hood latch showed Avery's DNA.⁵ The prosecutor told the jury that only if Brendan had actually seen Avery do that would he have known to say so, and that later tests corroborated the truth of his statement. However, the actual recordings of the interrogations reveal that Brendan did *not* volunteer that information. Brendan said nothing whatsoever about Avery supposedly going under the hood of Halbach's vehicle until it was specifically suggested to him by the questioner.⁶

⁵The evidence produced at Avery's trial explained how that DNA result may have been obtained because one crime lab investigator checking the blood splatter evidence inside the Halbach vehicle, where Avery's blood was claimed to have been planted, moments later opened the hood by use of the same hood latch without first changing the gloves he had been using inside the vehicle.

⁶See p. 603: "FASSBENDER: That's not what I'm thinking about. He did something to that car. He took the plates and he, I believe he did something else in that car. (pause) BRENDAN: I don't know. FASSBENDER: OK. Did he, did he, did he go and look at the engine, did he raise the (continued...)"

A complete review of all the taped interrogations reveals all of this and much more that explains why Brendan confessed to something he did not do. Because the jury in Brendan's trial did not hear most of Brendan's statements or the full context of how they came about, this Court cannot simply rely on that jury's conviction to conclude at Avery's sentencing that he did any of the things Brendan described.

BACKGROUND

Teresa Halbach, a 25-year old photographer, disappeared between October 31 and November 3, 2005, when her family reported her missing. The media was notified of her missing person status and cooperated with a widespread request for assistance. As early as November 3rd, it was reported that she had visited the Avery Auto Salvage on the afternoon of October 31. Steven Avery was later interviewed in television reports admitting that she had been to the property to photograph a vehicle for Auto Trader magazine, but saying that she had left after a brief visit.

On Saturday, November 5, 2006, Halbach's Toyota RAV-4 was found partially concealed by branches and an automobile hood on the Avery Auto Salvage property, in the corner of the 40 acre parcel farthest away from Steven Avery's residence. A massive search and investigation ensued involving more than one hundred law enforcement officers. Halbach's blood was identified in the rear of her

⁶(...continued)
hood at all or anything like that? To do something to the car? BRENDAN: Yeah."

vehicle and Steven Avery's DNA was found in several small blood spots or smudges in the passenger compartment of the RAV-4. Charred human remains were discovered in a burn pit behind Steven Avery's garage, which were later identified as very probably Teresa Halbach's.

On November 15, 2005, Steven Avery was charged with the murder and mutilation of Halbach's body. He was questioned by police several times and admitted meeting with Halbach when she took the photograph of his sister's van, but denied any wrongdoing in her disappearance or death.

An unprecedented amount of publicity surrounded the case, including detailed reporting of the facts alleged in the complaint. At a preliminary hearing on December 6, 2005, which was televised live, numerous additional facts were made public, including a photograph of the RAV-4 depicting its condition when found, with branches and a junk car's hood propped against it (Prelim. Trans., Dec 6, 2005, at 35), the fact that its license plates had been removed and located in another junk vehicle elsewhere on the Avery Salvage property (*Id.* at 36-37, 56), and that Avery had a cut on his finger about the same time as Halbach's disappearance (*Id.* at 42).

The law enforcement investigation in Steven Avery's case continued in the months after his arrest, yet nearly four months later the State was faced with gaping holes in its case against Avery. Despite a full week of searches, no DNA of the victim had been found anywhere inside Steven Avery's trailer residence or detached

garage. A key which operated the RAV-4 was found in Avery's bedroom, but suspiciously not until the seventh search of his residence. None of Halbach's DNA was found on the key itself. No murder weapon had been found. Indeed the manner of Halbach's death was still unknown.

The State theorized that the small spots of Avery's blood in the RAV-4 came from a cut on Avery's finger. Yet Avery's fingerprints had not been found anywhere in or on the Halbach RAV-4. It seemed unlikely that he could have been wearing gloves so as to avoid leaving fingerprints, yet managed to leave blood from a cut (and gloved) finger. Further, other unidentified latent fingerprints *were* found on Halbach's vehicle.

In addition, although the majority of the victim's charred remains that were discovered were located in the burn pit behind Avery's garage, some of her charred remains were also found inside one of four burn barrels 300 feet away, behind the Janda/Dassey residence. Other possible remains of the victim were found about one quarter mile away in a quarry.⁷ This raised the question of whether Halbach's body was burned on Steve Avery's property or elsewhere, and then dumped in his burn pit to incriminate him.

⁷Those remains were never positively identified as the victim's, but they did appear to be human pelvic bones and they exhibited the same degree of charring as did the remains found in the burn pit and burn barrel.

Also troubling to the State's case was that Avery had no apparent motive to kill Teresa Halbach. Avery had publicly denied wrongdoing and argued that he was being framed by the Manitowoc County Sheriff's Department because of a \$36 million civil suit he had filed for his wrongful conviction and 18 years of imprisonment. Nearly 4 months later, at the end of February, 2006, many people both inside and outside Manitowoc County believed Steven Avery was innocent of the Halbach murder. The State desperately needed a confession to shore up the case against Avery, but Avery was unavailing.

The law enforcement investigators then went after young Brendan Dassey, a 16-year old nephew of Avery's with limited mental functioning and special education needs. Brendan was interviewed early in the investigation and provided nothing helpful to the State. To the contrary, Brendan was a partial alibi witness for Steven Avery, and thus was a likely target for a thorough interrogation effort. If Brendan could be persuaded to say something incriminating against Avery, his value as a defense alibi witness would be destroyed and the case against Avery significantly strengthened. The efforts began on February 27, culminating in the March 1, 2006 confession tape which was partially played at Brendan's jury trial last month.

BRENDAN DASSEY INTERROGATIONS

1.

February 27, 2006, Mishicot High School

On Monday, February 27, 2006, Special Agent Tom Fassbender and Calumet County Investigator Mark Wiegert went to Brendan's high school and pulled him out of class to talk. The interview took place at the Mishicot High School and was audio tape recorded.

The investigators began by reminding Brendan that he had admitted in a prior statement that he was at a bonfire with Steven Avery behind his garage on October 31, 2005. Fassbender told him "we believe that's where Teresa was cooked," (p.441). He asked Brendan if he saw "any body parts." (p. 442). Fassbender said, "I gotta believe you did see something in the fire." (*Id.*).

Fassbender then presented Brendan with a clear threat of prosecution:

[W]e've got people back at the sheriff's office, district attorney's office, and their [sic] lookin' at this now saying there's no way Brendan Dassey was out there and didn't see something. They're talking about trying to link Brendan Dassey with this event. They're not saying that Brendan did it, they're saying that Brendan had something to do with it or the cover up of it which would mean *Brendan Dassey could potentially be facing charges* for that.

(*Id.*) (emphasis added). Fassbender suggested to Brendan perhaps Steve got him out there to help build a fire and maybe he "inadvertently saw some things." (*Id.*). Fassbender claimed they could tell something "heavy" was bothering Brendan and

that's why they came to talk. (p.443). He then repeated the threat of prosecution and gave Brendan *carte blanche* to make up a story they could accept:

[S]ome people don't care, 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 with the information that he has, and get it off of his chest. Now make it look, *you can make it look however you want . . .*

(*Id.*) (emphasis added). The two investigators then used a "false friend" technique and promised they would help him if he talked:

FASSBENDER: Mark and I, yeah we're cops, we're investigators and stuff like that, but I'm not right now. I'm a father that has a kid your age too. I wanna be here for you. There's nothing I'd like more than to come over and give you a hug cuz I know you're hurtin'. Yes I do wanna give justice to, to this and to the Halbachs too. You wanna tell me what you saw and what you heard, cuz I know that something is, its intensely bothering you. 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? I promise I will not let you high and dry, I'll stand behind you.

WIEGERT: We both will Brendan. We're here to help ya.

(*Id.*). Brendan did not immediately take the bait, but the investigators continued to suggest that perhaps he saw a hand, a foot, her bones or something in the fire. (p.444).

Brendan tried to explain that the only thing bothering him was that Steve was in jail (p.440-41) and that his girlfriend had broken up with him (p. 445-46), but that explanation was rejected. The investigators told Brendan that "Steve doesn't care

about you right now. He cares about himself,” and “he left you to hang out to dry,” and that he was “using your love, and taking advantage of that.” (p.447).

The investigators continued to pressure Brendan with suggestions about what they believe he must have seen in the fire (“a hand, or a foot, a head, hair, something”), and again reminded him of the threatening prosecutor who was waiting to hear from them:

Mark and I can go back to the district attorney and say, ah, . . . Dassey . . . came forward and finally told us. Can you imagine how this was weighing on him? They’ll understand that.

(p.448). Both repeated their promises that they would “go to bat for ya, but you have to be honest with us,”⁸ implying that the investigators would accept as the truth only what *they* believed happened: “I promise you I’ll not let you hang out there alone, but we’ve gotta have the truth. The truth is gonna be terrible” (*Id.*).

The investigators then began to use a tactic which was frequently employed in all of their sessions with Brendan. They would often suggest one or two answers in their questions, then get Brendan to adopt the suggestion as his own. For instance, Brendan began to discuss some clothing that he saw, which Avery had obtained from his garage. He never mentioned any blood on the clothes until the officers first

⁸It should be noted that the very promise to “go to bat” for a suspect has been held to be an improper inducement by an interrogator by several courts. *Hillard v. State*, 286 Md. 145, 153, 406 A.2d 415 (Ct. App. 1979) (held confession suppressed because improper inducement made by officer that “if you are telling me the truth . . . I’ll go to bat for you.”); *People v. Ruegger*, 32 Ill App 3d 765, 771, 336 N.E.2d 50 (Ill App. 1975) (improper inducement for officer to promise to “go to bat for you” on matters like recognizance bond or probation if confessed).

suggested it: "Was there blood on those clothes? Be honest Brendan. We know. We already know you know. Help us out. Think of yourself here. Help that family out. It's gonna be all right, Ok. Was there blood on those clothes?," to which Brendan responded "[a] little bit." (p.449).

Numerous other examples of this tactic will be found throughout the interrogations, such that very little of what Brendan said actually originated with him. This is especially true, as will be shown below, as to those very few facts which were not already a matter of public record but as to which there was corroborating evidence that only the true perpetrator - or the police - would have known. Brendan was unable to supply that sort of information until the answers were suggested to him by the questioner.

Brendan was reassured again that "its not your fault," and that "this could help you." (p. 451). He never said that he saw any body parts in the fire until the interrogator repeatedly suggested that he must have: "you saw some body parts. . . . Did you see part of the arm, the legs . . . part of her head? Skull?" (*Id.*). After Brendan began to adopt his suggestions, Fassbender reviewed what he got Brendan to say he saw in the fire: "toes, fingers, parts of hand and feet . . . stomach area." (*Id.*) Fassbender then employed another frequent tactic in which he suggested that Brendan was holding back particular facts: "I find it very hard that you didn't see

a skull or the head. Did you see part of the head or face or skull?" Predictably, Brendan responded that he "somewhat" saw her forehead. (*Id.*).

After reassuring Brendan that "you've done nothing wrong," the investigators then expanded the questioning from observations Brendan may have made to actual assistance he gave Avery in disposing of the body: "Did you help him put that body in the fire? If you did it's OK." (p. 453). Brendan did not immediately take that bait, either, but would eventually.

Later the investigators suggested that they had superior knowledge that Brendan and Avery talked about the body Brendan had seen: "Now I-I've been told that you and STEVE talked about the body in there, OK, that's what I was told, and I believe that. You guys did talk about it didn't ya?" (p. 456). Brendan said "yeah" but could not really articulate much of what Avery said about how or why he did it. Later, Brendan told the investigators that Avery told him he tied Halbach up and stabbed her in the jeep, and that he "tried to cover it with branches, a car hood."⁹ (p. 458-59). The investigators obviously knew there was no evidence of a stabbing taking place in the jeep, so they introduced to Brendan, for the first time, the idea of shooting as a manner of death: "Did he say anything about shooting her. Tell me

⁹The partially concealed condition in which the RAV-4 was found was not information only the killer could have known, as it was freely disclosed at the preliminary hearing and in the media.

again how he said he killed her.” (p.459). Brendan, again, did not accept that suggestion at first, but in later interviews, after the seed had been planted, he did.

To try to answer the imponderable question of why Steven Avery would have killed Teresa Halbach and risked returning to prison when he was very likely about to come into a large amount of money from his civil suit, the interrogators introduced the idea of a sexual assault to Brendan in suggestive, leading questions: “Did he try to have sex with her or anything and she said no and . . . Did he ever tell you that, its very important, OK cuz we had heard that he might have told you that.” (p. 461-62). Once again Brendan did not immediately adopt that suggestion, but later would do so.

They also managed to get Brendan to say that Avery told him that he cut his finger, first on some glass in the garage (p.462). Then he later changed that in response to another leading and suggestive question: “He said that he cut himself, while he was stabbing her? Yes or no,” to which Brendan replied “Yes.” (p.463). The fact of Avery’s cut finger was, again, a matter of public record, having been revealed in the preliminary hearing, and on television footage of Avery himself, and thus could not corroborate the truthfulness of Brendan’s statement.

Following a short break, the investigators suggested Brendan write out a statement in his own handwriting, but they had to greatly assist him in that task, even spelling simple words like “agent” and “detective” for him. (p.469). Although

professing that “its totally up to you how you want to do it,” the investigators suggested how he should start the statement and what he should include in it. (*Id.*). See also p. 470: “there are some things that we feel you should probably add to your statement, but that’s up, that’s up to you,” and p. 471: “You told us that he talked to you about not talking and that he threatened you. That would probably be a good thing to add to your statement if you’d like.”

Fassbender concluded that first interview with several gratuitous statements congratulating Brendan and providing positive reinforcement:

Brendan, before I neglect to do this, I want to say that I’m extremely proud of you and what, what you did had to be very, very difficult and you’re one hell of a kid because that had ta be the hardest thing you probably ever done in your life and I don’t know if I could even feel what you hadda just do and I, I truly believe you’re one hell of a kid. And you need to believe that too, okay, no matter what anyone says.

(p. 477).

When that interview concluded Brendan was allowed to return to his eighth period class at the high school. Later it was decided that a second “sew-up” interview should be conducted that day, this one videotaped. So arrangements were made to conduct the second interview at the Two Rivers Police Department.

2.

February 27, 2006, Two Rivers Police Department

The “sew-up” confession¹⁰ interview by Fassbender and Wiegert was conducted at the Two Rivers Police Department in a room with videotaping capability. Interestingly, Wiegert began by asking him a number of questions usually used with very young or immature children to determine if they know the difference between the truth and a lie. Such children require careful questioning to ensure that the interviewer does not inadvertently (or deliberately) lead the witness to say inaccurate or false things by suggesting particular answers. This more open questioning technique was later abandoned, as Wiegert frequently shaped Brendan’s statement by asking leading questions which suggested particular answers.

Brendan was also told at the beginning of this interview that if he was asked something that he did not know the answer to, he should just tell them “I don’t know.” However, throughout most of the interviews with Brendan, the agents did

¹⁰A “sew-up” confession may be found to be impermissible if police detain an individual a sufficiently long period of time to decide whether to charge or release him, but still interrogate further. It has been held that if the “purpose of the interrogation was to “sew up” the case by obtaining a confession or culpable statements to assure a finding of guilty,” it is impermissible. *Briggs v. State*, 76 Wis.2d 313, 324, 251 N.W.2d 12, 17 (1977).

not accept many “I don’t know” answers. Instead they continually pressed Brendan while supplying him cues as to the answers they really sought.

Brendan was told that he was being re-interviewed “about what you had initially told us earlier.” (p. 484). Brendan told them he got off the bus at 3:45 p.m. and saw “a jeep down by our house.” (p. 486). He walked home and played Playstation for a number of hours, and then ate. In this story Brendan said he did not get a call from Steven Avery until 8:00 p.m., when Steve asked him to come over for a bonfire. Brendan agreed, and at about 9:30 p.m. he accompanied Steve on a golf cart locating wood and other items to put on the fire. Brendan claimed the fire was already going and he saw a toe, forehead and belly of a person in the fire, which simply repeated the story Brendan had eventually been prevailed upon to describe at the high school interview session. (*Id.*) With the exception of Brendan’s claim that he saw parts of an intact body in the fire, his reported observations did not contain information not already known and talked about with other Avery family members as well as Avery himself.

In this version, Brendan denied that he had anything to do with the disappearance of Halbach, or that he stabbed her or helped put her body in the fire. He claimed that Avery saw him notice the body in the fire and “threatened me a little bit . . . [t]hat he would, he would stab me” if Brendan told anyone. (p. 491). He also claimed that Avery told him that he “tied her up in the jeep thing and stabbed

her in the stomach,” and put the knife under the seat (p. 492).¹¹ Wiegert asked Brendan where the jeep was when Avery supposedly stabbed her and he said “down in the pit.”¹² (p. 498). Brendan claimed that Avery told him he moved Halbach’s body out of the salvage yard pit to the burn area behind his garage with his snowmobile sled, an allegation never corroborated by the investigation. (p. 491-92, 498). When asked whether Avery ever told him why he did this to Teresa, Brendan said, “[b]ecause he was angry, that he had to take it out on someone,” but he never said who he was angry with or why Halbach was the victim.(p. 493). He also said that Avery never told him anything about sexually assaulting Halbach or that he had any desire to do so. (p. 495-96).

After a break in the questioning, Fassbender tried to get Brendan to provide some motive for Avery to have killed Halbach. He asked Brendan again whether Avery ever told him who he was angry with, and suggested that perhaps Avery was angry with his girlfriend, Jodi. Brendan did not take the bait this time, but once again, in a later interview he would adopt the police officers’ peculiar theory of anger transference. *See* May 13 interview at p. 815.

¹¹A search of the RAV-4 revealed no knife or any evidence that a person had been stabbed inside the vehicle. No knife has ever been found anywhere that was linked to Halbach’s death. The cause of death was later determined to be a gunshot to the head, about which Brendan said nothing in this interview.

¹²The term “pit” was used to describe the area of the Avery Salvage Yard where the land was depressed from former quarry operations and in which the salvage vehicles were stored.

Fassbender: OK. Has Steven said anything to you about her [Jodi] in any relation ta what he did?
Brendan: No.
Fassbender: No. Do you know if she knows that he did this?
Brendan: No.
Fassbender: Has he blamed her in any way?
Brendan: No.
Fassbender: I'm trying to understand what he might have been mad about. Do you have any idea what he was angry about that day?
Brendan: No.
Fassbender: Did you ask him?
Brendan: No.

(p. 501-02).

Shortly after that Investigator Wiegert caught Brendan in an inconsistency. Brendan had earlier told them that on October 31 he helped Avery move into his garage a gray Suzuki jeep that had been located outside on the side of the garage. (p. 501). Later, however, he told them that the next day Steve was working on "his Monte [Carlo]" which was located inside the garage. (p. 506).

Wiegert: How did the Monte get in the garage?
Brendan: Well it drives, drive, you can drive it.
Wiegert: I thought you told us before that the Suzuki was in the garage. You helped him push it in there.
Brendan: He had to fix somethin' on it.
Wiegert: So where was the Suzuki when he was working on the Monte?
Brendan: Probably outside.

(p. 506). Wiegert knew the Suzuki was inoperable and would have had to be physically pushed in or out of the garage by two people. Brendan offered no reason why Steve would have moved the Suzuki into the garage on October 31, then take it back out the very next day, or how Avery could have been accomplished that

without assistance. But he never pursued this inconsistency in Brendan's story any further.

Wiegert instead turned Brendan's attention to the cut on Avery's finger that Brendan had mentioned in the previous audio recorded interview. Brendan told him that he saw a "scratch" on Avery's "pointer finger." (p. 508). In fact, the cut on Avery's finger was on his middle finger, but Wiegert did not press Brendan about that discrepancy. More curious was Brendan's story this time about how that "scratch" came to be. In the Mishicot High School interview Brendan first said Avery told him he cut his finger on glass in the garage (p. 462). But with leading questions from the agents, Brendan changed his story to say that Avery told him he cut himself while stabbing Halbach (p. 463). In the Two Rivers interview, Brendan changed the story again to claim Avery told him he was cut by Halbach scratching him during a struggle while he was trying to tie her up (p. 508). The agents accepted this inconsistent story without challenging Brendan.

The agents ended this session with positive reinforcement:

Fassbender: I know this was very difficult and you're a brave boy for doing what you did.
Wiegert: Is everything you told Agent Fassbender and myself the truth?
Brendan: Yeah.
Wiegert: Did you lie at all during this conversation?
Brendan: No.
Wiegert: Have you lied to us all about anything you told us?
Brendan: No.
Wiegert: I appreciate you being honest, all right?

(P. 511-12). Brendan was then rewarded with a free stay at the Fox Hills Resort in Mishicot for the night. Wiegert arranged for Brendan's mother and brother to stay with him at the resort, along with Calumet Sheriff's Department Sgt. Tyson. Besides being a reward for Brendan, who now appeared to be the "star" witness for the prosecution, the Fox Hills Resort placement had the benefit of isolating Brendan from other family or friends while the investigation proceeded.

While Sgt. Tyson was with Brendan at the resort he was directed by other investigators to ask Brendan certain followup questions. In particular, Brendan was asked whether he saw Avery's burn barrel burning at all on October 31, and Brendan replied that he did not recall that. Brendan was also asked if he ever saw Avery shoot a .22 caliber firearm, and he answered that he had not. Investigators would question Brendan more aggressively about that in the next interview, because they had learned from forensic examiners new information that Teresa had been shot with .22 caliber ammunition. That was information that was unknown to the public, so if Brendan could volunteer that knowledge the investigator's would finally have concrete corroboration of his story. Unfortunately for the agents, Brendan could not do so, and out of frustration Wiegert came out and asked Brendan a loaded question which revealed she had been shot in the head - which thereby destroyed any independent corroborative value in Brendan's subsequent admissions about the shooting.

3.

March 1, 2006, Manitowoc County Sheriff's Department

On Wednesday, March 1, 2006, Fassbender and Wiegert took Brendan out of the high school and drove him to the Manitowoc Sheriff's Department for another interview. The agents conveyed to Brendan a clear message that although he was "the good guy" and that they "would go to bat" for him, his prior story wasn't good enough for them to do so. Brendan was told he had to *make himself look worse* in order for his story to be believed, but that he did not need to worry about what he said or how he looked because they were "in his corner" and they could set him free if he was "honest" - meaning that his story conformed to their theory of the crime.

The interview began with Wiegert reading Brendan his *Miranda* rights (p. 526), but when they arrived at the sheriff's department Fassbender undercut that warning by implying that anything Brendan said would not be used *against* him, but rather that he was safe from harm because "both Mark and I are in your corner, we're on your side." (p.540). He reminded Brendan that he previously had told them one reason he did not come forward earlier was the fear that "people would say you helped or did this." (*Id.*). He then told Brendan that "[o]ne of the best ways" to avoid that was to tell the agents things "against your own interest" that "might make you look a little bad or make you look like you were more involved." (*Id.*). Fassbender told Brendan such admissions against his interest would really be "good from the

vantage point to say hey, there's no doubt you're telling the truth because you've told the whole story." (*Id.*).

Fassbender explained to Brendan that they were back interviewing him because after reviewing his prior stories "there's some places where some things were left out or maybe changed just a bit ta, to maybe lookin' at yourself to protect yourself a little." (*Id.*). But he also reassured Brendan that "you don't have to worry about things" because they knew what Steven did and "what happened to you when he did." (*Id.*). He made it clear that the agents were looking for a better story, one that *they* could be comfortable with and that "I think you're gonna be a lot more comfortable with that. It's going to be a lot easier on you down the road." (*Id.*).

Wiegert then introduced a theme he used for the rest of their interviews with Brendan: all they want is "honesty" – but "honesty" as *they* define it.

Wiegert: Honesty here Brendan is the thing that's gonna help you. OK, no matter what you did, we can work through that. OK *We can't make any promises but we'll stand behind you no matter what you did.* OK Because you're being the good guy here. You're the one that's saying you know what? Maybe I made some mistakes but here's what I did. The other guy involved in this doesn't want to help himself. All he wants to do is blame everybody else. OK And by you talking with us, its, its helping you. OK? Because the honest person is the one who's gonna get a better deal out of everything. You know how that works. (Brendan nods "yes").

Brendan: mm hm. (Nods "yes").

Wiegert: You know. Honesty is the only thing that *will set you free.*

(p. 541) (emphasis added).¹³

¹³Although the agents deny they can make any actual "promises" to Brendan in return for
(continued...)

The agents then directed Brendan to some prior (unrecorded) conversation¹⁴ they had with him in which he described helping Avery “cleaning up stuff.” (*Id.*). Brendan explained that while working on his car Avery had poked a hole in something which caused it to leak and that Brendan helped him clean up the mess. (p 542). That evidently did not fit the agents’ theory so the subject was changed to what he saw when he got off the bus. But when Fassbender asked Brendan what Teresa was wearing when he saw her outside Avery’s trailer Brendan guessed incorrectly (white shirt with red shorts). The agents quickly attributed that to simply failed memory, and instructed him not to guess when he did not recall. Especially when it came to easily verifiable facts, better that Brendan not “make anything up” (p. 544), than that he guess incorrectly and expose his entire story to a credibility challenge.

However, when Brendan also told them several other facts which did not fit their theory, the agents became more confrontational. Brendan said he went over to

¹³(...continued)

his cooperation, they repeatedly imply otherwise, as in this segment of the interview. They repeatedly told Brendan they would not leave him “high and dry” and they would “go to bat” for him. But when they didn’t accept what he told them the message could not have been clearer: the “promise” to go to bat for him was conditioned on Brendan telling them a story they wanted to hear.

¹⁴This conversation was not recorded, in contravention to the rule in *In re Jerrell C. J.*, 2005 WI 105, ¶ 58, 283 Wis.2d 145, 699 N.W.2d 110, which requires that all custodial interrogation of juveniles “shall be electronically recorded where feasible, and without exception when questioning occurs at a place of detention.”

Avery's garage about 6:30 p.m. on Halloween night and Avery's Monte Carlo vehicle was in the garage and the big overhead garage door was open. That would not have been possible if, under the agent's theory, Halbach's RAV-4 was hidden in the garage. Brendan also said the fire in the burn pit had not yet been started. The agents cut Brendan off, told him they would not accept his story and threatened they would no longer "go to bat" for him, unless he changed his story.

Fassbender: OK. We're not gonna go any further in this cuz we need to get the truth out now. We know the fire was going. We know that he had already had his altercation with Teresa. We don't believe there's a Monte in there. I talked to ya the other night and you said nothing about Monte you said nothing about something getting punctured and leaking out. We talked about cleaning somethin' up in that garage. You told me you thought thinking back now there was blood. It was red in color plus you're at your house. You said six, six-thirty, I'll go that far with ya it might even have been earlier. What's going on? Lets take it through honestly now. (Brendan nods "yes").

Fassbender: We don't get honesty here, I'm your friend right now, but I gotta I gotta believe in you and *if I don't believe in you, I can't go to bat for you.*

(P. 547). The agents also began to emphasize that they had a false superior knowledge, that they "already knew" what happened but had to hear it from him.

Brendan got the message and began to follow their cues to the answers they wanted so they could "believe" in him enough to stay "in his corner."

He told them the fire was started when he went over and "the jeep was still in [the garage]." Wiegert asked "who's jeep?," and Brendan told them it was Avery's Suzuki jeep, but they rejected that response. They repeated the question and

Brendan finally replied, “her jeep,” meaning Teresa’s RAV-4. (p.548). He went on to say that Avery showed him the knife and rope and that he saw Halbach’s dead body in the back of the jeep. (p. 550). At first he denied helping put her in the jeep or touching her, but then Wiegert re-assured him that “[i]f you helped him its OK, because he was telling you to do it. You didn’t do it on your own.” (p. 552). Prompted by their cues, Brendan gradually began to describe more and more involvement. He said he helped move Halbach’s body from the rear of the jeep to the burn pit by use of an auto creeper¹⁵ (p. 557). He said that Avery told him he stabbed her once in the stomach and Brendan claimed that he saw a bloody wound in her stomach.

Wiegert and Fassbender implied that something else was done to Halbach because “[w]e’ve got enough of her to know some things that happened to her. So tell us the truth.” (p. 560). Brendan then claimed that Avery admitted he raped her and that she tried to get away but he was too strong. He claimed he did not know where that happened. The agents told him they still did not believe he was not more involved, and suggested he “was there when this happened.” (p. 561).

Wiegert: We already know Brendan. We already know. Come on. Be honest with us. Be honest with us. We already know, its OK? We gonna help you through this, alright? (Brendan nods “yes”) Tell us, how do you know that?

¹⁵Forensic test found none of Halbach’s DNA on the creeper.

Brendan then began to piece together a story they would accept, apparently guessing what answers they were looking for. When something he said was rejected by the interrogators, he changed it as necessary until they accepted an answer and gave him positive feedback such as “now I can start believing you, OK?” (p. 570). Brendan relied on their threat that they would go to bat for him only if they “believed” him, and that it was okay to admit that he was personally involved (even if that was not true) because that would make the police more likely to believe his story.

It is significant that the story the State relied on to convict Brendan at his trial was never told by Brendan in a long narrative (contrary to the impressions left by the State in their notorious March 1 & 2 news conferences) and despite its horrific nature Brendan displayed no emotions as he answered their questions. That is because the story he was compelled to say did not really happen; it was no more a reality for Brendan than a Playstation game.¹⁶ The story was pieced together gradually with key suggestions and leading questions presented by the interrogators. Dr. Lawrence White notes in his attached report that the police “used repeated and persistent questioning to shaped Brendan’s responses” and led him

¹⁶Indeed, several family members will attest that Brendan’s story that he slit Halbach’s throat was especially contrary to Brendan’s reality. Brendan did not even have the guts to dress a deer himself, and became physically sick at the sight of someone doing that to a dead animal, much less slitting the throat of a live human being.

to report specific details that conformed to their theory of the crime. (Exhibit 1, at 14-15).

First Brendan said he got the mail and heard screaming, but he did not go to Avery's trailer, instead he returned to his own house and watched TV. The interrogators rejected that story and suggested "I think you went over to his house and then he asked him [sic] to get his mail, somethin' in here is missing." (p.565). Brendan accepted this suggestion and changed his story to say that he went over to Avery's trailer to deliver a piece of mail and then left and went home. Again, Wiegert challenged him and suggested "Be honest. You went inside, didn't you? (Brendan nods yes") (*Id.*). Once again Brendan accepted the suggestion as well as another immediately thereafter when Wiegert assumed that Halbach was inside the trailer and asked Brendan, "OK and where was she?" (p. 566). Brendan replied that she was "in his room," naked and handcuffed (both legs and feet) to the bed. (P. 566-67). Fassbender showed his pleasure at the tale Brendan began to tell ("you're getting there OK," p. 567) and Wiegert repeated the theme of the superior knowledge of the police ("Brendan, I already know. You know we know." p. 568). They asked what Avery supposedly told Brendan and he eventually replied that Avery wanted to get "some pussy." (p. 570). This quite obviously fit with the police theory of the crime, and Fassbender rewarded Brendan by saying, "[n]ow I can start believing you, OK? (Brendan nods "yes")." (*Id.*). Fassbender responded with

increasing approval when he got Brendan to describe the words Avery supposedly said:

Fassbender: What kind of words is he use, using though? You can say those words here.

Brendan: That he wanted to fuck her so hard.

Fassbender: *Yeah.*

(p. 571) (emphasis added). Wiegert and Fassbender took turns shaping Brendan's story so that he would eventually admit that he sexually assaulted Halbach while she was chained to the bed with "silver " handcuffs.¹⁷ They did so while lying to Brendan that he was not to blame if he did rape Halbach:

Fassbender: What does *Steve make* you do?

Wiegert: It's not your fault, *he makes* you do it.

(p. 574) (emphasis added).

Next, the police got Brendan to say that Avery killed Halbach and that he was present: "Brendan, be honest. You were there when she died and we know that. Don't start lying now. We know you were there. What happened?" (p. 578). But, they needed Brendan to describe a killing method that fit with their theory of the crime. He would prove unable to do so.

¹⁷A pair of silver handcuffs and leg irons were found in a search of Avery's bedroom, but DNA tests proved none of Halbach's DNA was on them. However, DNA from Avery and another unknown individual was found on the handcuffs, which indicated that Halbach's DNA was not absent simply because they had been cleaned. This was one of numerous objective facts that disproved the truthfulness of Brendan's story, and the police used his later interview on May 13 to try to get him to change his story enough to fit the facts they had since learned.

The investigation had uncovered a number of bone fragments believed to have come from Halbach, but most of the cremains recovered revealed no specific type of injury that gave a clue as to how she was killed. But, on the day before the March 1 interview with Brendan, the investigators received forensic evidence that Halbach had been shot in the head with a .22 caliber bullet. This was not a matter of public record, and if they could get Brendan to say that she was shot in the head they would have very damning corroboration.

The interrogators asked Brendan a long sequence of questions about how she was killed, and Brendan appeared to be guessing at what answer they sought. For instance, Brendan had up to that time in the interrogation said nothing about the killing method other than that she was stabbed in the stomach (which was never corroborated by other evidence). Wiegert said: "What else did he do to her? (pause) He did something else, we know that. (pause) What else?" (p. 578). Brendan's first reply was that he tied her up. (*Id.*). That was not the answer they were looking for so Wiegert asked again: "We know he did something else to her, what else did he do to her?" (p. 579). Brendan thought for a moment and then suggested "He choked

her." (*Id.*)¹⁸ Again, that was not what they were searching for, so Wiegert got more specific:

Wiegert: "What else did he do to her? We know something else was done. Tell us, and what else did you do? Come on. *Something with the head.* Brendan?"

(p. 584). (emphasis added). After a long pause where Brendan seemed confused and unable to guess what they wanted him to say, he said "that he cut off her hair."

(*Id.*)¹⁹ Fassbender and Wiegert pushed Brendan some more, without getting the answer they sought:

Fassbender: What else was done to her head?
Brendan: That he punched her.
Wiegert: What else? (pause) What else?
Fassbender: He made you do somethin' to her, didn't he? So he - he would feel better about not bein' the only person, right? (Brendan nods "yes")
Yeah.
Wiegert: mm huh.
Fassbender: What did he make you do to her?
(Pause)
Wiegert: What did he make you do Brendan? It's OK, what did he make you do?
Brendan: Cut her.
Wiegert: Cut her where?
Brendan: On her throat.

¹⁸As just one example of the remarkably leading questions they asked to shape Brendan's answers, at one point Fassbender asked what Avery said to Halbach: "Is he telling her that he's gonna kill her, is he telling her he's gonna let her go, what's he telling her?" Predictably, Brendan replied "that he was gonna kill her." (p. 582).

¹⁹Forensic evidence examinations never found any of Halbach's hair in Avery's bedroom, or anywhere else.

(p. 585-86). Brendan's nonsensical "overkill" story by that time had described he and Avery stabbing Halbach in the stomach, then choking her, then punching her in the head, then slitting her throat – after all of which she was still apparently alive. But he had still not volunteered the one and only fact that could be corroborated by independent evidence. So they tried again, unsuccessfully:

Wiegert: So Steve stabs her first, then you cut her neck? (Brendan nods "yes")
 What else happens to her head?
Fassbender: It's extremely important you tell us this, for us to believe you.
Wiegert: Come on Brendan, what else?
(pause)
Fassbender: We know, we just need you to tell us.
Brendan: That's all I can remember.

Finally, Wiegert became frustrated and blurted out the answer, which thereby destroyed the value of Brendan's response as any corroborative evidence:

Wiegert: All right, I'm just gonna come out and ask you. *Who shot her in the head?*
Brendan: He did.
Fassbender: Then why didn't you tell us that?
Brendan: Cuz I couldn't think of it.

(p. 587). It apparently never occurred to either investigator that Brendan's failure to mention the shooting on his own was a fact that undermined the credibility of his entire story.

With more prodding, Brendan's story added that Halbach was carried outside and shot as her body lay near the side of the garage. He denied that she was ever inside the garage itself (p. 592). He said they then put her body in a fire that was already going before Brendan even got there (p. 594). That story did not fit the police

theory of the crime, and failed to explain the forensic evidence that some of Halbach's blood was found in the cargo area of her jeep. So Fassbender went to work getting him to change his story yet again:

Fassbender: OK Brendan, we gotta, I think, I think you're doin' a real good job up to this point of ah coming forward and stuff, but you bring her out of the house, you just said that ah, after you put her on the, on the fire, then, then you wanted to get the car, help get the car out of the garage and stuff. (Brendan nods "yes") Again, we have, w-we know that some things *happened in the garage, and in that car*, we know that. You need to tell us about this so we know you're tellin' us the truth. I'm not gonna tell you what to say, you need to tell us.

(p.595) (emphasis added). Brendan understood the warning that they were not satisfied yet, so he took the cue and said she was first placed in the jeep, because they were "gonna take her down in the pit and throw 'er in that water." (p. 596). Then Avery apparently changed his mind and decided to burn her so they took her out, sat her on the floor and then later put her in the fire.²⁰

Again, Brendan demonstrated his inability to tell a story that fit the facts as the police believed them to be. Wiegert believed Halbach had been shot on the garage floor, even though none of her blood had been found there.²¹ As he often did throughout the interrogation, he posed an "either/or" question to Brendan, with the

²⁰This contradicted Brendan's earlier story that as they sat in the house watching TV for awhile Avery told him he was going to burn her body (p. 577).

²¹Another thorough search with a warrant obtained after Brendan's statement also failed to every find any of Halbach's blood or DNA on the garage floor.

“correct” answer presented as the first choice. Brendan nearly always picked the first choice, but in this instance did not, and was quickly chastised:

Wiegert: Was she on the garage floor or was she in the truck?
Brendan: Innn [sic] the truck.
Wiegert: Ah huh, come on, now where was she shot? Be honest here.
Fassbender: The truth.
Brendan: In the garage.
. . .
Fassbender: And she was in the back of the truck or the SUV that whole time that he shot her?
Brendan: She was on the, the garage floor.
Wiegert: She was on the garage floor, OK.
Fassbender: All Right.
Wiegert: That makes sense. Now we believe you.

(p.597). Similar shaping took place when they asked Brendan about what was done to the vehicle.

Wiegert: With, how’s the license plates were taken off the car, who did that?
Brendan: I don’t know.
Wiegert: Did you do that?
Brendan: (shakes head “no”) No.
Wiegert: Did Steve do that?
Brendan: Yeah.
Wiegert: Well then why’d you say you don’t know? Did Steve take the license plates off the car?
Brendan: (nods “yes”) Yeah.

(p. 602).

In its closing argument at Brendan’s trial the prosecutor argued that Brendan *volunteered* that he saw Avery do something under the hood of Halbach’s RAV-4, and that was something only the true killer’s accomplice would have known – because a later DNA test supposedly revealed Avery’s DNA on the hood latch. But the record proves otherwise. Fassbender *suggested* that Brendan saw Avery go under

the hood. Brendan never mentioned the hood at all until Fassbender did, and only then did Brendan incorporate that suggestion into his own statement.

Fassbender: OK, what else did he do, he did somethin' else, you need to tell us what he did, after that car is parked there. It's extremely important. (pause) Before you guys leave that car.

Brendan: That he left the gun in the car.

Fassbender: *That's not what I'm thinkin' about.* He did something to that car. He took the plates and he, I believe he did something else in that car. (pause).

Brendan: I don't know.

Fassbender: OK. Did he, did he, did he go and look at the engine, *did he raise the hood at all* or anything like that? To do something to that car?

Brendan: Yeah.

Fassbender: What was that? (pause)

Wiegert: What did he do, Brendan?

Wiegert: It's OK, what did he do?

Fassbender: *What did he do under the hood*, if that's what he did? (pause)

Brendan: I don't know what he did, but I know he went under.

Fassbender: He did raise the hood? (Brendan nods "yes") You remember that?

Brendan: Yeah.

(p. 603-04) (emphasis added).

This exchange provides one more example of Brendan trying to guess at the answers he thought the police wanted. When he was unable to guess correctly Fassbender and Wiegert readily supplied him with the answers they wanted. Unfortunately the technique worked well enough to obtain a "confession" from Brendan, but the police penchant for providing Brendan the answers takes away any honest argument that Brendan's statement can be viewed as truthful because of its corroboration with independent facts. The police simply shaped the answers to fit

the facts as they knew them at that time. Later forensic tests would disprove critical facts alleged in the March 1 statement, which gave rise to the need for Brendan and the police to try to “correct” the story in the May 13 interview. As will be seen, however, that interview backfired so badly that the State did not wish it introduced in either defendant’s trial.

Fassbender and Wiegert took a break in the interrogation to consider whether Brendan had told them a story that really fit their theory of the crime. They realized that the last version they obtained from Brendan did not fit the time line they preferred, because, if true, then Bobby Dassey’s story about seeing Halbach walking toward Avery’s trailer at about 2:45 p.m. was impossible. They could not explain Teresa still being around and chatting amiably with Avery nearly an hour later. Of course there was another unbiased witness who corroborated Brendan’s story that Halbach was still outside when he got off the bus – the school bus driver, Lisa Buchner, who said she dropped the kids off at 3:45 p.m. and saw a woman taking pictures of a van. But by then the police had already decided they liked Bobby Dassey’s story better, and had written *him* off as a likely suspect with no investigation or challenge to his story whatsoever.

Thus, when Fassbender and Wiegert returned to the interrogation room ,they told Brendan there were “some areas that we have ta revisit” (p. 614). They asked him to reconsider what happened as he got home from school, at 3:45 p.m.:

Fassbender: OK, and you said you walked down th [sic] the road to your house, (Brendan nods "yes") and you said that you saw Steven on the porch.

Brendan: (nods "yes") uh huh

Fassbender: Mark [Wiegert] and I are havin' a problem with that. Now if, I'm not, I'm not sayin' that I'm gonna put words in your mouth so we're havin' a problem with that. You know Blaine not seeing it and stuff like that and and the time period cuz its quarter to four and we're real familiar with time periods here and when she got there and stuff. Is there somethin' you need to tell us about that? When you got home what did you see before you went into your house? Did you even go in your house or did ya go over to Steven's. (cough) Talk to us about what happened there cuz *the time periods aren't addin' up bud.*

Brendan: Well I don't know if Blaine seen it but I never asked him about it. So I don't know if he seen it or not.

Fassbender: Again, er, whether Blaine saw it or not, the time periods aren't adding up. They're not equaling out. We know when Teresa got there. (Brendan nods "yes") Um, and, and *I know I guarantee ya Teresa's not standing on that porch when you come home from school.* I ju [sic] I don't see that. Um, I don't even ya I have a problem with the car sittin' out front yet at this time either. That cars sittin' out front other people er at would have seen that car, you know. Somethin' is not adding up here and you need to tell us the truth. Did this all start right when you came home from school? You need to tell me, you need to be honest with me. I can't tell ya, I I can't tell you these things. *I can tell ya we don't believe you* because there's some things that are wrong but you've gotta tell me the truth. This is you know gettin' serious her now, OK? (Brendan nods "yes") Tell me what happened when you got home.

(p. 614-15) (emphasis added). Brendan took Fassbender's transparent hint and changed his story to say that her "jeep" was in the garage when he first got home and that he did *not* see Avery and Halbach standing on his porch at that time. (*Id.*)

Wiegert saw another practical problem with Brendan's story – that if they cut her throat she would have bled a great deal, leaving blood soaked into the mattress and on Brendan's clothes (p. 640). But Brendan was unable to explain why he didn't get blood on his clothes or why there was not blood evidence remaining in Avery's

trailer. Fassbender then suggested that she was taken to the garage alive and killed there instead of the bedroom – the very theory the State offered to Avery’s jury to explain why none of Halbach’s blood or DNA was found in Avery’s trailer:

Fassbender: You sure that she wasn’t taken out to the garage alive and some of the stuff was done to her out there?
Brendan: (shakes head “no”) No.
Fassbender: Hanging from a rafter, ’er anything like that?
Brendan: (shakes head “no”) mm uh.
Fassbender: Now the worst is over, you’re not gonna shock us or anything by tellin’ us if that happened. Cuz I-I just have a feeling that something may, may be there. Talk to me.
Brendan: Nothin’ happened in there.
Fassbender: It all happened in the bedroom you said. (Brendan nods “yes”) You’re positive of that.
Brendan: (nods “yes”) Yeah.

(p. 644). This time Brendan did not take the hint and change the site of the killing to the garage, but he would do so later in the May 13, 2006, interview, no doubt after he had learned from his lawyer that the forensic evidence disproved his story.²²

Brendan’s story became more incredible when the police revisited the sequence of injuries he and Avery supposedly inflicted on Halbach. Brendan said that after he had sex with Halbach, Avery then stabbed her, Brendan cut her throat, Avery then choked her, and finally Brendan cut off her hair (p. 657). Wiegert seemed taken aback a bit that Avery would have choked her *after* her throat was cut: “He must have had a lot of blood on his hands then huh? (Brendan nods “yes”)” (p. 658).

²²Brendan’s lawyer at the time of the May 13, 2006, interview was widely quoted in the media as working to get a plea bargain for Brendan, and likely needed his client to provide a version at that time that would more closely fit the facts the State wanted to present at Avery’s trial.

But he did not challenge Brendan about the incongruity of a killer choosing to choke a victim whose throat was already slit open in the first place.

Shortly thereafter the police took another break and left the room. Brendan's jury saw no more of the taped interview because, for some reason unknown to Avery's counsel, Brendan's lawyers stipulated that the remainder was not relevant. Yet the tape reveals that when the police re-entered the interrogation room Brendan seemed not to comprehend what he had been tricked into telling the police. He wondered if he would be done with the interview in time to return to school:

Brendan: Am I gonna be at school before school ends?
Fassbender: Probably not. I mean we're at two thirty already, and schools over at what, three? (Brendan nods "yes")
Brendan: 3:05
Fassbender: 3:05 yeah. No.
Brendan: What time will this be done?
Fassbender: Well, we're pretty, we're pretty much done. we have a couple follow up things ta ask ya, but its pretty much done.

(p. 667). Fassbender did not tell Brendan yet that he was going to be arrested, but after another long break he finally did (p. 668). At that time the police brought Brendan's mother, Barb Janda in to confront him. She told him he would be going to "a juvie jail" (p. 671). Brendan asked her what would happen if Avery told a different story "like I never did nothin' or somethin' " (p. 672). Barb then asked:

Barb Janda: Did you? Huh?
Brendan: Not really.
Barb Janda: What do you mean not really?
Brendan: *They got to my head.*
Barb Janda: Huh?
Brendan: . . .say anything.

Barb Janda: What do you mean by that? (pause) What do you mean by that
Brendan? . . .

(p. 672) (emphasis added). Brendan did not answer further, but, sensing something was wrong, Barb then confronted Wiegert and asked “were you pressuring him [Brendan]?” (*Id.*). Wiegert denied any pressure and tried to convince Barb that they had been “doing this job a long time” and could tell when people aren’t telling the truth. Brendan’s jury never heard that Brendan complained that very same day that the police had tricked him by “getting into his head.”²³

Wiegert apparently believed that the story Brendan told about a bloody killing in Avery’s bedroom was true, yet his internal “truth detector” must have been faulty at the time of the March 1 interrogation, because by the time of the May 13 interview – and later at Avery’s trial --he was apparently convinced that Halbach was killed in the garage, not in Avery’s bedroom.

4.

May 13, 2006, Sheboygan County Juvenile Detention Center

On May 12th, Brendan and his lawyer, Len Kachinsky, learned that the defense motion to suppress his confession had been denied by the court. That evening Kachinsky arranged for the police to re-interview his client the following

²³Brendan’s jury also never heard any of the later May 13 interview with Brendan, at the end of which the police prodded Brendan to call his mother and repeat the same story to her. *See*, further discussion *infra* at Section 4, p.54. Brendan did as instructed and called his mother, which tape recorded conversation was played for the jury without their knowledge that the call had been orchestrated by the police.

day, without his presence. The purpose of the interview was purportedly so Brendan could “fill in some blanks” but in all likelihood it was part of Kachinsky’s plea bargain discussions with the prosecution which anticipated Brendan testifying against his uncle. By that time the results of DNA tests had come in which proved Halbach’s blood or DNA was found nowhere inside Avery’s residence, including on the handcuffs Brendan claimed were used to restrain her arms to the bed. Brendan met at length with Kachinsky’s investigator the night before the May 13 police interview, so he would have known about these problems with his March 1 statement as well. The police hoped Brendan would give them a story which explained away the exculpatory evidence that continued to mount in Avery’s case. They were greatly disappointed. Brendan’s transparent effort to change his story quickly fell apart and he was not only forced to admit numerous “lies” in the March 1 session, but it became ludicrously obvious that he could not tell a credible version now either.

The session began with Fassbender explaining to Brendan that he and Wiegert had looked at the evidence and “even your last statement, there’s some areas that . . . don’t seem ta necessarily add up” (p. 759). He told Brendan they were offering “the opportunity now to tell us about some of those things, and, and clarify some of those areas for us” (*Id.*). Implying that Fassbender knew Brendan’s lawyer or investigator had already discussed with him certain holes in his March 1 statement,

Fassbender told Brendan “you know those areas and you know the places where you need to, ah finish or clarify” (*Id.*).

Brendan then started with a long narrative as if he had been coached to give a summary of the entire encounter with Avery on October 31, but it was immediately obvious that his story failed the expectations of the police. He claimed that he went home after getting off the bus and did not even go over to Avery’s until sometime after 7:00 p.m., at which time Avery told him to “have sex” with Halbach (who was evidently still very much alive). He claimed he only had sex with Halbach because Avery was too strong and “I thought I was not gonna get away from ‘em” (*Id.*). He then claimed that Halbach was taken out to the garage alive and stabbed and killed there, instead of Avery’s bedroom as he had said in the prior statement. (p. 750-60). He went on to say that Avery shot her five times to be sure she was dead and they then burned her body in the fire (*Id.*).

Brendan’s story omitted any mention of Halbach’s vehicle, so Wiegert asked him where that fit in to the story. Brendan’s response was that he “never seen it that day” (p. 760). That obviously did not fit with the prior statement or the police theory of the crime, so Wiegert tried walking him through the story again. In doing so, Wiegert noticed that Brendan also omitted any reference to getting the mail on his bike, and asked if his prior statement was true. Brendan admitted that part had been a lie, and also this time denied hearing any screaming coming from Avery’s trailer

(p. 761). Brendan maintained that he did not go over to Avery's until after 7:00 p.m., but this time the interrogators stopped him and challenged whether he was being "honest" with them. Fassbender warned him that if they did not feel he was being honest with them they would just leave (p. 764). Brendan denied he was lying to them, but continued to say (contrary to his earlier statement) that he did not go inside and see Halbach until well after Steve called him at 7:00 p.m. (*Id.*).

Brendan said that when he first saw Halbach she was completely naked on Avery's bed but was not screaming, and had nothing covering her mouth (p. 766). Unlike his prior statement, however, he now claimed that her arms were restrained to the bedpost with rope, not the "silver colored" handcuffs he previously described, and on which none of Halbach's DNA was found (p. 766-67).²⁴ He was asked to describe Halbach's body, including her private areas. He claimed Halbach had no pubic hair, which the agents immediately noticed contradicted his previous version. The agents suggested that "[i]f you don't remember something, Brendan, tell us you don't remember" (p. 768), which naturally prompted Brendan to change his story again and claim that he did not remember whether or not she had pubic hair. Brendan also said he did not recall seeing her breasts and did not touch them at all during the " 'bout two minutes" that he had sex with her (p. 770).

²⁴The Crime Lab's trace analysis of the bedpost also revealed no rope fibers.

Brendan next claimed that Avery “unroped her” from the bed and then tied her hands and feet and carried her into the garage, during which time she surprisingly did not kick or try to get away, even though Avery supposedly told her he was “gonna take her out ta the garage and stab her and shoot her” (p. 770-71). Unbelievably, Brendan claimed that Avery was able to carry alone, one in each hand, both the .22 rifle and Halbach from his bedroom to the garage, without Brendan’s assistance (p. 771). Fassbender was incredulous:

Fassbender: So you want us to believe that he carried a body and a gun at the same time out into the garage?

Brendan: Yeah.

Fassbender: Ain’t that nearly impossible to do unless you gave her [sic] the gun and then you carried the body?

Brendan: No. (Shakes head “no”).

(p. 773-74). When Brendan also claimed to know the exact time when Halbach was carried to the garage, both agents found that unbelievable and warned him they would be following up the interview with Brendan’s attorney:

Fassbender: OK. Wa, we’re not here ta try and put words in your mouth or force you to say anything. OK? So it’s all right if ya don’t know or, or you [sic] guessing, say that word, well I’m guessing that’s what it was or I believe it was blue, I’m not sure, you know, you know what I mean? Um, because its real important, and it is your words and your memory and, and that you tell us cuz this is potentially your last opportunity to do that. And I think Marks right, it’s, it’s the, we think, we feel your doin’ it for the right reasons and its because you feel it’s the right thing to do. But Mark and I also, you know, *will be talking to your attorney* and we have ta tell your attorney, Len, that that we feel you that you did tell us the truth or did tell us everything, and that’s important to.

Wiegert: Because you know we have evidence about a lot of this stuff, right? You’re aware of that?

Brendan: Yeah.

Wiegert: And the evidence will tell us if you're lying or not. OK.
Brendan: Mm hum.

The agents again asked Brendan if he saw Halbach's vehicle in Avery's garage, but Brendan denied seeing it. Wiegert then became so frustrated he lost his composure:

Wiegert: *Brendan at some point, she's in that truck. We know that. OK? Bleeding. So you can't say you didn't see the truck or know where the truck was because she had to be in that truck after she was bleeding. OK? That's just the way it is. And I'm not gonna sit here and let ya lie to me. You need to be honest here. We just went through that.*

Fassbender: Mark and I don't wanna leave because we feel you deserve this opportunity cuz you're the one that came forward initially with this information. But we're not gonna sit here and listen ta this. Now sometimes you tend, you seem to be honest about some part and then for some reason then you're not totally honest about other parts and its maybe cuz those other parts bother you a lot. And we understand that. And that it can be difficult ta talk about. But we came out here today, you know Saturday morning, because we wanted ta give you that, that chance cuz you said you wanted ta talk. *We know you were involved in this. There's no question about that but we're looking for the detail so we can know so we match everything up with the evidence, and, and so we can believe what you say. Do you understand that?*

(p. 775) (emphasis added). Naturally, with this prompting Brendan changed his story to say that he did see Halbach's vehicle in the garage, and that she was placed into the "jeep" after she was stabbed and bleeding.

Later, Brendan claimed that other parts of his March 1 statement were not true. He said that while he did stab her in the stomach, he never slit her throat (p. 779). In the May 13 statement, he also described a completely different knife as the murder weapon -- this time it was an eight-inch pocket knife that he had in his pocket, not a straight knife that Avery just found in the garage (p. 805-06). In this

story he also denied seeing Halbach's cell phone, camera or purse in Avery's burn barrel, which contradicted the March 1 version (p. 819). Brendan also said that after he pulled the bloody knife out of her stomach he gave it to Avery and they later "put it into the jeep" (p. 781).²⁵ Brendan then said that Avery "took the gun and shot her five times," but did not know where in her body she was shot (*Id.*). Fassbender confronted him again:

Fassbender: The first time you told us ah 10 times, about 10 times, that you shot her.²⁶ And you told us where he shot her. Were you lying then or are you lying now?

Brendan: I was lying ah then.

Fassbender: Why? Why are there 10 shell casings or more on that garage floor?

Brendan: Well there's gun shells all over the place though.²⁷

(p. 782). Eventually Brendan said he only "heard five shots" but agreed with Fassbender that it may have been more (p. 783-84).

The agents also encountered difficulty when Brendan denied that he accompanied Avery when the RAV-4 was driven down into the Avery Salvage Yard pit (p. 787-88). They wanted Brendan to say again, as he had with their prompting in the March 1 session, that he saw Avery do something under the hood, because

²⁵ No knife or bloody transfer from a knife was ever found inside Halbach's vehicle.

²⁶Fassbender incorrectly said this was claim was made "the first time." Actually it was not until the third time they interrogated him the week of February 27 that Brendan said anything at all about shooting Halbach, and that was only after a leading and suggestive question introduced the topic.

²⁷In this respect Brendan is corroborated by the property owner, Rollie Johnson, who later testified at Avery's trial that .22 shells were all over the property for years.

they knew the vehicle was discovered with the battery cable disconnected. Instead, Brendan claimed he was at home when Avery took the vehicle to the pit, which provoked this response from the agents:

Fassbender: See, I can't believe that now. I'm sorry. Your mom wasn't home. Your mom was at Scott's.
Wiegert: Brendan, d-do you want us to walk out of here? Is that what you want? Then quit lying to us.
Fassbender: First version you say you went down and ended up yet with Steven with the RAV-4. You saw some things down there? You told us about those things. Where'd you come up with that? You told us that Steve took the license plates off the vehicle. You told us that Steven went under the hood of the vehicle. What did you just grab that out of the air? How do you know those things?
Brendan: Just guessing.

(p. 788). Perhaps Fassbender forgot that the real source of that information in the March 1 story was actually Wiegert and himself.

Shortly after this exchange Brendan gave conflicting answers about cutting Halbach's hair. First he told them, consistent with the March 1 statement, that he cut off her hair in the bedroom, but claimed he used the knife they found in the garage.

Once again the agents were disbelieving:

Wiegert: It doesn't make sense.
Fassbender: It's impossible. You took her out to the garage and that's when you got the knife. Explain how that can be. (pause) Did you cut her hair off?
Brendan: No.
Fassbender: Then why did you just tell us that you did? Brendan?
Brendan: I don't know.

(p. 791).

After this confrontation, the agents suddenly seemed to recall that the 16 year old boy that they were questioning was still just a child, and so they tried to get the answers they sought by threatening to tell his mother that he was lying to them. Wiegert said: "OK. So when I walk out this door right now and I go call your mom and tell her that you've been lying to me, what do you think she's gonna say? You think she'll be mad at you?" (p. 791-92). When this also failed to work, they both pretended to walk out of the room in a huff:

Fassbender: Brendan, I'm gonna tell you what. I just about had enough and I'm, I'm gonna leave and I'm gonna take Mark with me, um and we're gonna talk and if Mark can convince me to come back in, if that's what he even wants, we'll come back in to give you a moment to think about. If we come back in, just tell us the truth. We're gonna take you through it if we come back in, you can tell us the truth and we're gonna ask you some tough questions. If you changed your story between, we'll ask you why, cause that's important. OK?

Wiegert: OK. What he's saying is you got one more opportunity left. You understand that? You gonna take that opportunity? Think about it. You got one more chance to tell the truth or we're done. Got it?

(p.792).

Following the break, the agents returned and again repeated the threat to call his mother and tell her Brendan was lying to them (p. 793). They then tried to run through his story one more time, but Brendan would not even look at them as he merely parroted back the answers they wanted. After agreeing to the basics – that he was involved in the Halbach murder with Steven Avery – Wiegert told him "that's the hard part; you've admitted it, OK. That's over. You know the rest of it is just details" (*Id.*). The problem for the police was that Brendan simply *did not know* "the

details” they wanted to hear, so the interrogation went on for a long time in much the same way it did before the break – Brendan told them a story that did not fit the facts and the police did their best to shape it into a credible confession.

One of the problems the police had with their theory of the crime was explaining how and why Halbach came to be inside Avery’s trailer. They knew Halbach was a physically fit 25-year old woman with enough experience photographing cars for strangers that she would not have voluntarily entered Avery’s home. Despite repeated questions, Brendan never could offer any explanation as to how Avery managed to get Halbach into his house (*See* p. 815, 833, 861).

It also seemed logistically improbable that Avery could have killed Halbach on the spur of the moment and completely disposed of her body with no one noticing. So Wiegert, for the first time, introduced to Brendan the theory that the killing was planned. He asked: “Why did you go over there? You had this stuff planned out already, didn’t you? You and Steve had this planned?” (p. 796). Brendan responded to this cue by claiming they had planned it “for a few days” (*Id.*). But he could give no details of any “plan” that would satisfy the agents that such a plan really existed. There was evidently no list of things to do and no preparations made (p. 798-99).

The police also could not understand what motive Avery had to kill anyone, much less Teresa Halbach. Brendan first told them Avery did it because he missed jail and wanted to return, but the police didn't buy that explanation (p. 797). Later, at Wiegert's suggestion, Brendan offered that Avery was unhappy that his girlfriend Jodi was in jail, but he could not logically explain why that would lead Avery to kill someone. Wiegert suggested: "[h]e told you why he was pissed off. Probably cuz he wasn't getting any or something like that's my guess" (p. 815). Only after such prompting did Brendan agree with this unlikely suggestion. (*Id.*)

Fassbender also suggested that because Brendan told them in his March 1 statement that Avery put an old car hood and branches against the RAV-4 to obscure it from view he must have been with Avery or he could not otherwise have known that information (p. 842). Of course, the photo of the vehicle when it was discovered showed those items clearly and it was presented at the preliminary hearing and widely shown on T.V. More significantly, when they asked Brendan to draw the route Avery traveled to take Halbach's vehicle into the pit where it was found, he at first told them the wrong direction the RAV-4 was facing, then later claimed, at Fassbender's suggestion, that he did not recall (p. 859).

The police also explored whether Avery or his girlfriend may have had sex with Brendan, which he denied (p. 816). Brendan did claim that on occasion while goofing off and wrestling Avery may have grabbed his crotch area, but not in a

sexual manner (p. 848). In fact, Brendan claimed he was not only a virgin before the incident with Halbach, but that he never even fooled around with a girl before (p. 855). The police apparently did not consider how unlikely it was that a 16 year old boy who was completely inexperienced with sex would even take off his clothes in front of his uncle and be able to perform sexually with a woman for the very first time in his life.

Near the end of the May 13 session, when asked what punishment he thought he deserved for his part in the Halbach killing, Brendan said "I should get a few years in jail" (p. 822). He also remembered to add that "I did it because Steven told me to," which is no doubt what his lawyer told him to say.

Finally, Fassbender used the session to try to persuade Brendan to call his mother and confess to her. "If you're truly sorry for the Halbach's, you'll be, you'll tell your mother the truth about this" (p. 861). He clarified a few moments later that what he really wanted Brendan to tell his mother was not necessarily "the truth," but "exactly what you told us" (p. 863). The police encouraged him to call his mother right away "before we tell her" (p. 862). Later, the phone call the police orchestrated between Brendan and his mother was used against Brendan at his own trial, as an implication of his guilt.

On several occasions Fassbender suggested Brendan was changing his story because other people in his family told him what to say (p. 832). But every single

phone call and jail visit Brendan had with anyone, from the time of his arrest to the trial, was recorded by the authorities, yet no recordings of family members supposedly pressuring Brendan to recant his confession or change certain facts in his story were ever presented at Brendan's trial. The fact is that the only two people documented to have manipulated Brendan Dassey into saying anything about this case are Special Agent Fassbender and Investigator Wiegert. They manipulated Brendan so well that none of his statements can be deemed reliable.

CONCLUSION

Despite Brendan Dassey's conviction at his own jury trial, this Court should not consider the statements he made implicating Steven Avery to be reliable enough to consider at Avery's sentencing. As the foregoing summary of those statements demonstrates, there are many reasons to question the trustworthiness of his alleged "confession." Because the PSI writer relied substantially on Brendan's March 1 statement to the police, and the entirely unproven sexual assault allegation, this Court should reject all of that report, and also order that it not be included in his Department of Corrections file.

Dated at Brookfield, Wisconsin, May 29, 2007.

Respectfully submitted,
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