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

BRIEF *AMICUS CURIAE* OF PROFESSORS OF CRIMINAL LAW, CRIMINAL PROCEDURE, AND CONSTITUTIONAL LAW IN SUPPORT OF PETITIONER

Brandon Garrett
White Burkett Miller Professor of Law and Public Affairs, Justice Thurgood Marshall Distinguished Professor of Law
University of Virginia School of Law
580 Massie Road
Charlottesville, VA 22903
(434) 924-4153
bgarrett@law.virginia.edu

Gregory B. Craig
Counsel of Record
Donald P. Salzman
Julia K. York
Anne K. Six
Timothy H. Grayson
Ryan J. Travers
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000
gregory.craig@probonolaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

Amici curiae are academics who focus on criminal procedure and Fifth Amendment and Fourteenth Amendment law.[2] (A list of the *amici curiae* is attached as Appendix A.) Their principal interest in this case is proper application of clear Supreme Court precedent in assessing the voluntariness of the confession given by the juvenile suspect in this case. *Amici* file this brief out of concern that some lower courts, including the court below, are straying from this Court's clear mandates in applying the totality-of-the-circumstances test to confessions given by juveniles with intellectual impairments. *Amici* write to provide a historical overview of this Court's voluntariness case law. They further write to demonstrate why this Court's guidance is necessary to protect due process rights of intellectually challenged children, and to assuage mounting concerns over the reliability of confessions obtained from such vulnerable suspects in response to police coercion.

SUMMARY OF THE ARGUMENT

This Court has long recognized that coerced confessions are antithetical to our accusatorial system. Indeed, this Court's precedents—rooted in longstanding common law traditions—reflect an abhorrence of

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel has made any monetary contribution to the preparation or submission of this brief. The parties received 10 days' notice of the intention to file this brief.

[2] The views expressed by *amici* are their own and do not reflect the views of their employers.

confessions coercively wrung from vulnerable suspects. Over the past century, the Court adopted a totality-of-the-circumstances approach to assessing voluntariness of confessions, which examines both the characteristics of the accused and the details of the interrogation. *Withrow* v. *Williams*, 507 U.S. 680, 693 (1993); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973).

In applying this test, "th[e] Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn* v. *Alabama*, 361 U.S. 199, 206 (1960). Further, the Court has clearly instructed that the propriety of police techniques must be viewed in terms of their effect on the particular suspect in question. *See, e.g.*, *Miller* v. *Fenton*, 474 U.S. 104, 116 (1985). The Court has repeatedly recognized that certain categories of suspects are particularly vulnerable to police coercion, including children, *see, e.g., In re Gault*, 387 U.S. 1, 45 (1966), and those with intellectual impairments, *see, e.g., Fikes* v. *Alabama*, 352 U.S. 191, 196-97 (1957). Indeed, the Court has clearly mandated that "special care" be used in assessing the voluntariness of a juvenile confession. *Gallegos* v. *Colorado*, 370 U.S. 49, 53 (1962); *see also Gault*, 387 U.S. at 45, 55. Careful attention to the impact of the police techniques on the particular suspect effectuates key principles undergirding the Fifth Amendment and Fourteenth Amendment totality-of-the-circumstances test, namely that: (1) psychological coercion can manipulate suspects; (2) juvenile confessions must be reviewed with "special care"; (3) the suspect's intellectual challenges must be taken into account in a

voluntariness review; and (4) when facts are disclosed to suspects, that contamination raises still greater reliability concerns, particularly in confessions involving psychological coercion, juveniles, or those with intellectual challenges.

In this case, both the court below and the Wisconsin Court of Appeals made grave doctrinal errors in applying this Court's longstanding precedent. The circuit court below saw clear evidence of psychological coercion—*e.g.*, the "leading and suggestive" nature of the questioning, the "broad assurances" from police that "honesty would produce leniency," the "guesses" that petitioner had offered when investigators were not satisfied with his responses, and the nonpublic facts that investigators "blurted out" when they "lost patience," which petitioner then adopted, *Dassey* v. *Dittmann*, 877 F.3d 297, 301, 308, 312 (7th Cir. 2017) (en banc)—but discounted it because "Dassey was not subject to physical coercion." *Id.* at 313. That ignores—or, at best, clearly misapplies—the well-established law holding "that coercion can be mental as well as physical." *Blackburn*, 361 U.S. at 206; *see also Spano* v. *New York*, 360 U.S. 315, 321-24 (1959).

In addition, the court below failed to apply "special care" in determining whether the police techniques "as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means," *Miller*, 474 U.S. at 116, and that asks whether the suspect's will was in fact overborne. *Spano*, 360 U.S. at 321-24; *see also Lynumn* v. *Illinois*, 372 U.S. 528, 534 (1963). The defendant here

was a sixteen-year-old juvenile at the time he confessed. He is borderline intellectually disabled and extremely suggestible. He lacked prior experience with law enforcement, and was alone with the police—without parent or lawyer—when making his most inculpatory statements. Merely *acknowledging* these factors, without paying "close attention to the individual's state of mind and capacity for effective choice," *Miranda* v. *Arizona*, 384 U.S. 436, 507 (1966) (Harlan, J., dissenting) (citing *Gallegos*, 370 U.S. 49), simply does not amount to "special care." Yet, in its voluntariness analysis the court below paid mere lip-service to the import of experienced detectives feeding facts to Brendan Dassey and the impact of those leading and suggestive questions on him.

The sections that follow provide a historical overview of this Court's voluntariness case law, followed by exposition of the errors committed by the court below, and of the divergent approaches taken by other lower courts. In short: This case provides an opportunity for this Court to correct recurring departures from the clearly established voluntariness standard, which forms a bedrock protection against coercive interrogation methods that are anathema to our criminal justice system.

ARGUMENT

I. The Constitutional Voluntariness Inquiry Has Long Reflected Concern with Coercive Methods and with "Special Care" for Vulnerable Persons

Amici describe how this Court's rulings on voluntariness reflect the concerns that: (1) psychological

coercion can manipulate suspects into confessing; (2) juvenile confessions must be reviewed with "special care"; (3) the confessing suspect's intellectual capacity must be taken into account; and (4) greater reliability concerns arise in confessions involving psychological coercion, juveniles, or those with intellectual challenges. The Seventh Circuit's *en banc* decision and the Wisconsin Court of Appeals ruling in *Dassey* discuss a totality-of-the-circumstances analysis without confronting any of these clearly established elements of the modern voluntariness test.

A. Voluntariness Analysis Requires Examination of the Psychological Coercion Applied to the Particular Suspect

This Court's voluntariness-of-confessions doctrine stretches back well over a century. In *Hopt* v. *Utah*, 110 U.S. 574 (1884), the Court recognized the danger of inducements held out by the authorities—whether in the form of threats or promises—that "operat[e] upon the fears or hopes of the accused, in reference to the charge" and "deprive[] him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law." *Id.* at 585. Fifteen years later, the Court again expressed concern over confessions "extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence." *Bram* v. *United States*, 168 U.S. 532, 542-43 (1897) (internal quotation marks and formatting omitted); *see also Arizona* v. *Fulminante*, 499 U.S. 279, 285-88 (1991).

The Court's early police coercion cases condemned confessions obtained through physical coercion. *See, e.g.*, *Brown* v. *Mississippi*, 297 U.S. 278 (1936) (confession extracted by means of beating); *Ashcraft* v. *Tennessee*, 322 U.S. 143, 153 (1944) (confession given after 36-hour interrogation). Indeed, *Brown* "was the wellspring of [the] notion, now deeply embedded in our criminal law" that certain interrogation techniques "are so offensive to a civilized system of justice" that they violate the Due Process Clause. *Miller*, 474 U.S. at 109. In *Brown*, the Court held that confessions "procured by means 'revolting to the sense of justice' could not be used to secure a conviction." *Id*. (quoting *Brown*, 297 U.S. at 286).

The Court also recognized, however, that "coercion can be mental as well as physical," and "the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn*, 361 U.S. at 206; *see also Reck* v. *Pate*, 367 U.S. 433, 440 (1961) (whether confession was coerced "does not depend simply upon whether the police resorted to the crude tactic of deliberate physical abuse," for "other circumstances may combine to produce an effect just as impellingly coercive as the deliberate use of the third degree."). Thus, the "totality–of–the–circumstances" test took root as the Court shifted its focus to psychologically coercive police tactics.[3] As the Court

[3] The totality-of-the-circumstances approach appears to have coalesced in cases such as *Malinsky* v. *New York*, 324 U.S. 401 (1945) and *Fikes* but has origins in decisions such as *Hopt*. *See Malinsky*, 324 U.S. at 404; *see also Fikes*, 352 U.S. at 198; *Hopt,* 110 U.S. at 583 (admissibility of confession evidence "largely depends upon the special circumstances connected with the confession").

observed in *Miranda*, "the modern practice of in-custody interrogation is psychologically rather than physically oriented." 384 U.S. at 448. This Court's voluntariness doctrine therefore requires that a confession statement be the product of a defendant's "rational intellect" and "free will," *Townsend* v. *Sain*, 372 U.S. 293, 307 (1963) (citations omitted), and not the result of "the defendant's will [having been] overborne." *Lynumn,* 372 U.S. at 534.

In assessing the totality of the circumstances in psychological coercion cases, the Court has expressed discomfort with police tactics such as questioning that suggests the answers that the interrogator wishes to hear. For example, in *Fikes*, this Court held involuntary a confession elicited from a suspect who was "of low mentality, if not mentally ill," and was subject to "quite leading or suggestive" questions. 352 U.S. at 195-96; *see also id*. at 199 (Frankfurter, J., concurring) (decrying the "horse-shedding of the accused"). [4] Using the totality-of-the-circumstances approach in *Fikes*, the Court concluded that though there was "no evidence of police brutality," the case was "beyond the allowable limits." *Id*. at 195, 197; *see also Miranda*, 384 U.S. at 449-55 (describing "third degree" tactics that "put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty"; it is this "aura of confidence in his guilt

[4] "Horse-shedding" (also "horseshedding") refers to "instructing of a witness favorable to one's case . . . about the proper method of responding to questions while giving testimony . . . . The term often connotes unethical witness-coaching techniques." *Horseshedding*, Black's Law Dictionary (10th ed. 2014).

[that] undermines his will to resist" such that "[h]e merely confirms the preconceived story the police seek to have him describe."); *Spano*, 360 U.S. at 321-24 (defendant "did not make a narrative statement, but was subject to . . . leading questions"); *Leyra v. Denno*, 347 U.S. 556, 560 (1954) (suspect "began to accept suggestions of" the questioner).[5]

The Court has also found involuntary confessions involving the entreaties of a "false friend." In *Spano*, for example, the Court held involuntary a confession elicited by police use of the defendant's childhood friend—a police officer—who plied their "bond of friendship" and "play[ed the] part of a worried father" to extract a confession at the direction of his superiors. 360 U.S. at 321-24; *see also Fulminante*, 499 U.S. at 286 & n.2 (informant's position as defendant's friend "might well have made the [defendant] particularly susceptible to the former's entreaties").

Similarly, the Court's decisions continued to reflect concern about the effect of promises of leniency on voluntariness. *See, e.g., Lynumn*, 372 U.S. at 534 (confession coerced where police threatened to take suspect's children away, and petitioner's testimony cited police promises to recommend leniency if she cooperated); *Leyra*, 347 U.S. at 560 (confessions obtained through coercion and promises of leniency held involuntary).

---

[5] A plurality of the Court likewise condemned police coercion that led a suspect to "agree[] to the composition of a statement that was not even cast in his own words." *Culombe* v. *Connecticut*, 367 U.S. 568, 584, 634 (1961).

Though but a sampling of the coercive interrogation techniques this Court has cited in evaluating voluntariness under the totality of the circumstances, crucially, however, the Court has insisted that the effect of these tactics not be assessed in the abstract, or even in terms of their effects on an average adult. Rather, this Court has repeatedly instructed lower courts to evaluate the coerciveness of the police tactics in terms of their effect on the *particular suspect in question*. *Fikes*, 352 U.S. at 197-98 ("the limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing, what would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal'") (quoting *Stein* v. *New York*, 346 U.S. 156, 185 (1953)); *id*. at 198 ("the circumstances of pressure applied against the power of resistance of *this* petitioner, . . . deprived him of due process of law") (emphasis added); *see also Dickerson* v. *United States,* 530 U.S. 428, 434 (2000); *Miller*, 474 U.S. at 116; *Blackburn*, 361 U.S. at 206 ("the efficiency of the rack and thumbscrew can be matched, *given the proper subject*, by more sophisticated modes of 'persuasion.'") (emphasis added); *Schneckloth*, 412 U.S. at 226 (in assessing voluntariness, "the Court [has] determined the factual circumstances surrounding the confession, *assessed the psychological impact on the accused*, and evaluated the legal significance of how the accused reacted.") (emphasis added).

The mandate that the voluntariness inquiry focus on the tactics' effect on the particular suspect invokes principles discussed next, as the concern over psychological coercion is greater depending on factors that

include age, education, intelligence, and prior experience with law enforcement. *Id.*; *see also* Wayne R. LaFave et al., Criminal Procedure § 6.2(c) (4th ed. 2017).

B. Voluntariness Analysis Requires Special Care in Assessing Juvenile Confessions

This Court has long accepted that the immaturity, inexperience, and underdeveloped intellect characteristic of youth make juvenile suspects particularly susceptible to police pressure and thus especially likely to confess involuntarily. So pronounced are the vulnerabilities of juveniles that the Court demands "special care" in reviewing voluntariness of juvenile confessions.

Seventy years ago, a plurality of Justices acknowledged that inculpatory statements made by children are to be evaluated differently than such statements made by adults. In *Haley* v. *Ohio*, 332 U.S. 596 (1948), the plurality found inadmissible a confession made by a fifteen-year-old boy while being questioned by police without parent or counsel for several hours, calling it "a confession wrung from a child by means which the law should not sanction." *Id.* at 601. Reasoning that "[w]hat transpired would make us pause for careful inquiry if a mature man were involved" and "[t]hat which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens," the plurality admonished that a "mere child—an easy victim of the law . . . cannot be judged by the more exacting standards of maturity" and that "*special care* in scrutinizing the record must be used." *Id.* at 599 (emphasis added).

This "special care" mandate has dominated the Court's review of the voluntariness of juvenile confessions in the decades since *Haley*, and the Court has relied heavily on the suspect's youth in finding statements made during police interrogation involuntary. *See, e.g., Gallegos*, 370 U.S. at 54-55 (emphasizing the "youth of the petitioner," a fourteen-year-old, who "[could not] be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions" and invoking *Haley's* "special care" directive); *Gault*, 387 U.S. at 48 (regarding juveniles, "both common observation and expert opinion emphasize that the 'distrust of confessions made in certain situations' . . . is imperative in the case of children from an early age through adolescence.") (citation omitted); *see also id.* at 45 (admissions and confession of juveniles "require special caution"); *id.* at 55 (if juvenile admission is obtained in the absence of counsel, "the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright, or despair.").

As recently as 2011, the Court reiterated the particular vulnerabilities faced by juveniles during custodial police interrogation. *See J.D.B.* v. *North Carolina*, 564 U.S. 261, 272 (2011) (citing precedent carefully accounting for the differences between children and adults). In *J.D.B.*, the Court stressed the concern that the differences between juveniles and adults result in a heightened risk of juveniles speaking involuntarily:

> By its very nature, custodial police interrogation entails inherently compelling pressures. Even for an adult, the physical and psychological isolation of custodial interrogation can undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely. Indeed, the pressure of custodial interrogation is so immense that it can induce a frighteningly high percentage of people to confess to crimes they never committed. That risk is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile.

Id. at 269 (internal quotations, alterations, and citations omitted); *see also Graham* v. *Florida*, 560 U.S. 48, 68 (2010) (calling juveniles "'more vulnerable or susceptible to negative influences and outside pressures'" (quoting *Roper* v. *Simmons*, 543 U.S. 551, 569-70 (2005))).

Age alone, however, does not end the voluntariness inquiry. Rather, the application of the "special care" standard in the totality-of-the-circumstances test requires an actual evaluation of a juvenile suspect's age, experience, intellect, and mental state and how these factors affect his or her responses to police interrogation, *see Miller*, 474 U.S. at 118; *Schneckloth*, 412 U.S. at 226, rather than merely a "check-the-box" approach that lacks meaningful weighing.

C. Voluntariness Analysis Requires Consideration of the Suspect's Intellectual Impairment

The concerns that animate the Court's "special care" jurisprudence vis-à-vis juvenile confessions are amplified where the juvenile has intellectual impairments. Confessions from intellectually impaired suspects raise the concern that the suspect's will has been overcome by interrogation tactics that "might be utterly ineffective against an experienced criminal," *Stein*, 346 U.S. at 185, leading to unreliable confessions. *See Blackburn*, 361 U.S. at 207. As such, this Court has long held that the intelligence of a confessor must be considered when assessing voluntariness. *See, e.g., Schneckloth*, 412 U.S. at 226 (noting as relevant factor the "low intelligence" of the accused); *Fare* v. *Michael C.*, 442 U.S. 707, 725 (1979) (voluntariness "mandates . . . evaluation of [a] juvenile's age . . . and intelligence"); *Procunier* v. *Atchley*, 400 U.S. 446, 453–54 (1971) (low intelligence "relevant . . . in establishing a setting in which actual coercion might have been exerted to overcome the will of the suspect."); *Fikes*, 352 U.S. at 196 (confessor was of "low mentality, if not mentally ill"). More recently, this Court acknowledged that individuals with intellectual disabilities "face 'a special risk of wrongful execution' because they are [*inter alia*] more likely to give false confessions." *Hall* v. *Florida*, 134 S. Ct. 1986, 1993 (2014) (quoting *Atkins* v. *Virginia*, 536 U.S. 304, 320-21 (2002)).

Social science demonstrates that individuals with diminished mental capacity are "generally more suggestible than those of superior cognitive abilities." Gisli Gudjonsson, *Theoretical and Empirical Aspects*

of Interrogative Suggestibility, *in Suggestion and Suggestibility* 141 (Gheorghiu et al. eds., 1989); *see also* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 Law & Hum. Behav. 3, 8-9, 19, 30-31 (2010). A survey of false confession cases from 1989–2012 found that 42% of exonerated defendants younger than 18 at the time of the crime had confessed, as well as 75% who were mentally ill or intellectually disabled, compared to just 8% of adults with no known mental disabilities. *See* Samuel Gross & Michael Shaffer, *Exoneration in the United States, 1989-2012: Report by the National Registry of Exonerations*, U. of Mich. Pub. Law Working Paper No. 277, 58 (June 25, 2012). These statistics confirm the correctness of this Court's precedent requiring that confessions of suspects with intellectual impairments be scrutinized closely.

D. Voluntariness Analysis Requires that Courts Examine Whether the Circumstances of the Confession Raise Substantial Reliability Concerns

Grave concerns are raised when police disclose key crime-related facts to suspects during interrogations. Leading questions can suggest facts, and fact feeding, whether intentional or not, contaminates a confession so that it is impossible to know whether the suspect could independently volunteer information about the crime, without prompting from the police. Decades ago this Court emphasized reliability as crucial among the "complex of values" that animates the totality-of-the-circumstances voluntariness test. *Blackburn*, 361 U.S. at 207 (assessing "the likelihood that the confession is untrue"). In particular, the Court has raised constitutional concerns with po-

lice tactics that suggest or feed facts to make a confession statement appear corroborated. *See supra* Section I.A. (discussing *Fikes* and *Miranda*).

More broadly, the Court in *Spano* looked skeptically at psychologically coercive interrogation tactics that often produce "inherent[ly] untrustworth[y]" confessions. 360 U.S. at 320, 322-23. Likewise, *Gault* analyzed with "greatest care" the voluntariness of a minor's confessions because "authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children." 387 U.S. at 52-55. Similarly, *Miranda* was unwilling to allow "trad[ing] on the weakness of individuals"—in particular, those "of limited intelligence"—that risks "giv[ing] rise to a false confession." 384 U.S. at 455 & n.24; *see also id.* at 447, 470 (establishing its prophylactic rule in part because of "the dangers of false confessions" and in recognition of the fact that "the assistance of counsel can mitigate the dangers of untrustworthiness"); *Fulminante*, 499 U.S. at 286 n.2, 296 (admission of an involuntary confession from one who "possesse[d] low average to average intelligence" was not harmless error due to "the risk that the confession is unreliable"). Moreover, recent research has confirmed empirically that police contamination has led to numerous false confessions and wrongful convictions of many individuals later exonerated by DNA evidence. *See* Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* 19-21 (2011).

As such, it is unsurprising that the Court has recently and repeatedly underscored dangers of false confessions—especially from juveniles and the intel-

lectually impaired. *See, e.g.*, *Corley* v. *United States*, 556 U.S. 303, 321 (2009) (describing how interrogations "induce a frighteningly high percentage of people to confess to crimes they never committed"); *J.D.B.*, 564 U.S. at 269; *Hall*, 134 S. Ct. at 1993.

In its decision below, the *en banc* Seventh Circuit incorrectly suggested that in *Colorado* v. *Connelly*, 479 U.S. 157 (1986), this Court abandoned reliability. *Dassey*, 877 F.3d at 317. But *Connelly* merely applied, in this context, the "settled law requiring some sort of 'state action' to support a claim of violation of the Due Process Clause of the Fourteenth Amendment." 479 U.S. at 165. The court below overlooked that, in doing so, *Connelly* expressly reaffirmed *Blackburn*, *see Connelly*, 479 U.S. at 164-65, which rested in large part on reliability concerns, *see Blackburn*, 361 U.S. at 207. And in the passage upon which the court below placed so much weight, *see Dassey*, 877 F.3d at 317, *Connelly* merely acknowledged that evidentiary laws can exclude unreliable confessions even if "state action" is absent. *See Connelly*, 479 U.S. at 167.

II. Lower Courts Have Taken Divergent Approaches in Applying This Court's Voluntariness Standards to Review Confessions

In this case, the court below unreasonably applied this Court's clear precedent in denying habeas relief. Contrary to this Court's mandate that the effect of the coercive tactics must be viewed through the lens of their impact on the particular suspect, the courts below manifestly failed to consider the impact of the various police tactics *on Brendan Dassey*, in breach of

their duty to apply "special care" in analyzing juvenile confessions and to account for intellectual impairment under the totality-of-the-circumstances standard. *Cf. Dickerson,* 530 U.S. at 434; *Miller*, 474 U.S. at 116; *Schneckloth*, 412 U.S. at 226; *Gault*, 387 U.S. at 45, 55; *Gallegos*, 370 U.S. at 53; *Blackburn*, 361 U.S. at 206; *Fikes*, 352 U.S. at 197-98; *see also Dassey* v. *Dittmann*, 860 F.3d 933, 961 (7th Cir. 2017) (panel op.).

The *en banc* Seventh Circuit expressly acknowledged the "leading and suggestive" nature of the questioning. *Dassey*, 877 F.3d at 312. The court below observed that Brendan Dassey was alone with the police, *id*., and that this "vulnerable suspect" had received "broad assurances . . . that honesty would produce leniency." *Id*. at 301. It also recognized that Dassey had appeared to guess in response to questioning when investigators were not satisfied with what he had told them, and that the investigators told Dassey facts that were not publicly known, which he then adopted.[6] *Id*. at 308. This Court has repeatedly acknowledged that purely psychological tactics such as fact-feeding, playing the "false friend," inducement, and making implied promises can be just as coercive as physical violence and cause a defendant's will to be overborne. *See supra* Section I.A.; *cf*. *Dassey*, 877 F.3d at 313 (noting the "importan[ce]"

---

[6] In fact, the original Seventh Circuit panel noted that Dassey's confession mostly corroborated publicly disclosed evidence and that "the lack of physical evidence was the weakest part of the State's case." *Dassey*, 860 F.3d at 981; *see also id*. (stating that "[t]here was no DNA or other physical evidence linking Dassey to this crime in any way" and many parts of Dassey's story were not corroborated by physical evidence).

of the fact that "Dassey was not subject to physical coercion").

Yet, although the Wisconsin Court of Appeals and the court below catalogued some of Brendan Dassey's personal characteristics, neither court actually "*assessed* the psychological impact"[7] that the police tactics used here had on "*this* suspect"[8] to conclude whether, under the totality of the circumstances, the confession was voluntary. The court below, in a single paragraph, approved the Wisconsin court's passing mention of Dassey's age, his IQ, and his mother's absence as satisfying the "special care" required in assessing juvenile confessions.[9] *Id.* at 314. This check-the-box approach simply cannot constitute the "special care" that this Court demands in assessing the voluntariness of a confession made by an intellectually impaired juvenile. *Gallegos*, 370 U.S. at 53; *see also Gault*, 387 U.S. at 45, 55.[10]

---

[7] *Schneckloth*, 412 U.S. at 226 (emphasis added).

[8] *Miller*, 474 U.S. at 116; *see also Schneckloth*, 412 U.S. at 226; *Blackburn*, 361 U.S. at 206; *Fikes*, 352 U.S. at 197-98.

[9] The circuit court below read *Yarborough* v. *Alvarado*, 541 U.S. 652 (2004), to give lower courts "leeway" in their voluntariness assessments. *Cf. Dassey*, 877 F.3d at 313. However, *Yarborough* highlighted the "conceptual difference" between objective inquiries, like the *Miranda* custody analysis at issue there, and *subjective* tests, such as "voluntariness." *Yarborough*, 541 U.S. at 667. In fact, if anything, *Yarborough* underscores that the Wisconsin court erred by failing to consider—let alone apply "special care" regarding—how the police tactics here affected Dassey's "actual mindset." *See id.*

[10] The lower court further failed to pay close account to Dassey's lack of prior experience with the criminal justice system, another factor making him more vulnerable to coercion by mature adult officers. *See Dassey*, 877 F.3d at 335 n.20 (Rovner,

As described below, however, the *en banc* Seventh Circuit is not alone in improperly applying this Court's clearly-articulated voluntariness doctrine. The lower courts have diverged in their approach to juvenile confessions, demonstrating the need for this Court's guidance in application of the totality-of-the-circumstances test to confessions from juvenile suspects.

A. Lower Courts That Have Erred

Lower courts, both state and federal, routinely fail to conduct a proper totality-of-the-circumstances analysis. Courts often articulate various factors but then err by failing to consider a suspect's age using the "special care" mandated by this Court.[11] *See Barcheers* v. *Alameida*, 146 F. App'x 100, 102 (9th Cir. 2005) (unpublished) (holding 15-year-old juvenile's confession voluntary, without mentioning age, psychological problems, and history of sexual abuse); *see also State* v. *Goodwin*, 774 N.W.2d 733, 745-46 (Neb. 2009) (finding no implied promise of leniency, without considering effect of age, intellect, or other personal characteristics of fourteen-year-old suspect); *Commonwealth* v. *Hodges*, Nos. 02-1075-F, 02-1076-F, 2002 WL 31971840, at *1-2 (Va. Cir. Ct. Nov. 13, 2002) (statements of a sixteen-year old with "significantly below average" intelligence found voluntary, without considering defendant's age).

J., dissenting); *see also Reck*, 367 U.S. at 422; *Fikes*, 352 U.S. at 193.

[11] Indeed, some courts treat coercion and personal characteristics as separate inquiries. *See, e.g.*, *B.H. v. State*, 941 So. 2d 345, 347-48 (Ala. Crim. App. 2006).

In one such case, *State* v. *Hough*, the Minnesota Court of Appeals found a confession voluntary with only limited analysis of the suspect's age. 571 N.W.2d 578, 581 (Minn. Ct. App. 1997), *rev'd on other grounds*, 585 N.W.2d 393 (Minn. 1998). The court considered the police officers' use of a "'sympathetic' approach"—telling the suspect that it was in his "best interest" to admit involvement—and found that it did not render the confession involuntary. *Id.* However, the court never grappled with how that tactic impacted the fifteen-year-old suspect who was interrogated with no parent or guardian present.

Similarly, in *McIntyre* v. *State*, 526 A.2d 30 (Md. 1987), the Maryland Court of Appeals upheld a trial court's voluntariness determination despite recognizing that the trial court "did not specifically address the fact of [the fifteen-year-old suspect's] youthful age, and his several requests to see his mother before waiving his *Miranda* rights, in evaluating the validity of the waiver or the voluntariness of the statement." *Id.* at 38. Failure to even *acknowledge* a juvenile suspect's age simply cannot constitute "special care," yet courts consistently make this error in evaluating voluntariness.

B. Lower Courts That Have Applied the Correct Standard

Some appellate courts have hewed to this Court's instruction that the totality-of-the-circumstances test demands an assessment of how particular interrogation techniques impact a particular suspect, and have reversed lower courts' failures to do so. For example, in *State* v. *Rettenberger*, 984 P.2d 1009 (Utah 1999),

when an eighteen-year-old with "a below-average I.Q." was charged based on a confession that "contain[ed] little information that was not first provided or suggested by the interrogating officers" who "made extensive use of the so-called 'false friend' technique," the Utah Supreme Court held the confession involuntary because the youth's will, which was "already vulnerable due to certain known mental disabilities and deficiencies, was overborne by . . . suggestive and coercive techniques." *Id.* at 1016, 1020, 1021. Similarly, in *In re J.F.*, 987 A.2d 1168 (D.C. 2010), the District of Columbia Court of Appeals held involuntary a fourteen-year-old's confession, after it "more carefully scrutinize[d] the police interrogative tactics" due to the suspect's "youthful age" and found that "most of the details" in the confession "were initially provided by the officers." *Id.* at 1177, 1179. Other courts likewise have recognized that certain suspects—especially juveniles and the intellectually impaired—are more likely to be overborne by psychological coercion. *See, e.g.*, *State* v. *Hunt*, 151 A.3d 911, 914-16, 923 (Me. 2016) (holding that, *inter alia*, "minimization of . . . moral blame" and "pleas to 'do the right thing,'" which "might not have rendered a different defendant's confession involuntary," nonetheless rendered instant defendant's confession involuntary "in light of [his] cognitive disability"); *State* v. *Swanigan*, 106 P.3d 39, 54 (Kan. 2005) (holding confession involuntary even though "any one of these factors which Swanigan asserts—[including] his low intellect and . . . [the interrogators'] threats and promises—may not be sufficient to show coercion"); *cf. State* v. *Horse*, 644 N.W.2d 211, 220, 225 (S.D. 2002) (juvenile's *Miranda* waiver was involuntary due to "questionable" interrogation tactics that

may well have been "view[ed] . . . differently in the context of an adult interrogation").

Of course, lower courts can correctly apply this Court's precedent and still find confessions voluntary. For instance, in *In re D.L.H., Jr.*, 32 N.E.3d 1075 (Ill. 2015), the confessor was a nine-year-old with "a full scale IQ of 78." *Id.* at 1079. Although his youth and "even younger mental age" "color[ed] the lens" of the voluntariness analysis, the court concluded that his will "was not overborne" by "conversational" questioning that was "not prolonged," "did not suggest the answers," and involved "no threats" or "promises." *Id.* at 1092-93. By contrast, a later statement—made only after the police "seized on respondent's fear," "rejected [his] repeated denials of wrongdoing," "downplayed the significance of an admission," and were "explicit about the kind of admission that would suffice"—was involuntary. *Id.* at 1096.

C. Failure to Examine Voluntariness Properly Can Prolong Convictions of the Innocent

False confessions of innocent suspects—convicted but later exonerated—have been affirmed in high-profile rulings that failed to conduct a proper voluntariness analysis. This Court has considered some of these cases. In 1994, the Court considered the case of Henry McCollum, an intellectually disabled man, who along with Leon Brown (a fifteen-year-old juvenile who was also intellectually disabled), was convicted of murder and rape based on their false confessions. *See McCollum* v. *North Carolina*, 512 U.S. 1254 (1994) (denying certiorari). The North

Carolina Supreme Court affirmed McCollum's conviction, finding his confession voluntary in a brief statement that barely considered the impact of his diminished intelligence. *State* v. *McCollum*, 433 S.E.2d 144, 160 (N.C. 1993). Neither the North Carolina Supreme Court nor the North Carolina Court of Appeals conducted a searching voluntariness analysis, despite the state's evidence resting almost solely on McCollum's confession. This Court denied McCollum's petition for certiorari, but Justice Blackmun dissented, focusing on McCollum's low IQ and observing that "there is more to the story." *McCollum*, 512 U.S. at 1255 (Blackmun, J., dissenting).

Justice Blackmun was correct. In 2014, over twenty years after McCollum's and Brown's convictions, DNA tests cleared them and implicated a man who had committed a similar rape and murder around the same time and who lived adjacent to the crime scene. *See State* v. *McCollum*, No. 83CRS15506-07, 2014 WL 4345428, at *1-2 (N.C. Super. Ct. Sept. 2, 2014). Recently, Justice Breyer observed that had McCollum been executed, the DNA tests and exoneration would never had occurred. *See Glossip* v. *Gross*, 135 S. Ct. 2726, 2770-71 (2015) (Breyer, J., dissenting). Had the North Carolina courts done more than a cursory voluntariness analysis, McCollum's confession—the centerpiece of the State's case—may not have been admitted and he likely would not have been convicted.

Unfortunately, McCollum's and Brown's case is far from unique, and failure to identify involuntary confessions can prolong convictions of the innocent by

years or decades before exoneration, if it ever occurs. Moreover, a series of DNA exonerees who falsely confessed had similarly been denied relief when trial, appellate, and habeas courts rejected challenges to voluntariness of their confessions or otherwise rejected challenges implicating the confession evidence. *See* Garrett, *supra*, at 20-21 & n.36, 36-39, 186. Indeed, some of those courts rejected challenges raised by subsequently DNA-exonerated innocent persons, citing to the very details that we now know were the result of police contamination. *See id*. at 20-21, n.36; *see also, e.g.*, *People* v. *Warney*, 750 N.Y.S.2d 731, 732-33 (App. Div. 2002) ("Defendant confessed to the crime and gave accurate descriptions of many details of the crime scene."). As evidenced by these cases and by McCollum's case, if state courts conducted appropriate voluntariness analyses as mandated by this Court, some of these confessions would never be admitted and innocent individuals would not be convicted.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Brandon Garrett
White Burkett Miller
Professor of Law and
Public Affairs, Justice
Thurgood Marshall
Distinguished
Professor of Law
University of Virginia
School of Law
580 Massie Road
Charlottesville, VA 22903
(434) 924-4153
bgarrett@law.virginia.edu

Gregory B. Craig
Counsel of Record
Donald P. Salzman
Julia K. York
Anne K. Six
Timothy H. Grayson
Ryan J. Travers
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000
gregory.craig@probonolaw.com

March 26, 2018

APPENDIX

APPENDIX A
LIST OF SIGNATORIES[1]

Professor Shima Baradaran Baughman
University of Utah, S.J. Quinney College of Law

Professor John H. Blume
Cornell Law School

Professor Stephen L. Braga
University of Virginia School of Law

Professor Bennett Capers
Brooklyn Law School

Professor Gabriel "Jack" Chin
University of California, Davis School of Law

Professor Hillary B. Farber
University of Massachusetts School of Law

Professor Barry Feld
University of Minnesota Law School

Professor Adam Gershowitz
William & Mary Law School

Professor Paul Giannelli
Case Western Reserve University School of Law

---

[1] This brief presents the views of the individual signers. Their institutional affiliations are listed here for identification purposes only.

Professor Mark Godsey
University of Cincinnati College of Law

Professor Lisa Kern Griffin
Duke University School of Law

Professor Samuel Gross
University of Michigan Law School

Professor Martin Guggenheim
New York University School of Law

Professor Randy Hertz
New York University School of Law

Professor Tonja Jacobi
Northwestern Pritzker School of Law

Professor Yale Kamisar
University of Michigan Law School

Professor Lee Kovarsky
University of Maryland Francis King Carey School of Law

Professor Corinna Barrett Lain
University of Richmond School of Law

Professor Jamie Lau
Duke University School of Law

Professor Jennifer E. Laurin
University of Texas School of Law

Professor Richard Leo
University of San Francisco School of Law

Professor Paul Marcus
William & Mary Law School

Professor Lawrence Marshall
Stanford Law School

Professor Richard H. McAdams
University of Chicago Law School

Professor Daniel S. Medwed
Northeastern University School of Law

Professor Eric Miller
Loyola Law School, Los Angeles

Professor Theresa Newman
Duke University School of Law

Professor Eve Brensike Primus
University of Michigan Law School

Professor Allison Redlich
George Mason University, Department of
Criminology, Law and Society

Professor Jenny Roberts
American University, Washington College of Law

Professor David Rudovsky
University of Pennsylvania Law School

Professor Dan Simon
University of Southern California Gould School of Law

Professor Colin Starger
University of Baltimore School of Law

Professor Jordan Steiker
University of Texas School of Law

Professor Sandra Guerra Thompson
University of Houston Law Center

Professor Ronald Wright
Wake Forest University School of Law

Professor Keir Weyble
Cornell Law School