No. 17-1172

IN THE

Supreme Court of the United States

BRENDAN DASSEY,
Petitioner,
v.

MICHAEL A. DITTMANN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Respondent's opposition rests largely on the same error made here by the police, the Wisconsin courts, and the en banc Seventh Circuit: disregarding the fundamental difference between interrogations of adults and interrogations of juveniles. In particular, respondent never acknowledges the critical fact that interrogation tactics that can produce a voluntary (and reliable) confession from an adult often "'overawe and overwhelm'" a juvenile, *J.D.B.* v. *North Carolina*, 564 U.S. 261, 272 (2011), potentially inducing a coerced (and false) confession. *Accord id.* at 272-273 ("'[N]o matter how sophisticated,' a juvenile subject of police interrogation 'cannot be compared' to an adult." (brackets in original) (quoting *Gallegos* v. *Colorado*, 370 U.S. 49, 54 (1962))). That is why this Court requires that "special care," indeed "the greatest care," be used when assessing the voluntariness of a juvenile confession. *Gallegos*, 370 U.S. at 53; *In re Gault*, 387 U.S. 1, 55 (1967). It is also why the Court has "mandate[d]" that courts addressing a juvenile's voluntariness challenge perform an actual "evaluation of the juvenile's age … and intelligence" in determining whether the confession was coerced. *Fare* v. *Michael C.*, 442 U.S. 707, 725 (1979). Respondent never meaningfully addresses these mandates; he instead urges—consistent with the Wisconsin Court of Appeals' decision—that "special care" requires nothing extra at all. That is manifestly wrong.

Respondent's opposition also rests on mischaracterizations of the petition. He asserts, for example (*e.g.*, Opp. 2), that petitioner Brendan Dassey seeks to "change" the law in light of recent social-science research. But Dassey expressly disavowed any such argument (Pet. 20 n.6). Similarly, respondent contends (*e.g.*, Opp. 1) that Dassey seeks "opinion-writing stand-

ards" for lower courts. That assertion likewise has no basis in the petition, which challenges not the Wisconsin decision's word count but its departure from the precedent just cited (a departure confirmed by the state court's exclusive reliance on *adult*-confession cases in rejecting Dassey's voluntariness challenge, *see* Pet. App. 283a).

The balance of respondent's opposition, including his highly misleading characterization of the interrogation tactics, is addressed below. Written arguments alone, however, cannot adequately convey what transpired here; for that the Court should review the video of Dassey's interrogations (which was filed with the petition). It can then draw its own conclusion about whether the interrogators improperly coerced a juvenile with significant intellectual and social limitations. And having drawn its conclusion, the Court can in turn decide whether the Wisconsin courts unreasonably applied this Court's precedent, thus condemning Dassey to a life sentence.

ARGUMENT

I. THE WISCONSIN COURT OF APPEALS UNREASONABLY APPLIED THIS COURT'S VOLUNTARINESS PRECEDENT, AS HAVE OTHER COURTS

A. Respondent first contends (Opp. 16) that certiorari is unwarranted because the petition presents no "split[]." This Court, however, frequently grants review despite the absence of a lower-court conflict—including where a state court's ruling on federal law conflicts with this Court's precedent, *see* S. Ct. R. 10(c).

Respondent denies any such conflict here, but he points to nothing in the Wisconsin Court of Appeals' decision showing that that court actually applied this

Court's special-care requirement for juvenile confessions. Nor does he dispute that the Seventh Circuit likewise pointed to nothing. *See* Pet. 22-23. Instead, he asserts (Opp. 13) that the Wisconsin court "recited the appropriate test." That is wrong: While the court recited the general totality-of-the-circumstances test, it never mentioned this Court's *additional* special-care requirement for juvenile confessions. Applying the totality standard without such care—*i.e.*, without recognizing that interrogation techniques that may operate fairly on an adult can frequently coerce a juvenile—conflicts with clearly established federal law.

These points also undermine respondent's reliance (Opp. 27-28) on *Early* v. *Packer*, 537 U.S. 3 (2002) (per curiam). The issue there was governed by the general totality-of-the-circumstances test, and because the state court recognized the factors relevant to that test, this Court concluded that it had in fact "consider[ed]" them. *Id.* at 9. Such consideration sufficed because under the general totality test, the state court had no obligation to give "certain facts and circumstances" particular weight or attention. *Id.* But in the juvenile-confession context, this Court *has* required particular attention to certain facts, *i.e.*, special care.

Respondent's error in relying on *Early* is confirmed by *Wilson* v. *Sellers*, 138 S. Ct. 1188 (2018). *Wilson* instructs that under AEDPA, federal courts must focus on "the particular reasons … state courts rejected a … federal claim[]." *Id.* at 1191-1192. And when a state court "explains its decision … in a reasoned opinion," a habeas court "reviews the specific reasons given … and defers to those reasons if they are reasonable." *Id.* at 1192. Here, the "specific reasons" given by the Wisconsin Court of Appeals are objectively *un*reasonable because they make clear the court did

not apply the requisite special care—including evaluating, in light of the differences between adults and minors, how Dassey's age (and his intellectual and social limitations) bore on the interrogators' techniques and hence the voluntariness of the confession. *See Miller* v. *Fenton*, 474 U.S. 104, 116 (1985) (voluntariness "turns … on whether the techniques for extracting the statements, as applied to *this* suspect," were unduly coercive).

B. Respondent also protests (Opp. 1, 16, 19) that this Court does not engage in "error correction." But this case is not about simple error correction; there is a broader problem of lower courts departing from this Court's longstanding precedent regarding juvenile confessions. Pet. 30-35. That broader problem justifies review.

Respondent's contrary arguments are meritless. First, respondent repeatedly claims, as noted, that Dassey is requesting opinion-writing requirements for state courts. But again, Dassey's arguments address not the length of courts' decisions but their substantive inconsistency with clearly established federal law. *See supra* pp.1-2.[1]

Respondent next notes (Opp. 17) that most of the lower-court decisions the petition cites in describing

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[1] This same mischaracterization of Dassey's argument underlies respondent's assertion (Opp. 28) that *Fare* and *Boulden* v. *Holman*, 394 U.S. 478 (1969), show that courts can succinctly conduct a proper special-care analysis. Dassey never contended otherwise. He contends that courts unreasonably apply this Court's juvenile-confession precedent by—as here—not conducting the special-care analysis *at all*. (*Boulden* could not support respondent's assertion in any event, because it was not a juvenile-confession case, *see* Opp. 28.)

the broader problem were from state intermediate courts rather than state supreme courts. That is irrelevant. Intermediate state courts, no less than state high courts, are bound to follow this Court's precedent—and when they fail to do so, this Court has not hesitated to grant review. *E.g.*, *Lafler* v. *Cooper*, 566 U.S. 156, 173 (2012).

Respondent also contends (Opp. 18-19) that the facts here are less "egregious" than in some of the other lower-court cases the petition (and amici) cite. Respondent is again attacking a strawman; the other lower-court cases were cited not as evidence that the Wisconsin Court of Appeals' decision was erroneous, but to show (1) that disregard of this Court's special-care mandate is sufficiently widespread that this Court's review is justified; and (2) that some courts faithfully adhere to that mandate, demonstrating that adherence is entirely feasible.

Lastly, respondent asserts (*e.g.*, Opp. 2) that AEDPA precludes the Court from using this case to correct lower courts' broader disregard of its precedent. That is wrong; this Court has repeatedly granted review in AEDPA cases to give lower courts guidance. For example, the Court gave guidance regarding claims of race discrimination in jury selection in *Miller-El* v. *Dretke*, 545 U.S. 231, 253, 255 (2005). And in a trio of AEDPA cases—*Rompilla* v. *Beard*, 545 U.S. 374 (2005); *Williams* v. *Taylor*, 529 U.S. 362 (2000); and *Wiggins* v. *Smith*, 539 U.S. 510 (2003)—this Court instructed lower courts about how to apply the ineffective-assistance-of-counsel standard. *Wiggins* even recognized that in providing such guidance, the Court "made no new law." 539 U.S. at 522 (discussing *Williams*). In short, there is ample precedent for the

Court to use this AEDPA case to address the special-care standard and lower courts' departures from it.[2]

II. DASSEY'S CONFESSION WAS COERCED

The petition explained (at 24-30) that certiorari is also warranted because Dassey's confession was involuntary under a proper analysis (which a federal habeas court would perform upon concluding that the state courts had unreasonably applied clearly established federal law). Respondent's contrary contentions lack merit.

To begin with, respondent repeatedly notes (*e.g.*, Opp. 15) that Dassey's interrogators did not physically beat him. But that does not demonstrate voluntariness; "coercion can be mental as well as physical," *Blackburn* v. *Alabama*, 361 U.S. 199, 206 (1960). Indeed, over 30 years ago this Court noted a trend of "interrogators … turn[ing] to more subtle forms of psychological persuasion." *Colorado* v. *Connelly*, 479 U.S. 157, 164 (1986).

Respondent's denial that any psychological coercion occurred here rests on a strained and misleading account of Dassey's interrogations. For example, respondent repeatedly contends that, although the interrogators told Dassey he would be "set … free" if his account of the crime matched theirs, Pet. App. 362a, they "made no promises of leniency," *e.g.*, Opp. 16. That blinks reality. The "set free" statement—even if "a

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[2] These cases also refute respondent's suggestion (Opp. 20) that certiorari should be denied simply because a "general … rule" (like the ineffective-assistance standard) gives state courts "leeway." The cases show that even with "leeway," courts can contravene clearly established federal law regarding a general rule, including by—as here—failing entirely to comply with this Court's precedent regarding that rule.

paraphrase of a common [biblical] maxim," Opp. 30—*was* a promise of leniency, certainly to Dassey, who because of his intellectual limitations did not understand "subtle distinctions between literal and figurative language," Pet. App. 150a; *accord* Pet. App. 270a-271a. Respondent cannot wish away that promise (and other similar ones) by noting that the interrogators also said something contradictory.

Next, respondent persistently avers that the officers' interrogation techniques were "standard" or "routine." *E.g.*, Opp. i, 1. The lone authority he offers for that claim, however, is the panel dissent below—which cited *no authority* for its assertion that the techniques were both commonplace and routinely upheld, "including in juvenile cases," Pet. App. 175a. As the law-enforcement-instructor amici explain at length, the techniques employed here are in fact widely considered improper by law enforcement because of their propensity to induce false confessions from juveniles. Indeed, amici explain (Br. 5) that trainers use Dassey's interrogation video to teach "'what *not* to do' in interrogations involving juveniles and individuals with intellectual impairments" (emphasis added).

Respondent also denies that the confession here resulted to a significant extent from the interrogators' tactic of feeding Dassey incriminating facts. But respondent ignores most of the fact-feeding examples that Dassey and his amici identify. Instead, respondent repeatedly insists (Opp. 2, 25, 32) that Dassey volunteered "unexpected[ly]" that he had raped Teresa Halbach. But that too was fed to Dassey: Two days earlier, the interrogators had asked Dassey whether Halbach had been raped, indicating that they "had heard that [Steven Avery] might have told" Dassey that an assault had occurred:

> Fassbender: Did he try to have sex with her or anything and she said no and
>
> Dassey: …
>
> Wiegert: Did he tell you that, it's very important, OK …

Pet. App. 538a-539a. Given Dassey's propensity to agree with his interrogators' account of the facts, this prior exchange makes it unsurprising that, when the officers confronted him about whether Avery "ask[ed] [him]" if he wanted to have sex with Halbach—and suggested that they already "kn[e]w" such an exchange had occurred—Dassey told them what they wanted to hear. Pet. App. 395a. It is all the more unsurprising given the interrogators' extensive use of "minimization" and "maximization" techniques (*see* Prosecutors' Br. 10-11, 15) in the moments leading up to Dassey's statement. *See* Pet. App. 394a ("What happens next? Remember, we already know."); Pet. App. 397a ("It's not your fault. He [Avery] makes you do it."). Hence, what respondent apparently views as a central point in his favor is actually another example of Dassey's extreme suggestibility and the interrogators' pervasive fact-feeding—facts Dassey parroted back in what become "his" (really their) confession.

Respondent next argues (Opp. 24) that Dassey's confession must have been voluntary because he "resisted" a few of the interrogators' most extreme accusations. This Court has recognized, however, that coercion is not an all-or-nothing proposition; it held in one case, for example, that a defendant who repeatedly rejected interrogators' accusations (despite extensive physical abuse) before confessing had been impermissibly coerced. *Brown* v. *Mississippi*, 297 U.S. 278, 281-282 (1936). That Dassey pushed back on some of his in-

terrogators' extreme assertions (that he shot Halbach, for example) therefore does not indicate that he was not coerced. Moreover, as described in the petition (at 23-30), instances in which Dassey resisted were decidedly rare.[3]

Finally, respondent argues (Opp. 22) that *Gault* and other cases "where this Court has held that juvenile confessions are involuntary have involved extreme facts." As an initial matter, it is far from clear that the facts of *Gault* are more "extreme" than those here. The crux of *Gault*'s voluntariness analysis was that "[t]he 'confession' of Gerald Gault was first obtained by Officer Flagg, out of the presence of Gerald's parents, without counsel and without advising him of his right to silence." 387 U.S. at 56. The Court also noted that no confession there "was reduced to writing." *Id.* Much of this is equally true of Dassey's confession—but here there are additional facts indicating coercion, including Dassey's intellectual and social limitations, the interrogators' extensive fact-feeding, their maximization and minimization techniques (*see* Prosecutors' Br. 10-11, 15), the length of the interrogations, and the fact that Dassey was subjected to two-on-one questioning. The point is simply that respondent's effort to draw a bright

[3] Respondent is also incorrect in asserting (Opp. 8-9) that Dassey "stuck to his story" regarding both "who started the fire" and "what happened to the victim's hair." When first asked "if [the fire] was started," Dassey said: "No it wasn't." Pet. App. 369a. But after the officers responded, "[w]e know the fire was going," Dassey acquiesced. *Id.* As to Halbach's hair, the interrogators themselves later acknowledged that this part of Dassey's story "doesn't make sense" and was "impossible." Dist. Ct. Dkt. 19-34, at 37.

line between the facts here and the "extreme facts" of other cases falls short.[4]

More fundamentally, factual differences between this case and ones in which this Court held a confession involuntary do nothing to show that Dassey's confession was voluntary. In none of those cases did the Court hold or even intimate that coercion is limited to facts like those before it. *Cf. Panetti* v. *Quarterman*, 551 U.S. 930, 953 (2007) (the Court's decisions do not create clearly established federal law only for other cases with "a nearly identical factual pattern"). And as noted, the Court more recently has not only made clear that coercion can be psychological as well as physical, but also noted both the growing prevalence of psychological coercion and its disproportionate impact on the young and intellectually challenged. *See supra* pp.1, 6. It was such coercion that rendered Dassey's confession involuntary—and, as the petition explains (at 28-30), highly unreliable.

III. THIS CASE IS A GOOD VEHICLE

Respondent argues that, for two closely related reasons, this case is a poor vehicle to provide lower courts with guidance and clarity about the special-care standard. First, respondent points (Opp. 31-32) to the case's

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[4] The foregoing also rebuts respondent's declaration (Opp. 2) that Dassey "cannot cite *any* decision, from *any* court, invalidating a [minor's] confession … in analogous circumstances." There are in fact several such cases. To take just one, Dassey cited (Pet. 33) *United States* v. *Preston*, 751 F.3d 1008 (9th Cir. 2014) (en banc). The court there unanimously invalidated a confession under very similar circumstances: an 18-year-old intellectually disabled suspect interrogated—for a much *shorter* time than here—by two officers who "fed him the details of the crime to which they wanted him to confess" (among other tactics). *Id.* at 1010.

AEDPA posture. That fails for the reasons—and under the precedent—discussed above (pp.5-6). Second, respondent reprises his strawman claim (Opp. 33-36) that Dassey seeks to change the law in light of recent social-science research. As noted, however, the petition explicitly rejected this notion (and explained why the research is relevant). *See supra* p.1. The petition also explained (at 20) that this Court has repeatedly relied on similar empirical research in discussing closely related issues. Respondent notably offers no response.

Respondent also attempts to resist the plain fact that Dassey's confession was essentially the entire case against him. Pet. 36. Respondent cannot, of course, deny that *no* forensic or other direct evidence linked Dassey to the crimes. He instead dismisses that as "unsurprising" (Opp. 32 n.8) because Dassey and Avery "had four additional days to clean up." But as respondent knows, there was ample physical evidence left behind—just none linked to Dassey. For example, Avery's blood and DNA were found on items on his property, specifically in the victim's car and on her key. Pet. App. 259a. Respondent's theory is thus that Avery and Dassey conducted an absolutely perfect "clean up" of some items and areas but did little or nothing elsewhere. That is utterly implausible.

Respondent further contends that despite the lack of other direct evidence against Dassey, there was "significant … evidence confirming the confession[.]" Opp. 9. But that supposed evidence (*see* Opp. 9-10) consists almost entirely of items found *before* Dassey's interrogation—meaning their locations were known to Dassey's interrogators when they fed him facts and otherwise shaped the confession. This is therefore not a situation in which a confession led police to evidence they did not have; it is a case in which police used the

evidence they did have to script a confession that corroborated that evidence. The other evidence thus does nothing to "confirm[]" the confession's reliability, nor to undermine the conclusion that the confession was virtually the only evidence against Dassey. Pet. App. 170a-171a, 233a, 278a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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