

Federal Judge Grants Brendan Dassey New Trial And Castigates His First Lawyer

Brendan R. Dassey was granted a new trial by U.S. Magistrate Judge William E. Duffin on August 12, 2016. [Judge Duffin granted](#) Dassey's federal habeas corpus petition, vacated Dassey's convictions related to Teresa Halbach's homicide in 2005, and ordered that he either be retried within 90 days or released.

Brendan Dassey and his uncle Steven Avery were convicted in separate trials of charges related to the disappearance in late October 2005 of 25-year-old Teresa Halbach, and her apparent murder. The case was the subject of the [Netflix series](#) — *Making A Murderer* — that was first broadcast in December 2015.

Dassey was 16-years-old when Halbach disappeared. Dassey had intellectual disabilities, and he had been involved in special education services. Testing in October 2002 showed his cognitive abilities were below average, his verbal abilities were below average, and his short and long-term memory was below average.

Four months after Halbach disappeared, Dassey was interrogated four times during a 48-hour period from February 27 to March 1, 2006 about Halbach's disappearance. During a three-hour interrogation session on March 1, 2006 -- without an attorney or his mother present on his behalf -- Dassey gave an audio and videotaped statement implicating himself and his uncle Steven in the rape, murder, and mutilation of Halbach.

Based on his confession, Dassey was charged with first-degree intentional homicide, second-degree sexual assault, and mutilation of a corpse.

On March 7, 2006, attorney Leonard Kachinsky was appointed to represent Dassey.

Three days later Dassey met and talked with Kachinsky for the first time. Dassey told Kachinsky he knew nothing about Halbach's disappearance, his statement wasn't true, and he wanted to take a polygraph test to prove his innocence.

Kachinsky gave numerous local and national media interviews in which he blamed



Brendan Dassey
(Wisc. DOC, 2011)

Avery for being a bad influence on Dassey, who might take a plea deal. Kachinsky didn't mention to reporters that Dassey wasn't considering a plea deal, and he insisted his statement was false and he was innocent. Kachinsky [even](#)

[stated](#) on Nancy Grace's national television program, "there is, quite frankly, no defense" for Dassey if his recorded statement was accurate and admissible.

Avery stated to the media that Dassey was not very smart and it would have been easy for the police to have coerced him, and that his confession must have been coerced because there was no physical evidence to support his confession. Kachinsky responded by telling a reporter that it did not appear from Dassey's recorded statement that the police coerced him. Kachinsky told another reporter that Dassey had a good ability to recall the events he described in his statement.

Three weeks later Dassey met for a second time with Kachinsky, insisted he was innocent, and reiterated that he wanted to take a polygraph examination.

Apparently without conducting a background check, Kachinsky hired Michael O'Kelly, who claimed to be a private investigator and a polygraph examiner, to conduct a polygraph examination. Kachinsky notified Dassey in a letter about the planned polygraph examination, but [he added](#) in the letter, "the videotape is pretty convincing that you were being truthful on March 1."

Before Dassey took the polygraph examination the Manitowoc County District Attorney sent an email to Kachinsky expressing concern about his pre-trial press interviews. He also referred Kachinsky to the relevant bar association ethics rule governing such publicity.

O'Kelly reported that Dassey's polygraph result was inconclusive, but he expressed [his opinion](#) that Dassey was "a kid without a conscience." Kachinsky hired O'Kelly as the defense investigator. However, O'Kelly's primary mission was to find evidence that would assist the prosecution to convict Avery, since Kachinsky was assuming that Dassey would plead guilty and be a cooperative prosecution witness against his uncle. None of the information

that O'Kelly provided to the prosecution resulted in the discovery of any evidence against either Dassey or Avery.

On April 19, 2006 [Kachinsky filed](#) a motion to suppress Dassey's police statements and video taped confession. He expected to lose the motion. To increase his leverage with getting a plea bargain, he told O'Kelly to interrogate Dassey and get an additional confession from him to Halbach's murder.

After the suppression motion was denied on May 12, 2006, O'Kelly videotaped his interrogation session that day in which he acted belligerent towards Dassey and tried to scare and bully him into confessing to the involvement of him and his uncle Steven in Halbach's murder. O'Kelly even lied to Dassey and told him that he had failed the polygraph examination. Dassey insisted he didn't do anything, and he was innocent. After O'Kelly told Dassey that he would spend the rest of his life in prison if he didn't confess, Dassey recounted a story similar to what was in his police videotaped confession.

Without watching the videotape, Kachinsky authorized O'Kelly to communicate with the prosecution about the substance of Dassey's "new" confession.

The next day, May 13, Kachinsky authorized Dassey to be interrogated by the prosecution's investigators without him being present. While O'Kelly observed from another room, Dassey gave a statement that contained many internal contradictions, and which was inconsistent with his statement on March 1.

That same day, Dassey called his mother Janda from jail. He told her that he had been interrogated again, and that Kachinsky wasn't present. In the recorded conversation [she told him](#): "Don't talk to them no more. ... They are putting you in places where you're not. ... what your attorney should be doing is putting an order on all of them that they cannot interfere with you or your family members unless your attorney is present. ... Cause they're all investigators for the Halbach case.... Cause the only thing that they're putting out there is bad stuff about you ..."

The State Public Defender's Office sent a letter to Dassey's trial judge that stated Kachinsky allowing law enforcement officers to interview Dassey without counsel present was "indefensible," and that it had decertified him from being appointed in

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Class A through Class D felony cases.

Kachinsky filed a motion to withdraw as Dassey's lawyer, which was granted during a hearing on August 25, 2006. The judge [also ruled that](#) Dassey's statement on May 13 would not be admissible. The judge stated that in light of Dassey's age and record of intellectual deficits, "Kachinsky's failure to be present while his client gave a statement to investigators" "constituted deficient performance on Attorney Kachinsky's part."

Dassey was appointed another lawyer.

During his trial in April 2007 the prosecution's key evidence was Dassey's March 1, 2006 confession.

Dassey relied on two defenses:

First, that his incriminating statements were not true. Dassey's lawyer introduced records to prove his intellectual disabilities, and forensic psychologist Dr. Robert H. Gordon testified that his examination and testing of Dassey showed he was "highly suggestible ... when being interrogated," and that the officer's interrogation of Dassey on March 1 exploited his suggestibility.

Second, his alibi defense for October 31, 2005 was he was home from the time he got off the school bus until his uncle Steven called him about 7 p.m. to invite him to the Avery family's wrecking yard where Avery was burning some branches and tires. He got home about 10 p.m. Dassey testified in his defense that he did not see Halbach on October 31, and he never saw her picture or heard her name until after she was reported missing. When asked why he confessed to the law enforcement officers that he participated in the rape and murder of Halbach, [Dassey responded](#), "I don't know." He testified that he was led to believe by his interrogators that he would be able to go home to his family "regardless of what he said."

Dassey was convicted by a jury of all charges on April 25, 2007. For his first-degree intentional homicide conviction Dassey was sentenced to life imprisonment with the possibility of parole after November 1, 2048. He was sentenced to concurrent terms of 14 years imprisonment for second-degree sexual assault, and six years for mutilation of a corpse. Avery was convicted in March 2007 of first-degree intentional homicide and illegal possession of a firearm. He was sentenced to life in prison.

On January 30, 2013 the Wisconsin Court of Appeal [denied Dassey's](#) consolidated direct appeal and petition for post-conviction relief. The court affirmed the trial court's ruling admitting Dassey's confession, because it "was voluntary and admissible," and he was not coerced. The court also ruled that Kachinsky's pretrial conduct did not constitute an "actual conflict of interest" because Dassey hadn't proven by clear and convincing evidence that he "actively represented conflicting interests." The court also ruled against Dassey's claims his trial lawyers [were ineffective](#) "because they failed to present substantial evidence that his March 1 confession was unreliable, failed to retain an expert on coercive interrogation tactics, failed to present a part of his confession suggesting recantation, and, in closing argument, conceded his guilt to the corpse-mutilation charge."

The Wisconsin Supreme Court declined to review the appeals court's ruling.

In October 2014 Dassey filed a federal habeas corpus petition that raised two issues: Kachinsky's pre-trial conduct denied Dassey his Sixth Amendment right to effective assistance of counsel; and, Dassey's confession was obtained in violation of the Fifth Amendment.

The State of Wisconsin vigorously opposed Dassey's petition.

On August 12, 2016 U.S. District Court Magistrate Judge William E. Duffin [issued his ruling](#) in *Dassey v. Dittmann*, No. 1-14-cv-01310 (USDC ED Wisc., 8/12/2016).

Duffin denied Dassey's claim that Kachinsky's pre-trial conduct constituted a "conflict of interest." Duffin had to deny Dassey's claim because the U.S. Supreme Court has never ruled a defense lawyer assisting the prosecution to the detriment of his client is an actual conflict of interest. [See Endnote 1 for explanation] In making his ruling Duffin didn't mince words that Kachinsky's acted contrary to Dassey's interests. [Duffin emphasized](#) Kachinsky's "conduct was inexcusable both tactically and ethically. It is one thing for an attorney to point out to a client how deep of a hole the client is in. But to assist the prosecution in digging that hole deeper is an affront to the principles of justice that underlie a defense attorney's vital role in the adversarial system."

However, Duffin grant Dassey's petition based on the involuntariness of his confession. Duffin's [ruling stated](#):

"Most significantly, however, the [Wis-

consin] court of appeals erred when it focused on the statements of the investigators in isolation to conclude that they did not make any promises of leniency. ... But when assessed collectively and cumulatively, as voluntariness must be assessed, it is clear how the investigators' actions amounted to deceptive interrogation tactics that overbore Dassey's free will. [Op. cit. 86]

... Thus, as long as Dassey told a version the investigators accepted as "the truth," he was led to believe he had no fear of negative consequences. But if the investigators did not accept as true the story Dassey told them, he was told there would be repercussions. [Op. cit. 87]

... Especially when the investigators' promises, assurances, and threats of negative consequences are assessed in conjunction with Dassey's age, intellectual deficits, lack of experience in dealing with the police, the absence of a parent, and other relevant personal characteristics, the free will of a reasonable person in Dassey's position would have been overborne. ... [Op. cit. 88]

... Dassey's confession was, as a practical matter, the entirety of the case against him on each of the three counts. [Op. cit. 89]

... the state courts unreasonably found that the investigators never made Dassey any promises during the March 1, 2006 interrogation. ... These repeated false promises ... rendered Dassey's confession involuntary under the Fifth and Fourteenth Amendments. The Wisconsin Court of Appeals' decision to the contrary was an unreasonable application of clearly established federal law. [Op. cit. 90]

... **IT IS THEREFORE ORDERED** that Brendan Dassey's petition for a writ of habeas corpus is **GRANTED**. The respondent shall release Dassey from custody unless, within 90 days of the date of this decision, the State initiates proceedings to retry him." [Op. cit. 90]

The State of [Wisconsin appealed](#) Duffin's ruling to the U.S. Seventh Circuit Court of Appeals on September 9, 2016. If Duffin's ruling is overturned, it may come back to haunt Dassey that his post-conviction lawyers failed to claim Kachinsky provided ineffective assistance of counsel — instead of asserting he had a "conflict of interest" —

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for his conduct detrimental to Dassey during the six months after Dassey was arrested.

On November 14, 2016 Judge Duffin ordered Dassey's release pending the outcome of the State's appeal. Duffin rejected the State of Wisconsin's argument that Dassey is a threat to public safety. The State appealed, and on November 17, 2016 the Seventh Circuit Court [reversed Duffin's](#) ruling, and ordered that Dassey remain in custody pending his appeal.

[Click here to read *Dassey v. Dittmann*](#), No. 1-14-cv-01310-wed (USDC ED Wisc., 8-12-2016), in which Magistrate Judge Duffin granted Dassey's federal habeas corpus petition.

Avery is expected to rely on the ruling in Dassey's case in the brief due on August 29, 2016 in his post-conviction case.

[In 2012 Justice Denied](#) was one of the first organizations to publicly suggest Dassey and Avery were innocent of involvement in Teresa Halbach disappearance, "and that just as he [Avery] and his lawyers claimed, he was framed for a second time by the Manitowoc County Sheriff's Office and the District Attorney's Office." See, "Has Steven Avery Twice Been Wrongly Convicted Of Heinous Crimes?", *Justice Denied*, [Issue 52 \(Fall 2012\)](#), pp. 3-5.

Justice Denied was [highly critical](#) in 2006 of the Wisconsin Innocence Project's disregard of Steven Avery's presumption of innocence and their abandonment of Avery after he was charged with Halbach's apparent homicide. See *Justice Denied's* Editorial, "Wisconsin Innocence Project Needs To Show Backbone In Steven Avery's Case," *Justice Denied*, [Issue 31 \(Winter 2006\)](#), p. 5.

Avery needed money to pay his defense lawyers for his prosecution for Halbach's homicide, so in February 2006 he hastily agreed to a \$400,000 settlement of his \$36 million federal civil rights lawsuit against Manitowoc County for his wrongful conviction in 1985 for the rape of Penny Beerntsen, and his 18 years of imprisonment. DNA testing later identified another man committed the crime, and Avery was released in 2003. See, "Steven Avery Settles Wrongful Imprisonment Suit For \$400k," *Justice Denied*, [Issue 31 \(Winter 2006\)](#), p. 22.

Endnote 1.

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) governed

Magistrate Judge Duffin's consideration of Dassey's habeas petition. Under the AEDPA a federal court can only grant a writ of habeas corpus when the state court's adjudication of the petitioner's claim on the merits: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Dassey's post-conviction lawyers inexplicably argued that Kachinsky's conduct was an actual "conflict of interest," even though the U.S. Supreme Court has never held -- as required by the AEDPA -- that the type of attorney conflict Dassey alleged requires a new trial. In doing that Dassey's lawyers failed to properly base his claim regarding Kachinsky, to assert he provided ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). His lawyers did that [even though](#), "In its decision granting Kachinsky's motion to withdraw from the case, the trial court found that Kachinsky's performance was deficient under *Strickland* when he allowed investigators to interrogate Dassey without an attorney present." Duffin's ruling laid out that Dassey's post-conviction lawyers could be considered deficient in their handling of this issue, because, "Although Kachinsky's conduct might support a claim for relief under *Strickland*, Dassey never made this argument to the state courts or to this court."

Dassey's post-conviction lawyers erroneously relied on *Cuyler v. Sullivan*, 446 U.S. 335 (1980) to assert his "conflict of interest" claim. Duffin noted in his ruling, "In *Sullivan* two attorneys jointly represented three co-defendants, all at separate trials." and, the Supreme Court ruled in 2002 that *Sullivan* "does not clearly establish, or indeed even support" expansion of "conflict of interest" to "various types of conflicts other than those involving the representation of multiple clients." Consequently, under the AEDPA's restriction that a federal habeas claim must rely on "clearly established Federal law, as determined by the Supreme Court of the United States," Duffin's claim had no legal basis. [Quotes from, *Dassey v. Dittmann*, No. 1-14-cv-01310 wed (USDC ED Wisc.), *Op. cit.* 50-51.] A "conflict of interest" claim in Wisconsin under *Sullivan* must be proven by "clear and convincing evidence," while to establish an ineffective assistance counsel of claim under *Strickland* must be proven by the lesser

standard that a petitioner "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland v. Washington*, 466 U.S. 668, 693-94 (1984). Under *Sullivan* a petitioner must prove "adverse effect" from the multiple representation, while *Strickland* requires a petitioner must prove he or she was prejudiced by their counsel's conduct. [*Dassey*, *Op. Cit.* 57.]

Sources:

[Dassey v. Dittmann](#), No. 1-14-cv-01310-wed (USDC ED Wisc.) (Decision granting habeas corpus petition, 8-12-2016)

[State of Wisconsin v. Brendan R. Dassey](#), No. 06-CF-88 (Cir. Ct. of Manitowoc County, April 19, 2006) (Notice of Motion And Motion To Suppress Statements)

[State v. Dassey](#), No. 2010AP3105-CR (Wis. Ct of Appeals, 2nd Dist. 2013) (Denying consolidated direct appeal and petition for post-conviction relief.)

[Making a Murderer](#), Netflix.com

[Dassey to remain in prison](#), Appeals court rules, *Post Crescent*, November 17, 2016



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Year	Desktop	Mobile	Tablet
2008	100%		
2009	99.7%	0.3%	
2010	97%	3%	
2011	92%	8%	
2012	82%	13%	5%
2013	72%	19%	9%
2014	61%	28%	11%
2015	51%	37%	12%
2016	50%	39%	11%

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