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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2018AP2220-CR

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

ADAM W. VICE,

Defendant-Respondent

On review of a decision of the Court of Appeals, District III, affirming an order suppressing evidence, entered in the Circuit Court for Washburn County, the Honorable John P. Anderson, presiding

**BRIEF OF THE
DEFENDANT-RESPONDENT
ADAM W. VICE**

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III. Statement of issues presented for review.

This appeal presents the following issue for review:

Was it error for the circuit court to suppress Adam Vice's post-polygraph interview?

Two grounds were presented by Vice for suppressing his post-polygraph interview. First, Vice argued that the post-polygraph interview was not a totally discrete event from his polygraph examination. Alternatively, Vice argued that his confession elicited during the post-polygraph interview was involuntarily given

The circuit court, concluded that it was compelled to accept an earlier decision of the Court of Appeals that Vice's first trial counsel had conceded the discreteness argument, but made factual findings to support a conclusion that Vice's post-polygraph interview was not a totally discrete event from his polygraph examination. The Court of Appeals reconsidered the discreteness argument, and held that Vice's post-polygraph interview was a totally discrete event from his polygraph examination.

As to the voluntariness argument, the circuit court held that Vice's confession was involuntarily given, and suppressed his statements made during the post-polygraph interview. The Court of Appeals agreed, and affirmed the circuit court's order to suppress.

IV. Statement on oral argument and publication.

This case involves an unusual fact pattern in which the polygraph examiner attended the post-polygraph interview, and in the course of that interview made repeated and constant references to the polygraph examination and its results. Moreover, he did so as an

integral and essential part of his interrogation strategy. That strategy included leading Vice into believing that he must have committed the crime because the polygraph machine was detecting repressed “memories” of his committing the crime. As Vice put it, “I must have [done] it because obviously the test says I did it.” He came to believe he committed the crime, despite his initially having no memory at all of touching the victim. This Court's decision should be published, and this Court will benefit from oral argument.

V. Statement of the case and facts.

In the early part of December 2014, Detective William Fisher of the Washburn County Sheriff's Office was assigned to investigate allegations of a sexual assault made by E.J., a four-year-old girl. (R.109:7). The assault allegedly occurred on October 25, 2014. (R.1:1). E.J. reported to a forensic child interviewer that Adam Vice had inserted his finger into her anus and vagina and had attempted to lick her "privates." (R.1:4). At one point during the interview, E.J. stated that her mother, her mother's boyfriend, her grandmother, and her grandmother's husband were all in the bathroom when Vice put his finger in her anus, none of whom corroborated the incident. *Id.* When Vice denied any wrongdoing, Fisher suggested that Vice take a polygraph examination in order to clear his name. (R.109:15-16 and 44-45). Vice agreed, but having no means of transportation, he had to be driven by Fisher to the Eau Claire Police Department for the exam. (R.109:45). Vice did not have a cell phone, and had no means of communicating with anyone other than the detectives during the trip, the polygraph examination, and the subsequent interrogation. (R.109:23).

The polygraph examination was conducted on December 11, 2014, by Detective Ryan Lambeseder of the Eau Claire Police Department. (R.109:25-26). Prior to the examination, Lambeseder had Vice sign two forms, a Waiver-of-Rights form, and a Polygraph Examination Consent form. (R.109:25-30; R.10:1-3). At no time, either before or after the polygraph examination, was Vice told that the results of his polygraph examination would be inadmissible in court. (R.109:37 and 20).

The polygraph examination took approximately an hour and forty-five minutes. (R.109:32). Vice later testified that during the polygraph test he was “really nervous,” was attempting to control his breathing, but “just tense[d] up and freak[ed] out.” (R.109:48). The bottom portion of the Polygraph Examination Consent form indicates that the examination concluded at 11:40 a.m., and a second signature by Vice is subscribed thereunder. (R.10:2).

After the polygraph examination Lambeseder escorted Vice to an interrogation room in the same building, where he left Vice alone while he scored the exam. (R.109:32-33, see also 37-38). The detectives entered the room approximately fifteen minutes later. *Id.* The interrogation room was small. (R.109:38). Vice was seated in a straight-backed chair behind a small table, with his back up against the wall. (R.109:19-21). When the detectives entered the room, Fisher seated himself directly across from Vice, with Lambeseder to his left. *Id.* The positioning was such that the detectives were between Vice and the door. (R.109:39). At no point during the interrogation was Vice told that he was free to leave. (R.109:20). Vice would later testify that he did not believe he was free to leave, that he was afraid of being arrested, had

no way of communicating with anyone, and that his only way of getting home was by getting a ride from one of the officers. (R.109:49-50).

The interrogation proceeded as follows:

When Lambeseder enters the interrogation room the very first thing he asks Vice is how he thinks he did on the exam. (R.128:2; Res-App. 2). Vice responds that he does not know, but that he knows for a fact that he was telling the truth. *Id.* Lambeseder then informs Vice that he “didn’t pass the exam.” *Id.* This is the first of what will be eleven direct references to the polygraph examination and/or its results during the interrogation. Vice later testified that when he was told he failed the exam “my heart dropped. I honestly couldn’t believe I failed the polygraph test. I didn’t think I was going to fail `cause I honestly – I didn’t do it ...” (R.109:50).

Lambeseder proceeds to tell Vice that on “the questions regarding [E.J.] it’s very clear, Adam, that you weren’t telling the truth” (the second direct reference). (R.128:3; Res-App. 3). Lambeseder then tells Vice that “we want to talk about that” i.e. the exam results (the third direct reference). *Id.* He goes on to tell Vice that he knows that “this has been weighing on you, and I can tell. And I can tell on that exam, okay? In fact, I can tell on your face it's been weighing on you” (the fourth direct reference). *Id.*

But Vice tells the detectives that he has no memory of committing these crimes. (R.109:22). “I’ll be honest, ... 100 percent honest, and I’ll take that test again. I do not remember doing this. I honestly do ... and I will take the test.” (R.128:4; Res-App. 4). But then, instead of questioning the test results, Vice questions himself. He says “but obviously I failed the test. Something’s wrong. Is there a way or is

it any possibility that I - somehow blacked out and not remember this?” *Id.* He then tells the detectives that “right now I feel like I’m having a heart attack.” *Id.* Lambeseder “explains” to Vice that “[y]ou do remember doing it, otherwise you wouldn’t react the way you did on the exam” (the fifth direct reference). (R.128:4-5; Res-App. 4-5).

The detectives then suggest to Vice that maybe his acts were a result of his being a twenty-five-year-old virgin, of “not getting girls,” and that he just made a bad mistake. (R.128:4-6; Res-App. 4-6). They present him with questions in the alternative, “[a]re you the guy who is going to do this to every little kid he comes in contact with?” to which Vice shakes his head in the negative. (R.128:6; Res-App. 6). Or “[a]re you the guy who made a mistake, made a poor choice, and we need to deal with that appropriately as opposed to the guy who going to do this to everybody.” *Id.* Vice’s response is illuminating, “I’m not going to do that ... I don’t know why I would do it -- first one, apparently.” *Id.* He asks, “[w]hat should I do?” *Id.*

The detectives tell Vice that it is important that he cooperate so he can “get the help you need.” (R.128:7; Res-App. 7). When Vice tells the detectives “I’m going to say flat out, I honestly don’t remember doing this, but I’m going to do what you say,” Lambeseder makes the sixth direct reference to the polygraph, telling Vice, “It’s true. I see you wouldn’t react like that.” (R.128:8; Res-App. 8). Lambeseder then tells Vice that “probably what you want to do is block it out because it was a bad mistake.” *Id.* Vice apparently believes him because his response is “[h]ow do you get out of that? Because I honestly can’t remember, and its scaring me right now.” *Id.* Lambeseder tells Vice that “without you saying I screwed up or admitting, ... we can't help you.” *Id.* Fisher then makes the seventh direct reference to the polygraph, telling Vice that

“[t]he reason you reacted that way is because you know you did it. And that’s why the reactions were that way.” (R.128:8-9; Res-App. 8-9).

Vice tells the detectives that he is scared, and is “worrying about what else I’m blocking out. If I can’t -- I’m --I’m trying hard to remember this.” (R.128:9; Res-App. 9). Seven minutes into the interrogation, Lambeseder makes the eighth direct reference to polygraph examination, “the thing is, it's -- you're trying to block it out but it's not blocked out, okay? Because you've reacted. You -- you know what you did, and you -- and you remember it.” *Id.* Fisher then tells Vice that if he does not confess, the District Attorney and Judge will conclude that “he’s dangerous, he’s -- all these other kids out there that he may have access to. We need to protect them.” (R.128:9-10; Res-App. 9-10). However, if Vice were to confess to “an isolated mistake,” then “they can say okay, we can allow him to be in the community, you know. And that's for them to decide, but you have to give them that option.” *Id.* (*see also*, R.109:22). So they offer Vice help, but first he has to confess. Lambeseder asks, “can you do that for us right now?” *Id.*

So Vice tells the detectives “this is going to sound really shitty to hear me say this right now, but I sexually assaulted [E.J.]” (R.128:10; Res-App. 10). But when asked “can you explain what you did?” Vice responds “no, I cannot, I honestly can’t.” *Id.* He puts his head on the table and appears to be crying saying, “I never fucking remember. I -- my whole body’s reacting to it. Why can’t I fucking remember ... I feel like I am going to throw up.” (R.128:10-11; Res-App. 10-11 and R.127 VIDEO at 12:06:30-12:07:35). Fisher offers him a box of tissues, and Lambeseder assures Vice “we know it happened.” *Id.*

“But I don’t know when ... I honestly don’t.” *Id.* Vice then asks, “was I drinking?” *Id.* He tells them, “I don't know. I honestly don't

know. I don't know if I was drunk. I don't know if I was -- I honestly don't know, and it's scaring me. It's like how did something --" *Id.* Lambeseder interrupts, "but you do know." *Id.* When Vice tells the detectives once again that "I don't remember," Lambeseder interrupts him and says "[y]ou do. You do remember. That's just it, okay." (R.128:12; Res-App. 12).

Vice then tells the detectives, "I would tell you if I knew, but I -- I'll -- ***I'll admit that I must have [done] it because obviously the test says I did it,*** but I don't physically remember. I'm trying honestly -- I --." (R.128:13; Res-App. 13; emphasis added). Vice tells the detectives that his heart is racing; that he "honestly can't remember." *Id.* And again, shortly thereafter, "I do not remember anything involving this situation whatsoever. I'm trying to remember. And ***obviously somehow in my subconscious I remember and I'm just trying to block it out*** and it won't come out." (R.128:15; Res-App. 15; emphasis added).

Fisher suggests that something happened on Halloween. *Id.* Vice remembers buying the girls crayons on Halloween, but he insists that he does not remember any inappropriate acts. (R.128:15-16; Res-App. 15-16). Fisher then tells Vice that "if you don't remember, or you're saying you don't remember, that's not going to help you out at all. I mean, we can't have people running around doing things they can't remember and aren't responsible for...." (R.128:16-17; Res-App. 16-17). Lambeseder now makes the ninth direct reference to the polygraph, "Adam, like I said, okay, it shows on the test that you remember, okay?" *Id.* Fisher reinforces this statement, telling Vice, "it happened. You remember it happening." *Id.* When Vice responds, "but I don't know if I actually --" Fisher interrupts, telling Vice that by saying he

doesn't remember he is not taking responsibility, that he needs to confess, "we need you to get help. ... so the rest of society can function with you in it." (R.128:17-18; Res-App. 17-18).

"But I -- I don't know what I did. I honestly don't. I don't know if I took off her clothes, if she was in her underwear, if I tried licking her over her pants or her underwear, if I actually touched her, or if I took my pants off --." *Id.* Lambeseder stops Vice, and tells him "[y]ou remember ... you do remember..." *Id.* Vice puts his head in his hands and Lambeseder then asks, "would it be easier if we just ask you, like, certain direct questions whether or not you did it or something?" *Id.* (and R.127 VIDEO; 12:15:25-40). After his telling the detectives for the last twenty minutes that he has no memory of the acts he is alleged to have committed, the detectives have offered to provide him with these details through direct questions. Adam Vice's response to this offer is "I'll -- I must have done it." *Id.*

Detective Fisher then asks Vice if he placed his fingers under E.J.'s underwear and directly onto her vagina. Vice pauses, then answers "Yes." (R.128:19 and R.129 VIDEO; 12:15:50-12:16:05; Res-App. 19). When Lambeseder asks "you're recalling that right now?" Vice responds weakly, "sort of." *Id.* Then Vice begins to relate a vision he is conjuring in his mind, "[l]ike I see myself going, like, with just one finger going through her front and going like this (indicating)." *Id.* Fisher asks, "you remember that?" Vice replies, "I think, Yes." *Id.* Then Fisher asks, "[d]o you remember when?" Vice replies "No." Then he says it "had to have been in October," i.e. Halloween. *Id.* When asked, "where were you when that happened?" Vice does not remember, but guesses, "I must -- downstairs in the big living room when she was on the bed." *Id.* He conjures another vision, "[s]he was on the right-hand

side.” *Id.* But he is having difficulties producing the visions, he says, “I don’t know where her sister was. I can’t see that side.” *Id.* Fisher asks, “did you try to lick her vagina?” Vice answers, “I don’t know. I don’t think so,” and then under his breath “I’m trying--.” *Id.* So Lambeseder asks “did you try to pull down her pants to do that?” and Vice answers “I think I tried just to pull down her pants so I could get my hand down her pants easier. Oh, God. I’m sick.” *Id.*

The detectives again assure Vice that they just want him to confess so they can get him the help he needs. *Id.* Vice, with obvious anguish in his voice asks the detectives “at least tell me this, because I honestly don’t remember, did I try having sex with her ... did I take off my pants and ...?” (R.128:21; R.129 VIDEO; 12:18:15-55; Res-App. 21). Lambeseder replies “you tell us,” and Vice says, “I don’t know. That’s why I’m trying to ask.” *Id.* He eventually responds, “I’m just trying -- I’m trying to think if I did or not. I don’t think I did.” *Id.*

Prompted by the detectives, Vice produces other “memories.” He denies pulling out his penis; says he tried to lick E.J. in the crotch, but over her pants; that he took off her pants and put his hand beneath her underwear; but he denies trying to lick her crotch over her underwear, and he denies anything other than incidental contact with E.J.’s buttocks. (R.128:22; Res-App. 22).

“It hurts. I don’t know what it is, it feels like I’m getting a massive headache trying to break through these barriers or something.” (R.128:23; Res-App. 23). When Lambeseder asks Vice “what else had happened?” Vice replies, “I don’t know. Fucking monster.” *Id.*

Thirty minutes into the interrogation, Fisher makes the tenth direct reference to the polygraph, “Detective Lambeseder, he's been,

you know, working with the polygraph things and we've been interviewing people. We know the techniques people use, you know, to try, you know, not remembering or it was their fault.” (R.128:24; Res-App. 24). If it was Fisher’s intent to firm up Vice’s recollections, it doesn’t work. Vice’s memories, vaporous as they are, begin to dissipate. Fisher tells him, “we need to know what happened,” but Vice responds “I don’t know It's -- it's -- I don't -- I think that's the only time. It's the only thing I can even somewhat remember.” (R.128:25; Res-App. 25). He denies any other incidents, “This is the first time I've been accused – was even accused ... [a]nd this is why it’s such a fricking shock.” *Id.* When Lambeseder presses him, Vice says, “No. I don’t see anybody.” To which Lambeseder responds, “well try.” (R.128:26; Res-App. 26).

Lambeseder asks Vice if he is attracted to girls of this age, but Vice firmly denies this. (R.128:27; Res-App. 27). Lambeseder changes tack, and returns to the theme that Vice is a “twenty-five-year-old guy who just hasn’t had a girl yet.” *Id.* Vice accepts this idea, and says, “that one mixed with a little bit of alcohol.” (R.128:27-28; Res-App. 27-28).

When Fisher asks, “but you do remember that?” meaning the touching of E.J., Vice replies “vaguely.” *Id.* Nearing the end of the interrogation, with only ten minutes or so remaining, Lambeseder make the eleventh direct reference to the polygraph, telling Vice that “it’s clear to you, because you ... showed you did on the test, okay.” *Id.* Vice responds, “vaguely.” *Id.* He then explains, “[l]ike I said, only thing I remember is coming home, playing video games, and drinking, and vaguely remember going into the other room. Pretty much like a dream at this point in time. That's how fuzzy it is.” (R.128:29; Res-App. 29). To which, Lambeseder replies, “[t]hat’s natural. It’s – you’re trying to

block it out because it was a mistake. It was a bad, bad situation, that's natural." *Id.*

Vice tells the detectives:

But that's--that's all I remember is what I said, going to the other room -- it's just fuzzy as hell. Staggering around. I don't remember the other girl being in there. I don't even know what time it was. Or why [E.J.] didn't scream or something like that. Or why anybody else didn't see me. But I don't remember falling asleep. I don't remember waking up. I don't remember anything.

Id. Fisher then asks, “[b]ut you remember staggering into the room?” and Vice answers, “that’s all I remember.” *Id.* Fisher tells Vice that his memory is actually quite good. (R.128:30-32; Res-App. 30-32). But Vice is insistent that he has only:

... vague memories of doing the things I said I did ... Kind of -- like I said, *kind of like a dream. ... Like – kind of like those déjà vu dreams that you have that you’re just sitting there and you say hey, I remember this in a dream.* It’s kind of like that.

(R.128:32; Res-App. 32; emphasis added). The detectives’ respond, “but it’s real” and “it wasn’t a dream.” *Id.*

To summarize, after a forty-five-minute interrogation, Detectives Lambeseder and Fisher were able to extract from Vice a “memory” of touching E.J.’s vagina, and of attempting to lick her vagina but being unable to do so because of her pants. Vice had no memory of putting his finger in E.J.’s anus. The “memories” he did have were neither clear nor firm, but rather, were “vague,” “fuzzy,” “*déjà vu*,” “dream-like,” “somewhat” memories. (R.128:25, 27, 29 and 32; Res-App. 25, 27, 29, and 32).

Vice was charged with First Degree Child Sexual Assault. (R.1). His first trial counsel immediately filed a motion seeking to suppress the confession. (R.8:1). This pleading was supplemented by briefs and a

recording of the interrogation. (R.9, R.12, R.13 and 18). Testimony was received at an evidentiary hearing from Detectives Fisher, (R.109:6-24) and Lambeseder, (R.109:25-43), as well as from Adam Vice (R.109:43-60). In addition to the facts related above, Vice testified that he had been a special education student the entire time he was in school, that he received counseling for learning disabilities, and that he had diagnoses since elementary school for attention deficit hyperactivity disorder, depression, and anxiety. (R.109:47-48). He stated that he still suffered from all of these conditions when he took the polygraph examination. (R.109:47).

On September 30, 2015, the circuit court granted Vice's motion to suppress. (R.110:4-5). The State appealed that order. (R.13). In the State's first appeal, Vice argued (1) that his polygraph examination and his post-polygraph interview were not discrete events, and (2) that the circuit court was correct in finding that the statements made by Vice during the post-polygraph interview were involuntarily given. (COA Decision, ¶¶32-33; A-App. 113-14). With regard to Vice's first argument, the Court of Appeals ruled that Vice's trial counsel had conceded in the circuit court that the polygraph examination and post-polygraph interview were discrete events, and that Vice was judicially estopped from arguing to the contrary on appeal. *Id.* With regard to Vice's second argument, the Court of Appeals ruled that it could not discern from the circuit court's oral ruling which facts the court considered important in concluding Vice's confession was involuntary, and therefore remanded the case for further fact-finding. *Id.*

On remand, Vice obtained new trial counsel who filed a second motion to suppress. (R.42 and R.47). The parties stipulated that additional testimony would not be required from Vice, Lambeseder, or

Fisher. (R.118:3). Vice's trial counsel, however, advised that she intended to elicit expert testimony concerning the coercive nature of Vice's interview, (R.118:4 and R.42:1), and eventually retained Hollida Wakefield, M.A., LP, who submitted a report and testified on this issue on June 22, 2018. (R.69:8-12 and R.122:45-85). Ms. Wakefield's professional opinion was that Vice's interview was a "good example" of an internalized false confessions, induced by the detectives telling Vice that he failed a polygraph test and by leading him into believing that the polygraph reads his brain or taps into his subconscious, thereby causing him to become unsure about his memories. (R.122:48 and R.69:11-12).

Prior to the circuit court's second oral ruling on Vice's suppression motion(s) the parties submitted more briefs, (R.78 and R.79), and made further oral arguments. (R.123:65-90). During arguments, Vice's trial counsel argued that she believe Vice's prior trial counsel was wrong in conceding that the polygraph examination and post-polygraph interview were totally discrete events (and argued in briefing that the concession constituted ineffective assistance of counsel). (R.123:76 and R.83:1). The circuit court also expressed concern about whether the post-polygraph interview was a totally discrete event from the polygraph examination, stating "there's a lot of factors to look at here that indicate that it wasn't a distinct interview." (R.123:88).

The circuit court entered its second oral ruling on September 14, 2018. (R.124:1; Res-App. 40). Before ruling on the voluntariness of Vice's statement, the court stated that "I've had a chance to do a more thorough review of the polygraph and the issues pertaining to the defendant's statements made thereafter. And after such, you know, I'm

a little concerned that the defense may have prematurely conceded the point that the post-polygraph interview was wholly discrete and separate from the polygraph test.” (R.124:4; Res-App. 43). However, the circuit court also felt compelled to accept the Court of Appeals decision regarding the concession. *Id.* Instead, the court made findings of facts in the event the Court of Appeals would be willing to reconsider the argument. (R.124:4-6; Res-App. 43-45).

First, the court found that “an officer who assisted with the interview that resulted in the confession was the same person who conducted the polygraph.” *Id.* Second, “[t]he location of the interview was the same building as the polygraph but in a different room.” *Id.* Third, “[t]he time between the polygraph in one room and the interview in another room is close ... minutes apart but not much more than that.” *Id.* Fourth, “there are at least 11 separate references to the polygraph test during the interview.” *Id.* Fifth, that there was “a somewhat unique discussion” that led Vice to believe that “the polygraph said I did it so it must be true or words to that effect,” which went uncontradicted. *Id.* Sixth, that Vice’s “*Miranda* rights were discussed before the polygraph but not before the post-polygraph interview.” *Id.* And seventh, “in neither interaction was the defendant ever informed that the polygraph was not admissible in court but any statement could be.” *Id.*

On the voluntariness of the statements, the court made the following findings. It reiterated that the polygraph examiner participated in the interview, and that the polygraph was referenced by the detectives at least 11 times during the interview. (R.124:7; Res-App. 46). It found that the interview was approximately forty-five minutes long, “which you do the math, you know, comes out to it being

a fairly continuous reference.” (R.124:9; Res-App. 48). It found that the detectives used “clearly misleading information regarding the test,” telling Vice that “because he failed the test, he must remember the sexual assault.” (R.124:7 and 9; Res-App. 46 and 48). It also found that Vice “referred to the test himself as being proof that he committed a sexual assault and his conclusion was never challenged or corrected in any way.” (R.124:7; Res-App. 46). The court found that “the test results were used over and over again to elicit a statement.” *Id.* It found that Vice was not told that the polygraph test would be inadmissible in court. (R.124:9; Res-App. 48). And it found that “[t]he overt reference in this case to the polygraph test on multiple occasions with the actual polygraph examiner in the room and the use of clearly misleading information regarding the test without the benefit of telling the defendant the test would not be admissible in court together with the defendant drawing clearly erroneous conclusions; in other words, the test says I did it or words to that effect, had a tendency to create a certain coercive atmosphere.” (R.124:8-9; Res-App. 47-48).

Regarding Vice’s personal characteristics the circuit court found, first, that Vice was in his mid 20s at the time of the interview. (R.124:8; Res-App. 47). Second, that “[h]e had little or marginal prior contacts with law enforcement.” *Id.* Third, “[h]e apparently was able to finish high school but did have a history of special education.” *Id.* Fourth, “[i]t does appear that he is competent and can reasonably understand the seriousness of the events but he’s by no means sophisticated or wily in the operation of the criminal justice system.” *Id.* Fifth, “[t]he defendant’s demeanor at the time of the interview was a mixture of being both distraught with the news that he failed, nearly crying at times.” *Id.* That “he got to the point that he was apparently

physically sick and indicated that. And I'm satisfied that it does appear that to one extent or another, his physical state at times appeared to be compromised to a certain degree.” *Id.*

The circuit court also found that Vice “was not otherwise restrained or physically abused, but he was isolated in a room for 45 minutes with the examiner and the investigator. The room wasn't apparently uncomfortable.” *Id.* “[F]ormal **Miranda** warnings were not given prior to the statement but same or similar information was given to the defendant prior to the test. So he had information but not necessarily in conjunction with the statement that he gave.” *Id.*

The circuit court found that “statements made by both the examiner and/or the interviewer indicating that the test somehow is determinative that he does remember,” and that these statements were “clearly intended and was deliberately coercive and extremely effective.” (R.124:9-11; Res-App. 48-50). “While law enforcement is not required, necessarily, to always be truthful in an interview, we begin to cross lines when the examiner of a polygraph is there and perhaps information about what the polygraph may or may not mean is also given, that begins to have an impact, I believe, on the voluntariness of the statement.” *Id.* The circuit court concluded, when considering the totality of the circumstances, Vice’s ability to resist was simply overwhelmed by the detectives’ coercive interrogation tactics. *Id.* “I'm satisfied that the statement was not voluntary and I'm going to grant the motion to suppress again.” *Id.*

The State appealed again. The Court of Appeals, exercising its discretion, reconsidered whether Vice’s post-polygraph interview was a totally discrete event from his polygraph examination, and rejected

Vice's arguments that suppression was warranted under the "discrete events" prong of the *Davis* analysis. (COA Decision, ¶¶46-53; A-App. 119-22). The Court of Appeals agreed, however, that Vice's confession was not voluntary. The Court wrote:

Critically, we do not hold that a confession made during a post-polygraph interview must be suppressed any time law enforcement refers to the polygraph results during the interview. Instead, we conclude Vice's confession was involuntary under the specific circumstances of this case, which included:

- (1) numerous, repeated references to the polygraph results throughout the course of the post-polygraph interview;
- (2) repeated assertions that those results showed Vice—who claimed not to remember the assault—did remember it;
- (3) the officers' failure to respond to Vice's statement that he must have assaulted the victim because the test said he did; and
- (4) the officers' failure to inform Vice that the test results would be inadmissible in any criminal proceedings against him.

While any of these circumstances, standing alone, may have been insufficient to render Vice's confession involuntary, together they demonstrate a level of coercion sufficient to overcome Vice's ability to resist.

(COA Decision, ¶81; A.-App. 135; formatting altered). Of the cumulative effect of these tactics on Vice, the Court wrote that "we do not view the tactics employed here as merely 'subtle' psychological pressures. Instead, we conclude these strategies would exceed most any defendant's ability to resist, regardless of whether he or she was physically or mentally compromised." (COA Decision, ¶72; A.-App. 131).

VI. Argument.

A. Vice's polygraph examination and post-polygraph interview were not two "totally discrete events."

The law with regard to polygraph evidence is one of unconditional inadmissibility. *State v. Dean*, 103 Wis.2d 228, 307 N.W.2d 628 (1981). While "the results of polygraph examinations are not admissible in criminal proceedings, ... persons accused of crime can take them voluntarily in an effort to lift the cloud of suspicion. Anything that a defendant says during what is considered to be part of the polygraph examination is not admissible." *State v. Greer*, 2003 WI App 112, ¶9, 265 Wis.2d 463, 666 N.W.2d 518. (citations omitted). Statements that a defendant makes after the polygraph examination is over, however, may be admissible. *State v. Johnson*, 193 Wis.2d 382, 388, 535 N.W.2d 441 (Ct. App. 1995).

While voluntary polygraph examinations may lift a cloud of suspicion over persons accused of crimes, polygraph examinations have an additional attraction for law enforcement in helping to elicit confessions from suspects,¹ as evidenced by the numerous cases involving post-polygraph confessions. See, *McAdoo v. State*, 65 Wis.2d 596, 223 N.W.2d 521 (1974), *State v. Schlise*, 86 Wis.2d 26, 271

¹ See, the American Psychiatric Association white paper by Kassin, S. M., Drizin, S. A., Grisso, T., Gudjonsson, G. H., Leo, R. A., & Redlich, A. D., *Police-Induced Confessions: Risk Factors and Recommendations*. 34(3) Law and Human behavior 1, 15 (2010) (Res-App. 84) ("Although it is best known for its use as a lie detector test, and value as an investigative tool, post test 'failure' feedback is often used to pressure suspects and can prompt false confessions.").

N.W.2d 619 (1978), *State v. Johnson*, supra, *State v. Greer*, supra, and *State v. Davis*, 2008 WI 71, 310 Wis.2d 583, 751 N.W.2d 332.²

From these cases a framework has developed for determining when post-polygraph statements are admissible in criminal proceedings. That framework involves a two-step analysis. First, there is a threshold determination as to whether the polygraph examination and the incriminating statement were the product of one event, or two “totally discrete” events. *Davis*, 2008 WI 71, ¶2. “When a statement is so closely associated with the voice stress [or polygraph] analysis that the analysis and statement are one event rather than two events, the statement must be suppressed.”³ *Id.* If the statement survives this first

² *Davis* was not a polygraph case, but rather a voice stress analysis case. However, this Court wrote that “we see no reason at this time to treat these two methods of ‘honesty testing’ differently.” *Davis*, 2008 WI 71, ¶20.

³ The State argues that discreteness is not at issue in this appeal, asserting that Vice needed to file a cross-petition if he wished to argue the discreteness prong of *Davis* on review. (State’s Brief, p. 24 fn. 5). Not so. “A petition for cross-review is not necessary to enable an opposing party to defend the court of appeals’ ultimate result or outcome based on any ground, whether or not that ground was ruled upon by the lower courts, as long as the supreme court’s acceptance of that ground would not change the result or outcome below.” Wis. Stat. Rule § 809.62(3m)(b)1. The State misreads *State v. Sulla*, 2016 WI 46, 369 Wis.2d 225, 880 N.W.2d 659. Sulla, the appellant, sought to raise additional issues on review which would have changed the result or outcome in the circuit court. Vice, on the other hand, is merely offering an alternative legal ground for affirming the decisions of the circuit court and Court of Appeals. As per Wis. Stat. Rule § 809.62(3)(e), Vice made clear in his Response to the State’s Petition for Review that he intended to argue the discreteness prong of *Davis*. (Response pp. 19-27). Vice, who has been the respondent in all stages of this appeal, may advance any legal argument that will sustain the trial court’s ruling. *State v. Darcy N.K.*, 218 Wis. 2d 640, 581 N.W.2d 567 (Ct. App. 1998). Ultimately, “an appellate court is concerned with whether a court decision being reviewed is correct, rather than with the reasoning employed by the circuit court. If the holding is correct, it should be sustained.” *State v. Baudhuin*, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987).

test, then, “as is the case with any statement, the statement must also survive constitutional due process considerations of voluntariness.” *Id.*

“The touchstone of admissibility is whether the interviews eliciting the statements are found to be totally discrete from the examination which precedes them.” *Davis*, 2008 WI 71, ¶29, quoting *Greer*, 2003 WI App 112, ¶10. “Stated another way, statements that a defendant makes after he or she takes a polygraph examination will be suppressed if [t]he post-mechanical interview was so closely associated with the mechanical or electronic testing, both as to time *and content*, that it must be considered as one event.” *Greer*, 2003 WI App 112, ¶10, citing *Schlise*, 86 Wis.2d at 42 (emphasis added). To assist in making this determination the courts have developed a five-factor analysis:

- (1) whether the defendant was told the test was over;
- (2) whether any time passed between the analysis and the defendant’s statement;
- (3) whether the officer conducting the analysis differed from the officer who took the statement;
- (4) whether the location where the analysis was conducted differed from where the statement was given; and
- (5) whether the voice stress analysis [or polygraph examination] was referred to when obtaining a statement from the defendant.

Davis, 2008 WI 71, ¶23 (formatting altered). The test is a totality of the circumstances test; so no one factor will trump the other elements.

In this case Vice signed a form with boilerplate language to the effect that the test was over. (R.10:2). While in other cases this has proved dispositive, (e.g., *Greer*, 2003 WI App. 112, ¶ 4), this case differs from those which have preceded it, in that, while Vice may have signed a form stating that the polygraph examination was over, the polygraph examiner then proceeded to attend the post-polygraph interview, and in

the course of that interrogation made repeated and constant references to the polygraph examination and its results. He did so as an integral and essential part of his interrogation strategy, and in the process blurred the distinction between the polygraph examination and post-polygraph interview.

That is a fact scenario which had never before been presented to a Wisconsin court. Prior decisions, however, suggest that constant and repeated references to the polygraph examination results will breakdown the separation between the polygraph examination and the post-polygraph interview such that the two events can no longer be deemed “totally discrete.” In *Davis*, this Court found that a voice stress analysis, and statements made during a post-analysis interview, were totally discrete events. Pertinent to this conclusion was that “[t]wo different officers were involved—one conducted the examination and the other conducted the interview,” that “[t]he interviewing officer did not refer to the polygraph examination or its results during the interview, and the examination and interview took place in different rooms.” *Davis*, 2008 WI 71, ¶30-31. “[W]here there is a distinct break between the two events *and the post-polygraph interview does not specifically relate back to the ... test*, the events are sufficiently attenuated.” *Id.* quoting *Johnson*, 193 Wis.2d at 389 (emphasis added).

In *Johnson* it was significant to a finding that the polygraph examination and post-polygraph interview were two totally discrete events that “the police officer did not refer back to the polygraph examination or tell the defendant that he failed the test during post-examination questioning in order to elicit an incriminating statement.” *Johnson*, 193 Wis.2d at 389. Only in *Schlise* was there a situation in which a polygraph examiner participated in the post-examination

interview and made frequent references to the polygraph examination, and in *Schlise* the post-examination statements were suppressed. *Davis*, 2008 WI 71, ¶27.

This is not a case where the detectives made a single reference to the polygraph results at the end of the polygraph examination. *E.g. Greer*, 2003 WI App 112, ¶6. Here the detectives made at least eleven references to the polygraph results during the post-polygraph interview, at what the circuit court considered a “fairly continuous” rate. (R.124:9; Res-App. 48). The results of the polygraph examination were most certainly being “referred to when obtaining a statement from the defendant.” *Davis*, 2008 WI 71, ¶23. And these were not passing references to the results, in which the detectives were merely relaying to Vice that he failed the polygraph examination. The polygraph results were used by the detectives as an integral part of their interrogation strategy, further helping to blur the distinction between the polygraph examination and the post-polygraph interview. Further, most of these references were being made by the polygraph examiner, which is also a relevant factor under the analysis, “whether the officer conducting the analysis differed from the officer who took the statement.” *Davis*, 2008 WI 71, ¶23.

Vice’s argument is actually quite simple, the detectives through their repeated and constant references to the polygraph examination during the interrogation, broke down any separation in “time and content” which may have existed between the two events, such that they can no longer be deemed two “totally discrete events.”

Why, after all, does this Court require that post-polygraph interviews be “totally discrete” from the examinations which precedes them? Vice would argue that at least part of the reason is that this

Court does not want evidence that the defendant took and failed a polygraph examination entering the courtroom. The rule in Wisconsin regarding polygraph evidence is one of unconditional inadmissibility. *Dean, supra*. But in Vice's case, as the circuit court observed, it will be difficult, if not impossible, to admit Vice's confession into evidence while keeping out that Vice had failed a polygraph examination. (R.122:93-94 and R.124:6-7; Res-App. 45-46). The problem here is two-fold.

First, as the circuit court found, the references to the polygraph results were "fairly continuous." (R.124:9; Res-App. 48). Consequently, the statements by the detectives concerning the polygraph results are so "intertwined" with the confession, that the circuit court twice stated that it doubted whether the interview could be redacted so as to keep that particular information out. (R.122:93-94 and R.124:6-7; Res. App. 45-46). There is a risk, as the circuit court put it, of "poisoning the jury well with this whole idea that, you know, oh, he took a polygraph and the polygraph is accurate and, therefore, he's guilty." *Id.* But second, and perhaps more important, by conducting the post-polygraph interview in the manner they did, the detectives ensured that evidence of Vice's having failed a polygraph examination will be presented to the jury if he argues at trial that his confession was involuntarily given. Under *State ex rel. Goodchild v. Burke*, 27 Wis.2d 244, 265, 133 N.W.2d 753 (1965), even if a confession is held by the courts to be voluntary, challenges to the confession's voluntariness may be still be presented to the jury for its independent consideration. In Vice's situation, that will necessarily require presenting evidence concerning the manner in which the interrogators used the polygraph results to

convince Vice the he must have committed the sexual assault because “*the test says I did it.*”⁴ (R.128:13; Res-App. 13).

Law enforcement should not be able to structure their interrogations so as to present the defendant with a Hobson’s choice of either introducing otherwise inadmissible evidence that he failed a polygraph examination in order to demonstrate his confession was coerced, or alternatively, having to concede the voluntariness of his confession, and hence his guilt, in order to keep the evidence of the polygraph results from reaching the jury. This, of course, is no choice at all. If the confession is admitted into evidence, then State can expect the polygraph results to be presented to the jury as well. Structuring an interrogation in such a manner subverts the rule of unconditional inadmissibility for polygraph examination results. The fact that Vice may be presented with such a choice clearly demonstrates that the polygraph examination was not sufficiently attenuated from the statements which were elicited from him during the interrogation. These were not two “totally discrete events.”

B. Vice’s confession was involuntarily given.

The voluntariness of a confession is a question of constitutional fact. When presented with questions of constitutional fact the reviewing court examines two determinations of the trial court, but applies a different standard of review to each. “First, we review the circuit court’s findings of historical fact under the clearly erroneous

⁴ That is assuming Vice is even able to present evidence that the detectives used the polygraph results to coerce his confession. *Dean* might preclude the admission of such evidence. *But see, People v. Melock*, 149 Ill.2d 423, 599 N.E.2d 941 (1992), for the proposition that precluding the admission of polygraph evidence when voluntariness is at issue would deny the defendant a fair trial.

standard. Second, we independently apply constitutional principles to these historical facts.” *State v. Wright*, 2019 WI 45, ¶22, 386 Wis.2d 495, 926 N.W.2d 157. With regard to the historical facts, it is for the trial court to resolve any conflicts in the testimony and to draw any reasonable inferences; the appellate courts should “search the record for evidence to support the findings that the trial court made, not for findings that the trial court could have made but did not.” *Glob. Steel Prod. Corp. v. Ecklund*, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269.

“A defendant’s statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant’s ability to resist.” *State v. Hoppe*, 2003 WI 43, ¶36, 261 Wis.2d 294, 661 N.W.2d 407. The courts must “inquire whether the statements were the result of coercion or otherwise improper conduct by law enforcement.” *Id.* at ¶37. “If neither coercion nor other improper conduct was used to secure the statement, it is deemed voluntary.” *Id.*

The courts apply a “totality of the circumstances standard to determine whether a statement was made voluntarily.” *Id.* The courts “must balance the personal characteristics of the defendant, such as age, education, intelligence, physical or emotional condition, and prior experience with law enforcement, with the possible pressures that law enforcement could impose. ... Possible pressures to consider include the length of questioning, general conditions or circumstances in which the statement was taken, whether any excessive physical or psychological pressure was used, and whether any inducements, threats, methods, or

strategies were utilized in order to elicit a statement from the defendant.” *Id.* at ¶¶38-39. Moreover, in cases where the statement was elicited following a polygraph examination, “[a]n important inquiry [in determining voluntariness] continues to be whether the test result was referred to in order to elicit an incriminating statement.” *Davis*, 2008 WI 71, ¶42;

This case concerns the use of psychological pressures to coerce a confession. It has long been 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). Both the circuit court and the Court of Appeals found that Vice’s statements in the post-polygraph interview were coerced. In support of that conclusion, both courts cited the detectives “(1) numerous, repeated references to the polygraph results throughout the course of the post-polygraph interview; (2) repeated assertions that those results showed Vice—who claimed not to remember the assault—did remember it; (3) the officers’ failure to respond to Vice’s statement that he must have assaulted the victim because the test said he did; and (4) the officers’ failure to inform Vice that the test results would be inadmissible in any criminal proceedings against him.” (COA Decision, ¶81 and R.124:7-9; A.-App. 135 and Res-App. 46-48). The circuit court, found the detectives comments to be “deliberately coercive and extremely effective.” (R.124:9-11; Res-App. 11). The Court of Appeals wrote that “we do not view the tactics employed here as merely ‘subtle’ psychological pressures. Instead, we conclude these strategies would exceed most any defendant’s ability to resist, regardless of whether he or she was physically or mentally compromised.” (COA Decision, ¶72; A.-App. 131).

This is not a case where law enforcement merely informed the suspect at the end of a polygraph examination that he had failed the test. *See e.g., Greer*, 2003 WI App 112, ¶16. Here the detectives, and in particular the polygraph examiner, made repeated and constant references to the results of the polygraph examination in order to convince Vice that his memory could not be trusted. They told Vice he had blocked memories which caused his body to react in such a way that he failed the examination. When Vice told the detectives that he had no memory of committing this crime, Lambeseder told him that “You do remember doing it, otherwise you wouldn’t react the way you did on the exam.” (R.128:4-5; Res-App. 4-5). They continued that refrain throughout the entire interview. *See*, (R.128:8, 8-9, 10-11, 17, 24, 27-28; Res-App. 8-9, 10-11, 17, 24, 27-28). When told that “you’re trying to block it out but it’s not blocked out, okay? Because you’ve reacted,” the implication was clear, the machine had detected memories that Vice was repressing. (R.128:9; Res-App. 9). This was a tactic which by its very design was likely to induce a false confession. And the effectiveness of this line of interrogation was demonstrated when Vice finally conceded “I’ll admit that I must have [done] it because obviously the test says I did it, but I don’t physically remember.” (R.128:13; Res-App. 13).

The State discounts these tactics noting that law enforcement may use misrepresentations and deception to elicit a confession, citing among other cases, *United States v. Rutledge*, 900 F.2d 1127, 1130 (7th Cir. 1990). (State Br. 22). Indeed, in *Rutledge*, the Seventh Circuit wrote that “[t]he police are allowed to play on a suspect’s ignorance, his anxieties, his fears, and his uncertainties; *they just are not allowed to magnify those fears, uncertainties, and so forth to the point where*

rational decision becomes impossible.” (emphasis added). But that is just the point, isn’t it. In Vice’s case, the detectives *did* magnify Vice’s ignorance, anxieties, fears and uncertainties to the point that a rational decision became impossible. When Vice says, “obviously somehow in my subconscious I remember and I’m just trying to block it out and it won’t come out,” Vice did not come up with that idea on his own, the detectives planted that thought in Vice’s mind. (R.128:15; Res-App. 15). Lies *are* relevant to the voluntariness analysis. ***State v. Triggs***, 2003 WI App 91, ¶¶15-17, 264 Wis.2d 861, 663 N.W.2d 396; ***Frazier v. Cupp***, 394 U.S. 731, 739 (1969). And it is widely recognized that falsehoods which are “reasonably likely to produce an untrue statement” can render a confession inadmissible. *See, People v. Scott*, 52 Cal. 4th 452, 129 Cal. Rptr. 3d 91, 257 P.3d 703, 727 (2011) (“The use of deceptive statements during an interrogation does not invalidate a confession as involuntary *unless the deception is of a type reasonably likely to produce an untrue statement*”); ***Creager v. State***, 952 S.W.2d 852, 856 (Tex. Crim. App. 1997) (Trickery or deception does not make a statement involuntary *unless the method is calculated to produce an untruthful confession* or was offensive to due process); ***Walker v. State***, 194 So. 3d 253, 273 (Ala. Crim. App. 2015) (same); ***State v. Baylor***, 423 N.J. Super. 578, 34 A.3d 801, 807 (App. Div. 2011) (same); ***Goodwin v. State***, 373 Ark. 53, 281 S.W.3d 258, 265 (2008) (“a misrepresentation of fact does not render a statement involuntary *so long as the means employed are not calculated to procure an untrue statement* and the confession is otherwise freely and voluntarily made with an understanding by the accused of his constitutional rights.”); ***Daniel v. State***, 285 Ga. 406, 677 S.E.2d 120, 124 (2009) (same); ***State v. McKinney***, 153 N.C. App. 369, 570 S.E.2d 238, 242 (2002) (“Totality

of circumstances must be viewed in determining whether confession was given voluntarily and understandingly, one of which may be whether means employed were *calculated to procure an untrue confession*"); (emphasis added to preceding quotes).

The interrogation tactics adopted by the detectives in Vice's case were reasonably likely, even calculated, to produce a false confession because they caused Vice to question his own lack of memory. A polygraph test cannot ascertain guilt or innocence, it cannot read minds, and it cannot tell if a person remembers or forgets some particular event. (R.122:56-58). There is little scientific evidence that polygraphs can detect deception, much less memories. *See, The Truth About Lie Detectors (aka Polygraph Tests)*, American Psychological Association, (August 5, 2004; Res-App. 118-19). Indeed, a National Research Council Committee established to review the scientific evidence on polygraphs expressed concern over the risk of false confessions entailed by telling suspects they had failed a polygraph examination.⁵

Vice's expert characterized this confession as "a good example of what they call internalized false confessions in which the person doesn't just give in because they think things will go better, but they

⁵ *See*, National Research Council, *The Polygraph and Lie Detection*. Washington, DC: The National Academies Press. <https://doi.org/10.17226/10420>. Page 56 (2003) (Res-App. 117). ("False confessions are more common than sometimes believed, and standard interrogation techniques designed to elicit confessions—including the use of false claims that the investigators have definitive evidence of the examinee's guilt—do elicit false confessions (Kassin, 1997, 1998). There is some evidence that interrogation focused on a false-positive polygraph response can lead to false confessions. In one study, 17 percent of respondents who were shown their strong response on a bogus polygraph to a question about a minor theft they did not commit subsequently admitted the theft (Meyer and Youngjohn, 1991)"). *Cf.*, Kassin, et al., *infra*, 15 (Res-App. 84).

think oh, gosh, the lie detector. It's tapping into my unconscious. I must have done it.”⁶ (R.122:48). Scientific research has indicated that among interrogation techniques, the presentation of false evidence has the strongest tendency to elicit a false confession, and that suggesting memory problems will increase people’s tendency to distrust their memory. *See*, van Bergen, S., Jelacic, M., and Merckelbach, H., *Interrogation Techniques and Memory Distrust*, 14(5) *Psychology, Crime and Law*, 425-34 (2008); Res-App. 120-29).

It is not only the scientific community which has found such interrogation techniques to be untrustworthy. Courts in many jurisdictions have found techniques quite similar to those used by the detectives in Vice’s case to be coercive, and have suppressed the confessions elicited thereby. In *State v. Craig*, 262 Mont. 240, 241, 864 P.2d 1240 (Mont., 1993), the Montana Supreme Court suppressed a confession when both the examiner and investigating detective who interrogated Craig kept telling him that “that the machine is proof that he lied.” The court wrote, “[r]egardless of its acceptability among the police, it is not acceptable to this Court for the police to use the results of a polygraph examination to tell a defendant that he lied in order to extract a confession.” *Id.* at 242. In *People v. Leonard*, 59 A.D.2d 1,

⁶ For a description of “internalized false confessions,” *see* Kassin, et. al, *supra* at 13 (Res-App. 82).

False confession are a leading cause of the wrongful convictions of the innocent in America. *See*, Drizin, S., *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L.Rev. 891, 906 (2004; Res-App. 60) (“studies report that the number of false confessions range from 8-25% of the total miscarriages of justices studied).

397 N.Y.S.2d 386, 392 (N.Y. App. Div., 1977), a confession was found to be involuntary and suppressed when the police told the defendant that “the truth was know by God, the defendant, and the polygraph machine, and that the polygraph machine proved he was lying.” *See also, State v. Davis*, 381 N.W.2d 86 (Minn. App., 1986) (confession suppressed when, among other things, suspect was told that the polygraph was “foolproof”); and *Martinez v. State*, 545 So. 2d 466 (Fla. 4th DCA, 1989) (polygraph examiner told accused that it was "impossible" that he was being truthful).

Courts have also suppressed confessions where the interrogators used the polygraph results to induce the accused into questioning the validity of their own memories. In *State v. Sawyer*, 561 So.2d 278, 289-90 (Fla. 2d DCA, 1990), a Florida appellate court focused special attention on the polygraph examiner’s having told Sawyer that the polygraph machine was detecting repressed or hidden memories, and then suggesting that Sawyer visualize the commission of the crime. Much like Vice, Sawyer was told by his polygraph examiner that his physiological responses were evidence of memories. He was told that his “heart was talking to him, his conscience; Sawyer's belief in his own innocence was useless.” *Id.* at 290. And much like Vice, Sawyer was encouraged to visualize himself committing the crime. Sawyer was told to “disregard his reliance on his own senses of what happened on the night of the killing, accept the blackout theory, and ‘picture’ what could have happened. Sawyer also accepted [the detective's] suggestion that he imagine or ‘picture’ what it would have been like to do the killing, which he does not recall because of a blackout.” *Id.* at 289. *See also, State v. Valero*, 285 P.3d 1014, 1018 (Idaho App., 2012) (“on more than one occasion, the detective conveyed to Valero that, from the

polygraph, there was no question what Valero had done and, in essence, that the polygraph was determinative of his guilt. The coercive nature of this misrepresentation can be seen one last time as Valero attempted to deny the accusations, stating ‘I never would touch her but if that thing [the polygraph] says I did....’ To which the detective responded ‘Well, you did”).

Similarly, the detectives in Vice’s case, after convincing Vice that he must have committed the crime because the machine said he did, (R.128:13; Res-App. 13); encouraged Vice to visualize a crime, (R.128:19; Res-App. 19); again based upon a drunken blackout theory. (R.128:27-28; Res-App. 27-28). This is not how you gain the truth; this is how you create false memories. *See*, Loftus, E.F., *Creating False Memories*, 277 *Scientific American* 70-75 (1997) (“Research is beginning to give us an understanding of how false memories of complete, emotional and self-participatory experiences are created in adults. First, there are social demands on individuals to remember; for instance, researchers exert some pressure on participants in a study to come up with memories. Second, memory construction by imagining events can be explicitly encouraged when people are having trouble remembering.”; Res-App. 114).

Other similarities with Vice’s case can be seen in *People v Zimmer*, 68 Misc. 2d 1067, 329 N.Y.S.2d 17 (1972), *affirmed* 40 App. Div. 2d 955, 339 NYS2d 671. In that case a confession was suppressed when the defendant was not told that the results of the polygraph test would be inadmissible at trial, and was even shown literature which stated that the test results could be used in court against her. Like *Zimmer*, Vice was not told that the results of the polygraph test would be inadmissible at trial, and the Polygraph Examination Consent form

he signed would lead one to believe that evidence of the polygraph examination was admissible. Paragraph two, among other things, stated that “I fully realize that: I am not required to take this examination, I may remain silent the entire time I am here, [and] *anything I say can be used against me in a court of law ...*” (R.10:2) (emphasis added). “[E]ven the State concedes that the form ‘could have been clearer about which statements could and could not be used against Vice in court.’” (COA Decision, ¶65; A-App. 128). Both the circuit court and the Court of Appeals cited the detectives failure to inform Vice that the polygraph examination would be inadmissible in court as one more circumstance increasing the psychological pressure placed upon Vice. (*Id.* and R.124:9; Res-App. 48).

The detectives placed other psychological pressures on Vice. Indeed, Vice’s interrogation closely followed the dictates of the widely criticized “Reid technique” of interrogations.⁷ Vice was placed in a

⁷ Bergen, *supra* at 425 (“The main objection to this technique is the high level of pressure that suspects are exposed to, sometimes giving rise to false confessions (Gudjonsson, 2001). To protect the interrogated individual, the Reid technique is prohibited in several European countries (Vrij, 1998).”);

Gallini, *infra* at 529 (“the outdated Reid technique was premised on the very same principles that underlie the lie detector. At the time of its creation, then, the Reid technique was crafted from a ‘science’ already discredited by nearly every court in the nation. From a policy standpoint, continued reliance on the Reid technique does a disservice to our justice system and unnecessarily risks obtaining inherently unreliable confessions.”);

Kassin et al, *supra* at 25 (“As illustrated by the Reid technique and other similar approaches, the modern American police interrogation is, by definition, a guilt-presumptive and confrontational process—aspects of which put innocent people at risk.”).

For a description of the Reid technique generally, see, Gallina, B., *Police “Science” in the Interrogation Room: Seventy Years of Pseudo-Psychological Interrogation Methods to Obtain Inadmissible Confessions*, 61(3) *Hastings L.J.* 529, 536-43 (2010); Res.-App. 61-69.

small room, seated in a chair, his back up against a wall, with both detectives positioned between Vice and the door. (R.109:19-21 and 39; *see*, Gallina, *supra* at 538, “Inbau et al. advise the investigator to set up a private soundproof room within the police station that is free from distractions and furnished sparsely with straight-backed chairs.”). Vice was kept alone and in isolation before the interview. (R.109:32-33; *see*, Gallina, *supra* at 538, “The interrogator should then `allow the suspect to sit in the interview room alone for about five minutes.”). At no point during this interrogation was Vice told that he was free to leave. (R.109:20; *see*, Gallina, *supra* at 538, “Arranging the room in this manner isolates the suspect and removes the suspect from any familiar surroundings, thereby heightening the suspect's anxiety while incentivizing the suspect to extricate himself from the situation”). From the very outset, Lambeseder directly confronted Vice, telling him that he failed the polygraph exam, that it was clear Vice was not telling the truth, and Lambeseder exhibited an air of confidence in his absolute certainty in Vice’s guilt. (R.128:2-3; Res-App. 2-3; *see*, Gallina, *supra* at 539, “Step one of the Reid technique then specifically directs the interrogator to “initiate the interrogation with a direct statement indicating absolute certainty in the suspect's guilt.”; *compare*, *Zimmer*, *supra* at 24, “She was alone, bewildered, with no one to advise her what to do next, except Inv. Scott insisting she had lied”). After confronting Vice, Lambeseder then told Vice that “we want to talk about that” i.e. the exam results. *Id.* (*see*, Gallina, *supra* 539, “Immediately thereafter, the interrogator should pause and say, “I want to sit down with you so that we can get this straightened out. Okay?”). “Step 2 of the Reid method directs the interrogator to begin developing a ‘theme.’ The theme should present the suspect with a moral--not legal--excuse for

committing the offense.” Gallina, *supra* at 539. And on cue, the detectives offer just such a “theme,” suggesting that maybe Vice’s acts were a result of his being a twenty-five-year-old virgin, of “not getting girls”; that he just made a bad mistake. (R.128:4-6; Res-App. 4-6). “[T]his ‘minimization’ technique is designed to ‘offer a ‘crutch’ for the suspect as he moves toward a confession.” Gallina, *supra* at 540. When Vice protested that he had no memory of the sexual assault, Lambeseder “explained” to Vice that “[y]ou do remember doing it, otherwise you wouldn’t react the way you did on the exam.” *Id.* at 4-5 (See, Gallina, *supra* at 540, “Should a denial follow step one, Inbau et al. advise interrogators to ignore a suspect’s ‘weak denial.’ Should the suspect offer a more forceful denial, then the investigator should ‘reassert his confidence in the suspect’s guilt...”). The detectives then presented Vice with an “alternative question,” asking if Vice’s acts were a result of his being a virgin, of “not getting girls,” and that he just made a bad mistake, or “[a]re you the guy who is going to do this to every little kid he comes in contact with?” (R.128:6; Res-App. 6). Again, that technique is right out of the manual. (See, Gallina, *supra* at 542, “the officer should present to the suspect a so-called ‘alternative question,’ which provides the suspect ‘a choice between two explanations for possible commission of the crime.’ One explanation is designed to be more ‘acceptable’ or ‘understandable’ than the other”).

“It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner.” *Miranda v. Arizona*, 384 U.S. 436, 457 (1966). The detectives took particular advantage of Vice’s insecurities concerning his memory, his virginity; and told him that it was necessary for him to confess if he wanted to get help. (R.128:7, 9-10, 18; Res-App. 7, 9-10,

18). In fact, at one point, Fisher turned this tactic into a threat, telling Vice “you’re saying you don’t remember, that’s not going to help you out at all. I mean, *we can’t have people running around doing things they can’t remember.*” (R.128:17; Res-App. 17; emphasis added). Having convinced Vice that he must have committed a sexual assault upon a child, because the polygraph machine said that he did, they further convinced Vice that he had to confess in order to get help. *Id.* That was unmistakably coercive. *Cole v. State*, 923 P.2d 820, 831-32 (Alaska App., 1996) (detectives declarations that the purpose of the interrogation was to get defendant the help he needs; along with declaration that he could only get this help if he confesses, was “unmistakably coercive”).⁸

This is a totality of the circumstances analysis; these things add up. At every step in Vice’s interrogation the detectives were seeking a confession, and not simply trying to solve a crime. It is apparent in their methods, statements, and behavior, that their only goal was to get Vice to confess. When it is shown that the undeviating intent of the officers is to extract a confession from the defendant, the confession obtained must be examined with “the most careful scrutiny.” *Spano v. New York*, 360 U.S. 315, 324 (1959).

When the circuit court looked at Vice’s personal characteristics it found that Vice was in his mid 20s at the time of the interview. (R.124:8; Res-App. 47). That “[h]e apparently was able to finish high school but did have a history of special education.” *Id.* The testimony

⁸ *But see contra, Turner v. State*, 76 Wis.2d 1, 22, 250 N.W.2d 706 (1977). *Turner*, however, is distinguishable in that the “getting help” ploy was never used as a threat, as it was in Vice’s case.

received indicated that he received counseling for learning disabilities since elementary school, and had diagnoses for attention deficit hyperactivity disorder, depression, and anxiety. (R.109:47). Regarding his mental state and demeanor during the interview, circuit court found that “[t]he defendant's demeanor at the time of the interview was a mixture of being both distraught with the news that he failed, nearly crying at times.” (R.124:8; Res-App. 47). “He got to the point that he was apparently physically sick and indicated that. And I'm satisfied that it does appear that to one extent or another, his physical state at times appeared to be compromised to a certain degree.” *Id.* Viewing the video of the interrogation should convince this Court that the circuit court’s findings on this point were not “clearly erroneous.” (*See*, R.127 VIDEO at 12:06:30-12:07:35). It is heart-wrenching to watch Adam Vice trying, desperately hard, to remember a crime that he cannot remember, but which he has been convinced he must have committed because the test said he did it. (R.128:10-11; Res-App. 49-50; R.127 VIDEO at 12:06:30-12:07:35).

Importantly, the circuit court found that “[h]e had little or marginal prior contacts with law enforcement,” and while “[i]t does appear that he is competent and can reasonably understand the seriousness of the events but he's by no means sophisticated or wily in the operation of the criminal justice system.” (R.124:8; Res-App. 47). The Court of Appeals agreed. (COA Decision ¶64 fn. 8; A.-App. 27-28). Vice was subjected to a sophisticated interrogation. His understanding of polygraphs was flawed and naïve, and his interrogators played upon and magnified his naivete, his insecurities, his ignorance, and his inexperience. Vice’s statements were not the product of “a free and unconstrained will,” but rather false memories, “the result of a

conspicuously unequal confrontation in which the pressures brought to bear on him by representatives of the State exceeded his ability to resist.” Indeed, how *could* a confession be said to be the product of “a free and unconstrained will” when it was induced by a belief that a machine had detected a “memory” of which the suspect had no prior awareness? The circuit court and Court of Appeals were correct in finding Vice’s confession was involuntarily given.

VII. Conclusion.

Wherefore, Adam Vice requests this Court affirm the order of the circuit court, suppressing his statements made during the post-polygraph interview on December 11, 2014.

Respectfully submitted,

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VIII. Certifications.

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10984 words.

I further certify that I personally served the State of Wisconsin, Plaintiff-Appellant-Petitioner, with three copies of this brief the same day it was filed with this court.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Finally, I further certify that pursuant to Rule 809.19(12)(f) I have submitted an electronic copy of this brief, excluding the appendix. The text of the electronic copy of the brief is identical in content and format to the text of the paper copy of the brief. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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CERTIFICATION OF MAILING

I certify that this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Supreme Court of Wisconsin by priority mail on October 21, 2020. I further certify that the brief was correctly addressed and postage was pre-paid.

Date: October 21, 2020

Signature: _____