

When the “Guiding Hand” of Counsel Becomes A  
“Heavy Hand”: *In re Gault and the  
Representation of Brendan Dassey*

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When the “Guiding Hand” of Counsel Becomes A  
“Heavy Hand”: *In re Gault and the  
Representation of Brendan Dassey*

- CHAPTER ONE: The History of *In re Gault*
- CHAPTER TWO: Background on the Case Against Steven Avery and Brendan Dassey
- CHAPTER THREE: Len Kachinsky’s Comments to the Media Before and After Meeting Brendan
- CHAPTER FOUR: Breaches of the Duty of Loyalty
- EPILOGUE

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**CHAPTER ONE: The History of *In re Gault*,  
387 U.S. 1 (1967)(8-1 decision)**

FACTS: Gerald Gault was 15 years old when he was arrested and charged with making an obscene phone call to a neighbor, Mrs. Cook on June 8, 1964. Gault was on probation for being present when a friend stole a wallet from a woman’s purse.

- Police left no notice with Gault’s parents re his arrest;
- Officer filed a petition on the 9<sup>th</sup>, did not serve GG or parents
- No record of detention hearing; no findings of fact, no complaining witness. Gault was detained.
- Gault was released after 2-3 days but trial set for 6/15
- No counsel for Gault; no transcript, again no complaining witness; no record of what Gault admitted to;
- Gault adjudicated delinquent and sent to “training school” till 21. Adult charged with same offense – 50\$ fine and max 2 mos.

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CHAPTER ONE: The History of *In re Gault*,  
387 U.S. 1 (1967)(8-1 decision)

- Gault had no right to appeal the juvenile court judge's decision
- Parents filed a writ of habeas corpus in Supreme Court. Writ was denied.
- Appeal taken to the United States Supreme Court: what "procedural rights", if any, must be given to a juvenile during a delinquency hearing in which there is a possibility of incarceration.

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CHAPTER ONE: The History of *In re Gault*,  
387 U.S. 1 (1967)(8-1 decision)

JUSTICE FORTAS: Argued the case of *Gideon v. Wainwright* which in 1963, gave criminal defendants charged with felony crimes the right to appointed counsel.

HELD: Children charged with crimes in juvenile court have basic due process rights, including the right to notice, the right to counsel, the right to compulsory process of witnesses, the right to confrontation and cross-examination, and the right against self-incrimination. In sweeping and sometimes soaring language, Justice Fortas destroyed all of the arguments put forth by defenders of the juvenile court with its "kindly" judges and goals of "treating children" in a less formal, non-adversarial system. He laid bare the gulf between the rhetoric about the court and its reality.

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CHAPTER ONE: The History of *In re Gault*,  
387 U.S. 1 (1967)(8-1 decision)

- JUSTICE FORTAS:
  - "the condition of being a boy does not justify a kangaroo court" that all too often gives juveniles the "worst of both worlds – neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children"
  - The juvenile court was prone to inaccurate fact-finding, unchecked abuses of discretion, arbitrary punishments.
  - The solution to the court's ills was a healthy dose of due process, the most imp. of which was the right to counsel.
  - The "guiding hand" of counsel was essential; only through this "guiding hand" could a child make "skilled inquiry into the facts" and "ascertain a defense and prepare to submit it."

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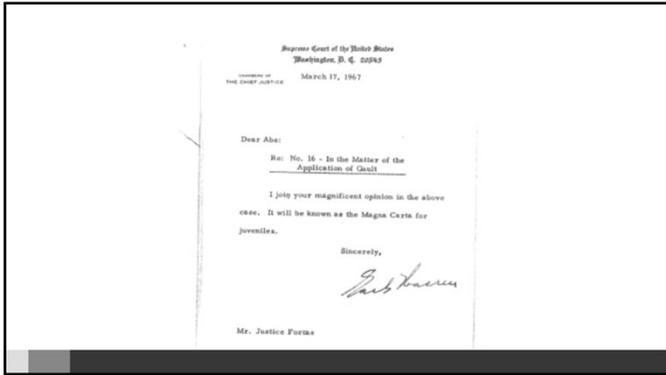
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**Need For “Guiding Hand” Necessary To Prevent Wrongful Convictions**

- Powell v. Alabama, 287 U.S. 45, 68-69 (1932)
- The criminal defendant “requires the guiding hand of counsel at every step of the proceedings against him. **Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.**

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**Chapter Two: Background on Case Against Steven Avery and Brendan Dassey in the Murder of Teresa Halbach**

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## The Murder of Teresa Halbach

- Teresa Halbach, a professional photographer, disappeared on 10/31/2005, while on assignment shooting a van at the Avery Salvage Yard in Two Rivers, WI.
- She had been on the property several times before photographing cars for Auto Trader Magazine and had met Steven Avery, one of the men who lived and worked at the Salvage Yard. Avery was a celebrity in WI. He was the first person exonerated by DNA evidence after he spent 18 years in prison for a rape he did not commit. He was released in 2005
- After three days, a missing person's report was filed and police pieced together Teresa's whereabouts on the last day she was seen.
- They swarmed the Avery Salvage Yard, sealed off the property and over the next 8 days gathered evidence

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## The Murder of Teresa Halbach

- They found forensic evidence which linked Steven Avery to her disappearance and her murder:
    - Her Car Was Found on the Yard in a Remote Corner Covered with Branches
    - Inside her Car, police found blood in the hatchback area and in the driver's area near the ignition
    - They searched Avery's trailer and found a key to Teresa's car
    - They found Teresa's cell phone, purse, and camera in a burn barrel
    - They found human bones in a fire pit next to Avery's trailer
- DNA Testing Proved that the Blood in the Hatchback Area was Teresa's, that the Blood in her car was Avery's, Avery's DNA was also on the key; some of the bones were Teresa's.  
AVERY WAS CHARGED WITH HER MURDER

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## Brendan Dassey: Steven Avery's Nephew

- Brendan was at home on the evening of October 31 when Avery invited him over for a bonfire.
- He assisted his uncle with stoking the bonfire and in cleaning up an area of the garage he believed was a puddle of motor oil with bleach, gasoline, and paint thinner.
- In late Feb. 2006, the lead investigators interrogated Brendan on four separate occasions, leading to a confession by Brendan to assisting his uncle in the rape and murder of Teresa Halbach and in covering up the crime by mutilating her body.

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## Questioning Brendan Dassey

Early afternoon  
of Feb. 27, 2006  
at Mishicot  
High School  
(audio only)



Late afternoon  
of Feb. 27, 2006  
at Two Rivers  
Police Dept.  
(video)

Late evening  
of Feb. 27, 2006  
at local hotel  
(unrecorded)



Midday on  
March 1, 2006  
at Manitowoc  
Police Dept.  
(video)

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## CHAPTER THREE: Len Kachinsky's Comments to the Media Before and After Being Appointed to Represent Brendan Dassey

- Appointed March 7, 2006
- Even Before Len Kachinsky had Met Brendan and Before He had Viewed the Interrogation Tapes, Before he had Done any Investigation on the Case, he talked about the case and about Brendan to the Media.
- His Comments Both Before and After Meeting Brendan did Great Damage to Brendan and His Case.
- Essentially Kachinsky told reporters such things as: Brendan has no defense; he only pleaded "not guilty" so we could keep our options open; that a plea deal might be "in Brendan's best interests"
- But Brendan was insisting he was innocent, that his confession was false, never authorized LK to explore plea deals.

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Brendan is "remorseful" and could be "easily led into the offenses he allegedly committed." – Len Kachinsky, 3/10/06

Brendan's not guilty plea was intended "simply to keep [his] options open." – Len Kachinsky, 3/10/06

VELEZ-MITCHELL: Well, what is his defense? I mean, you're his attorney. This is a litany of horrors that he recites to authorities for four hours on videotape. I understand you haven't seen it but we've all heard what's on that tape. What's his explanation? What's your explanation?

KACHINSKY: Well, if the tape is accurate, an accurate recollection of what occurred, there is, quite frankly, no defense....

--Len Kachinsky, Nancy Grace, CNN, 3/17/06

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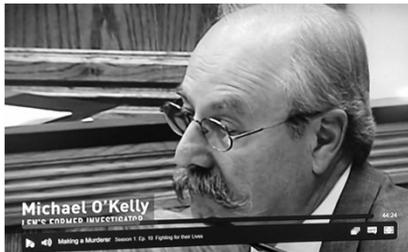
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### Len Kachinsky's Breaches of Duty of Loyalty: Hiring of Polygrapher Michael O'Kelly on April 3



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To: dbrindley@men.com <dbrindley@men.com>  
From: Len Kachinsky <lenk@strosow.com>  
Subject: State v. Brendan Cassady Polygraph - 06 CF 88  
Cc:  
Date: 04/03/2006  
Attached: C:\Documents and Settings\Len Kachinsky\My Documents\Trial level clients\Cassady\Complaint.pdf

To: Mr. Michael O'Kelly  
Affordable Investigation & Polygraph  
3020 Main Street Road #1022  
Des Plaines, IL 60018

Mike--This confirms that you will perform a polygraph exam on Mr. Cassady in the near future. I have sought authorization from the State Public Defender for \$300 for the exam. It should be approved within 24 hours.

Attached is the criminal complaint in the above matter. When you have a firm time and date for the exam, I can provide confirmation to the Sheboygan County Sheriff's Department of your authority to conduct it.

Mr. Cassady is at the Sheboygan County Juvenile Detention Facility, 527 N. 6th Street, Sheboygan, WI 53081. The phone there is (920) 459-3130.

If you have any questions, please let me know.

LEN KACHINSKY  
Strosow and Kachinsky Law Offices  
103 W. College Avenue #1010  
Appleton, WI 54911-5244  
Office: (920) 893-7777  
Fax: (920) 845-7965  
Car: (822) 985-8926  
Mobile: (920) 641-6706

"Not for the glory. Not for the rush. Sometimes you just do what you have to do."

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O'Kelly and Kachinsky Plan to Manipulate  
Brendan into Confessing Again, Pleading Guilty,  
and Testifying Against Brendan

- Plan To Go into Effect on May 12, 2006
- The Day After Brendan's Motion to Suppress His Confession is Denied
- The Day When Brendan is Going to Be At His Most Vulnerable
- O'Kelly arranges with the Prosecution to Get Some Props for his Interview, Gets Permission to Bring Video Equipment into the Detention Center School
- Sets up a Prop Table
- And Then O'Kelly Interrogates Brendan and Gets A Confession to Him
- O'Kelly arranges for Brendan to Be Interrogated Again The Next Day By Investigators; Len Kachinsky Is Not Present

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I am not concerned with finding connecting evidence placing Brendan inside the crime scene as Brendan will be status primary witness. This will only serve to bolster the prosecution. It will actually benefit the state if there is evidence attributed to Brendan. It will corroborate his testimony and color him truthful.

Michael O'Kelly to Len Kachinsky, 4/27/06

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Kristz, Ken

From: Len Kachinsky [mailto:lk@csd.com]  
Sent: Friday, May 05, 2006 11:07 AM  
To: Ken Kristz  
Cc: lenk@csd.com; ken.kristz@csd.com; len.kristz@aol.com  
Subject: Avery/Deputy Investigation

Mark - Our investigator, Mike O'Kelly, has developed some information in the course of talking to Brendan's relatives that we (Michael) that might shed some light on the whereabouts of the Suzuki and Brian's van which may contain some evidence useful in this case. You are authorized to call to him directly at (719) 548-5300 or by e-mail at the address above as the "to". This appears to me to be insufficient in and of itself to establish PC for another search of the Avery salvage yard. However, it may go a long way toward getting you there.

We would prefer to pay someone in my affidavit for a search witness if at all possible. Mike has not made any direct observations of the subject vehicles. The information he has may just lead you to request some witnesses prior to another search warrant application.

Also - Mike may want to take a look at the aerial photos of the Avery property at the Cal Co DA's office. He can call them directly at (920) 848-1431 to see them during business hours.

LEN KACHINSKY  
Steven and Kachinsky Law Offices  
113 N. College Avenue #1010  
Asheville, NC 28801-5781  
Office: (920) 993-3777  
Fax: (719) 548-7962  
Cell: (920) 968-9616  
Mobile: (920) 841-6766

"Not for the glory. Not for the cash. Sometimes you just do what you have to do."

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This is truly where the devil resides in comfort. I can find no good in any member. These people are pure evil. This is where one would eat their young to satisfy/justify a control issue where none previously existed.

A friend of mine suggested "This is a one branch family tree. Cut this tree down. We need to end the gene pool here".

I think that your visit will be counterproductive to our goals for Brendan. It could have Brendan digging his heels in further. He could become more entrenched in his illogical position and further distort the facts.

We need to separate him from fantasy and bring him to see reality from our perspective.

Brendan needs to be alone. When he sees me this Friday I will be a source of relief. He and I can begin to bond. He needs to trust me and the direction that I steer him into.

I would like to obtain his confession this Friday.

Michael O'Kelly to Len Kachinsky, 5/9/06

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To: "Crime Scene & Statement Analysis" <donlietome@msn.com>  
From: Len Kachinsky <len@sissonlaw.com>  
Subject: Brendan Dasey meeting on May 12th  
Cc:  
Bcc:  
Attached:

Mike-- I will cancel my planned visit for today. I have plenty of other work to do here.

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### Brendan's Original Confession to MOK

**Self Interview & Information Survey** Page 1

**My Explanation with Details**

You have disseminated the information that you have told me and I am sure that you have done so. Please, keep your identity safe. Do not tell anyone about what happened and write in detail everything you know. We are not trying to get you in trouble. We are just trying to get the truth out of you. We are not trying to get you in trouble. We are just trying to get the truth out of you. We are not trying to get you in trouble. We are just trying to get the truth out of you.

**Continue** Page 2

Then I helped him pick up the yard and picked up a shovel, a wheelbarrow, and some dirt. Then we went to the fire and we waited for the fire to go down and then we got a phone call from the fire and it was my mom and she told me that I had to go home at 7:00pm and I was home at that time. Then I called to my mom and she said to go back.

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Wisconsin State Public Defenders

You did not articulate any strategic reason you spent so much time with media contacts. We are willing to pay for an attorney's professional time. That professional time may include some media contact if it is done strategically to protect the client's interests. That does not appear to be what you did in this case. I am cutting 13.8 hours of the time billed for media contact. Please see the enclosed spreadsheet. I have ...  
...and those dates and hours that seem related to litigation events in the case. I did deduct ...

2/12/07 Letter from Wis. PD to Attorney Kachinsky

Dear Mr. Kachinsky:

I have received and reviewed a report from the Director of the Assigned Counsel Division, Deborah Smith. She is recommending that you be decertified from the Class A felony appointment list and the Trial 3 - Class B - D felony list. Her recommendation is based on your failure to provide competent representation in the Brendan Dassey case. You have confirmed to her that you allowed law enforcement to interview your client on May 13, 2006 in your absence. You have confirmed to her that you were not present at the interview on May 13, 2006 because you had to attend army reserve training that weekend. It is difficult to imagine a situation when it would be appropriate to allow a client in a serious felony case to give a statement in the attorney's absence. To allow such an interview in this case is indefensible.

8/15/06 Letter from Wis. PD to Attorney Kachinsky

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Although it probably does not need to be stated, it will be: Kachinsky's conduct was inexcusable both tactically and ethically. It is one thing for an attorney to point out to a client how deep of a hole the client is in. But to assist the prosecution in digging that hole deeper is an affront to the principles of justice that underlie a defense attorney's vital role in the adversarial system.



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### Lessons to Learn From Len Kachinsky

- If lawyers are going to talk to the media, they must have a strategy that is designed to help their client's case, not hurt it.
- Rule 3.6 Rules of Professional Conduct: A lawyer "shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and would pose a serious and imminent threat to the fairness of the adjudicative proceeding"
- Lawyers are responsible for the acts of their agents
- Rule 5.3: a lawyer shall be responsible for conduct of non-lawyers employed or retained by the lawyer to the extent that the conduct would be a violation of the Rules of Professional Conduct if engaged in by the lawyer.
- Lawyers Should Never Allow Their Clients to be Interrogated By the Police Outside of Their Presence (or even in their presence unless they have some kind of immunity agreement or it's a proffer)

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### Lessons to Learn From Len Kachinsky

- Lawyers Cannot Serve Two Masters: They Cannot Try to Serve the Interests of their Clients While at the Same Time Serving the Interests of the Government
- Lawyers Must Represent the "Expressed Interests" of their Client's Not What they Believe are the Client's Best Interests"
- Rule 1.2: "A lawyer shall abide by the client's decisions concerning the objectives of the representation". In a criminal case, the lawyer shall abide by the client's decision on "whether to enter a plea, whether to waive a jury trial, and whether the client will testify."

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### This was a Defensible Case: Contamination and Coercion Examples

- Remember those Three Facts that Brendan confessed to that were not known by the public:
  - That Teresa Was Shot in the Head
  - The Location of Her Personal Belongings
  - That Steven Avery had Gone Under the Hood of the Car
- HAD LEN KACHINSKY STUDIED THE RECORDINGS HE WOULD HAVE SEEN THAT THE POLICE CONTAMINATED BRENDAN'S CONFESSION BY FEEDING THESE FACTS
- THERE WERE ALSO NUMEROUS IMPLIED PROMISES OF LENIENCY AND THREATS OF HARM

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### Contamination in Brendan's Case



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### Coercion in Brendan's Case: Promises of Help



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### Epilogue Brendan's Case Today

- Convicted on the basis of his videotaped confession
- Brendan is Sentenced to Life; Parole Eligible in 2048.
- Claims that Confession Was Coerced and that Len Kachinsky Violated His Duty of Loyalty to Brendan Rejected by Wis. St. Cts.
- LK is a Municipal Judge for Town of Menasha
- Federal petition for a writ of habeas corpus has been granted on Aug. 12, 2016
  - Confession thrown out as coerced and involuntary
  - State appealed. We Cross-Appealed. Oral argument was on February 14, 2017 before 7<sup>th</sup> Cir. [http://media.ca7.uscourts.gov/sound/external/frs.1001.16-3397\\_02\\_14\\_2017.mpg](http://media.ca7.uscourts.gov/sound/external/frs.1001.16-3397_02_14_2017.mpg)



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Center on Wrongful Convictions of Youth  
www.cwey.org



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