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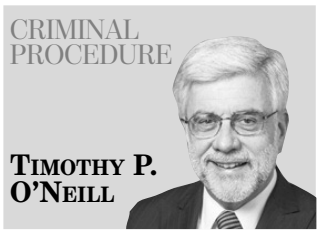
Confessions, case law and 50 years of silence from Supreme Court



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Last August, I wrote about Brendan Dassey, the teenager convicted of murder in Wisconsin along with his uncle, Steven Avery. This case was the subject of Netflix's Emmy Award-winning documentary "Making a Murderer."

The conviction was based almost solely on his confession. Dassey, a 16-year-old special education student with an IQ between 74 and 81, was involved in hours of police interrogation. He eventually confessed to murder, rape and the burning of the victim's body. Despite the lack of even a single piece of physical evidence linking him to the crime, Dassey was convicted and sentenced to life imprisonment.

Last year, in an exhaustive 104-page opinion, Judge Ilana Diamond Rovner of the 7th U.S. Circuit Court of Appeals held that "no reasonable court could have any confidence that this was a voluntary confession" and granted Dassey's habeas petition.

But within days of my column discussing this opinion, the 7th Circuit voted to rehear the case en banc. Then on Dec. 8, the court in a 4-3 opinion reversed the panel opinion and denied the petition. *Dassey v Dittmann*, 877 F.3d 297 (2017).

Judge David F. Hamilton's majority opinion stresses the limits Congress has placed upon the ability of federal courts to disturb state criminal court judgments through use of habeas corpus. But Rovner's dissent raises serious issues about the "chasm" between how courts have traditionally understood the concept of involuntary confessions under the due process clause and the current state of social science research on the psychology behind false confessions. She argues that courts have a duty to "update their understanding" of what coercion really is.

The majority begins by noting that Congress severely restricted the habeas power of federal courts when it passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The act provides that a state court conviction can be overturned in one of only two ways.

First, it can be reversed if the state courts' adjudication of a federal claim on the merits results either in a decision contrary to, or involving an unreasonable application of, clearly established federal law as determined by the U.S. Supreme Court.

Second, it can be reversed if the state decision is based on an unreasonable determination of the facts.

This is a stringent standard of review. The Supreme Court has held that this is meant to be a standard difficult to satisfy. The issue is not whether the federal court merely thinks the state decision is incorrect; rather, federal relief can be granted only if the state decision is objectively unreasonable.

Consequently, the majority notes that federal relief from state convictions is "rare." It is reserved for "relatively uncommon cases in which state courts veer well outside the channels of reasonable decision-making."

The majority concedes that there is evidence on both sides of the voluntariness issue. But the clincher is that the "Supreme Court has not found a confession involuntary in circumstances like Dassey's confession."

A reader may find it odd that the vast majority of the Supreme Court cases on voluntariness of confessions cited in the opinion were decided anywhere from 40 to 50 years ago. A fair question is, Where are the recent Supreme Court cases that have found confessions during custodial interrogation to be involuntary?

The answer is there are none.

Here's why. From 1936 up to the *Miranda* decision in 1966, the Supreme Court decided dozens of cases dealing with whether confessions obtained during custodial interrogations were coerced and thus involuntary under the due process clause. *Miranda*, however, created a sea change in confession law. It established a system of warnings and waiver to guarantee that custodial interrogations by police did not violate the self-incrimination clause of the Fifth Amendment.

Miranda was meant to supplement, not eliminate, the voluntariness test. Since 1966, the Supreme Court has decided around 90 cases construing the *Miranda* decision. But unfortunately, the court lost interest in deciding cases concerning voluntariness. In fact, the Supreme Court has not found a confession made during custodial interrogation to be involuntary since 1967 — a half-century ago.

And this is why it is no surprise that Dassey could not cite a Supreme Court case similar to his. The Supreme Court hasn't found a confession during custodial interrogation to be involuntary in more than 50 years.

[Rovner] argues that courts have a duty to "update their understanding" of what coercion really is.

This is the "chasm" that Rovner is referring to. She notes that the Supreme Court last decided voluntariness cases during an era when the general consensus was that there was no such thing as a "false confession."

How wrong we were.

Rovner states that starting in the 1990s, DNA evidence has helped prove that "Innocent people do in fact confess, and they do so with shocking regularity." Twenty-five percent of murder exonerations involve false confessions. Rovner points to a "robust and growing body of rigorous, peer-reviewed, legal and psychological research" demonstrating how current interrogation techniques can cause people to confess falsely.

This is particularly true of juveniles and intellectually impaired people. And Brendan Dassey, of course, belongs to both of these categories.

Rovner decries that fact that "Our 'modern constitutional standards' come from a 50-year-old understanding of human behavior." And the Supreme Court's refusal to consider involuntary confession cases during the last half-century has resulted in two separate wrongs.

First, it has refused to acknowledge the exciting advances made in the area of the psychology behind confessions in general and false confessions in particular.

But equally troubling is that by refusing to keep its precedent updated with new psychological advances, the Supreme Court has crippled the ability of state habeas petitioners to obtain federal relief. The anti-terrorism act does not require citation to case precedent in general; it mandates that petitioners must specifically point to U.S. Supreme Court precedent to prevail.

The refusal of the Supreme Court for a half-century to confront this new body of psychological knowledge makes it extremely difficult for lower federal courts to grant relief to deserving habeas petitioners.

Federal courts deciding voluntariness issues brought by state habeas petitioners are faced with a 20th century body of U.S. Supreme Court case law that shows no recognition of 21st century human psychology.

It is imperative that the Supreme Court begins to rectify this serious failure. We cannot allow another Brendan Dassey.