**Case No. 2017 AP 002288**



# In the State of Wisconsin Court of Appeals District II

STATE OF WISCONSIN,

*Plaintiff-Respondent,*

v.

STEVEN A. AVERY,

*Defendant-Appellant.*

On Appeal from the Orders Denying Postconviction Relief and Additional Scientific Testing Entered in the Circuit Court of Manitowoc County, Case Number: 2005CF000381.
The Honorable **Angela W. Sutkiewicz**, Presiding Judge.

## CORRECTED BRIEF OF DEFENDANT-APPELLANT STEVEN A. AVERY

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## ISSUES PRESENTED

I. Did the circuit court abuse its discretion in denying Mr. Avery's motion to vacate its October 3, 2017, order and allow additional scientific testing?

The circuit court answered: No.

II. Did the circuit court abuse its discretion in summarily dismissing Mr. Avery's second motion pursuant to Wis. Stats. § 974.06 without addressing the 5 *Brady* claims raised and in subsequently denying Mr. Avery's Motion to Supplement which raised a 6th *Brady* claim all of which deprived him of due process, in violation of the Wisconsin and United States Constitution?

The circuit court did not address the 5 *Brady* claims.

The circuit court answered: No to the 6th *Brady* claim.

III. Did the circuit court err as a matter of law in failing to address Mr. Avery's claim of ineffective assistance of trial counsel?

The circuit court answered: No.

IV. Did the circuit court err, as a matter of law, in ruling that it was not authorized by statute to resolve claims of ineffective assistance of prior counsel, and that Mr. Avery would have to pursue that claim with the Court of Appeals pursuant to *State v. Knight* 168 Wis.2d 509, 484 N.W.2d 540 (1992)?

The circuit court answered: No.

V. Did the circuit court abuse its discretion in dismissing Mr. Avery's second motion pursuant to Wis. Stats.§ 974.06 without requiring the State to respond or conduct an evidentiary hearing?

The circuit court answered: No.

VI. Did the Circuit Court err as a matter of law in applying the wrong standard to the newly discovered evidence?

The circuit court answered: No.

VII. Did the circuit court abuse its discretion in ruling that the second motion of Mr. Avery pursuant to Wis. Stats. § 974.06, failed to show a sufficient reason as to why these issues could not have been raised in prior motions and is

therefore barred by *State v. Escalona-Naranjo* 185 Wis.2d 168, 517 N.W.2d 157 (1994)?

The circuit court answered: No.

VIII. Did the circuit court abuse its discretion by denying Mr. Avery's motion to reconsider and his three supplements to said motion, which included new evidence developed after his original filing on June 7, 2017?

The circuit court answered: No.

IX. Did the circuit court abuse its discretion in ignoring the subsequent briefs submitted by the parties incident to the Motion to Supplement?

The circuit court answered: No.

X. Did the circuit court abuse its discretion by denying Mr. Avery's supplemental § 974.06 motion for new trial pertaining to the discovery of human bones in the Manitowoc County Gravel Pit southwest of the supposed crime scene?

The circuit court answered: No.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Pursuant to Wis. Stat. § 809.22 (2009–10), Appellant requests oral argument to facilitate review of the complex legal issues raised herein, some of which are believed to be of first impression. Pursuant to Wis. Stat. Rule § 809.23 (2017–18), a publication is warranted because the case is of interest to the public and raises issues believed to be of first impression.

## STATEMENT OF THE CASE AND PROCEDURAL HISTORY

### I. THE STATE'S CASE

In the 4 months before her murder, 25-year-old Teresa Halbach ("Ms. Halbach") had been to the Avery salvage yard to take photographs of vehicles 5 times (June 20, 2005, August 22, 2005, August 29, 2005, September 19, 2005 and October 10, 2005). (194:2; 694:22–24).[1] Ms. Halbach worked for *AutoTrader* magazine and had her own photography business. (696:165–66). *AutoTrader* is a magazine that contains advertisements and photos of automobiles for sale.

Steven Avery ("Mr. Avery") had arranged hustle shots with Ms. Halbach previously by calling her cell phone directly, as he did on October 10, 2005. (264:1; 694:96). Because hustle shots were not pre-arranged, the *AutoTrader* office did not know about such shots until after they occurred, when the billing took place. (694:56). A photographer earned more from a hustle shot than a shot pre-arranged through *AutoTrader*. (694:45–46). Ms. Halbach did many such hustle shots. (694:56, 100).

[1]Citations to the record on appeal appear with the document number before the colon and the page number after the colon. A citation to 429:16, for instance, refers this Court to page 16 of document 429. Citations to different documents in the record are separated by semicolons. Where available, parallel citations to the Separate Appendix appear in separate parentheticals after the citations to the record. Mr. Avery shall cite to the concurrently filed Separate Appendix as "App. [page number(s)]." Mr. Avery shall cite to exhibits from his 2007 trial as "T.E. [exhibit number]" pursuant to direction from this Court. For purposes of this appeal, Mr. Avery shall refer to the Manitowoc County Circuit Court that heard his trial as the "trial court." Mr. Avery shall refer to the specially assigned Sheboygan County Circuit Court that ruled on his most recent motions as the "circuit court."

### A. The State's timeline for October 31, 2005 and witnesses

**8:12 a.m.**: According to the State, Mr. Avery called *AutoTrader* and spoke with Dawn Pliszka ("Ms. Pliszka"), the *AutoTrader* receptionist, in an attempt "to lure" Ms. Halbach to the Avery salvage yard by setting up a photo shoot appointment for his sister Barb Dassey's ("Barb") Plymouth van. Mr. Avery called from his cell phone (920) 323-4038. Ms. Pliszka testified that the caller left the telephone number, (920) 755-8715, the landline number for the Dassey-Janda residence, and the Dassey-Janda address, 12930A Avery Road. (694:76–78; 258:1).

**9:46 a.m.**: Ms. Pliszka testified about an incoming call from *AutoTrader* to Ms. Halbach, allegedly leaving the Dassey-Janda phone number and their address. (316:1; 694:79).

**11:43 a.m.**: Ms. Halbach called the Dassey-Janda number, (920) 755-8715, and left a message on their answering machine, which stated, "I don't have your address or anything, so I can't stop by without getting--a call back from you." (702:159–60; 763:1–2; T.E. 218).

**1:10 p.m.**: Ms. Halbach arrived at Steven Schmitz's ("Mr. Schmitz") residence. The State presented an incorrect timeline to the jury, based upon Mr. Schmitz's erroneous recollection that he received a call from Ms. Halbach at 1:10 p.m. (694:122–23; 621:63). Ms. Halbach's phone records show that she called Mr. Schmitz at 12:51 p.m. (315:1). Therefore, contrary to the State's timeline,

Ms. Halbach arrived twenty minutes earlier at the Schmitz residence than the State represented to the jury. (715:88).

**2:12 p.m.**: Ms. Halbach called the Zipperer residence and left a voicemail on the Zipperer answering machine stating that she could not find their residence. (694:134; 715:88). This voicemail is missing and was never turned over to trial defense counsel. (603:150–51, at ¶ 297; 621:143-44).

**2:24 p.m.**: The State claimed that, as part of Mr. Avery's effort to lure Ms. Halbach to his property, Mr. Avery used "the *67, or blocked feature, where the recipient of that call can't tell who is calling." (705:154). Ms. Halbach did not answer this telephone call, and Mr. Avery did not leave a message.

**2:27 p.m.**: Ms. Halbach spoke to Ms. Pliszka and allegedly informed her that she was on her way to the Avery property. The State provided no explanation of how the unanswered 2:24 p.m. *67 call would have lured Ms. Halbach to the Avery property. Three minutes later, Ms. Halbach told Ms. Pliszka that she was on the way to the Avery property at 2:27 p.m. (694:80). The State never explained how Ms. Halbach learned of the Dassey-Janda address. The telephone records of *AutoTrader*, Ms. Halbach, and Mr. Avery do not show contact between Ms. Halbach and Mr. Avery from 11:43 a.m. to 2:27 p.m. (314:1–2; 315:1–2; 621:189). Ms. Halbach's text and computer messages were never retrieved by the State.

**2:35 p.m.**: Mr. Avery placed the second *67 call at 2:35 p.m., but the call was never connected. (705:155–56).

**2:32–2:45 p.m.**: The State's primary witness was Bobby Dassey ("Bobby"), who testified that he was asleep and woke up around 2:30 p.m. and looked out of the kitchen window of the Dassey-Janda residence. Bobby testified that he saw Ms. Halbach's RAV-4 pull up, Ms. Halbach exit the vehicle, and start taking pictures of the Dassey-Janda van. (689:38–39). When Ms. Halbach finished photographing the van, Bobby saw her "walking up towards Uncle Steve's trailer." (689:38; 715:91). Bobby then took a shower, and when he left the property at about 2:45 p.m. to go bow hunting, he saw that Ms. Halbach's RAV-4 was still on the property but he did not see her. (689:38–40). Based upon Bobby's testimony, the State claimed that Mr. Avery was the last person to see Ms. Halbach alive. (696:51).

**2:41–2:43 p.m.**: Ms. Halbach's records indicate that a call was actively forwarded at 2:41 p.m. using the Call Forward No Answer feature ("CFNA"). After the 2:41 p.m. call on October 31, there are no other CFNA messages left; rather, the subsequent calls are voicemails without CFNA. (315:1). The 2:41 p.m. call to Ms. Halbach's phone pinged off of the Whitelaw tower, which was 7.8 miles from the Avery property. (315:1).

**3:00 p.m.**: Scott Tadych ("Mr. Tadych"), Barb's boyfriend, testified that at about 3:00 p.m., he went bow hunting in Kewaunee, and, as he drove on Highway 147 going west, he saw Bobby driving east. (705:124).

**3:46–3:47 p.m.**: Bobby's brother, Blaine Dassey ("Blaine"), testified that at approximately 3:46 p.m. or 3:47 p.m., after he got off the school bus and was

walking home, he saw Mr. Avery place a plastic bag in his burn barrel, and the barrel had white "smoke and flames" coming out of it. (705:67, 81). The State Prosecutor, Kenneth Kratz ("Prosecutor Kratz") claimed that, by 4:35 p.m., Mr. Avery had burned Ms. Halbach's electronic devices in his burn barrel. (715:93–94).

**4:35 p.m.**: According to the State, Mr. Avery placed an "alibi call" to Ms. Halbach's phone from his landline. (715:93–94).

**4:45 p.m.–dusk**: Mr. Robert Fabian, a friend of Earl Avery's ("Earl"), testified that he saw smoke and smelled plastic being burned in Mr. Avery's burn barrel around dusk. (705:114–16).

**7:30–7:45 p.m.**: Mr. Tadych testified that he saw a large fire in Mr. Avery's burn pit with flames reaching above the roof of the garage, and he saw Mr. Avery standing by the fire. (705:130–31). The State claimed that Ms. Halbach was already murdered by this point and Mr. Avery was in the process of "destroying, mutilating and burning her body" in his burn pit. (715:95).

**11:00 p.m.**: When Blaine got home from trick-or-treating, he testified that he saw "Steven Avery sitting there watching the fire," and that the flames were about 4 or 5 feet. (705:70–71).[2]

[2]The State failed to identify the following calls on October 31, 2005: 8:17 a.m. from AutoTrader to Ms. Halbach, 8:39 a.m. from Mr. Avery to Bobby, 10:44 a.m. from Denise Heitl ("Ms. Heitl") to Ms. Halbach, 10:52 a.m. from AutoTrader to Ms. Halbach, 11:04 a.m. from Mr. Avery to AutoTrader, 11:35 a.m from Ms. Halbach to Ms. Heitl.; and 12:44 p.m. from Steven Speckman ("Mr. Speckman") to Ms. Halbach. (315:2; 316:1; 630:150, 153; App. 295, 298; 315:2).

### B. The State's forensic evidence[3]

The State's case against Mr. Avery was based almost exclusively on circumstantial forensic evidence. The critical facts related to the State's forensic evidence are as follows:

**November 5, 2005**: Ms. Halbach's RAV-4 was discovered on the Southeast corner of the Avery property by two civilian searchers, Pamela Sturm ("Pam") and her daughter Nicole Sturm ("Nicole"), within 30 to 35 minutes of their arrival. (694:230). According to the State, the speed with which Pam located Ms. Halbach's RAV-4 on the Avery salvage yard was attributable to "the hand of God." (715:39). Ms. Halbach's RAV-4 was locked and partially obscured by branches, plywood, and an old vehicle hood. According to the State, the RAV-4's battery had been disconnected to prevent the alarm from being activated. (716:95–96). The State argued that it was readily apparent that Mr. Avery intended to crush Ms. Halbach's RAV-4 simply because the RAV-4 was found in the vicinity of the car crusher. (715:38). Also, the State contended that the RAV-4 could not have been driven onto the Avery property from the Radandt Pit because of the 15–20 foot-high berm immediately to the south of the RAV-4,

[3] The State presented the following experts at trial: John Ertl ("Mr. Ertl"), DNA analyst; Ronald Groffy ("Mr. Groffy"), forensic imaging specialist; Sherry Culhane ("Ms. Culhane"), DNA analyst; Nick Stahlke ("Mr. Stahlke"), blood spatter analyst; Dr. Donald Simley ("Dr. Simley"), forensic odontologist; Dr. Leslie Eisenberg ("Dr. Eisenberg"), forensic anthropologist; Curtis Thomas ("Mr. Thomas"), electronics engineer; William Newhouse ("Mr. Newhouse"), firearms and toolmarks examiner; Kenneth Olson ("Mr. Olson"), trace evidence examiner; Dr. Jeffrey Jentzen ("Dr. Jentzen"), forensic pathologist; Dr. Marc LeBeau ("Dr. LeBeau"), chemist; Michael Riddle ("Mr. Riddle"), fingerprint identification analyst; Anthony Zimmerman ("Mr. Zimmerman"), Cingular network engineer; and Bobbie Dohrwardt ("Ms. Dohrwardt"), Cellcom technical support analyst.

which would have prevented entry from the Radandt Pit onto the Avery property. (715:53–54).

**November 6, 2005**: Deputy David Siders found a tire rim in Mr. Avery's burn barrel. (700:153). Underneath the tire rim Ms. Halbach's electronic devices were discovered, including her Motorola V3 RAZR ("RAZR") cell phone, the circuit board for her Palm Zire 31 palm pilot, and components of her Canon PowerShot A310 digital camera. (715:65–66; 700:155–56). Inexplicably, there were unburned cans and unscorched foliage in the burn barrel. (648:1–2; T.E. 156).

**November 7, 2005**: The Wisconsin State Crime Lab ("WSCL") discovered 5 small blood drops in Ms. Halbach's vehicle. (604:91–97; T.E. 294). A DNA profile of Mr. Avery was obtained from these drops. (604:94–97; 699:186–96).

**November 8, 2005**: Human bones, a tooth root fragment, and rivets from a pair of jeans were found in the burn pit behind Mr. Avery's garage, and a RAV-4 key was found in Mr. Avery's trailer. (706:19; 700:55–56; 701:129–30). Mr. Avery's DNA profile was recovered from the RAV-4 key. (699:182–83). The RAV-4 license plates were discovered in another vehicle at the Avery salvage yard during a search by a volunteer. The male DNA on the plates was insufficient to develop a full DNA profile. (695:2–5, 227).

**November 9, 2005**: Mr. Avery is arrested and charged with possession of a firearm by a felon. (4:1–4; 242:1).

**November 15, 2005:** Mr. Avery is arrested and charged with first degree intentional homicide for the Halbach murder. (4:1–4; 242:1).

**March 1–2, 2006**: Based on Brendan Dassey's ("Brendan") alleged confessions, law enforcement conducted a search of Mr. Avery's garage and discovered fragments of 2 .22-caliber bullets ("#FL and #FK") that had somehow gone undetected during 6 previous searches (November 5, 6, 8, 9, 10, and 12, 2005). (695:185–86, 199-200). Prosecutor Kratz held 2 press conferences where he disclosed, in great detail, Brendan's confession. (646:5).

**March 8, 2006:** The State filed an amended information adding the charges of sexual assault, kidnapping, and false imprisonment counts. (32:1–5).

**April 3, 2006**: The hood latch of the RAV-4 was swabbed. (700:210).

**May 8, 2006**: Ms. Culhane confirmed that #FL had Ms. Halbach's DNA on it, and the profile developed from the RAV-4 hood latch matched Mr. Avery's DNA. (699:168, 176).

**June 15, 2006**: The State attempted to interject 9 items of "other acts" evidence into its prosecution to corroborate the amended information filed on March 8, 2006. The 9 acts consisted of 2 alleged acts of physical violence against women and 1 against a cat, 1 act of reckless endangerment, 1 act of a convicted felon in possession of a firearm, and 3 alleged acts of improper sexual behavior, and 1 act of a phone conversation of an alleged sexual nature. (156:1–17).

**September 22, 2006**: The trial court ruled against the State's 9 other acts evidence, holding that it failed to find any meaningful relationship between the other acts evidence and the charged offenses. In the trial court's opinion, the other acts evidence had virtually "zero probative value," would be highly prejudicial, and was clearly inadmissible. (156:1–17).

**February 2, 2007:** The State filed a second amended information dropping the charges for sexual assault and kidnapping. At the beginning of the trial, the State convinced the court to instruct the jury about a party-to-a-crime theory of accomplice liability as to the homicide, mutilation of a corpse, and false imprisonment charges then to be tried. (696:25–26).

*Mr. Avery's Blood in the RAV-4 Was Not Planted*

Approximately 1–2 milliliters of Mr. Avery's blood, allegedly from an actively bleeding finger, was discovered in the RAV-4 in 5 places, *i.e.*, on the driver's and passenger's seats, rear passenger door jamb, CD case, and by the ignition. Blood flakes were found on top of the driver's side carpet. There was no corresponding stain under the blood flakes. (699:144–48; 705:27).

The State claimed that no one in law enforcement had access to Mr. Avery's blood prior to November 5, 2005, to plant it. (716:112). The blood from Mr. Avery's bathroom was collected after the RAV-4 was removed from the Avery property. (716:87). Also, the State argued that trial defense counsel had failed to demonstrate exactly how the police could have planted Mr. Avery's

blood in the RAV-4 because of "the sheer volume" and "sheer number of places" where the blood was discovered. (715:58–59, 118, 121).

Prosecutor Kratz emphasized that Mr. Avery's DNA profile from his blood in Ms. Halbach's vehicle came from the cut on the middle finger of his right hand, which occurred during his struggle with Ms. Halbach. (715:118). The State's blood spatter expert, Mr. Stahlke, agreed in his testimony that the ignition stain (648:1–2; T.E. 291) was consistent with somebody who could be actively bleeding on their right hand. (704:220–21; 648:1–2). In his closing, Prosecutor Kratz stated that the stain was "absolutely consistent with somebody with a cut to the outside of the right hand and turning an ignition. . . ." (715:62).

The State, through its expert, Dr. LeBeau, attempted to rule out the 1996 blood vial as the source of Mr. Avery's blood in the RAV-4. The blood in the 1996 tube was preserved by using EDTA. Dr. LeBeau tested 3 of the 6 swabs from the RAV-4 and claimed there was no EDTA in them. (709:48).

*Ms. Halbach's Blood in the RAV-4*

Mr. Stahlke, the State's blood spatter expert, claimed that, after Ms. Halbach had been shot, she was thrown into the rear cargo of the RAV-4, causing impact spatter on the inside of the rear cargo door. (704:227–29; 648:1–2; T.E. 299). According to Mr. Stahlke, Ms. Halbach left a hair imprint from her bloodied head on the side panel of the interior of the rear cargo area: "[T]he bloody hair component; however, it is consistent with a bloody object such as a body being

comploded (phonetic) into the rear end of this vehicle." (704:229; 648:1–2; T.E. 296–97). There was no mixture of Mr. Avery and Ms. Halbach's blood, even though Mr. Avery allegedly tossed Ms. Halbach in the RAV-4 as he was "actively bleeding" from his right middle finger.

Despite the blood in the interior of the RAV-4 being linked to Mr. Avery, there were no fingerprints of Mr. Avery on the interior or exterior of the RAV-4 even though the State's fingerprint expert, Mr. Riddle, claimed that someone with "sweaty hands" was more likely to leave prints than someone with dry hands. (711:103). Prosecutor Kratz contended that Mr. Avery touched the hood latch with sweaty hands that left his DNA profile. (715:119–20). Mr. Riddle testified that he discovered 8 latent prints on the RAV-4 "that were suitable for comparison." (711:110). One of the 8 latents contained a palm print. (711:146). The latent prints were located where the key for the cargo gate is inserted, along the pillar that goes above the taillight assembly, on the other side of the wheel cover, inside a rear passenger window, and on the hood. (711:143–44). Mr. Avery was not matched to any of the 8 latent prints. (711:144). The State never claimed that Mr. Avery was wearing gloves.

Mr. Riddle was never asked to examine the shell casings found in Mr. Avery's garage for fingerprints. The shell casings were never linked to #FL. (711:120–21). A blood stain (#A-23) from a male on the rear cargo door of the RAV-4 did not match Mr. Avery either. (704:88–89).

*No Blood of Ms. Halbach in Mr. Avery's Trailer, Garage or on the .22 LR Marlin Glenfield.*

There was no blood of Ms. Halbach in Mr. Avery's trailer, garage, or on the .22 LR Marlin Glenfield in his bedroom that was allegedly used to shoot Ms. Halbach in the head. (700:96–98; 704:34).

*Mr. Avery's DNA on the RAV-4 Key*

Between November 5–9, 2005, there were 7 searches of Mr. Avery's trailer. On the 6th entry, on November 8, Ms. Halbach's Toyota key was observed for the first time next to Mr. Avery's bookcase in his bedroom. (701:129–30). The State contended that Mr. Avery kept the key so that he could move the RAV-4 to crush it.

During the November 8 search of Mr. Avery's bedroom, Manitowoc County Sheriff's Department ("MCSD") Sergeant Andrew Colborn ("Sgt. Colborn") conducted an hour-long search of Mr. Avery's small bookcase. (701:123). Sgt. Colborn testified that he tipped and twisted the bookcase, pulling it away from the wall. (701:126). Sgt. Colborn testified that he forcefully pushed the photo album into the bookcase, causing the Toyota key to fall out the back of the shelf. Sgt. Colborn never explained how the key moved from behind the shelf to a spot on the northwest side of the bookcase by Mr. Avery's slippers. (701:125–31).

During Sgt. Colborn's interaction with the bookcase, MCSD Lieutenant James Lenk ("Lt. Lenk") left the bedroom. (701:129–30). When Lt. Lenk

returned, he noticed a Toyota key had suddenly appeared by the northwest side of the bookcase on the carpet. (702:12–13; 196:2; Img. 25). Neither side subpoenaed the bookcase for trial. (716:84–85).

The State admitted that even if the key was planted, as trial defense counsel claimed, the jury should "set the key aside" because there was "enough other evidence of Mr. Avery's guilt" and "that key, in the big picture, in the big scheme of things here, means very little." (716:64).

The State relied upon Ms. Culhane to explain the absence of Ms. Halbach's DNA on her own key by explaining that the last person to handle the key was the most likely source of the DNA. (704:104). Ms. Culhane testified that there was no mixture of Ms. Halbach and Mr. Avery's DNA on the key because, "[I]f you have someone who's a good shedder and sheds a lot of DNA when they touch something, a lot of studies show that is going to be—the last person is going to be the DNA you pick up." (704:104).

*Ms. Halbach's Body Burned in Mr. Avery's Burn Pit*

The State relied upon the testimony of forensic anthropologist Dr. Eisenberg to claim that Ms. Halbach was burned in Mr. Avery's burn pit. (715:104–05). Dr. Eisenberg testified that the primary burning episode was in the burn pit behind Mr. Avery's garage and that "at least a fragment or more of almost every bone below the neck was recovered in that burn pit." (706:166; 707:43). Dr. Eisenberg stated on cross-examination that "[t]here is evidence from the Avery

property that there was transport of human bone. And I believe that transport occurred from the original burn pit and adjacent areas, to barrel number two," which was the Dassey-Janda burn barrel. (707:37).

Dr. Eisenberg identified the bones designated by Calumet County evidence tag #8675 ("#8675") as being located southwest from the Avery property, which is called the Manitowoc County Gravel Pit (#8675). (321:2; 707:10). Dr. Eisenberg testified that her second report was a spreadsheet of tag numbers and the evidence collected under each tag number. (706:221).

Dr. Eisenberg admitted that 1 bone fragment (#8675) from the Manitowoc County Gravel Pit appeared to be a human pelvic bone with "a long, linear cut on either side of those two bones that were still in proximity." (707:18–19). Dr. Eisenberg, in describing the "suspected" human pelvic bone, stated that "it was clearly a joint articulation at the right side of the pelvis where the pelvis meets the lower part of the spine." (707:11). In the closing, Prosecutor Kratz stated that he would take "20 seconds" to talk about the "possible human" pelvic bone in the Manitowoc County Gravel Pit. (716:78). He said that these bones were "possibl[y] human" so "[i]t means that we don't know what it is," "Dr. Eisenberg didn't know what they were," and "Dr. Fairgrieve didn't know what they were." (716:78–79). Dr. Scott Fairgrieve ("Dr. Fairgrieve") was trial defense counsel's forensic anthropology expert.

Some larger human bones were found in the Dassey-Janda burn barrel Evidence Tag 7964 ("#7964"). Dr. Eisenberg described a human scapula, portions

of a spinal column, metacarpals, and a fragment of long-bones in the Dassey-Janda burn barrel. (706:231–33). The bones found in the Dassey-Janda burn barrel (#7964) also exhibited evidence of cut marks. (756:29). Dr. Eisenberg claimed that when she opened the container of bones from the Dassey-Janda burn barrel (#7964), she got a "waft of flammable liquid or fluid," but did not smell burned rubber from tires. (707:6–7). Prosecutor Kratz admitted the bones were moved, but claimed "the big bones" were moved by Mr. Avery from his burn pit to the Dassey-Janda burn barrel "a couple hundred feet away." (716:75–76).

SA Thomas Sturdivant ("SA Sturdivant") testified that the burn pit bones were "intertwined or mixed" in with the steel belt from the tires. (706:19). Prosecutor Kratz stated in his closing, "The bones being intertwined and mixed in is the State's, or one of the State's, strongest argument for this being the primary burn site." (715:97).

The State claimed Wisconsin Department of Justice Division of Criminal Investigation ("DCI") Agent Rodney Pevytoe ("Agent Pevytoe") ruled out the smelter and the woodburner as other possible burn sites on the Avery property. (715:99–100).

The State called DCI Agent Kevin Heimerl ("Agent Heimerl") to testify that the investigators found 5, out of the standard 6, jean rivets marked "Daisy Fuentes" in Mr. Avery's burn pit. (698:161–62; 648:1–2; T.E. 275). The State referenced Katie Halbach's ("Katie") testimony that Ms. Halbach had Daisy Fuentes brand jeans that were missing after her disappearance. (699:39–40).

*Cause of Death: 2 Gunshots to Head*

The State claimed that Mr. Avery backed Ms Halbach's RAV-4 into his garage, closed the garage door, placed Ms. Halbach in the rear cargo area, then removed her from the RAV-4, laid her on the garage floor, and shot her in the left side and back of her head. (716:98–99). Dr. Eisenberg testified that the defect in the parietal bone, above the left ear, showed the characteristic sign of an entrance bullet wound (648:1–2; T.E. 391; T.E. 392), and a second defect in the occipital region showed Ms. Halbach was also shot in the back of the head with a .22 caliber gun. (715:128; 706:172–73; 648:1–2; T.E. 393, 395). Additionally, the State relied upon Mr. Olson, a trace metal expert, who testified that x-rays of the skull defects in the parietal region showed particles of lead. (715:128; 703:15).

On November 6, 2005, 11 spent shell casings were found in Mr. Avery's garage but were never forensically linked to #FL or #FK or any items of evidence in the case. (702:207–08). The State claimed that Mr. Avery cleaned the garage, but his DNA was detected on the garage floor. (699:170–71).

*Ms. Halbach's DNA on Bullet (#FL)*

There were 2 damaged bullets (#FL and #FK) eventually found on Mr. Avery's garage floor on March 1 and 2, 2006. (716:98; 648:1–2; T.E. 268, 271). Ms. Culhane, the State's DNA analyst, performed DNA testing on both bullets (#FL and #FK), and DNA was only found on #FL. (699:164–67). After visually examining #FL and observing no signs of blood, Ms. Culhane washed the bullet in

a buffer solution and developed a DNA profile matching Ms. Halbach. (699:163–65). Ms. Culhane was not able to determine the source of the DNA and testified that she could only determine that the DNA came from nucleated cells. Red blood cells do not have nuclei so the DNA did not come from red blood cells. (704:106).

The State explained that Ms. Culhane's contamination of the control sample for #FL with her own DNA during the testing process did not diminish the results of Ms. Culhane's DNA comparison and subsequent identification of Ms. Halbach's DNA. (715:114).

The State's ballistics expert, Mr. Newhouse, opined that the bullet containing Ms. Halbach's DNA was fired from the .22 LR Marlin Glenfield rifle mounted above Mr. Avery's bed. (707:116). Mr. Newhouse's worksheet did not indicate he performed a trace examination of #FL. (332:1).

The State's forensic pathologist, Dr. Jentzen, testified that Ms. Halbach's cause of death was the result of 1 or 2 gunshot wounds to her head. (703:62–63). Specifically, Dr. Jentzen testified that Ms. Halbach's DNA got on #FL when it travelled through her brain causing her death. (703:64–65).

Dr. Eisenberg testified that there was no evidence of other gunshot wounds to the bones from other parts of Ms. Halbach's body. (706:188). The State, in relying upon Dr. Jentzen and Dr. Eisenberg's opinions, told the jury in its closing that Ms. Halbach was killed by gunshots to her head. (715:127–29).

*Mr. Avery's DNA on Hood Latch*

The State claimed that Mr. Avery wanted to deactivate the RAV-4 alarm, so he disconnected the battery cables after he opened the hood, touching the hood latch, and leaving his DNA. (716:94–95). Prosecutor Kratz told the jury that this DNA came from Mr. Avery's "sweat". There was no witness description of Mr. Avery sweating on October 31, 2005. (696:87). Ms. Culhane never mentioned sweat in her hood latch testimony. (699:173–75).

Leg irons and handcuffs were seized from Mr. Avery's bedroom. (701:34–35; 648:1–2; T.E. 203; T.E. 204). Ms. Culhane confirmed that there was no DNA of Ms. Halbach on the leg irons or the handcuffs, but there was a mixture that included Mr. Avery's DNA. Ms. Culhane agreed that this meant these items were not wiped down with bleach. (704:33–35). Mr. Avery's mattress tested negative for blood, as did his knives. (700:145). No hair from Ms. Halbach was found in Mr. Avery's residence, including in his vacuum cleaner. (695:106, 206–08).

On March 12, 2007, the State dismissed the false imprisonment charge. (713:20–21).

*Only 1 Person Committed the Crime*

Prosecutor Kratz, in his rebuttal, told the jury, "It's not a difficult decision that you have to make, because everything in this case pointed towards one person, towards one defendant." (716:119).[4]

## II. The Defense Case

Mr. Avery was represented by retained attorneys Dean Strang ("Mr. Strang") and Jerome Buting ("Mr. Buting"). Mr. Avery paid trial defense counsel $220,000.00 for his defense. (604:17–20). In contrast with the State's 14 expert witnesses, trial defense counsel presented 7 witnesses in total, only 2 of whom were qualified as experts.

### A. Defense forensic evidence

*Mr. Avery's Blood in the RAV-4*

Trial defense counsel did not have a blood spatter expert. Trial defense counsel only offered one source for the allegedly planted blood of Mr. Avery—the 1996 blood vial, which was located in an unsecured area of the courthouse.

[4]In the *Dassey* opinion, the court references the State's theory that Brendan participated in raping and murdering Ms. Halbach with Mr. Avery, which contradicts the State's theory in Mr. Avery's trial that he was the only perpetrator. *Dassey v. Dittman*, 877 F.3d 297 (7th Cir, 2017). In Brendan's trial, Prosecutor Kratz claimed that Ms. Halbach was killed by Mr. Avery stabbing her in the stomach, Brendan slitting her throat, and Mr. Avery manually strangling her. Prosecutor Kratz claimed Ms. Halbach was killed in Mr. Avery's trailer, not shot in Mr. Avery's garage. (588:143).

(715:174). Obviously, this theory excluded anyone but law enforcement from planting Mr. Avery's blood.

Trial defense counsel did not do their own independent testing of the 1996 blood tube, rather they relied upon the testimony of Janine Arvizu ("Ms. Arvizu") to try to refute Dr. LeBeau. Ms. Arvizu held a bachelor's degree in biochemistry and worked as a laboratory quality auditor. (708:6–7). Ms. Arvizu testified that Dr. LeBeau's experiment did not account for the absence of a limit of detection, his protocol was rushed, and no one had attempted such an EDTA experiment in 10 years. (708:78-81).

Additionally, trial defense counsel presented Rollie Johnson, the owner of Mr. Avery's trailer, who testified that he observed that the cut on Mr. Avery's finger was present prior to October 31, 2005. (712:176).

*Discovery of RAV-4 Key with Mr. Avery's DNA*

Trial defense counsel failed to subpoena the bookcase to demonstrate for the jury the credibility of Sgt. Colborn's description of dislodging the key from the back of the bookcase and having it migrate to the northwest side of the bookcase, by Mr. Avery's slippers. (716:84–85). Mr. Avery's trial defense counsel did not have a DNA or trace expert examine the key.

*Mr. Avery's DNA on Hood Latch*

Trial defense counsel did not have a DNA expert analyze the swab from the hood latch to determine if the quantity of DNA was consistent with an individual

opening a hood latch 1 time. Trial defense counsel did not have a trace expert analyze the hood latch swab to determine if it had actually swabbed a hood latch.

*Bones in Mr. Avery's Burn Pit*

Trial defense counsel claimed the bones of Ms. Halbach were planted in Mr. Avery's burn pit, but presented no evidence as to who planted the bones, when, or how they were planted Dr. Fairgrieve would not offer an opinion as to whether Mr. Avery's burn pit was the primary location of the body burning and admitted that he had only looked at photographs and not examined the actual bones. (708:134–35, 126).

*Ms. Halbach's DNA on Bullet*

Trial defense counsel did not have a ballistics, trace, or DNA expert conduct experiments or microscopically examine #FL. Trial defense counsel speculated that because Ms. Culhane had contaminated the control sample for #FL, she may also have transferred Ms. Halbach's DNA onto #FL. Trial defense counsel stated that Ms. Culhane had Ms. Halbach's DNA from the RAV-4 cargo area "sitting right there on her bench" so "you can't tell how and whether Teresa Halbach's DNA ended up there in the same extraction mechanism." (715:194-95).

**B. Third-party suspects**

On January 30, 2007, the trial court precluded Mr. Avery from offering direct evidence "that a third party other than Brendan Dassey, participated in the commission of the crimes charged in the Amended Information." (238:1–15).

Trial defense counsel named third-party suspects pursuant to *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), which included Mr. Tadych, Andres Martinez, James Kennedy, Charles Avery, Mr. Fabian, Earl, Blaine, Bobby, and Bryan Dassey ("Bryan"). The trial court found that "[i]n the absence of motive, it certainly may be more difficult for the defendant to offer evidence which is relevant and material connecting a third person to the crime. The court simply finds nothing in the offer made by the defendant that goes beyond the level of speculation." (238:15).

The trial court did allow trial defense counsel, in his closing, to mention "other suspects" that were being investigated by Special Agent Thomas Fassbender ("SA Fassbender") and Inv. Wiegert. (715:210). Trial defense counsel criticized the investigation of these suspects by pointing out their suspicious behavior. Trial defense counsel named George Zipperer ("Mr. Zipperer"), Ms. Halbach's ex-boyfriend Ryan Hillegas ("Mr. Hillegas"), Ms. Halbach's roommate Scott Bloedorn ("Mr. Bloedorn"), Ms. Halbach's former married lover Bradley Czech ("Mr. Czech"), and Ms. Halbach's business associate Thomas Pearce ("Mr. Pearce"). (715:210). Specifically, trial defense counsel pointed out Mr. Zipperer's strange behavior; the lack of alibi for Mr. Hillegas, Mr. Bloedorn, and Mr. Czech; and the failure, for 4 days, of Mr. Bloedorn and Mr. Pearce to report Ms. Halbach missing. (715:210).

On March 18, 2007, Mr. Avery was convicted, following a jury trial, of first degree intentional homicide, contrary to Wis. Stat. § 940.0l(l)(a) and felon in

possession of a firearm contrary to Wis. Stat. § 941.29(2)(a). (719:3). The jury found Mr. Avery not guilty of mutilation of a corpse. (719:3).

## III. Postconviction and direct appeal

On August 3, 2007, Suzanne Hagopian and Martha Askins ("Prior Postconviction Counsel") of the Wisconsin State Appellate Defender's Office, were appointed as direct appeal and postconviction counsel. (409:1–2).

On June 29, 2009, they filed a motion for postconviction relief on Mr. Avery's behalf, pursuant to § 809.30(2)(h) seeking a new trial on grounds that: (1) the trial court improperly excused a deliberating juror; and (2) the trial court improperly excluded evidence of third-party liability. (429:1–28; 427:1–31). Mr. Avery's motion included a claim of ineffective assistance of counsel on the jury issue. (429:16, 19-21).

On September 28, 2009, an evidentiary hearing was held. (721:1–258). On October 29, 2009, a brief in support of Mr. Avery's postconviction motion was filed. (447:1–57). On January 25, 2010, the motion for postconviction relief was denied by the Honorable Patrick L. Willis in a written order. (453:1–106) (App. 1–106). There was an appeal from that decision (454:1–4) and that decision was affirmed by the appellate court on August 24, 2011. (468:1–44) (App. 107–50).[5]

[5]This court, in its 2011 opinion, erroneously stated that "Steven Avery was convicted *as a party to the crime* of the first-degree intentional homicide of Teresa Halbach." (emphasis added) (468:1) (App. 107). The *party to a crime* language was in the second amended information, which the State had to dismiss when Brendan recanted his confession. The information upon which Mr. Avery was convicted refers to the original Information and did not have the language "party to a crime." (12:1; 715:11).

On December 14, 2011, the Wisconsin Supreme Court denied the petition for review, pursuant to § 808.10. (470:1).

## IV. *Pro Se* postconviction § 974.06

On February 14, 2013, Mr. Avery filed his first and only *pro se* collateral postconviction motion, pursuant to Wis. Stat. § 974.06. (496:1–41). The motion was denied by the Honorable Judge Angela Sutkiewicz on November 23, 2015. (533:1–16) (App. 151–66).

Mr. Avery claimed that trial counsel failed to: (a) raise a 6th amendment violation regarding Mr. Avery's jail conversations with his trial attorneys (496:16–19); (b) suppress evidence obtained by invalid search warrants (496:26–30); (c) sever the felon in possession of a firearm charge (496:31–32); (d) develop an argument based upon available information that the State had planted evidence (496:33–34); (e) strike biased juror Carl Wardman (517:8); and (f) investigate relevant, material issues (531:2). Mr. Avery claimed that his appellate counsel failed to argue "retroactive misjoinder." (496:32–33). Additionally, Mr. Avery claimed the trial judge was biased, and both trial and appellate counsel failed to raise the issue of the State commenting on Mr. Avery's silence in the State's closing argument. (496:19–26, 34–37). On November 23, 2015, the court denied all of the claims in Mr. Avery's motion as lacking any merit. (533:1-16). Mr. Avery filed a notice of appeal on December 3, 2015. (539:1).

## V. Motion for Scientific Testing § 971.23(5), § 974.07, and Second Postconviction § 974.06

Mr. Avery obtained current postconviction counsel in January of 2016. (553:1–2; 556:1-2). On August 26, 2016, current postconviction counsel filed a motion for postconviction scientific testing pursuant to Wisconsin Statutes § 971.23(5) and § 974.07. (573:1–154). On September 12, 2016, the appellate court granted current postconviction counsel's motion to stay Mr. Avery's appeal and remanded the case to the circuit court (580:1–2), which entered an order on November 23, 2016, for specific items to be tested. (581:1–4; 582:1–3) (App. 167–69). Pursuant to that order, scientific testing was performed, and current postconviction counsel filed a motion for postconviction relief on June 7, 2017 (603:1–222) and also filed a motion to dismiss Mr. Avery's *pro se* appeal, which was pending with the appellate court. That motion was granted on July 24, 2017. (624:1–2).

On September 18, 2017, Mr. Avery's current postconviction counsel reached an agreement with the State to allow the June 2017 motion to be amended without opposition, to add and remove claims, and for additional scientific testing of evidence. Scheduling for a potential evidentiary hearing in the spring of 2018 was discussed because both sides believed the circuit court would grant an evidentiary hearing on Mr. Avery's claims. (629:1–11).

On October 3, 2017, prior to the State working out the logistics of the RAV-4 testing, the circuit court issued an order summarily denying Mr. Avery's

June 7, 2017, motion for postconviction relief without ordering the State to respond to Mr. Avery's motion or granting an evidentiary hearing. (628:1–6) (App. 171–76).

On October 6, 2017, current postconviction counsel filed a motion to vacate the October 3 order, informing the court of the September 18 agreement between Mr. Avery's counsel and the State for additional scientific testing, and an amendment to current postconviction counsel's motion for postconviction relief. (629:1–11).

When the circuit court did not timely respond to current postconviction counsel's October 6 motion to vacate, current postconviction counsel filed a motion for reconsideration on October 23, 2017 (631:1–54), and several supplements thereto on October 31 and November 1, 2, 16, and 17, 2017. (632:1–49; 633:1–50; 634:1–7; 635:1–113; 636:1–106). The motion to reconsider and its supplements contained new evidence that developed after the June 7, 2017, filing and after the filing of the original motion to reconsider on October 23, 2017. On November 17, 2017, current postconviction counsel filed a timely notice of appeal from the October 3, 2017, order. (637:1–3).

The circuit court did not rule on the October 6, 2017, motion to vacate until November 28, 2017, when it denied current postconviction counsel's motion to vacate the October 3, 2017 order, its motion to reconsider, and its supplements. (640:1–5) (App. 177–81). Current postconviction counsel filed an additional

timely notice of appeal on November 30, 2017, from the circuit court's order of November 28, 2017. (641:1–3).

On May 18, 2018, current postconviction counsel submitted a motion to supplement the record on appeal with a CD, disclosed for the first time by the State on April 17, 2018, which current postconviction counsel contends contains impeaching and/or exculpatory evidence. (727:1–22). The Appellate Court remanded to the circuit court to "conduct any necessary proceedings and enter an order containing its findings and conclusions within sixty days after the supplemental postconviction motion is filed." (729:3). On September 6, 2018, after this court's deadline for decision had elapsed, the circuit court, without conducting any proceedings, denied "all motions submitted by the defendant on or after July 6, 2018." (761:11).

On January 24, 2019, current postconviction counsel submitted a motion to the Appellate Court to supplement the record on appeal with an undisclosed police report, dated September 20, 2011, which, according to Mr. Avery's current postconviction counsel, reflects law enforcement's transfer of multiple human bones from the Manitowoc County Gravel Pit to Wieting Funeral Home for return to [Teresa] Halbach's family. Mr. Avery alleges that the State violated its statutory duty to preserve evidence, *see* Wis Stat. § 968.205, and the actions violated Mr. Avery's constitutional due process rights. (775:1-32).

On February 25, 2019, the Appellate Court granted the motion and allowed current postconviction counsel to file a supplemental postconviction motion. The

Appellate Court further ordered the circuit court to "conduct any proceedings necessary to address the claims raised in the supplemental postconviction motion, and [to] enter an order containing its findings and conclusions." (780:1-4).

On August 9, 2019, the circuit court, without conducting any proceedings, denied the motion, finding "that the defendant has failed to meet his burden to establish that Wis. Stats. § 968.205 was violated or his constitutional rights were violated under the provisions of *Youngblood v. Arizona*,", 547 U.S. 867, 869–70 (2006). (806:1-13).

Mr. Avery now appeals.

## ARGUMENT

### I. The circuit court abused its discretion in denying Mr. Avery's motion to vacate its October 3, 2017, order and allow additional scientific testing.

On September 18, 2017, a meeting took place in Madison, Wisconsin, in which Kathleen Zellner and Douglas Johnson ("Current Postconviction Counsel"), together with Prosecutors Thomas Fallon, Norman Gahn, and Mark Williams ("Prosecutors"), reached an agreement regarding additional forensic testing:

1. The RAV-4 (WSCL Item A) would be made available to current postconviction counsel's experts Dr. Karl Reich ("Dr. Reich") and Dr. Christopher Palenik ("Dr. Palenik") for a complete examination of the interior and exterior of the RAV-4 for additional forensic evidence to be tested. The examination was to take place at the Calumet County Sheriff's Department ("CCSD"), who has possession of the RAV-4. In addition to gathering forensic evidence from RAV-4's interior and exterior, the agreement provided for collecting swabs for testing from the following items:
    a. Battery cables;
    b. Bar under the driver's seat;
    c. Hood latch; and
    d. Interior hood release
2. The Prosecutors also agreed that Mr. Avery would be allowed to do the following:

a. Conduct more sensitive DNA testing of the license plates (WSCL Items AJ and AK);

b. Conduct DNA testing of the lug wrench. (WSCL Item A16); and

c. Dr. Steven Symes ("Dr. Symes") and Dr. Eisenberg would conduct a microscopic examination of the pelvic bones (#8675) discovered in the Manitowoc County Gravel Pit to determine if they were human in origin.

(629:1–2).

When current postconviction counsel inquired as to whether the circuit court should immediately be informed of the agreement, Prosecutor Fallon stated that once he had finalized the scheduling of the RAV-4 examination with the CCSD, a stipulated order could be presented to the circuit court, similar to the original Stipulated Order for Independent Scientific Testing that was presented by the parties to the circuit court and entered on November 23, 2016. (582:1–4; 629:2) (App. 167–70). Prosecutors stated that they would schedule the RAV-4 testing in the very near future before the weather worsened. The parties also agreed that, at that time, they would propose dates for a potential evidentiary hearing. (629:3). Neither side anticipated the circuit court filing its order prior to the time Mr. Avery could notify the court of the matters set forth herein. (629:3).

On October 3, 2017, the circuit court entered an order dismissing Mr. Avery's Wis. Stat. § 974.06 Motion for Relief. (628:1–6) (App. 171–76).

On October 6, 2017, current postconviction counsel spoke to Prosecutors and informed them that Mr. Avery was filing a motion to vacate the October 3, 2017 order. (629:3). Prior to filing the motion, current postconviction counsel presented the motion to Prosecutors, and Prosecutors agreed to the factual accuracy of the representations regarding the content of the September 18, 2017 meeting made in the motion. (629:3). The State did not file an objection to the motion.

The court did not issue its ruling until November 28, 2017. The circuit court denied Mr. Avery's motion for relief from judgment. (640:2).

The parties were not required to submit proposals for further scientific testing for approval by the circuit court because of the prior order of the trial court, entered on April 4, 2007. (395:1–3). Therefore, the circuit court clearly abused its discretion when it denied Mr. Avery's motion for relief from judgment.

**A. Standard of review**

An order granting or denying relief under Wis. Stat. § 806.07 will not be reversed on appeal unless there has been a clear abuse of discretion. *Mullen v. Coolong*, 135 Wis. 2d 401, 406 (1990). Under Wis. Stat. § 806.07, a defendant must first file a motion with the trial court to obtain relief from a judgment or order before appealing; otherwise the issue will be deemed unreviewable. It is undisputed that § 806.07 governs civil actions (*State ex rel. Lewandowski v. Callaway*, 118 Wis. 2d 165, 172 (1984)), and proceedings under § 974.06 are properly considered civil in nature. (Wis. Stat. § 974.06(6); *State v. Hayes*, 2004

WI 80, ¶ 20, 273 Wis.2d 1, 681 N.W.2d 203 (rules of practice in civil actions apply in all criminal proceedings "unless the context of a rule manifestly requires a different conclusion") (citing Wis. Stat. § 972.11).

### B. The circuit court erred in not complying with the prior trial court order regarding scientific testing

The original Stipulated Order for Independent Scientific Testing was presented by the parties to the circuit court and entered by it on November 23, 2016. The order made express reference to and relied upon the trial court's April 4, 2007, Order on Preservation of Blood Evidence and Independent Defense Testing. (395:1–3). (*See* 582:1 ("In order to facilitate compliance with the *Order On Preservation of Blood Evidence and Independent Defense Testing*; and by agreement of the parties . . . .")). The trial court entered the order in 2007, contemplating future scientific developments for DNA testing. The 2007 order provides in pertinent part:

> [T]he State shall preserve indefinitely, until further order of this Court, all bloodstains that the State believes contains Steven Avery's DNA and that were found in or on Teresa Halbach's vehicle, in a condition suitable for further scientific testing;
>
> [T]he defendant, Steven A. Avery, or any lawyer representing him, may at any time submit the bloodstains, swabs, and items described . . . above to any laboratory or person the defense may choose for independent scientific testing pursuant to Wis. Stat. § 971.23(5)[4], *without further order of this Court*. For purposes of illustration, not limitation, this paragraph expressly contemplates independent defense testing . . . during any state or federal postconviction proceedings (if any), or after any such postconviction proceedings;

(395:1–3) (emphasis added).

As demonstrated by the trial court's April 4, 2007, order, Mr. Avery was given the authority at "any time" to submit items of evidence for DNA testing. (395:2).

When current postconviction counsel entered into the stipulated order in 2016 with the State, the testing items were expanded to include the RAV-4 key and the bullet, #FL. (582:1-4; 586:1-2). As discussed previously, the September 18, 2017 agreement between the parties expanded the items for DNA testing even further, but is compliant with the spirit of the April 4, 2007 order which allowed Mr. Avery to seek additional DNA testing as DNA technology improved.

Any DNA evidence from a complete forensic examination of the RAV-4 would be consequential to Mr. Avery's conviction because the State's case hinged on the assumption that Mr. Avery's and Ms. Halbach's biological material—to the exclusion of all others—was present in the RAV-4. If biological material from another individual, with no innocent explanation for having been in the RAV-4, is detected therein, that exculpatory evidence would create a reasonable probability of a different outcome in satisfaction of *State v. O'Brien*, 223 Wis. 2d 303, 323, 588 N.W.2d 8 (1999) because it would support the third-party and frame-up defenses Mr. Avery has advanced since before his 2007 trial. *See State v. Denny*, 2016 WI App 27, ¶ 54, *rev'd on other grounds*, 2017 WI 17 (exculpatory evidence detected on reexamination "must be considered against the other evidence presented at trial to determine if '[i]t is reasonably probable that the movant would not have been . . . convicted.'") (quoting Wis. Stat. § 974.07(7)(a)(2)).

Male DNA was detected on the RAV4 license plates but was insufficient for a profile, however, with more sensitive and advanced DNA testing developed since the trial, a full profile may be detected which would rule out Mr. Avery as the person who removed the license plates from Ms. Halbach's vehicle. (296:2, 5). Since it is undisputed that the license plates were removed from Ms. Halbach's vehicle after her murder, the detection of a full DNA profile would be consequential to Mr. Avery's conviction and would satisfy *O'Brien,* and, if Mr. Avery is excluded from the profile, it could create a reasonable probability of a different outcome.

Pursuant to Wis. Stat. § 974.07, a criminal defendant may move the circuit court for postconviction testing when the movant can show that the evidence is relevant to the investigation or prosecution, the evidence is in the possession of the government agency, and that the evidence has not previously been subjected to DNA testing or, if previously tested, may be tested using a newer technique. Wis. Stat. § 974.07(2), *et seq*.

Wis. Stat. § 974.07(2)(c) provides as follows:

> [I]f the evidence has previously been tested, it may now be subjected to another test using a scientific technique that was not available or was not utilized at the time of the previous testing and that provides a reasonable likelihood of more accurate and probative results.

The circuit court clearly abused its discretion in not vacating its October 3, 2017 order in light of the explicit language of the trial court's April 4, 2007 order. Moreover, the parties reached an agreement in reliance on the circuit court's April

4, 2007, order, which provided the parties with the authority to test forensic evidence without seeking an additional court order. Mr. Avery should be relieved of the October 3 order because he has provided sufficient reason to justify that the circuit court reached an erroneous conclusion of law by not recognizing the existence of the April 4, 2007 order.

Because the conviction of Mr. Avery was primarily based on forensic evidence, further forensic testing, as agreed upon by the parties, has a reasonable likelihood of yielding exculpatory evidence that is consequential to Mr. Avery's conviction and would create a reasonable probability of a different outcome.

It is noteworthy that current postconviction counsel has paid for all the testing done to date and intended to pay for testing performed pursuant to the parties' September 18, 2017, agreement, so no financial burden is imposed upon the State.[6] It is a clear abuse of discretion for the circuit court to deprive both sides of additional testing which will be performed at Mr. Avery's expense.

## II. The circuit court abused its discretion in summarily dismissing Mr. Avery's second motion pursuant to Wis. Stats. § 974.06 without addressing the 5 *Brady* claims raised and in subsequently denying Mr. Avery's motion to supplement which raised a 6th *Brady* claim all of which deprived him of due process, in violation of the Wisconsin and United States Constitution

### A. Standard of review

To establish a *Brady* violation, a defendant must demonstrate that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the defense,

[6]Current postconviction counsel has expended $292,197.13 on experts as of the filing of this brief.

and (3) the evidence was material to an issue at trial. *State v. Harris*, 2004 WI 64, ¶ 13, 272 Wis. 2d 80, 680 N.W.2d 737 (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)). This court reviews *de novo* whether the facts of a case establish a *Brady* violation. *State v. Rockette,* 2006 WI App 103, ¶ 39, 294 Wis.2d 611, 718 N.W.2d 269. (citing *Strickler v. Greene,* 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)). There can be a due process violation "'irrespective of the good faith or bad faith of the prosecution.'" *Id.* (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). "The prosecution's duty to disclose evidence favorable to the accused includes the duty to disclose impeachment evidence as well as exculpatory evidence." *Id.* (citing *Strickler*, 527 U.S. at 280).

The circuit court failed to address any of Mr. Avery's 5 *Brady* violations filed in his Motion to Reconsider and its supplements, but concluded "[t]here is no argument or showing of a sufficient reason as to why these issues could not have been raised in prior motions. Without such sufficient reason, these arguments are precluded from any subsequent motion." (628:3) (App. 173).

**B. *Brady* violation re Mr. Rahmlow**

The circuit court failed to recognize that it is axiomatic that the discovery of a *Brady* violation *subsequent* to filing a motion pursuant to § 974.02 (or § 974.06) constitutes a sufficient reason for failing to raise the issue in a prior motion. *See*, *State v. Allen*, 2010 WI 89, at ¶¶ 44, 81 (noting a defendant's unawareness of the legal basis of his claim may constitute a sufficient reason in satisfaction of § 974.06); *State ex rel. Kyles v. Pollard*, 2014 WI 38, ¶ 54 (the defendant's

unawareness of the factual basis of his claim was "inextricably intertwined" with the legal basis of his claim).

Pre-trial, trial defense counsel made 2 specific requests pursuant to Wis. Stats. § 971.23(1)(h) for all exculpatory evidence and/or information within the possession, knowledge, or control of the State which would tend to negate the guilt of the defendant, or which would tend to affect the weight or credibility of the evidence used against the defendant, including any inconsistent statements. (26:3–9). A second request was made by trial defense counsel for *Brady* material immediately before trial on January 18, 2007. (225:1–6).

In July of 2017, a new witness, Kevin Rahmlow ("Mr. Rahmlow"), came forward and described the most significant *Brady* violation in the case to that point in time. Clearly, current postconviction counsel could not have included Mr. Rahmlow's affidavit in the June 7, 2017, filing since Mr. Rahmlow had not yet come forward with evidence that establishes a *Brady* violation. (630:18–23) (App. 279–84).

Mr. Rahmlow has provided an affidavit and supplemental affidavit to current postconviction counsel. In these affidavits, Mr. Rahmlow described observing Ms. Halbach's RAV-4 parked at the turnaround at State Highway 147 and the East Twin River Bridge on November 3 and 4, 2005. On November 4, Mr. Rahmlow disclosed his observation about seeing the vehicle during a conversation with Sgt. Colborn at the Cenex Station in Mishicot. Immediately prior to the conversation with Sgt. Colborn, Mr. Rahmlow observed the missing

person poster of Ms. Halbach posted on one of the doors to the Cenex Station and recognized the vehicle on the poster as the vehicle he had seen 2 days in a row at Highway 147 and the East Twin River Bridge. (630:18–23) (App. 279–84).

On December 12 and 19, 2016, after watching the Netflix documentary *Making a Murderer* more than a year after its release, Mr. Rahmlow, who lived in Michigan, sent text messages to Mr. Tadych, telling him that he recognized Sgt. Colborn from the documentary and that Sgt. Colborn was the officer with whom he spoke on November 4, 2005, at the Cenex Station in Mishicot. Mr. Tadych never responded to Mr. Rahmlow's specific request to be put into contact with Brendan's attorneys. (630:18–23; 634:2-3) (App. 279–89).

Mr. Rahmlow's observation of the RAV-4 on November 3 and 4, 2005 is material to the defense theory that evidence was planted to frame Mr. Avery. If the RAV-4 was spotted at the turnaround on Highway 147 on November 3 and 4, 2005, then it must have been moved and planted on the Avery property before it was discovered on November 5, 2005. Clearly, this information supports trial defense counsel's theory that the RAV-4 was planted on the Avery salvage yard on November 5, 2005, and that, contrary to the State's theory, it was possible to access the Avery property and plant the vehicle. (696:146–47; 715:182). Mr. Rahmlow's testimony would have established that Mr. Avery was framed for Ms. Halbach's murder.

A key issue in determining if the RAV-4 was planted was the credibility of Sgt. Colborn. At trial, Sgt. Colborn testified that he was not looking at the RAV-

4 when he made his dispatch call regarding the vehicle's license plate number. (701:187). The State argued that Sgt. Colborn made the call on November 3 to confirm the accuracy of the RAV-4 license plate number previously given to him that day. Because trial defense counsel did not have a police report documenting Sgt. Colborn's conversation with Mr. Rahmlow, they could not impeach Sgt. Colborn regarding his denial. (701:185, 187).[7] If trial defense counsel had been aware of the conversation between Sgt. Colborn and Mr. Rahmlow, Mr. Rahmlow could have been called as a witness to impeach Sgt. Colborn. Sgt. Colborn would have been discredited, and the jury would have been provided material information proving that the RAV-4 was originally at the turnaround on Highway 147 and was subsequently planted on the Avery property.

The United States Supreme Court, in *Wearry v. Cain* 136 S. Ct. 1002, 194 L. Ed. 2d 78 (2016), held:

> *Brady* applies to evidence undermining witness credibility[]. Evidence qualifies as material when there is "any reasonable likelihood" it could have "affected the judgment of the jury." To prevail on his *Brady* claim, Wearry need not show that he "more likely than not" would have been acquitted had the new evidence been admitted.

*Id.* at 1006 (citations omitted).

The only evidence the State presented that the RAV-4 was not planted on the Avery property on October 31, 2005, was the testimony that the 15–20 foot-high berm prevented access to the Avery property where the RAV-4 was found. (715:53–54; 716:95). However, Prosecutor Kratz conceded the weakness of that

[7]The chronology of the 30 tracks of the MCSD calls to dispatch demonstrates that the Sgt. Colborn's call was made on November 4, 2005. (603:137–38, at ¶¶ 266–69; T.E. 212).

argument when he admitted in his closing that the RAV-4 "couldn't be driven into that property unless somebody knew that property . . . ." (715:54). The only other evidence presented by the State that the RAV-4 never left the Avery property after October 31, 2005, was Bobby's testimony that the RAV-4 was still present when he left the Avery property at 2:45 p.m. (697:44).

Trial defense counsel presented no evidence from witnesses that the RAV-4 was planted and simply argued in the closing that there were "lots of ways to get in and. . . for someone to plant the vehicle." (715:182). The failure of the State to disclose Mr. Rahmlow's interview with Sgt. Colborn is material because it would have established that the vehicle not only left the Avery property, but that it was brought back to the property and planted. If the RAV-4 left the property, the State's theory that Ms. Halbach's murder occurred exclusively on the Avery property would be completely debunked.

If Mr. Rahmlow's interview with Sgt. Colborn had been disclosed to trial defense counsel and revealed to the jury by having Mr. Rahmlow testify to impeach Sgt. Colborn, there is a reasonable probability that the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Harris*, 272 Wis.2d 80, ¶ 14, 680 N.W.2d 737 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).[8]

[8]Current postconviction counsel has obtained an affidavit from a second witness, Paul Burdick, on June 28, 2018, who also saw the RAV-4 parked at the turnaround on 147 on October 31, 2005. Although this witness did not report this information to the police, he does corroborate Mr.

### C. *Brady* violation re Mr. Radandt

The State committed a second *Brady* violation related to the RAV-4 being planted when it failed to disclose information in a police report that the Department of Justice ("DOJ") investigators provided to Joshua Radandt ("Mr. Radandt") about its belief that the RAV-4 was planted on the Avery property. Mr. Radandt has provided an affidavit to current postconviction counsel that states the following:

> At that time [around November 5, 2005], I was told by the Department of Justice agents that they believed Teresa Halbach's vehicle was driven to the Kuss Road cul-de-sac by driving west through an empty field, then south down the gravel road past the hunting camp until reaching an intersection with a gravel road that ran northeast into the Avery property. They told me that they believed Teresa Halbach's vehicle turned northeast onto that gravel road and entered the Avery property at its southwest corner.

(621:224–28) (App. 292).

DOJ investigators never authored a report about the information they provided to Mr. Radandt. (621:224–28) (App. 290–94). Mr. Radandt's affidavit is similar to Mr. Rahmlow's affidavit in that it directly contradicts the State's denial that the RAV-4 was planted.

Furthermore, Mr. Radandt's affidavit contradicts the State's representation to the jury that the Avery property was inaccessible from the Radandt pit. (715:53–54; 697:70–71). Mr. Radandt could have been called as a witness to refute the State's claims that the RAV-4 was not planted and to impeach the

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Rahmlow's claims that the RAV-4 was moved from the Avery property and planted there before November 5, 2005. (739:75–76).

statements about the inaccessibility of the Avery property from the Radandt Gravel Pit. (697:70–71, 78–79).

### D. *Brady* violation re original flyover video taken on November 4, 2005

On November 4, 2005 Wendy Baldwin ("Ms. Baldwin") and CCSD Sheriff Jerry Pagel conducted a flyover searching for the RAV-4. (621:114). They were in the air for around 4 hours yet produced only 3 minutes of flyover footage. Prosecutor Kratz made a material admission when he told the jury that the RAV-4 was not visible in the flyover video because he claimed the vehicle was covered with branches. (715:53). However, the edited version did not show the southeast corner of the salvage yard at all, much less a vehicle covered with branches. Therefore, a reasonable inference from this statement to the jury is that Prosecutor Kratz saw the unedited flyover video. If the video was intentionally edited to delete the footage of the southeast corner, this is a *Brady* violation because the issue of whether the RAV-4 was planted was material to Mr. Avery's conviction. (648:1-2). An evidentiary hearing is necessary to determine the credibility of the State's claim that only 3 minutes of flyover footage exists, and that there were no deletions of the flyover video.

### E. *Brady* violation re Zipperer voicemail

Ms. Halbach left a voicemail on the Zipperer answering machine when she could not find their residence on October 31, 2005. (694:134–35). On November 3, when the Zipperers were interviewed at 9:30 p.m., they told the investigators

about Ms. Halbach's message. On November 3, 2005, Ms. Halbach's voicemail was listened to by Det. Remiker of the MCSD and copied by MCSD Detective Dennis Jacobs ("Det. Jacobs") onto a CD. (621:186-87, at ¶ 296; 588:241–42). The CD was never turned over to trial defense counsel and has allegedly disappeared. (603:150–51, at ¶ 297; 621:143-44). On April 20, 2017, Prosecutor Fallon confirmed by letter to current postconviction counsel that neither Calumet nor the Manitowoc Sheriff's Departments have been able to locate the CD of Ms. Halbach's voicemail. (615:40–41; 603:150).

The contents of the Zipperer voicemail may have contradicted the timeline established by the State that Ms. Halbach's last stop was the Avery salvage yard. Suspiciously, the State never played the recording of the voicemail for the jury, but they attempted to introduce its contents through JoEllen Zipperer ("Ms. Zipperer"). (694:134–35). Ms. Zipperer's un-impeached testimony on the contents was that Ms. Halbach came to the Zipperer property between 2 and 2:30 p.m. (694:152).

Corroboration of the assertion that the voicemail would have contradicted the State's timeline is found in a recorded conversation between Investigator Inv. Wiegert and Det. Remiker on November 5, 2005, about the sequence of Ms. Halbach's appointments on October 31, 2005. (621:146). In that conversation, which occurred after interviews with Mr. Schmitz, Mr. Avery, and Mr. Zipperer, they concluded that Ms. Halbach's first appointment was with Mr. Schmitz, her second appointment was with the Averys, and her third appointment was with the

Zipperers. (621:146). It is reasonable to infer that Inv. Wiegert and Det. Remiker based their conclusion on the Zipperer voicemail left by Ms. Halbach, which was listened to by investigators on November 3, 2005, at the Zipperer residence, recorded to a CD on November 6, 2005, and withheld from trial defense counsel. (621:186–87).

Clearly, the Zipperer CD is material evidence that could have been used to impeach Ms. Zipperer on the timeline and would have refuted the State's entire theory that Ms. Halbach's last stop was at the Avery property.

**F. *Brady* violation re Ms. Heitl**

Ms. Heitl has provided current postconviction counsel with an affidavit that states that she had a telephone conversation with Ms. Halbach on October 31, 2005, at 11:35 a.m. while Ms. Halbach was driving. Ms. Halbach pulled her vehicle over to make notations on her day planner as she engaged in conversation with Ms. Heitl. (630:150–52) (App. 216–18). There is no evidence that Ms. Halbach returned home after this conversation.

According to Ms. Heitl's affidavit, she reported this conversation to law enforcement, including the fact that Ms. Halbach was driving and pulled over to check her schedule and made notations about the conversation. No report of the Heitl-Halbach conversation was ever turned over to Mr. Avery's trial defense counsel, and the State never mentioned Ms. Heitl's call to Ms. Halbach at trial. It is a reasonable inference that Ms. Halbach's day planner was in the RAV-4 with her at the time of her murder. Ms. Halbach's ex-boyfriend, Mr. Hillegas, was in

possession of the day planner after Ms. Halbach's murder, according to one of Ms. Halbach's friends. (630:91).

Items from the RAV-4 have particular relevance since many things were missing that should have been present in the vehicle, such as Ms. Halbach's purse, wallet, driver's license, money, schedules, receipts, maps, Toyota master key, house key, and other items related to her activities with *AutoTrader* or her hustle shots. It is undisputed that items were removed from her vehicle to conceal the crime. Anyone in possession of those items would qualify as a *Denny* suspect because it would establish a direct link to the crime. If Ms. Heitl's report of her telephone conversation with Ms. Halbach had been disclosed to trial defense counsel by the State, it could have been used to directly connect Mr. Hillegas to the crime and firmed up Mr. Avery's theory and taken it beyond mere speculation. *State v. Wilson*, 2015 WI 48, 362 Wis. 2d 193, 864 N.W.2d 52, ¶¶ 56–59.

### G. *Brady* violation re Dassey-Janda CD

On April 17, 2018, current postconviction counsel received the Detective Michael Velie's ("Detective Velie") CD for the first time from Prosecutor Fallon. The CD contained Detective Velie's forensic examination of the Dassey-Janda computer. On May 18, 2018, current postconviction counsel filed a Motion to Supplement the Record, to the Appellate Court, with the CD. On June 11, 2018, the Appellate Court remanded the case to the circuit court with instructions that "this appeal is remanded forthwith to the circuit court to permit [Mr. Avery] to pursue a supplemental postconviction motion in connection with Avery's receipt

of previously withheld discovery or other new information." (729:3). The Appellate Court further ordered "that the circuit court shall conduct any necessary proceedings and enter an order containing its findings and conclusions within sixty days after the supplemental postconviction motion is filed." (729:3).

On September 6, 2018, the circuit court denied Mr. Avery's Motion to Supplement holding that "the defense was in full possession of the same information as the prosecution via the 7 CDs turned over pursuant to discovery." (761:9). The circuit court also determined that the CDs were turned over to trial defense counsel 2 months prior to trial. (740:78-81). Therefore, the circuit court held that Mr. Avery had failed to meet his burden of showing the evidence was suppressed. (761:5).

*The Dassey-Janda CD contained unique information not previously disclosed*

"The *Brady* obligation 'does not cease to exist at the moment of conviction' but 'continues to apply' to the plaintiff's posttrial assertion that he 'did not receive a fair trial because of the concealment of exculpatory evidence known and in existence at the time of that trial.'" *Thompson v. City of Chicago,* 722 F.3d 963, 972 (7th Cir. 2013) (citing *Whitlock v. Brueggeman,* 682, F.3d 567, 588 (7th Cir. 2012)).

The circuit court erred when it concluded that the CD contained exactly the same information as the 7 DVDs, so nothing was suppressed. The CD contained unique information derived from Detective Velie's application of specific Halbach

crime scene facts to the raw data in the 7 DVDs. The 7 DVDs did not contain the results of Detective Velie's unique search terms found exclusively on the CD. Those search results are as follows: 2,632 search results for the terms: blood (1); body (2,083); bondage (3); bullet (10); cement (23); DNA (3); fire (51); gas (50); gun (75); handcuff (2); journal (106); MySpace (61); news (54); rav (74); stab (32); throat (2); and tires (2). (741:23). It is undisputed that the results of those unique word searches of Detective Velie were suppressed and withheld from trial defense counsel, prior postconviction counsel, and current postconviction counsel until April 17, 2018.

Because there is no possible way, prior to April 17, 2018, that current or prior counsel could have "guessed" the specific search terms and the results which Detective Velie obtained, Mr. Avery was deprived of this material information, which could have established a direct link between the specific evidentiary terms related to the Halbach murder and the searches performed on the Dassey Janda computer.

The CD also contained the State's "recovered" pornography images relevant and material to the Halbach murder. The CD refined the 14,099 images on the 7 DVDs and recovered 1,625 violent pornography images, *which had been deleted*. (740:12; 741:23, 25) (App. 844, 846) (emphasis added). The "recovered porn" depicted violent images of the torture and mutilation of young females, many of whom bore a striking resemblance to Ms. Halbach. The 1,625 images of

violent pornography could have established motive for trial defense counsel's *Denny* motion. (453:61-62).

*Failure to disclose CD prior to Denny ruling*

The circuit court ignored current postconviction counsel's argument that trial defense counsel was completely impaired in its ability to effectively identify a motive in its *Denny* motion, filed on January 8, 2007 before trial. See *Socha v. Richardson*, 874 F.3d 983, 988 (7th Cir. 2017) (noting evidence may be considered impermissibly withheld if the prosecution failed to disclose the evidence before it was too late for the defendant to make use of the evidence). The circuit court abused its discretion when it ignored Mr. Avery's argument that his *Denny* motion was compromised by the late disclosure of the State and chose to focus only on the disclosure of the 7 DVD's 2 months before trial.

Trial defense counsel, Mr. Buting, provided an affidavit to current postconviction counsel explaining the effect of the late disclosure on the success of trial defense counsel's *Denny* motion regarding establishing the motive of Bobby. Mr. Buting states:

> We established that he [Bobby] had access and opportunity to have committed the crime, but the court ruled no motive was established and therefore denied the *Denny* motion as to Bobby Dassey and others. If there was anything that was on the CD investigator report from Det. Velie that would have linked Bobby Dassey to the violent porn images found on the Dassey computer, we would have included such information in our *Denny* motion. Such information could have strengthened Bobby Dassey as a possible suspect who may have sexually assaulted and killed Ms. Halbach, and specifically would have provided evidence of a motive.

(636:19).

*Misleading nature of the disclosure by Prosecutor Kratz*

The State admits that the CD was suppressed from May 10, 2006, until the State disclosed it to current postconviction counsel on April 17, 2018, exactly 4,360 days after it was created by State's forensic examiner. The circuit court ignores Mr. Avery's argument that his trial defense counsel was deliberately misled by Prosecutor Kratz. In Prosecutor Kratz's December 14, 2006 letter, he did not disclose the CD but did disclose the December 7, 2006, Thomas Fassbender report ("Fassbender report"). The Fassbender report was prepared 218 days after Det. Velie's final investigative report was completed, for the State, on May 10, 2006.

Mr. Strang provided an affidavit and raised additional issues about the State's nondisclosure of the CD. On January 25, 2007, on the eve of trial, Attorney Strang received a document entitled "Stipulation Project" from Prosecutor Kratz. In that document, Paragraph R stated, "Computer Analysis of Steve, Teresa's and Brendan's Computer—Mike Veile [*sic*], of the Grand Chute PD, analyzed the hard drives of these 3, and found *nothing of evidentiary value*. We may wish to introduce the fact that they looked. This stip eliminates Officer Veile [*sic*] as a witness." (266:3) (emphasis added).

Mr. Strang's affidavit states in relevant part:

> I accepted without challenge Ken Kratz's assertion in a January 25, 2007 email to me that Velie's analysis of "Steve, Teresa's and Brendan's" computers yielded "nothing much of evidentiary value." With the belated production of the Velie forensic analysis to Mr. Avery's current lawyers in April 2018, it now appears to me from materials that Ms. Zellner and co-counsel have filed that the Velie forensic analysis in fact did include much of evidentiary value, in direct

> contradiction to Mr. Kratz's claim. Given what I know now about the existence and content of the Velie forensic analysis, this looks to me like deceit.
>
> * * *
>
> My firm and I did not have Encase while representing Mr. Avery. I think that Mr. Buting did not, either. So, we could not review the data on the seven DVDs given to us. Of course, we never got the Velie CD-ROM at all.

(741:12–13).

The circuit court abused its discretion when it found that trial defense counsel had failed to exercise reasonable due diligence in the following ways:

1. Failed to request access to the Encase program from the prosecution and "was denied such access." (761:6).
2. Failed to request the missing CD, when they had notice of the existence of the Velie CD via Fassbender's report prior to trial.
3. Failed to submit a motion to the court requesting additional time to review the newly discovered evidence

The Wisconsin Supreme Court in *State v. Wayerski*, 2019 WI 11, 385 Wis. 2d 344, 922 N.W.2d 468 (2019), has specifically rejected the imposition of a reasonable diligence standard on trial defense counsel. The Wisconsin Supreme Court specifically stated:

> This court has never analyzed a *Brady* claim through the lens of "reasonable diligence" and we decline to adopt that requirement now, due to its lack of grounding in *Brady* or other United States Supreme Court precedent.

(*Id.*, at 25).

In *Banks v. Dretke*, 540 U.S. 668, 696 (2004), the United States Supreme Court specifically instructed, "A rule thus declaring 'prosecutor may hide,

defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." The State should not be allowed to impose a reasonable diligence standard on trial defense counsel when the State suppressed the Velie CD for 12 years.

*Exclusive Possession and Control*

The *Wayerski* court specifically overruled prior Wisconsin cases which have imposed a requirement of exclusive possession and control of the material evidence by the State. The court specifically stated:

> There is no express support in the United States Supreme Court's *Brady* jurisprudence for the limitation that only favorable, material evidence in the "exclusive possession and control" of the State must be turned over to satisfy the due process obligations enunciated in *Brady*. This limitation further thwarts the purpose of the State's obligation under *Brady*: to prevent the State from withholding favorable, material evidence that "helps shape a trial that bears heavily on the defendant" and "casts the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice." *Brady*, 373 U.S. at 87-88. We hereby overrule the holding set forth in *Nelson*, 59 Wis. 2d 474, and its progeny that favorable, material evidence is only suppressed under *Brady* where the withheld evidence is in the State's "exclusive possession and control."

(*Id.*, at 23).

Suspiciously, the Dassey-Janda CD was not accessible to trial defense counsel in the prosecutor's files because the CD was kept in the exclusive possession of SA Fassbender. (636:26) (App. 192). Even if trial defense counsel had searched the prosecutor's files, they would not have discovered the CD.

"[T]he knowledge of law enforcement officers may be imputed to the prosecutor. . . . The test . . . [is] whether by the exercise of due diligence [the prosecutor] should have discovered it." *State v. DeLao*, 2002 WI 49, ¶¶ 21–22,

252 Wis. 2d 289, 643 N.W.2d 480 (quotations omitted). Prosecutor Kratz knew that the CD was being kept separately from the other discovery and was in the sole possession of SA Fassbender. (636:26) (App. 192). The *Wayerski* court noted:

> The "exclusive possession and control," "reasonable diligence," and "intolerable burden" limitations distort the original *Brady* analysis and the purpose behind the prosecutorial obligations enunciated in *Brady*.

(*Wayerski*, at 27).

The State, in its response to the Motion to Supplement, contended that multiple people had access to the computer, but current postconviction counsel has provided sufficient evidence that it was only Bobby who had access to the computer during the day on weekdays. (737:69–70; 636:27-37, 39; 689:35; 705:56-57; 630:28-29; 633:47; 400:131; 743:12). If the circuit court had conducted an evidentiary hearing, the issue of who had access to the Dassey-Janda computer during the week from 6:30 a.m. to 3:30 p.m. could have been definitively established through witness testimony.

Current postconviction counsel has asserted, based on her forensic computer expert, Gary Hunt's ("Mr. Hunt") analysis, that the violent searches primarily occurred on weekdays when only Bobby was in the residence. (636:27–37, 39; 689:35; 705:56-57; 630:28-29; 633:47; 737:164; 739:154; 743:12). It is undisputed that Mr. Avery never accessed the Dassey computer. He did not have the password for the computer, nor did he possess a key to the Dassey residence, which was locked when no one was home. (636:89–90) (App. 739–40). Mr. Avery only entered the residence with the permission of a Dassey family member.

Mr. Avery worked during the weekdays from 8:00 a.m. to 5:00 p.m. (R. 636:6, 91) (App. 741). Mr. Avery would be eliminated from all but 15 of the 128 searches (11.7%) at issue simply by having been arrested on November 9, 2005. (R. 630:85). Brendan would be eliminated from all but 26 of the 128 searches (20.3%) at issue by having been arrested on March 1, 2006. (R. 636:11, 33-37).

The Wisconsin Supreme Court, in *Harris*, stated:

> Here, the undisclosed information is not directly exculpatory in the sense that DNA evidence might be because the fact that B.M.M. had alleged being previously sexually assaulted by her grandfather does not, in and of itself, tend to negate Harris's guilt regarding the separate assault that B.M.M. alleged he committed. However, the evidence here constitutes impeachment information that could be used to challenge the credibility of witnesses whose credibility would have been determinative of Harris's guilt. *Giglio*, 405 U.S. at 154.

*Harris*, 2004 WI 64, at ¶ 30.

Similar to *Harris,* of all of the witnesses in Mr. Avery's trial, Bobby's testimony was the most determinative of Mr. Avery's guilt because the State used it to establish that Ms. Halbach never left the Avery property. (696:103–04). Clearly, the jury was concerned about Bobby's credibility because he was 1 of only 2 witnesses whose testimony the jury requested to review during deliberations. (384:1–2).

Importantly, the CD timeline of internet searches directly contradicts Bobby's trial testimony that on October 31, he was asleep from 6:30 a.m. to 2:30 p.m. (633:38–39; 689:35) (App. 215–16). Mr. Hunt determined that the internet on the Dassey-Janda computer was accessed on October 31, 2005, when only Bobby was home at 6:05 a.m., 6:28 a.m., 6:31 a.m., 7:00 a.m., 9:33 a.m., 10:09

a.m., 1:08 p.m., and 1:51 p.m. (633:39) (App. 216). This impeaches Bobby's trial testimony that he was asleep from 6:30 a.m. to 2:30 p.m. (689:35).

On November 17, 2017, in a recent interview of Bobby by State investigators, Bobby claimed that the computer was located "on a desk in the living room at the time." When Bobby was asked if the computer was ever located in his bedroom, he stated, "It was not." (737:64–65). Bobby's statement is directly contradicted by the crime scene footage taken by Sgt. Tyson on November 12, 2005, which shows the computer was located in Bobby's bedroom. (737:170; 763:1–2). Bobby's statements are further contradicted by his brother, Blaine, who stated in his affidavit to current postconviction counsel on June 25, 2018, that the computer was located in Bobby's room and Bobby was the primary user of it. (737:165–66).

The suppressed impeachment evidence on the Dassey-Janda CD is not "'largely cumulative of impeachment evidence petitioners already had and used at trial,' nor is it simply impeachment evidence which only involved 'minor witnesses.'" *Turner v. United States,* -- U.S. --,137 S. Ct. 1885, 1894 (2017). As the Seventh Circuit points out in *Sims v. Hyatte*, 2019 WL 406268, *8, 913 F.3d 1078 (7th Cir. 2019), the *Brady* materiality standard is not an admissibility test: "It requires the court to gauge the potential effects on the outcome of the trial if the concealed information had been available to the defendant."

Bobby was the primary witness for the State in establishing that Mr. Avery and not he was the last person to see Ms. Halbach alive. (696:51). Bobby's

credibility would have been severely diminished if the jury realized that Bobby was doing the following: searching and viewing numerous images of young females, who bore a striking resemblance to Ms. Halbach, being tortured and sexually assaulted. Bobby was also lying to the jury about being asleep when he was doing internet searches. (689:35). Bobby was searching for key terms relevant to the murder and created folders labeled "Teresa Halbach" and "DNA." (737:65)

*The violent pornography on the Dassey-Janda CD fulfills the Denny motive requirement and therefore meets the materiality standard of Brady*

Because the circuit court erred in its finding that the 7 DVDs and CD were identical and therefore there was no suppression it never reached the materiality issue of the CD's contents for *Brady* purposes. Wis. Stat. § 904.04(2)(a), provides that "[e]vidence of other crimes [and/or] wrongs [and/or] acts . . . when offered . . . as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" is admissible. The court in *Dressler v. McCaughtry*, 238 F.3d 908, 910, 913–14 (7th Cir. 2001), held that the "acts" admitted pursuant to this section were the defendant's possession of the pornographic videotapes and pictures. Those images depicting intentional violence were admitted as evidence of the defendant's motive, intent, and plan to murder the victim. (636:7).

The defendant in *Dressler* argued that the videotapes and pictures were irrelevant and constituted inadmissible propensity evidence. The Seventh Circuit disagreed, stating:

> The fact that [the defendant] maintained a collection of videos and pictures depicting intentional violence is probative of the State's claim that he had an obsession with that subject. A person obsessed with violence is more likely to commit murder, and therefore the videos and photographs are relevant.

*Id.* at 914.

The *Dressler* court also rejected the defendant's argument that the videos and pictures were inadmissible propensity evidence and held that, although evidence of the general character of a defendant is inadmissible to prove he acted in conformity therewith, the above exception from § 904.04(2) was deemed to apply. *Id.*

*Dressler* is persuasive authority that the same result should occur here. Ms. Halbach was killed in a violent and vicious manner. An obsession with images depicting sexual violence against women made it more likely that person would commit a sexual homicide. The violent sexual images were relevant to motive and would have resulted in trial defense counsel being able to establish motive to meet the *Denny* standard.

As Mr. Avery's expert on sexual homicide Ann Burgess, PhD ("Dr. Burgess") opines in her affidavit, relying upon 30 years of empirical research literature, there is a well-established causal connection between pornography consumption and violent behaviors. (738:29–120).

*The Brady Violations are Newly Discovered Evidence that meet the Brady Materiality Standard*

The decision to grant or deny a motion for a new trial based on newly discovered evidence is committed to the trial court's discretion. *State v. Plude*, 2008 WI 58, ¶ 31, 310 Wis. 2d 28, 750 N.W.2d 42 (2008). *Plude* held:

> When moving for a new trial based on the allegation of newly discovered evidence, a defendant must prove: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative."

*Plude*, 2008 WI 58, at ¶ 31 (citation omitted).

The court in *State v. Vollbrecht*, 2012 WI App 90, ¶ 17, 344 Wis. 2d 69 stated:

> At the outset we observe that the parties parse out the issues on appeal—addressing the newly discovered evidence, third party perpetrator (*Denny*) evidence and the alleged *Brady* violation as if disconnected. However the overarching issue is that of newly discovered evidence under which all other issues on appeal are subsumed. We therefore examine it as such.

In this case, the contents of the Velie CD qualify as new evidence because: (1) the CD was first disclosed to current postconviction counsel in 2018 after being withheld for 12 years; (2) whatever duty Mr. Avery's trial defense counsel was under to investigate the Velie CD was superseded by the prosecution's ongoing duty to disclose and not suppress evidence; (3) the evidence *i.e.*, recovered pornographic images and 2,632 searches for keywords related to the murder of Ms. Halbach, provided by Detective Velie, was material to the trial court's consideration of *Denny* evidence related to Bobby; (4) and the evidence, specifically the aggregated pornographic images and Detective Velie's keyword

searches, was not cumulative of the 7 DVDs tendered to trial defense counsel. Rather, this evidence constitutes a unique work-product that is not merely a re-evaluation of existing evidence or a new appreciation of known evidence.

*The Velie CD was Material*

In order for the defendant to prevail on the third component of the *Brady* analysis, the suppressed evidence must be material. *See Harris*, 2004 WI 64, 272 Wis. 2d 80, ¶ 15, 680 N.W.2d 737 (citing *Strickler*, 527 U.S. at 281-82, 119 S. Ct. 1936). "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682, 105 S. Ct. 3375.

It is not difficult to imagine what Mr. Avery's trial defense counsel could have done at trial with the knowledge of the violent pornography searches performed on the Dassey-Janda computer by Bobby, the State's primary witness. The Court in *Sims* stated:

> Courts must consider the overall strength of the prosecution case, the importance of the particular witness's credibility to the prosecution case, the strength of the concealed impeachment material, and how the concealed material compares to other attacks the defense was able to make on the witness's credibility. *See Kyles*, 514 U.S. at 441, 445, 451, 454; *Giglio*, 405 U.S. at 154–55. . . *Wearry*, 136 S. Ct. at 1006–07.

914 F.3d 1078 at *8.

Bobby's trial testimony was completely unrebutted by the defense. (689:38) (715:91). The suppressed impeachment evidence contained in the CD was material because it was not "largely cumulative of impeachment evidence petitioners had

already used at trial" and because the impeachment evidence was of the State's primary witness. *Turner v. United States*, 137 S. Ct. 1885, 1894 (2017).

Mr. Avery had a constitutionally guaranteed right to present a complete defense to the charges against him. *Holmes v. South Carolina,* 547 U.S. 319, 324 (2006), *State v. Pulizzano,* 155 Wis. 2d 633, 645, 456 N.W.2d 325 (1990), *citing Chambers v. Mississippi,* 410 U.S. 284, 294–95 (1973). Mr. Avery was deprived of his constitutional right to present a complete defense because of the *Brady* violation committed by the State in failing to tender the forensic examination CD and report of Detective Velie, entitled "Dassey Computer, Final Report, Investigative Copy." The failure of trial defense counsel to have the benefit of using the CD to establish the *Denny* motive requirement as it pertained Bobby and/or to impeach Bobby, the State's primary witness, deprived Mr. Avery of a meaningful opportunity to present a complete defense.

*The Cumulative Effect of the Brady Violations establishes materiality*

In addressing a *Brady* claim, the court is not to view each piece of suppressed evidence in isolation. Instead, the court is required to assess the cumulative impact of all the suppressed evidence to determine its materiality. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Suppressed evidence is material if its cumulative effect creates a reasonable probability of a different result at trial. *E.g., Goudy v. Basinger*, 604 F.3d 394, 400 (7th Cir. 2010) (citing *Kyles*, 514 U.S. at 434). A reasonable probability of a different result exists if the suppressed

information undermines confidence in the verdict. *Id*. (citing *Kyles*, 514 U.S. at 434).

The *Kyles* Court noted "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id* at 434. A "reasonable probability" is lower than a preponderance of evidence standard. It is demonstrated where the defense shows that the failure "undermine[d] confidence" in the conviction. *Youngblood v. West Virginia*, 547 U.S. 867, 869–70 (2006).

For example, in *Bies v. Sheldon*, 775 F.3d 386 (6th Cir. 2014), the defendant was convicted for kidnap, assault, and murder. *Id*. at 388. In addressing the cumulative impact of the undisclosed evidence, the United States Court of Appeals for the 6th Circuit noted that, had the evidence been disclosed to the defense, it would have allowed defense counsel "to construct a plausible alternative narrative of the crime." *Id*. at 400. Specifically, witnesses reported seeing a group—that may have included the victim—taunting Cordray close in time to the victim's murder. *Id*. Police had determined that Cordray's palm print was similar to the print found at the scene, and one witness noted that Cordray had injuries to his knuckles after the murder. *Id*. In vacating the defendant's conviction, the court held, "These facts, had they been disclosed, would have provided a compelling counter-narrative to the State's theory of the case and could

have created a reasonable doubt as to [the defendant's] guilt in the minds of the jurors." *Id*. at 400-01.

The undisclosed evidence to Mr. Avery would have permitted the defense to construct a plausible alternative narrative of the crime. As stated previously, Mr. Rahmlow and Mr. Radandt's testimony and the unedited flyover video would have established that the RAV-4 was planted on the Avery property. The missing Zipperer voicemail and the undisclosed Heitl report would have changed the State's timeline of Ms. Halbach's activities and would have provided evidence establishing Mr. Hillegas as a *Denny* third-party suspect. The undisclosed Dassey-Janda CD would have impeached Bobby, who was unimpeached as the State's primary witness, as well as established motive to name him as a *Denny* third-party suspect.

## III. The circuit court erred as a matter of law in failing to address Mr. Avery's claim of ineffective assistance of trial counsel.

### A. Standard of review

The 6th and 14th Amendments to the United States Constitution guarantee Mr. Avery the right to effective assistance of counsel at critical stages of his prosecution. In order to prove that he received constitutionally inadequate assistance, Mr. Avery must show that: (1) his counsel performed deficiently; and (2) counsel's deficient performance prejudiced him. *State v. Jenkins*, 2014 WI 59, ¶ 35, 355 Wis. 2d 180, 848 N.W.2d 786 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

Whether Mr. Avery received ineffective assistance is a mixed question of law and fact. *Jenkins*, 2014 WI 59, at ¶ 38 (citing *State v. Domke*, 2011 WI 95, ¶ 33, 337 Wis. 2d 268, 805 N.W.2d 364). A circuit court's "findings of fact, including the circumstances of the case and the counsel's conduct and strategy," are upheld unless clearly erroneous. *Jenkins*, 2014 WI at ¶ 38 (citing *State v. Thiel*, 2003 WI 111, ¶ 21, 264 Wis. 2d 571, 665 N.W.2d 305). Whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel is a question of law, which this Court reviews *de novo*. *Id*.

**B. Failure to hire experts case law**

In certain cases, the duty to investigate includes a duty to consult with and call expert witnesses to testify at trial. "Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both." *Harrington v. Richter*, 562 U.S. 86, 106 (2011) (emphasis added). Thus, there are times where the only adequate means of challenging expert testimony elicited by the State is to introduce contrary expert testimony in favor of the defense. *Woolley v. Rednour*, 702 F.3d 411, 424 (7th Cir. 2012) (finding deficient performance for the failure to consult with and call a rebuttal expert where there were "significant holes" in the prosecution's expert's conclusions that could only be adequately addressed through contrary expert testimony).

Several cases in Wisconsin likewise hold that the failure to investigate and/or call expert witnesses to discredit the State's case, and/or to support the

defendant's theory, constitute ineffective assistance. *E.g.*, *State v. Zimmerman*, 266 Wis. 2d 1003 (Ct. App. 2003) (trial counsel rendered ineffective assistance by failing to call a pathologist to refute testimony that a cord in the defendant's van was consistent with victim's wounds).

Likewise, in *Thomas v. Clements*, the defendant was convicted of intentionally strangling the victim to death. 789 F.3d 760, 762–63 (7th Cir. 2015). The defendant's defense was that he unintentionally caused the victim's death by putting too much pressure on her neck for too long during sex. *Id.* To rebut this defense, the prosecution relied on testimony from the medical examiner who performed the victim's autopsy. *Id.* at 764–65. The medical examiner testified that the hemorrhages in the victim's eyes and abrasions to her face indicated that the pressure applied to her neck occurred during an assault and was intentional. *Id.*

The Seventh Circuit held that trial counsel's failure to even consider contacting a pathologist to review or challenge the medical examiner's findings constituted ineffective assistance. *Id*. at 769. Specifically, counsel knew that his client claimed that the death was unintentional, and that there were no signs of a struggle. *Id.* The court concluded that to not even contact an expert "was to accept [the medical examiner's] finding of intentional death without challenge and basically doom [the] defense's theory of the case." *Id.*

### C. Failure to hire experts

*Blood Spatter*

It is indisputable that the State's blood spatter expert's testimony regarding Mr. Avery's blood in the RAV-4 was the most critical piece of forensic evidence used to obtain Mr. Avery's conviction. The State's blood spatter expert was unrebutted because trial defense counsel failed to present a blood spatter expert on Mr. Avery's behalf.

On November 16, 2017, trial defense counsel, Mr. Strang, gave current postconviction counsel an affidavit admitting that trial defense counsel was ineffective for failing to hire a blood spatter expert:

> I knew that an acquittal very likely would depend in part upon an explanation for Steven Avery's blood being found in the Toyota RAV-4 other than because he was in that car himself. . . . To my recollection, I did not consider hiring a blood spatter expert who might have consulted, done independent testing, testified, or all three as to the bloodstains found in either of those two general areas of Ms. Halbach's car. I did not have a strategic reason for not considering or hiring such an expert or experts.

(636:105) (App. 765).

Trial defense counsel committed themselves to 1 theory about the source of the planted blood by claiming that it came from the 1996 blood vial and was planted by law enforcement. However, trial defense counsel did nothing to substantiate the theory for 8 months prior to trial, and at the pre-trial conference on December 20, 2006, they declined the State's offer to split the sample and perform "simultaneous testing" or to "join the State in pursuing a single test." (347:2).

Mr. Avery told law enforcement that his finger, which had been cut open prior to October 31, 2005, re-bled on November 3, 2005, and dripped blood in his bathroom sink and on the bathroom floor. (646:6; 648:1–2). Mr. Avery consistently expressed his belief to his attorneys and the media that his blood found in Ms. Halbach's vehicle was planted and that it came from his trailer. (114:2; 604:22) (App. 512). In a recorded interview, he said he dripped blood from his finger into his bathroom sink. (646:6; 648:1–2). Mr. Avery's claim that he bled in his bathroom into the sink was corroborated by his blood found around his sink and on his bathroom floor. (296:2). He told law enforcement and trial defense counsel that, as he was leaving his property on November 3, 2005, and exiting onto Highway 147, he observed tail lights of a vehicle close to his trailer. (604:80). Mr. Avery told trial defense counsel that he noticed that the blood had been removed from his sink when he entered his bathroom, early in the morning on November 4, 2005. (604:27; 646:6) (App. 517).

In current postconviction counsel's Motion filed on June 7, 2017, Mr. James, a blood spatter expert (604:137–63) (App. 310–36), opines in his affidavit that the blood drops and flakes from Mr. Avery found in the RAV-4 were not from "an actively bleeding middle right finger," as the State told the jury. (604:126–97; 696:86; 737:29–59) (App. 299–370, 1050–80).

Prosecutor Kratz erroneously claimed that the "sheer volume, the sheer number of places" rule out that the blood in the RAV-4 was planted. (715:59). However, only 1 to 2 milliliters of Mr. Avery's blood was found in the RAV-4.

(705:27). The experiments conducted by Mr. James with 1 to 2 milliliters demonstrates that the small amount of blood in the RAV-4 was selectively dripped in certain places but not others. Mr. James's experiments demonstrate that the blood was not from an actively bleeding finger because there would have been blood in many more places in the RAV-4, including on the door handle, key, gearshift, interior hood release, hood latch, hood prop, or battery cable. (604:134; 737:31) (App. 307, 1052).

Suspiciously, there were no bloody fingerprints of Mr. Avery in or on the RAV-4 despite the fact that he could not have been wearing gloves when he allegedly deposited blood from the cut on his finger in the RAV-4. (711:13).

Mr. James states in his affidavit that the contact stain by the ignition is consistent with being placed with an applicator. (604:135–36; 737:31) (App. 308–09). Mr. James opines that the blood flakes on the driver's side carpet rule out an actively bleeding finger because the blood would soak into the carpet and not form flakes on top of it. Similarly, EDTA blood would not form flakes on top of the carpet. (603:83, at ¶ 133; 604:135) (App. 308). Fresh blood dripped in a sink would coagulate in approximately 15 minutes and could form some flakes that could be scooped up and planted on top of the RAV-4 carpet. (604:135; 621:23) (App. 308; 773). If Mr. Avery had bled on the carpet, there would be a corresponding stain under the blood flakes. Additionally, the remaining fresh blood could be removed and planted.

In Mr. James's affidavit, he refutes the State's expert, Mr. Stahlke's testimony, regarding the origin of the blood spatter on the inside of the rear cargo door of the RAV-4. Mr. James performed experiments, which demonstrate that the blood spatter on the inside of the rear cargo door was caused by Ms. Halbach being struck with an object such as a hammer or mallet while she was lying on her back on the ground behind the vehicle after the rear cargo door was opened. (603:73–74). Mr. James ruled out Mr. Stahlke's explanation that the blood was from Ms. Halbach's hair as she was flung into the rear cargo area. (604:130–31) (App. 303–04).

The blood stain hair pattern on the panel in the cargo area was the result of the RAV-4 being driven while Ms. Halbach laid in the cargo area bleeding from a head wound, which created multiple stains as the car moved. (737:31, at ¶ 7; 603:130, at ¶ 251). The bloodstain pattern evidence refutes Prosecutor Kratz's claim that the pattern was caused by the vehicle sitting stationary and Ms. Halbach being thrown in and pulled back out of the vehicle. (715:60–61).

In a similar case in Texas, the Court of Criminal Appeals held that the failure to challenge the State's testimony concerning blood spatter constituted ineffective assistance of trial defense counsel. *Ex parte Abrams,* Case No. AP-75366, 2006 WL 825775 (Tex. Crim. App. Mar. 29, 2006.) In *Abrams*, the defendant claimed that she stabbed the victim believing him to be an intruder. *Id.* at * 1. Specifically, the defendant claimed that she was taking a bath when she heard noises in the other room. *Id.* at *2. The State elicited testimony contrary to

the defendant's version of events to the effect that blood spatter in the defendant's bathtub indicated that the tub was not wet when the blood was deposited. *Id.* The court held that defense counsel's failure to challenge the State's witness's testimony by, for example, presenting contradictory expert testimony, qualified as ineffective assistance. *Id.*

Mr. James states in his affidavit that the most likely source of Mr. Avery's planted blood was from the blood in his sink, and not blood from the 1996 blood vial as trial defense counsel claimed. (604:135–36; 603:73, 75–77 at ¶¶ 134, 140–44; 648:1–2; T.E. 206) (App. 299–370). Mr. James, because of his familiarity with EDTA blood vials, opines that the hole in the top of the 1996 blood vial tube was made at the time Mr. Avery's blood was put in the tube, and the blood around the stopper is a common occurrence and does not indicate that the tube was tampered with. (603:73, at ¶ 134; 604:126–97) (App. 299–370).

*Ballistics*

Mr. Strang, in his affidavit on November 16, 2017, admitted that he was ineffective in not having ballistics and trace experts regarding #FL. (636:105–06; 707:103) (App. 765–66).

Trial defense counsel failed to hire a ballistics expert to rebut the State's experts' testimony that Ms. Halbach's cause of death was the result of being shot into her skull with a .22, identified as #FL. (703:63; 706:150, 165–66, 172–73; 707:103, 116). Current postconviction counsel's ballistics expert, Lucien Haag

("Mr. Haag"), states in his affidavit that #FL shows no evidence of having been shot into a skull. Mr. Haag explains that #FL, identified as a .22 LR, was comprised of such soft metal that there would be detectable bone fragments embedded in the damaged bullet if it had been fired into Ms. Halbach's skull. (621:255–58) (App. 782–85). Mr. Haag conducted experiments that demonstrate bone would have been embedded in a .22 LR bullet if it was shot into bone. Because no bone fragments were identified in #FL (707:103) during its WSCL examination, it is Mr. Haag's opinion that #FL was not fired into Ms. Halbach's skull. (621:255–58) (App. 782–85).Trial defense counsel missed the opportunity to cross examine Mr. Newhouse about the absence of any bone particles in his report. (621:257).

*DNA Expert: Quantities of DNA on hood latch*

Trial defense counsel failed to present a DNA expert at Mr. Avery's trial. Current postconviction counsel retained DNA expert, Dr. Reich, a Harvard/Stanford-educated molecular biologist. Dr. Reich has offered the following opinions which refute the State's DNA evidence:

1. According to Dr. Reich, it would take approximately 90 attempts at opening the RAV-4 hood latch to deposit the amount of DNA recovered by the WSCL. (630:3) (App. 546). The WSCL identified 1.9 nanograms (30 microliters of a DNA solution at a concentration of 0.0616 nanograms/microliter) of DNA on the hood latch.

(604:107; 615:68–75) (App. 426). Dr. Reich reached this conclusion by conducting a series of experiments on an identical hood latch.

2. Dr. Reich refutes the State's claim "as having no scientific foundation" that the hood latch DNA was deposited by sweat from Mr. Avery's hands. (630:1) (App. 544).

*DNA Expert: Groin swab*

Trial defense counsel failed to investigate or raise the illegal seizure of 2 groin swabs from Mr. Avery on November 9, 2005, which could have been used to plant the DNA on the RAV-4 hood latch. (603:87, at ¶ 166; 604:64). The facts surrounding the illegal seizure of the groin swabs are as follows:

1. Mr. Avery was arrested on a felon in possession of a gun charge on November 9, 2005, and he was taken to the Aurora Medical Center where Nurse Fay Fritsch ("Nurse Fritsch") took 2 groin swabs from him in the presence of SA Fassbender and Inv. Wiegert.
2. After the groin swabs were taken, SA Fassbender and Inv. Wiegert "conferred and determined that the search warrant did not call for that type of exam. Inv. Wiegert immediately stopped Nurse Fritsch and the exam was concluded." (604:64).
3. According to Mr. Avery, Inv. Wiegert told Nurse Fritsch to give him the groin swabs and Mr. Avery observed Inv. Wiegert walk to the

examination room receptacle as if to discard the groin swabs, but Mr. Avery did not observe Inv. Wiegert deposit the groin swabs into the receptacle. (604:28, at ¶ 31) (App. 518).

Mr. Avery's claim that the groin swabs were not discarded is corroborated by the following highly suspicious facts:

1. Nurse Fritsch never charted on the forensic evidence sheet that she had taken the groin swabs, even though she charted that she took buccal swabs from Mr. Avery. (603:87–88, at ¶¶ 166–68; 615:45–46).
2. Nurse Fritsch's charting indicates that the only law enforcement officer present was Sgt. William Tyson ("Sgt. Tyson"), but SA Fassbender's report indicates that he met Inv. Wiegert at the examination and both of them were present in the room. (615:46; 604:64).

It is beyond coincidence that it was Inv. Wiegert and SA Fassbender who interrogated Brendan, a vulnerable, intellectually-impaired teenager, who is most likely on the Autism spectrum. They introduced the hood latch story in their March 1, 2006, interrogation. Agent Fassbender asked Brendan, "Did he, did he, did he [*sic*] go and look at the engine, did he raise the hood at all or anything like that? To do something to that car?" (615:48). On May 16, 2006, when asked how he came up with the hood latch story, Brendan responded "just guessing." (615:50).

It is a reasonable inference that SA Fassbender and Inv. Wiegert were highly motivated to provide corroboration for the confession they created. Therefore, they ordered that the hood latch be swabbed for DNA evidence.

On April 3, 2006, SA Fassbender and Inv. Wiegert specifically directed Dep. Hawkins and Sgt. Tyson to go into the storage shed where the RAV-4 was located to swab the hood latch, battery cables, and interior and exterior door handles. (615:53). At 19:37 hours, Sgt. Tyson swabbed the hood latch. Dep. Hawkins took photographs, including a photograph of the swab. (615:55–56). After Sgt. Tyson swabbed the hood latch, he gave the swab to CCSD Dep. Hawkins for storage. (615:58–59).

The instructions SA Fassbender and Inv. Wiegert gave Dep. Hawkins and Sgt. Tyson revealed their illegal plan, because they failed to request swabbing of the interior hood release lever and hood prop, which, by necessity, Mr. Avery would have handled when opening the hood to disconnect the battery cable. They knew Mr. Avery was never in the RAV-4, so no additional swabbing was requested.

On April 4, 2006, Dep. Hawkins signed the hood latch swab (CCSD Property Tag #9188) over to Inv. Wiegert for transport to the WSCL in Madison. (615:58, 61–62). When Inv. Wiegert arrived at WSCL, he presented Wisconsin Department of Justice Evidence Transmittal Form labeled M05-2467-27. (615:64, 66). Dep. Hawkins' name was typed on the form as the submitting officer, which he was not. (615:64). Then, Inv. Wiegert hand-printed Dep. Hawkins' name on

the form, again deliberately misidentifying Dep. Hawkins as the submitting officer, which was a complete misrepresentation. (615:66). Clearly, Inv. Wiegert switched the groin and hood latch swabs and fabricated the chain of custody documentation so that it would appear that Dep. Hawkins submitted the hood latch swab to WSCL. (615:61–62, 64, 66; 604:28, 105–104, 113) (App. 518, 524–29, 532). Trial defense counsel failed to investigate all of the surrounding circumstances that led to the groin swabs being illegally taken from Mr. Avery and the chain of custody on the submission of the alleged hood latch swab to the WSCL on April 4, 2006.

According to Dr. Reich, one way for forensic evidence to be planted is by re-labeling the forensic swabs. (604:111–13) (App. 530–32). Dr. Reich offers the opinion that "a rubbed groin swab taken from the defendant was relabeled and thus became evidence from a hood latch." (604:111–13) (App. 530–31).

Trial defense counsel never considered the possibility that the groin swab was substituted for the hood latch swab because they failed to investigate the chain of custody involving the hood latch swab and the illegal seizure of the groin swab.

*DNA Expert: Toyota Key*

Dr. Reich opines that the DNA found on the Toyota sub-key found in Mr. Avery's bedroom was planted. Dr. Reich conducted experiments which demonstrated that Mr. Avery deposited 10 times less DNA on the exemplar sub-key than what was discovered by the WSCL and used to convict Mr. Avery.

(604:110; 631:2; 604:110) (App. 529). Dr. Reich states, "An order of magnitude difference is a significant finding." (604:110) (App. 529). Dr. Reich's experiments refute Ms. Culhane's explanation for the presence of Mr. Avery's DNA on the key, that Mr. Avery was "a good shedder." Clearly, he was not. (704:104; 630:2) (App. 545).

*Forensic Anthropology and Kerf Marks Expert*

Current postconviction counsel's forensic anthropologist with kerf mark expertise, Dr. Symes, Ph.D., D-ABFA, offered the opinion in his affidavit that a microscopic examination of the suspected human pelvic bones performed in 2005 would have determined, to a high percentage of accuracy, whether the pelvic bones were human. (615:166) (App. 549). Dr. Symes also opined that it was below the standard of practice for a competent forensic anthropologist to not perform microscopic and histological examinations of the possible human pelvic bone. Neither Dr. Eisenberg nor Dr. Fairgrieve performed a microscopic examination of the suspected pelvic bones. (615:167) (App. 550). If the pelvic bones in the Manitowoc County Gravel Pit were shown to be human, the State's entire theory against Mr. Avery would have collapsed. The State claimed that Ms. Halbach never left the Avery property after she arrived, was murdered in Mr. Avery's garage, and her body was burned in his burn pit. If, in fact, Ms. Halbach was murdered in the Manitowoc County Gravel Pit and her body was burned

there, the State could not have linked the crime exclusively to Mr. Avery. (715:148).

*Audio Enhancement Expert*

Current postconviction counsel hired an audio enhancement expert to enhance the Sgt. Colborn dispatch call regarding the RAV-4 license plate. The enhanced version, created by the expert, clearly reveals that a second person was with Sgt. Colborn and makes the statement, "It's hers." (648:1–2; 621:133). The statement impeaches the testimony of Sgt. Colborn that he was not looking at the RAV-4 when he made the dispatch call. (648:1–2; 701:185, 187; T.E. 212).

*Experiment to establish that RAV-4 sub-key was planted*

Neither side subpoenaed Mr. Avery's bookcase to the trial. Trial defense counsel's failure to have the bookcase at trial, to demonstrate the impossibility of the State's story about the discovery of the key, was a fatal error. A simple experiment with the bookcase and Toyota key would have conclusively demonstrated that the key was planted next to the bookcase by Sgt. Colborn and Lt. Lenk. Conclusive proof that this one piece of evidence was planted would have collapsed the State's house of fabricated evidence. Current postconviction counsel had experiments performed with an identical bookcase and an identical 1999 Toyota RAV-4 key on a blue fabric lanyard that demonstrates that Sgt. Colborn's and Lt. Lenk's testimony about the discovery of Ms. Halbach's key in Mr. Avery's bedroom is demonstrably false. (603:78–80).

*Experiment to refute burning plastic smell of Ms. Halbach's electronic components*

Current postconviction counsel's investigator conducted a series of experiments refuting Mr. Fabian's trial testimony that on October 31, 2005, he was in the vicinity of Mr. Avery's burn barrel and smelled the distinct odor of burning plastic coming from Mr. Avery's burn barrel. (615:194–99; 705:112, 114) (App. 1120–25).

*The admissibility of experiments and recreations to support and illustrate an expert's opinions is well-established in Wisconsin*

The Wisconsin Courts have held: "Pretrial experiments may be admitted into evidence if their probative value is not substantially outweighed by prejudice, confusion, and waste of time. . . . Experts are allowed to describe such experiments, state the results and give their conclusions based thereon." *Maskrey v. VolkswagenwerkAktiengesellschaft,* 125 Wis .2d 145 (Ct. App. 1985). The experiments conducted by Mr. Avery's experts would all be admissible according to Wisconsin case law.

*Ineffective Assistance of trial defense counsel in obtaining experts prejudiced Mr. Avery in his defense*

The circuit court failed to address any of Mr. Avery's arguments on the ineffective assistance of trial defense counsel in failing to hire experts. Mr. Avery has demonstrated that trial defense counsel's deficient performance prejudiced his defense. Mr. Avery "is not required [under *Strickland*] to show 'that counsel's

deficient conduct more likely than not altered the outcome of the case.'" *State v. Moffett*, 147 Wis. 2d 343, 353, 433 N.W.2d 572, 576 (1989), quoting *Strickland*, 466 U.S. at 693. Rather, "[t]he question on review is whether there is a reasonable probability that a jury viewing the evidence untainted by counsel's errors would have had a reasonable doubt respecting guilt." *Id*. at 357.

"Reasonable probability," under this standard, is defined as "probability sufficient to undermine confidence in the outcome." *Id*., quoting *Strickland*, 466 U.S. at 694. If this test is satisfied, relief is required; no supplemental, abstract inquiry into the "fairness" of the proceedings is permissible. *Williams v. Taylor*, 529 U.S. 362 (2000). In addressing this issue, the Court normally must consider the totality of the circumstances (*Strickland*, 466 U.S. at 695) and thus must assess the cumulative effect of all errors, and may not merely review the effect of each in isolation. See, e.g., *Alvarez v. Boyd*, 225 F.3d 820, 824 (7th Cir. 2000); *State v. Thiel*, 2003 WI 111, ¶¶ 59–60, 264 Wis. 2d 571, 665 N.W.2d 305 (addressing cumulative effect of deficient performance of counsel).

The deficiency prong of the *Strickland* test is met when counsel's errors were the result of oversight rather than a reasoned defense strategy. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *Dixon v. Snyder*, 266 F.3d 693, 703 (7th Cir. 2001).

It is not necessary to demonstrate total incompetence of counsel, and Mr. Avery makes no such claim here. Rather, a single serious error may justify reversal. *Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986), *superseded by*

*statute,* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, *as recognized in Thomas v. Sullivan*, 2011 WL 5075807 (C.D. Cal.); see *United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984). Here, Mr. Avery's experts in blood spatter, ballistics, DNA, anthropology with kerf mark specialization, forensic pathology, police procedure, and audio enhancement have demonstrated that the State's experts made multiple serious errors in their unrebutted testimony to the jury. One error in and of itself justifies a reversal. *Kimmelman*, 477 U.S. at 383. Mr. Strang has provided current postconviction counsel with affidavits admitting that it was oversight and not a reasoned defense strategy to fail to hire a blood spatter and ballistics expert.

### D. Failure to investigate and impeach the State's primary witness: Bobby

In determining whether counsel performed deficiently, a defendant must show that counsel's representation "fell below the objective standard of reasonably effective assistance." *Jenkins,* 2014 WI 59, at ¶ 40 (citing *Domke,* 2011 WI ¶ 36). Both failure to conduct a reasonable investigation and failure to call a witness to testify can constitute deficient performance. *State v. Delgado,* 194 Wis. 2d 737, 751–56, 535 N.W.2d 450 (Ct. App. 1995); *State v. Hubert*, 181 Wis. 2d 333, 343–44, 510 N.W.2d 799 (Ct. App. 1993); *Whitmore v. State*, 56 Wis. 2d 706, 715, 203 N.W.2d 56 (1973). Incomplete investigations, which are the result of inattention or oversight, do not constitute a reasoned strategic judgment to satisfy the Constitution. *Wiggins*, 539 U.S. at 534.

Bobby was the State's primary witness against Mr. Avery. During his opening statement, prosecutor Kratz explicitly informed the jury of the significance of Bobby's putative observations on the date of Ms. Halbach's disappearance:

> You are going to hear that Bobby Dassey was the last person, the last citizen that will have seen Teresa Halbach alive.

(696:104).

At trial, Bobby testified that he observed Ms. Halbach's light-green or teal-colored SUV pull up in his driveway at 2:30 p.m. on October 31, 2005. (689:36). Bobby then observed Ms. Halbach exit her vehicle and start taking pictures of his mom's maroon van right in front of his trailer. (689:37). Bobby testified that he then observed Ms. Halbach walking towards the door of Mr. Avery's trailer. (689:38). The following exchange occurred between Prosecutor Kratz and Bobby:

> "Q: After seeing this woman walking toward your Uncle Steven's trailer, did you ever see this woman again?
>
> A: No."

(689:39).

Bobby then testified that he took a three- or four-minute shower and then left his trailer to go hunting. (689:39). Bobby walked to his Chevy Blazer, which was parked between the trailer and garage. (689:39). Bobby testified that as he walked to his vehicle, he observed Ms. Halbach's vehicle still parked in the driveway. (689:40). Bobby further testified that he did not see Ms. Halbach or

any signs of her. (689:40). Bobby testified that when he returned to his trailer around "five-ish," Ms. Halbach's vehicle was gone. (689:41).

During his closing argument, Prosecutor Kratz once again emphasized the importance of Bobby's testimony and vouched for his credibility:

> We talked more about the timeline and we heard from Bobby Dassey, again, in the same kind of a position to be—his credibility to be weighed by you, but is an eyewitness. Again, an eyewitness without any bias. It is a [*sic*] individual that deserves to be given a lot of credit. Because sometime between 2:30 and 2:45 he sees Teresa Halbach. He sees her taking photographs. He sees her finishing the photo shoot. And he sees her walking up towards Uncle Steve's trailer.

(715:91).

Bryan, Bobby's brother, told law enforcement that Bobby saw Ms. Halbach leave the Avery property on October 31, 2005, contrary to Bobby's trial testimony. (630:29; 631:33–39; 633:5). Trial defense counsel was well aware that Bryan had provided law enforcement with a statement that contradicted Bobby's trial testimony that Ms. Halbach never left the Avery property as illustrated in their motion Defendant's Statement on Third-Party Responsibility, which noted that Bryan had told law enforcement that Bobby actually saw Ms. Halbach leave the Avery property. (198:19). Unfortunately, trial defense counsel failed to call Bryan as a witness to impeach Bobby's testimony that he never saw Ms. Halbach leave the Avery property. (689:40; 630:29). On October 16, 2017, Bryan provided current postconviction counsel with an affidavit confirming that Bobby told him he saw Ms. Halbach leave the Avery property on October 31, 2005. (630:30–31) (App. 737–38). Trial defense counsel's investigator, Conrad Baetz

("Mr. Baetz"), has provided an affidavit that he was unaware of the police report of Bryan's interview. (630:32-45).

In *State v. Thiel*, 264 Wis. 2d 571 (2003), the Wisconsin Supreme Court granted postconviction relief after the trial defense attorney failed to conduct a significant investigation. There, the defendant set forth precisely what would have been revealed had the trial defense attorney conducted an investigation consistent with the defendant's constitutional right to counsel. In the instant case, *Thiel* also supports Mr. Avery's position that relief is warranted because his trial defense attorneys were ineffective in failing to properly review the discovery prior to Mr. Avery's trial to fully understand Bryan's statements to law enforcement. In *Thiel*, the defendant's allegation that his trial attorney had not reviewed all of the discovery constituted an additional basis for the Supreme Court to grant relief. The same result is compelled here.

Bryan was available to testify at Mr. Avery's trial and could have impeached Bobby on this critical piece of information that led to Mr. Avery's conviction. If Mr. Buting and Mr. Strang had effectively cross-examined Bobby they could have impeached him by calling Bryan. The State's most important eyewitness would have been discredited and the State's theory that Ms. Halbach never left the Avery property would have been refuted. Bryan's testimony would have been a game changer. Applying the correct *Strickland* standard to the failure of trial defense counsel to impeach Bobby, it has been demonstrated to a reasonable probability that if Bryan had been called as a witness to refute Bobby's

statement that Ms. Halbach did not leave the Avery property, that would have been sufficient evidence to undermine the verdict. Clearly, the jury perceived that Bobby was the most important State witness in establishing Mr. Avery's guilt because the jury, during deliberations, requested to review Bobby's testimony. (384:1–2). Wisconsin has long held that impeaching evidence may be enough to warrant a new trial. *State v. Plude*, 2008 WI 58, ¶ 47, 310 Wis.2d 28, 750 N.W.2d 42. In Mr. Avery's audio taped November 6, 2005 interview, he told the Marinette County Sheriff's Department:

> Well I went—I put the book in the house by the computer, and then I uh, I walked by my sister's and to see if Bobby was home yet. But he just left.

(737:80).

Trial defense counsel failed to fully appreciate the police interview of Bryan that would have discredited the State's primary witness, Bobby. It was Bobby and not Mr. Avery who was the last person to see Ms. Halbach. According to Mr. Avery's police procedure and investigation expert, Gregg McCrary ("Mr. McCrary") Bobby should have been investigated as a potential suspect in the murder of Ms. Halbach because of his preoccupation with viewing violent pornographic images resembling Ms. Halbach, his false statements to the police, and his perjured statements at Mr. Avery's trial. (630:117–48; 636:38–88) (App. 217–67, 660–91).

Additionally, trial defense counsel could have hired a forensic pathologist as current postconviction counsel did, who would have offered the opinion that the

scratches on Bobby's, upper back that were photographed on November 9, 2005, at Aurora Medical Center were inconsistent with his statements to the police that they were caused by his 8-week-old puppy scratching him. (737:153, 155–62) (App. 1082, 1084–91). Dr. Larry Blum ("Dr. Blum") has offered the opinion that the scratches on Bobby's upper back are inconsistent with a dog's paw and consistent with human fingernails. (737:152–62) (App. 1081–91).

### E. Failure to establish Mr. Hillegas as a *Denny* third-party suspect

Trial defense counsel failed to investigate and gather evidence about Mr. Hillegas. The following pieces of evidence regarding Mr. Hillegas were overlooked by trial defense counsel and demonstrate there was failure to conduct a significant investigation consistent with Mr. Avery's constitutional right to have effective counsel:

1) Concealment by Mr. Hillegas of his abusive relationship with Ms. Halbach (61:288) (App. 576);
2) Failure to impeach Mr. Hillegas on his trial testimony that the relationship between Ms. Halbach and Mr. Bloedorn was platonic, when in fact it was sexual in nature (694:157; 603:123);
3) Failure to impeach Mr. Hillegas with his untruthful statement to the police about Ms. Halbach's alleged insurance claim for her damaged parking light, when in fact no such insurance claim was made and the

parking light was found in the rear cargo area of the RAV-4 after Ms. Halbach's disappearance. (603:125–26; 621:91);

4) Failure to obtain an alibi from Mr. Hillegas or impeach him with the significant gaps in his phone records during the time of the murder. (603:126–27; 694:194; 621:86–88; 621:87; 694:158; 631:41–42; 621:87; 694:160);
5) Failure to impeach Mr. Hillegas regarding the 8 minutes and 55 seconds of telephone deletions from Ms. Halbach's phone after he obtained her username and password and accessed her phone. (603:128–31; 615:287 694:187) (App. 575);
6) Failure to impeach Mr. Hillegas as to his location when he received 22 unidentified dropped phone calls between 3:11 p.m. and 7:25 p.m. on November 4, 2005, the night trial defense counsel suspected the RAV-4 was planted on the Avery property (603:135; 621:88);
7) Failure to impeach Mr. Hillegas with the contradictory statement that the cell phone coverage on the Avery property was "absolutely horrid" when he had testified that he had never been on the Avery prior to November 5, 2005 (657:85);
8) Failure to discover that Mr. Hillegas was in possession of Ms. Halbach's day planner, which was in her vehicle at the time of her murder.

(631:48–49).

### F. Trial defense counsel failed to investigate a variety of additional topics

Current postconviction counsel describes in the Motion for Postconviction Relief, filed June 7, 2017, a variety of failures of trial defense counsel to conduct a significant investigation before trial. (603:136–149). *Thiel* at ¶¶ 45-48.

## IV. The circuit court erred as a matter of law, in ruling that it was not authorized by statute to resolve claims of ineffective assistance of prior postconviction counsel, and that Mr. Avery would have to pursue that claim with the Court of Appeals pursuant to *State v. Knight,* 168 Wis. 2d 509, 484 N.W.2d 540 (1992).

The circuit court held that "a circuit court is not authorized by statute to resolve claims of ineffective assistance of appellate counsel. *State v. Knight*, 168 Wis.2d 509, 484 N.W.2d 540 (1992). In this matter, if the defendant wishes to pursue the claims regarding appellate counsel, the defense may file a *Knight* motion with the Court of Appeals." (628:2–3) (App. 172–73).

### A. Standard of review

When, as here, the circuit court's decision turned on a matter of law, the appropriate standard of review is *de novo*. *See Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 32 n.5 (citing *Jones v. Secura Ins. Co.*, 2002 WI 11, ¶ 19).

Whether counsel was ineffective is a mixed question of fact and law. *State ex rel. Flores v. State*, 183 Wis.2d 587, 609, 516 N.W.2d 362 (1994) (citing *Strickland*, 466 U.S. at 698).

### B. Mr. Avery is not challenging ineffectiveness of prior appellate counsel

Contrary to the circuit court's interpretation, Mr. Avery is not challenging the effectiveness of appellate counsel. His claims focus exclusively on the deficient performance of prior postconviction counsel in failing to raise the ineffectiveness of his trial defense counsel. Mr. Avery does not raise a single issue regarding his appellate brief or oral argument.

The Wisconsin courts distinguish claims challenging the effectiveness of postconviction counsel from those challenging the effectiveness of appellate counsel. *See* Wis. Stat. § 974.06; *State ex rel. Rothering v. McCaughtry*, 205 Wis.2d 675, 681, 556 N.W.2d 136 (Ct. App. 1996) (holding that a claim of ineffective assistance of postconviction counsel should be raised in the trial court); *State v. Knight*, 168 Wis.2d 509, 520, 484 N.W.2d 540, 544 (1992) (describing procedure for challenging effectiveness of appellate counsel).

Because Mr. Avery's ineffective assistance of counsel claims relate to his prior postconviction counsel's failure to raise meritorious claims of ineffective assistance of trial—rather than appellate—counsel, he properly raised those issues in a § 974.06 motion filed with the circuit court. The court in *Rothering* stated:

> The distinction between appellate counsel and postconviction counsel is the decisive point here. "There are two principal manifestations of appellate representation: (a) the brief and (b) oral argument." Because the issues *Rothering* alleges appellate counsel should have briefed were waived, neither manifestation of appellate representation was deficient.
>
> What *Rothering* really complains of is the failure of postconviction counsel to bring a postconviction motion before the trial court . . . raising the issue of ineffective trial counsel. The allegedly deficient conduct is not what occurred

> before this [appellate] court but rather what should have occurred before the trial court by a motion filed by postconviction counsel. We hold that a *Knight* petition is not a proper vehicle for seeking redress of the alleged deficiencies of postconviction counsel.

*Rothering*, 205 Wis. 2d at 678–79 (citations omitted).

In *Balliette*, 2011 WI 79, 336 Wis.2d 358, 805 N.W.2d 334, the defendant's postconviction counsel raised two claims of ineffective assistance of trial counsel. *Id.* at ¶ 10. After the trial court denied those claims, the defendant unsuccessfully appealed that denial. The defendant then filed a § 974.06 motion for a new trial. *Id.* Ultimately, the Wisconsin Supreme Court reviewed the manner in which the defendant had raised his claims of ineffectiveness of postconviction counsel. *Id.* at ¶ 17. After explaining that the conduct the defendant alleged to be ineffective was postconviction counsel's failure to highlight the deficiency of trial counsel in a § 974.02 motion before the trial court, the Wisconsin Supreme Court concluded that there could be no dispute that the defendant properly filed his motion in the circuit court. *Id,* at ¶ 33.

### C. Mr. Avery's current claims are clearly stronger than prior postconviction counsel's claims

*Failure to hire experts*

Prior postconviction counsel ignored the ineffectiveness of trial defense counsel failing to retain experts. Clearly, prior postconviction counsel recognized the need for experts on Mr. Avery's behalf because they asked the court for an extension to retain experts and stated as follows:

> Counsel would be remiss if they did not consult with scientific experts on matters beyond their own knowledge and expertise, just as counsel would fail to satisfy their ethical obligations if they did not pursue potential leads for postconviction relief.

(421:3).

Despite the fact that prior postconviction counsel recognized the need for experts, they failed to retain a single expert to review the key pieces of forensic evidence that resulted in Mr. Avery's conviction.

Prior postconviction counsel failed to detect the illegal seizure of groin swabs taken from Mr. Avery. Prior postconviction counsel failed to retain their own experts in blood spatter, ballistics, DNA, anthropology with kerf mark specialization, forensic pathology, police procedure, and audio enhancement, who would have been able to demonstrate that all of the forensic evidence used to convict Mr. Avery was planted, as summarized *infra* at p. 99-103.

Both trial defense counsel and prior postconviction counsel were ineffective, pursuant to *Strickland*, in failing to hire the above-listed experts. Their deficient performance falls below an objective standard of reasonableness. Mr. Avery was prejudiced by their deficient performance. *State v. Thiel*, 2003 WI 111, ¶ 81 (finding ineffective assistance of counsel for the cumulative effect of their errors).

The cumulative effect of trial defense and prior postconviction counsel prejudiced Mr. Avery because both failed to review "certain portions of discovery" provided by the State; failed to "master the discovery documents;"

failed to independently investigate certain lines of inquiry about Bobby and Mr. Hillegas; and failed to initiate an investigation of any additional evidence or information to impeach them. The *Thiel* court instructed that, in making a *Strickland* evaluation of prejudice, the "totality of the representation" standard is not the proper inquiry, but rather "the effect of counsel's act or omissions on the reliability of the trial's outcome." *Thiel*, 2003 WI 111, at ¶ 80. The cumulative effect of all of these deficiencies undermines confidence in the outcome of the trial and establishes *Strickland* prejudice. *Id.* at ¶ 81. Even though prior counsel performed well on some aspects of the trial and postconviction, it does not offset the cumulative effect of their deficiencies in failing to master the discovery, independently investigate third party suspects, and obtain experts to undermine the very flawed theory used to convict Mr. Avery.

*Failure to Raise Ineffective Claim re: Impeachment of Bobby*

Prior postconviction counsel filed Mr. Avery's § 974.02 motion immediately after trial and were ineffective under *Strickland* because they confined their ineffectiveness claim against Mr. Buting and Mr. Strang to the narrow issue of juror removal. They overlooked the clearly stronger ineffectiveness claim of trial defense counsel's failure to impeach the State's primary witness, Bobby, and other witnesses and to hire vitally important experts to dispute the State's experts.

The court, in *Raether v. Meisner,* 608 Fed. Appx. 409 (7th. Cir. 2015), reversed the Wisconsin state court decision for applying the wrong standard in *Strickland*. The *Raether* court noted that *Strickland* is the "benchmark decision for claims of ineffectiveness [and] provides that the Sixth Amendment's guarantee of the assistance of counsel is violated if an attorney's actions are objectively unreasonable and prejudice the defendant." *Id.* at 413. The *Raether* court stated:

> Although the court identified *Strickland* as the controlling legal authority, it did not apply *Strickland*'s framework. Rather, in assessing whether Raether was prejudiced by counsel's errors, the court required a showing of but-for causation. That is not the standard. Instead a petitioner must demonstrate a "reasonability probability"—defined as one "sufficient to undermine confidence in the outcome"—that counsel's errors materially affected the outcome of the proceeding. *Strickland,* 466 U.S. at 694.
>
> * * *
>
> In this battle of credibility, counsel's failure to make use of the witness's prior statements doomed Raether's prospects from the beginning. Had counsel cross-examined the witnesses adequately, he could have cast significant doubt on Danielle's and Bragg's testimony, which was ripe for impeaching.

*Id.* at 414–15.

Prior postconviction counsel failed to recognize the *Strickland* ineffective argument that should have been raised about trial defense counsel's failure to recognize the significance of Bryan's statement to the police and that Bryan could have been called to impeach his brother Bobby, on the pivotal issue in the case: Did Ms. Halbach leave the Avery property on October 31, 2005? See *Washington v. Smith*, 219 F.3d 620, 629–30, 635 (7th Cir. 2000) (finding deficient performance where trial counsel failed to investigate and call significant witnesses).

Prior postconviction counsel failed to raise the clearly stronger *Strickland* argument regarding the failure of trial defense counsel to impeach Bobby. *Steinkuehler v. Meschner*, 176 F.3d 441 (8th Cir. 1999). The ineffectiveness of prior postconviction counsel is a sufficient reason to overcome the procedural bar relied upon by the circuit court in denying Mr. Avery relief on his current postconviction motion.

These failures, combined and individually, constitute textbook deficient performance. *Strickland*, 466 U.S. at 691 ("Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."); *Jenkins*, 2014 WI ¶¶ 41-48 (finding deficient performance of trial counsel for failure to call a key witness).

The defendant must show that counsel's failure resulted in prejudice. In order to demonstrate prejudice, Mr. Avery must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* When a defendant alleges multiple deficiencies by trial counsel, "prejudice should be assessed based on the cumulative effect of counsel's deficiencies." *Thiel*, 2003 WI ¶ 59.

To be clear, prejudice is not an outcome-determinative standard; the focus is on the reliability of the proceedings. *State v. Pitsch*, 124 Wis.2d 628, 642, 369 N.W.2d 711 (1985); *State v. Smith*, 2003 WI App 234, ¶ 17, 268 Wis.2d 138, 671

N.W.2d 854.

> The result of a proceeding can be rendered unreliable, and hence the proceeding itself, unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

*Pitsch*, 124 Wis.2d at 642.

Here, prior counsel's deficiency has rendered Mr. Avery's trial unreliable. The sole issues at trial were the forensic evidence linking Mr. Avery to the victim and the identity of the murderer. Trial defense counsel presented no real defense to the State's forensic evidence. Trial defense counsel called 7 witnesses and only 2 experts. Mr. Avery did not testify. The jury was left only with the State's unrebutted forensic evidence and the undisputed testimony of Bobby that Ms. Halbach walked to Mr. Avery's trailer and was never seen again. All of the evidence incorporated in the *Allen* chart on page 99-103 applies to prior postconviction counsel's ineffectiveness in conducting a significant investigation to impeach Bobby and others, and in failing to retain experts.

The above listed claims are obviously stronger than the claims raised by prior postconviction counsel. *State v. Balliette*, 2011 WI 79, ¶ 69, 336 Wis.2d 358, 805 N.W.2d 334 (rejecting a defendant's ineffective assistance claims where the defendant did not assert that the claims counsel failed to raise were obvious and very strong).

## V. The circuit court abused its discretion in dismissing Mr. Avery's second motion pursuant to Wis. Stats. § 974.06 without requiring the State to respond or conduct an evidentiary hearing.

### A. Standard of review

The Wisconsin Supreme Court has ruled that a trial court may deny a motion for postconviction relief under § 974.06, Stats., without a hearing if the motion fails to allege sufficient facts to raise a question of fact, or presents only conclusory allegations, or if the motion, files and record conclusively show that the defendant is entitled to no relief. *Rohl v. State*, 96 Wis.2d 621, 625, 292 N.W.2d 636 (1980).

Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing is a mixed standard of review. First, the appellate court determines whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendants to relief. If the motion raises such facts, the circuit court must hold a hearing. This threshold inquiry is thus a question of law subject to *de novo* review. A circuit court's discretionary decisions are reviewed under the deferential erroneous exercise of discretion standard. *State v. Bentley* 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

As with any other civil pleading, in assessing the legal sufficiency of the motion, the court must assume the facts alleged therein to be true. *Id.*; *Gritzner v. Michael R.*, 2000 WI 68, ¶ 17, 235 Wis.2d 781, 611 N.W.2d 906. Even if a court is disinclined to believe evidence offered by a movant, the court must hold a hearing before making credibility determinations. *State v. Allen*, 2004 WI 106, at

¶12, 274 Wis.2d 568, 682 N.W.2d 433(citing *State v. Leitner*, 2001 WI App 172, ¶ 34, 247 Wis.2d 195, 633 N.W.2d 207 (holding that when credibility is an issue, it is best resolved by live testimony)). Only after a hearing is the court charged with determining the issues and making findings of fact and conclusions of law. Wis. Stat. § 974.06(3)(d).

In *Rohl*, the defendant filed a motion for postconviction relief. The circuit court denied the motion, and the defendant appealed. The Court of Appeals reversed, and the State petitioned for review. The Wisconsin Supreme Court held that, while the allegations in the petition were initially conclusory, the circuit court had permitted the defendant to supplement his allegations with an affidavit. Because the affidavit "provide[d] some support for the conclusory allegation," the Wisconsin Supreme Court held that the circuit court abused its discretion in dismissing the petition without an evidentiary hearing. *Id.* at 626.

In *Zuehl v. State*, 69 Wis. 2d 355, 230 N.W.2d 673 (1975), the Wisconsin Supreme Court held that the circuit court abused its discretion because the motion set forth sufficient factual allegations, such that it should not have been summarily dismissed. Defendant's only support for his allegations was his own affidavit. The circuit court dismissed the motion, finding that the defendant's allegation was not supported by the previous trial court record. *Id.* at 357, 362. The Wisconsin Supreme Court explained: "that is not the test. A silent record does not conclusively show that the defendant is entitled to no relief." *Id.* The defendant's

burden at the first stage of the Act is to present an issue of fact that, if later proven at a hearing, would entitle him to relief. *Id.*[9][10][11]

The court in *Allen*, 2004 WI 106, ¶ 24, determined that a motion contains sufficient material facts, for an evidentiary hearing, if it includes, "the name of the witness (who), the reason the witness is important (why, how), and facts that can be proven (what, where, when)—that clearly satisfy the *Bentley* standard, and would entitle a defendant to a hearing." As the chart illustrates, Mr. Avery has met all of the *Allen* requirements:

| **Who** | **What** | **Where** | **When** | **Why/How** |
|---|---|---|---|---|
| **Ineffective Assistance of Counsel: Failure to Hire Experts** | | | | |
| Stuart James<br><br>*Blood Spatter Expert* | Mr. Avery's blood was selectively dripped in the RAV-4 was therefore planted. | Mr. Avery's blood in the RAV-4. | Mr. Avery's blood discovered in RAV-4 on November 5, 2005 | *Supra* at p. 68-72 |

[9]In the course of her investigation, current postconviction counsel has obtained affidavits from 14 experts.

[10] Current postconviction counsel has obtained 22 affidavits from 17 lay witnesses.

[11] Current postconviction counsel has also obtained 3 affidavits from Mr. Avery's trial attorneys.

| | | | | |
|---|---|---|---|---|
| Lucien Haag<br><br>*Ballistics Expert* | Ms. Halbach was not shot through the head because #FL had no bone particles | Mr. Avery's garage floor | March 1, 2006 | *Supra* at p. 72-73 |
| Dr. Christopher Palenik, Ph.D.<br><br>*Trace Expert* | Using a 2016 Scanning Electron Microscope, determined that #FL was not shot through Ms. Halbach's head.<br><br>Hood latch swab did not swab hood latch. | Mr. Avery's garage floor<br><br>RAV-4 | March 1, 2006<br><br>April 3, 2006 | *Infra* at p. 104-106, 108-109 |
| Dr. Karl Reich, Ph.D.<br><br>*DNA Expert* | Mr. Avery's DNA planted on RAV-4 hood latch and Sub-key. | Ms. Halbach's RAV-4<br><br>Mr. Avery's trailer. | April 3, 2006<br><br>November 8, 2005 | *Supra* at p. 73-74, 77-78 |
| Dr. Steven Symes, Ph.D.<br><br>*Forensic Anthropologist* | Microscopic examination should have been done to confirm suspected human pelvic bones were human | Manitowoc Gravel Pit | November, 2005 | *Supra* at p. 78-79 |

| | | | | |
|---|---|---|---|---|
| Dr. John DeHaan, Ph.D.<br><br>*Forensic Fire Expert* | Ms. Halbach's body not burned in Mr. Avery's burn pit | Mr. Avery's burn pit | November 8, 2005 | *Infra* at p. 109 |
| Dean Strang | Admits ineffectiveness in failure to hire experts. | Bloodstain patterns: RAV-4<br><br>#FL: Avery garage | Pre-trial and during trial | *Supra* at p. 68-73 |
| **Ineffective Assistance of Counsel: Failure to Investigate and Impeach Bobby** | | | | |
| Bryan Dassey<br><br>Blaine Dassey | Bryan impeaches Bobby regarding Ms. Halbach leaving Avery property. Blaine lied at trial about fire in Mr. Avery's burn barrel. | Dassey residence | November 4, 2005 | *Supra* at p. 84-86<br><br>*Infra* at p. 121 |
| Gregg McCrary<br><br>*Police Practice & Investigation Expert* | Hillegas and Bobby as third-party suspects | N/A | October 31, 2005, November 3, 2005, and April 23, 2006 | *Supra* at p. 86 |

| | | | | |
|---|---|---|---|---|
| Conrad Baetz<br><br>*Investigator for Trial Counsel* | Admits failure to investigate Bobby. | Dassey residence | November 6, 2005 (Bryan's interview) | *Supra* at p. 84-85 |
| Ross Colby<br><br>*Audio Enhancement Expert* | Audio enhancement impeaches Sgt. Colborn. | MCSD Dispatch call | November 3 or 4, 2005 | *Supra* at p. 79 |
| Dr. Larry Blum, M.D.<br><br>*Forensic Pathologist* | Bobby lied about origin of his back scratches. | Aurora Medical Center | November 9, 2005 | *Supra* at p. 86-87 |
| ***Brady* Violations: Rahmlow, Radandt, Dassey-Janda CD** | | | | |
| Kevin Rahmlow<br><br>*Eyewitness* | *Brady* violation re: RAV-4 being planted | Turnabout at the East Twin River Bridge on Highway 147 | July 15, 2017 | *Supra* at p. 41-43 |
| Joshua Radandt<br><br>*Witness* | Impeachment re: RAV-4 planted. | Avery salvage yard | November 5, 2005 | *Supra* at p. 45-46 |
| Denise Heitl<br><br>*Witness* | Establishes direct connection of Ryan Hillegas to crime scene | Ms. Halbach's location unknown at time of phone call | October 31, 2005 | *Supra* at p. 48-49 |

| | | | | |
|---|---|---|---|---|
| Gary Hunt<br><br>*Senior Forensic Examiner* | *Brady* unique Velie word searches withheld from trial defense counsel | Dassey-Janda residence | April 17, 2018 | *Supra* at p. 56-59 |
| Dr. Ann Burgess, PhD | Link between violent pornography and crime. | Dassey-Janda residence | April 17, 2018 | *Supra* at p. 60 |
| Jerome Buting | *Brady* violation re: Dassey-Janda computer. | Dassey-Janda residence | Pre-trial | *Supra* at p. 52-53 |
| Dean Strang | *Brady* violation re: Dassey-Janda computer. | Dassey-Janda residence | Pre-trial | *Supra* at p. 53-54 |

*The circuit court erred in weighing the scientific evidence rather than granting an evidentiary hearing*

The circuit court concluded that the "defendant's experts. . . could not reach definitive conclusions regarding items of evidence without further testing." (640:4) (App. 180). The circuit court specifically attempted to weigh the evidence about the DNA experiments performed by Mr. Avery's DNA expert on a RAV-4 hood latch. (628:3) (App. 173). The circuit court misinterpreted the statistical significance of Dr. Reich's findings and erroneously concluded that the DNA on the hood latch was deposited by sweat from Mr. Avery's hand, when Dr. Reich had stated there is no DNA in sweat. (628:3–4) (App. 173–74). The circuit court

misinterpreted Dr. Reich's affidavit to state that there "is no forensic test available that can conclusively determine whether DNA was left by sweat." (628:3) (App. 173). Of course there is no test available because there is no DNA in sweat. (630:1–4) (App. 544–47). In order to assist the court, Dr. Reich prepared another affidavit in which he explained the misperceptions of the circuit court. Dr. Reich stated that he had sufficient independent tests to support his conclusions. (630:2–3) (App. 545–46)

The circuit court also tried to weigh the evidence about the sub-key as a result of the experiments performed on it. (628:4) (App. 174). The circuit court ignored the experiment performed by Dr. Reich of Mr. Avery holding an exemplar key and depositing 10 times less DNA than the amount detected by the WSCL. (604:110) (App. 529). The circuit court chose to focus only on the allegation that the key was a sub-key. (628:4) (App. 174).

Finally, and most significantly, the circuit court completely misread Dr. Palenik's affidavit about the lack of bone particles and presence of wood on #FL. (628:5) (App. 175). The circuit court claimed that Dr. Palenik's report "is not that clear cut." (628:5) (App. 175). The circuit court claimed that Dr. Palenik did not "discover all particles present on the bullet's surface." The circuit court failed to comprehend Dr. Palenik's statement that only "[i]f indications of bone were detected by these methods, further analytical approaches could be applied to more specifically confirm its presence." (603:159). Dr. Palenik responded to this

erroneous interpretation by stating that the court was incorrect that the entire bullet surface had not been examined for the presence of bone. (630:5–6) (App. 428–29)

The circuit court also erroneously concluded that Dr. Palenik's report "indicates that the tests performed cannot determine what the red substance on the bullet is" and that further testing would be needed. Dr. Palenik clearly stated in his affidavit:

> Regardless of its identity, the texture of the bullet in the area where the droplets are observed strongly suggests that the droplet was deposited *after* the bullet was fired and came to rest. This material could be identified if subjected to further analysis.

(603:160) (emphasis added).

Clearly, if the droplets were deposited after the bullet came to rest, it is immaterial what the substance is.

Dr. Palenik disputes the circuit court's conclusion, and states:

> This court also misconstrued my statements in ¶ 15(e) regarding my observation of two red droplets on the surface of item FL. I proffered the opinion that the color, texture, and shape of the red droplet deposits suggest that the material may be paint and that it could be tested to identify it. There has never been an issue in the underlying case that the red droplets were blood because, at trial, the forensic analyst Sherry Culhane testified that she had not done a presumptive test for blood nor had she observed any stains on the bullet fragment. She also testified that she had washed the bullet fragment in a solution. The following observations all suggest that the material on the bullet is composed of paint:
>
> A. The properties of the droplets that were observed;
>
> B. the fact that bone was not detected on the bullet;
>
> C. the fact that the bullet had been previously extracted specifically for DNA;
>
> D. the fact that no indications of blood were previously noted during prior examinations;
>
> E. the presence of additional bullet holes in the garage where this bullet was found; and

> F. evidence that red paint was used to paint the garage, as well as objects in the garage, which would suggest a source for the bullet.

(630:6–7) (App. 429–30)

Dr. Palenik also states:

> Though this material could be identified by sampling and analyzing the droplets (analyses that were expressly prohibited and outside the scope of my analysis of the bullet), the identity of the material was not pursued further due to the above-listed facts of the case, which together with the lack of any prior indication of blood on the bullet, suggest that these droplets on the bullet are composed of paint.

(630:7) (App. 430)

The circuit court ignored Dr. Palenik's findings that numerous fibers were found on the bullet's surface, some embedded in wax and other embedded on the bullet's surface. (603:160).

There is no question that the State's theory as to the cause of death was gunshots to Ms. Halbach's skull. (703:62–63). The absence of bone particles on #FL completely refutes that it passed into Ms. Halbach's skull as the State's expert, Dr. Jentzen, opined. (703:62–63; 716:98).

The circuit court completely misread Dr. Palenik's affidavit as requiring further testing. No such testing is necessary because Dr. Palenik has established that the State's contention that #FL caused Ms. Halbach's death is false.

The circuit court also erroneously concluded that *State v. Allen,* 2004 WI 106, ¶ 24, was inapplicable because the "reports are speculative" and lack "conclusions." (640:4) (App. 180). The circuit court failed to acknowledge its errors in interpreting the expert reports and determined that the reports, contrary to

the experts' own opinions, were "interim" and therefore speculative. (640:4–5) (App. 180–81).

## VI. The circuit court erred as a matter of law in applying the wrong standard to the newly discovered evidence.

In its October 3, 2017 ruling, the circuit court stated:

> The defendant attached numerous reports to his latest motion, arguing that the forensic tests conducted in the reports were not available at the time of the defendant's trial in 2005. However, the defendant's arguments ignore an important question—were the tests available at the time of the defendant's previous motion pursuant to Wis. Stats § 974.06 or any of the other appeals or motions filed after trial?

(628:2) (App. 172).

The circuit court ruling that in order for evidence to be "new," the testing methods used to obtain it must not have been available at the time of Mr. Avery's prior appeals and/or postconviction motions is manifestly erroneous. That is not the standard. When moving for a new trial based on an allegation of newly discovered evidence, a defendant must prove: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). If the defendant is able to prove all 4 of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the newly discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. *State v. Love*, 2005 WI 116, ¶ 44, 284 Wis.2d 111, 700 N.W.2d 62.

If the defendant was not negligent in failing to ferret out the evidence on which he relies, then a prior motion brought pursuant to Wis. Stats. § 974.06(4) does not procedurally bar the claim. *State v. Edmunds*, 2008 WI App 33, ¶¶ 10–15, 308 Wis. 2d 374, 746 N.W.2d 590 (defendant's prior postconviction motion did not bar a successive postconviction motion based on newly discovered medical evidence calling into question State's evidence related to "shaken baby syndrome").

In *State v. Brian Avery*, 2013 WI 13, 345 Wis.2d 407, 826 N.W.2d 60, the defendant filed a motion under Wis. Stats. § 974.06 over 12 years after his conviction and argued that during that time, new technology had allowed him to develop new evidence of his innocence. The circuit court denied the motion, but the court of appeals reversed the postconviction order and remanded the matter for an evidentiary hearing, concluding that the defendant had made a *prima facie* claim of newly discovered evidence. *Id.* at¶ 13. The appellate court applied the test discussed above from *Edmunds*, and determined that the defendant met all 4 prongs of the test. *Id.* at ¶¶ 27, 33. As to the first prong, the defendant was not required to establish when the new technology was available; the defendant satisfied his burden by simply showing that the technology was not available at the time of his trial. *Id.* at ¶ 31. Similarly, Mr. Avery in the case at bar has satisfied his burden by setting forth in his motion that the new technology was not available at the time of trial. The new technology is as follows:

1) Dr. Palenik examined #FL using state-of-the-art technology, not available at the time of Mr. Avery's trial in 2007. (621:37) (603:154) (App. 406). Dr. Palenik's examination of #FL and his findings have produced new evidence that is totally inconsistent with the State's theory that Ms. Halbach was shot in the head while lying on Mr. Avery's garage floor.
2) Dr. Palenik, using a 2016 microscope to analyze the hood latch swab and conducting a series of experiments, has offered the opinion that the swab was not used to swab the RAV-4 hood latch. (621:35).
3) John DeHaan, Ph.D. ("Dr. DeHaan"), a forensic fire expert, has conducted more experiments on human cadavers than any other fire forensic expert in the world since 2012. (615:90). Dr. DeHaan's experiments refute the State's theory that Ms. Halbach was burned in Mr. Avery's burn pit. (615:99–151) (App. 447–99).
4) Dr. Reich was able, through the use of new source testing (RSID testing), to eliminate the following rich sources of DNA from the hood latch swab: blood, semen, and saliva. (604:103–05) (App. 523–24). The circuit court never addressed the undisputed fact that Mr. Avery has demonstrated through Dr. Reich's experiments and source testing that the DNA on the hood latch was planted. There is no innocent explanation for the large quantity of DNA on the hoodlatch if blood, saliva, and semen are ruled out. The only plausible explanation is that the large quantity of DNA came from

the illegally-seized groin swabs, which Dr. Reich said would provide a comparable quantity of DNA as that found on the hood latch. (604:111-12).

Ultimately, the question is whether there is a reasonable probability that the jury, after hearing the new evidence, would have reasonable doubt of the movant's guilt. *E.g.*, *Edmunds*, 2008 WI App 33, at ¶ 18. The question has been answered about the State's theory that #FL caused Ms. Halbach's death. It did not. Therefore, Ms. Halbach's DNA was planted on #FL. Also, Ms. Halbach's body was not burned in Mr. Avery's burn pit. This question is not answered by simply weighing the evidence because a jury can find reasonable doubt even if the State's evidence is stronger. *Id*. (citing *McCallum*, 208 Wis. 2d 463). This same principle is applicable to the prejudice prong of *Strickland* and the determination of whether the State committed a *Brady* violation. *E.g.*, *Mosley v. Atchison*, 689 F.3d 838, 850 (7th Cir. 2012) (citing *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000)) (holding that the application of a preponderance of the evidence standard to analyzing prejudice under *Strickland* is improper); *Beaman v. Freesmeyer*, 776 F.3d 500 (7th Cir. 2015) (holding that the reasonable probability standard for materiality of suppressed evidence is less rigorous than a preponderance of evidence standard).

## VII. Mr. Avery raised sufficient reason as to why these issues could not have been raised in prior motions pursuant to Wis. Stats. § 974.06

In its October 3, 2017 order, the circuit court found that Mr. Avery failed to overcome the procedural bar to having his motion heard. (628:1–6) (App. 171–

76). In so ruling, the circuit court held, "There is no argument or showing of a sufficient reason as to why these issues could not have been raised in prior motions. Without such sufficient reason, these arguments are precluded from any subsequent motion. *State v. Escalona-Naranjo,* 185 Wis.2d 168, 517 N.W.2d 157 (1994)." (628:3) (App. 173).

### A. Standard of review

Whether Mr. Avery's claims are procedurally barred depends upon the proper interpretation of Wis. Stat. § 974.06, which is a question of law that this Court must review *de novo*. *State v. Lo*, 2003 WI 107, ¶ 14, 264 Wis.2d 1, 665 N.W.2d 756; *Escalona-Naranjo,* 185 Wis.2d at 175–76.

### B. Mr. Avery has demonstrated a sufficient reason for failing to raise the current claims earlier

The Wisconsin Supreme Court has articulated 2 requirements for bringing a successive ineffective assistance of counsel claim in compliance with § 974.06. *State v. Romero-Georgana*, 2014 WI 83, ¶ 48, 360 Wis. 2d 522, 849 N.W.2d 668; *Escalona-Naranjo*, 185 Wis.2d at 181. First, the defendant must show a sufficient reason for failing to raise the current claims earlier. *Romero-Georgana*, 2014 WI 83, at ¶ 48; *Escalona-Naranjo*, 185 Wis.2d at 181–82. Second, the defendant must demonstrate that the claims made now are clearly stronger than previous claims. *Romero-Georgana*, 2014 WI ¶ 46.

The circuit court overlooked current postconviction counsel's argument in Mr. Avery's motion for postconviction relief, filed on June 7, 2017, that the

ineffectiveness of prior postconviction counsel is a sufficient reason in and of itself. Prior postconviction counsel failed to hire experts, conduct a significant investigation, or review discovery in order to impeach Bobby with Bryan's statements. (603:203, at ¶ 424; 631:22–25).

Shortly after the Wisconsin Supreme Court decided *Escalona*, the Court of Appeals held that ineffective assistance of postconviction counsel may constitute a sufficient reason for not raising issues in a previous postconviction motion. *Rothering*, 205 Wis.2d 675; *State v. Aaron Allen*, 2010 WI 89, ¶ 85. The Wisconsin Supreme Court has gone so far as to note that, following *Rothering*, ineffective assistance of counsel claims are not barred by *Escalona-Naranjo*. *See Love*, 2005 WI 116, at ¶ 31, n.11 ("The court of appeals has concluded that an ineffective assistance of counsel claim is not barred by *State v. Escalona-Naranjo* . . . .") (citation omitted).

In *Balliette*, the Wisconsin Supreme Court again reaffirmed the principle set forth in *Rothering*: ineffective assistance of postconviction counsel may be a sufficient reason why claims were not raised before. *Balliette*, 2011 WI 79, at ¶ 62. In its analysis, the *Balliette* court accepted the defendant's sufficient reason (i.e., postconviction counsel was ineffective) and analyzed the merits of his ineffective assistance of counsel claims. *Id.* at ¶¶ 62–78. Thus, when a defendant alleges ineffective assistance of postconviction counsel as a sufficient reason under *Escalona* and § 974.06(4), the court should accept the proffered reason as

sufficient and analyze the merits of whether postconviction counsel's performance was, in fact, constitutionally deficient.

Here, the circuit court erred when it neglected to analyze Mr. Avery's claim of ineffective assistance of prior postconviction counsel on the merits. Because Mr. Avery alleged ineffective assistance of prior postconviction counsel as a sufficient reason, the circuit court should have weighed Mr. Avery's claims to determine if prior postconviction counsel rendered ineffective assistance. The circuit court could only find Mr. Avery was procedurally barred from raising the instant claims if prior postconviction counsel was not ineffective. Because the trial court neglected to weigh the merits of Mr. Avery's sufficient reason, Mr. Avery is entitled to relief.

### C. Mr. Avery's *pro se* motion

Whether Mr. Avery's claims are procedurally barred depends upon the proper interpretation of Wis. Stat. § 974.06, which is a question of law that this Court must review *de novo*. *Lo*, 2003 WI 107, at ¶ 14; *Escalona–Naranjo*, 185 Wis.2d at 175–76.

*The circuit court failed to acknowledge the sufficient reasons raised in Mr. Avery's pleadings*

Mr. Avery claimed in his *pro se* petition that: the trial judge was biased (533:4–5) (App. 154–55); the preliminary hearing judge should have recused himself from trial (533:5–6) (App. 155–56); the search warrants were defective because lacked seal or signature (cited wrong statute) (533:6–7) (App. 156–57);

trial counsel was ineffective regarding chain of custody for the RAV-4 (533:7) (App. 157) and for stipulating that he was a convicted felon (533:8–9) (App. 158–59) and for not having a qualified scientific expert (533:9–10) (App. 159–60); the trial court was incompetent to hear an appointed special prosecutor (533:10) (App. 160).

In its October 3, 2017 ruling, the trial court reasoned that Mr. Avery's "prior *pro se* motion filed under [§ 974.06] . . . recognize[s] significant legal issues which the court has previously ruled on." (628:3) (App. 173). This reasoning led the court to conclude that the claims raised in Mr. Avery's recent § 974.06 motion were barred because Mr. Avery could have raised them earlier. (628:3) (App. 173). The circuit court failed to acknowledge the sufficient reasons raised in the pleadings of current postconviction counsel, but unambiguously ruled that all claims Mr. Avery raised is his *pro se* motion lacked merit in its order dismissing the motion. (533; 603:217–19, at ¶¶ 487–92; 631:25–30) (App. 151–66).

The circuit court found that in Mr. Avery's *pro se* motion, "most" of the authority cited by Mr. Avery "[had] little or nothing to do with the position he [sought] to advance." (533:3) (App. 153). Further, the circuit court noted that Mr. Avery "provide[d] no factual information of any evidentiary value" that supported his claims. (533:3) (App. 153). The circuit court went on to conclude that every claim raised by Mr. Avery was "unsubstantiated," "empty and without substance," "completely meritless," "border[ing] on frivolous," "wildly speculative," and "contrary to Wisconsin's long standing law and procedures." (533:4–6, 13) (App.

154–56, 163). Mr. Avery made "extensive use of federal case law, citing and quoting from a number of federal courts of appeals and U.S. Supreme Court cases," most of which were nongermane to the claims he sought to advance. (533:3) (App. 153). Ultimately, the circuit court found that the allegations made by Mr. Avery did not warrant relief. (533:16) (App. 166).

Contrary to the circuit court's October 3, 2017 opinion, current postconviction counsel's motion alleged sufficient reasons why the current claims were not raised in the *pro se* motion. (603:217–19). In his second motion for postconviction relief, Mr. Avery submitted his lack of knowledge of factual and legal bases, cognitive deficiency, indigence, and incarceration, collectively, as a sufficient reason for not raising the claims in his *pro se* motions. (603:217–18). "A defendant's unawareness of the factual and/or legal basis for his claims may constitute a sufficient reason for his failure to raise those claims." (603:217). *See, Aaron Allen*, 2010 WI 89, at ¶¶ 44, 81 (noting a defendant's unawareness of the legal basis of his claim may constitute a sufficient reason in satisfaction of § 974.06); *State v. Howard*, 211 Wis. 2d 269, 287–88, 564 N.W.2d 753 (1997); *State ex rel. Kyles v. Pollard*, 2014 WI 38, ¶ 57, 354 Wis. 2d 626, 649, 847 N.W.2d 805. The circuit court did not analyze whether these collective circumstances constituted a sufficient reason. In *Allen*, the Wisconsin Supreme Court, noting the procedural hurdles imposed by *Escalona-Naranjo*, stated that a "defendant could raise an issue 'which for *sufficient reason*' was not raised or was inadequately raised in a prior motion." *Allen*, 2010 WI 89, at ¶ 26 (*quoting*

*Escalona-Naranjo*, 185 Wis.2d at 184). The Wisconsin Supreme Court then went on to entertain Allen's argument that he had sufficient reason for raising his current claims because he was unaware of his claims at the time. *Allen*, 2010 WI 89, at ¶¶ 43–52.

Mr. Avery wrote to dozens of attorneys—all of whom rejected his requests for representation—following the denial of his direct appeal. Mr. Avery also wrote to laboratories that would not respond unless he had an attorney. (604:28–29) (App. 518–19).

Mr. Avery, who is learning disabled, simply lacks the legal acumen and financial resources necessary to advance an even arguably meritorious claim in a postconviction motion, let alone the claims raised based on countless hours of investigation and consultation with experts. (603:218). As a result, Mr. Avery has sufficient reason for not including his current claim based on trial counsel's failure to hire experts and to investigate and present evidence about the alternative suspect in his original postconviction motion.

## VIII. The circuit court abused its discretion in denying Mr. Avery's motion to reconsider and his three supplements to said motion, which included new evidence developed after his original filing on June 7, 2017.

### A. Standard of review

This Court reviews the circuit court's ruling on a motion for reconsideration under the erroneous exercise of discretion standard. *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 275

Wis.2d 397, 403–04, 685 N.W.2d 853 (Ct. App. 2004). An appellate court reviews "the [circuit] court's factual findings regarding what occurred under the clearly erroneous standard but will independently consider whether those facts fulfill the legal standard." *Id*. at 403.

### B. Mr. Avery's motion for reconsideration and its supplements presented new evidence not ruled upon in the court's October 3, 2017 order

On October 23, 2017, Mr. Avery filed a motion for reconsideration based on manifest errors of law and the development of new evidence. (631:1–54). Mr. Avery subsequently supplemented and amended the motion to reflect the discovery of additional evidence. On November 28, 2017, the circuit court entered an order denying Mr. Avery's motions to reconsider. (640:1–5).

Mr. Avery's motions for reconsideration were properly filed. Wis. Stats. § 805.17(3) permits a party, in an action tried to the court, to move for reconsideration of the court's findings, conclusions of law, and judgment upon motion of a party made not later than 20 days after entry of judgment. Although Wis. Stat. § 805.17 is a rule governing civil actions, rules of practice in civil actions apply in all criminal proceedings "unless the context of a rule manifestly requires a different conclusion." *State v. Hayes*, 2004 WI 80, ¶ 20, 273 Wis.2d 1, 681 N.W.2d 203 (citing Wis. Stat. § 972.11).

Wis. Stat. § 974.06 vests a circuit court with the authority to entertain a motion alleging that a prisoner's sentence has been imposed in violation of the constitution, grant a hearing, determine the issues, and make findings of fact and

conclusions of law. Wis. Stat. §§ 974.06(1), 974.06(3)(c) and (d). Moreover, proceedings under Wis. Stats. § 974.06 "shall be considered civil in nature." Wis. Stat. § 974.06(6). Therefore, the civil rule allowing a party to file a motion to reconsider a court's judgment applies to the circuit court's denial of a motion for postconviction relief pursuant to Wis. Stat. § 974.06.

Furthermore, the common law vests a court with the inherent authority to correct an error by reconsideration. *Fritsche v. Ford Motor Credit Co.*, 171 Wis.2d 280, 294, 491 N.W.2d 119 (Ct. App. 1992) ("[M]otions for reconsideration are common in Wisconsin's trial courts and have become part of our common law."). *See also, State v. Brockett*, 2002 WI App 115, ¶¶ 11–16, 254 Wis.2d 817 (holding that the trial court properly ruled on State's motion to reconsider trial court's order granting postconviction relief). Thus, even if the circuit court did not have the authority to rule on Mr. Avery's motion to reconsider pursuant to Wis. Stats. § 805.17(3), it did have the discretion to consider his motion under the common law.

An order denying a motion for reconsideration is not appealable unless the motion raised issues that were not resolved by the order sought to be reconsidered. *State v. Edwards*, 2003 WI 68, ¶ 8, 262 Wis.2d 448, 665 N.W.2d 136. "In other words, an 'order is not appealable where . . . the only issues raised by the motion were disposed of by the original judgment or order.'" *Id.* (quoting *Ver Hagen v. Gibbons*, 55 Wis.2d 21, 25, 197 N.W.2d 752 (1972)). The "new issues" test for

determining whether an order denying reconsideration is appealable is to be applied liberally. *Id*. at ¶ 12.

Here, Mr. Avery's motion for reconsideration raised "new issues" that were not disposed of by the circuit court in its original order denying him relief. "To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact." *Koepsell's*, 275 Wis. 2d at 416 (citation omitted).

*New evidence presented in the Motion for Reconsideration and its supplements*

Mr. Avery's Motion for Reconsideration and its supplements raised the following new evidence:

1. Affidavits from trial defense counsel admitting ineffectiveness in hiring blood and ballistics experts. (*Supra* at p. 68-73)
2. Affidavit from trial defense counsel's investigator, Mr. Baetz, that they were ineffective in impeaching Bobby with the testimony of Bryan that he had told the police Bobby witnessed Ms. Halbach leaving the Avery property on October 31, 2005, contrary to Bobby's trial testimony. (*Supra* at p. 84-85).
3. *Brady* violations, including the following:
    a. Mr. Rahmlow's affidavit that he saw the RAV-4 away from the Avery property on November 3 and reported it to Sgt. Colborn, who never disclosed a report to trial defense counsel. (*Supra* at p. 41-43).

b. Heitl (Coakley) report, which was not turned over to trial defense counsel. (*Supra* at p. 48-49).

c. Experiment conducted demonstrating that Bobby was at the same location as Halbach when she received her last call at 2:41 p.m. (631:43–46).

4. New forensic examination by Mr. Hunt (*Supra* at p. 56-59) of the 7 DVDs from the Dassey-Janda computer:

a. Reveals images of Ms. Halbach and Mr. Avery.

b. Reveals violent pornographic images on Dassey-Janda computer.

c. Mr. Hunt determined that the internet was accessed on October 31, 2005, when only Bobby was home at 6:05 a.m., 6:28 a.m., 6:31 a.m., 7:00 a.m., 9:33 a.m., 10:09 a.m., 1:08 p.m., and 1:51 p.m. This impeaches Bobby's trial testimony that he was asleep from 6:30 a.m. to 2:30 p.m.

d. New computer forensic examination reveals deletions on the Dassey-Janda computer.

e. Brad Dassey's affidavit that Barb hired someone to reformat the Dassey-Janda computer shortly before it was seized by authorities. She wanted to know if reformatting "would remove what was on the computer." (633:36–37).

5. New recorded telephone conversation on October 24, 2017, between Mr. Avery and Barb and Scott Tadych, in which they admit that they knew Ms. Halbach left the Avery property on 10/30/17. (632:3-5)
6. Barb's Facebook statement on October 30, 2017, that Bobby had admitted to her that he did not see Ms. Halbach walking towards Steven's trailer, as he testified to at trial. (632:5-6).
7. Blaine has provided an affidavit to current postconviction counsel, admitting that he lied at trial about the fire in Mr. Avery's burn barrel. (737:165) (App. 1093).

None of these issues were addressed by the circuit court in its original order to dismiss Mr. Avery's motion. Nor could they, given that all of them were based on the discovery of new evidence that was either withheld from Mr. Avery or, through no fault of his own, was not in Mr. Avery's possession at the time he filed his prior postconviction motions.

## IX. The circuit court abused its discretion in ignoring the subsequent briefs submitted by the parties incident to the motion to supplement.

On June 7, 2018, the Appellate Court ordered that "this appeal is remanded forthwith to the circuit court to permit Steven A. Avery to pursue a supplemental postconviction motion in connection with Avery's receipt of previously withheld discovery **or other new information**." (729:3) (emphasis added). The circuit court ignored this Court's specific order to allow the inclusion of new information in the Motion to Supplement. On September 6, 2018, the circuit court ruled:

> No where in the very specific orders of the Court of Appeals did the court allow for a reply brief by the state or a response by the defendant. Because the Court of Appeals was so detailed in its instructions, the court did not consider the subsequent briefs submitted by the parties after the defendant's court ordered filing. This court followed the order of the Court of Appeals and only considered the initial brief of the defendant.

(761:2).

Mr. Avery filed a Motion to Compel for production of the examination of the Dassey-Janda computer that was was performed over an 8-month time period in 2017–18. (735:1–37). The circuit court never ruled on Mr. Avery's Motion to Compel. Current postconviction counsel obtained an affidavit from Barb on August 2, 2018, wherein she described Investigator Dedering telling her, "[Y]ou should not give the computer to Kathleen Zellner." (747:81) (App. 1106). The circuit court never ruled on current postconviction counsel's motion to compel, or whether the computer would be tendered to current postconviction counsel. Barb voluntarily turned the computer over to current postconviction counsel, and, after a careful forensic examination of the computer data, Mr. Hunt concluded that there were "massive image deletions that would render any new forensic examination meaningless." (760:1). Current postconviction counsel's computer forensic expert was unable to determine when the massive deletions occurred, leaving open the possibility that law enforcement was responsible for the deletions. Because the circuit court denied a hearing, the issue of the deletions remains unresolved.

## X. The circuit court erred in denying Mr. Avery's supplemental motion for postconviction relief pursuant to Wis. Stat. § 974.06 Concerning the Discovery of Human Bones in the Manitowoc County Gravel Pit Before Trial.

It is well settled that this Court reviews the denial of a Wis. Stat. § 974.06 motion using a mixed standard of review:

> First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review *de novo*. If the motion raises such facts, the circuit court must hold an evidentiary hearing. . . . We review a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard.

*State v. Allen*, 2004 WI 106, ¶ 9 (citations omitted).

On February 25, 2019, the Appellate Court granted postconviction counsel's motion to supplement the record on appeal with an undisclosed police report and allowed current postconviction counsel to file a supplemental postconviction motion. The Appellate Court further remanded the appeal to the circuit court to "conduct any proceedings necessary to address the claims raised in the supplemental postconviction motion, and [to] enter an order containing its findings and conclusions." (780:1-4). On August 9, 2019, the circuit court entered an order (806:1-13), without conducting any further proceedings, denying Mr. Avery's supplemental § 974.06 motion.

Mr. Avery's motion alleged claims for relief in connection with the State's violation of Wis. Stat. § 968.205, the evidence preservation statute, and the violation of his due process right to the preservation of evidence as protected by *Youngblood v. Arizona*. (775:1-32). First, Mr. Avery's § 974.06 motion, alleged sufficient material facts that, if true, would entitle Mr. Avery to relief. This court

reviews Mr. Avery's claim of error *de novo. Allen,* 2004 WI 106, ¶ 9. Mr. Avery is entitled to an evidentiary hearing on both his Wis. Stat. § 968.205 and constitutional rights claims because evidence establishing that human remains were recovered from a location other than Mr. Avery's property refutes the State's theory that all of the human remains were recovered from a location under Mr. Avery's exclusive control. Indeed, if Ms. Halbach's remains were actually in the Gravel Pit, then the defense would have been able to substantiate—and not just speculate—about an alternative theory that someone other than Mr. Avery murdered Ms. Halbach and moved her bones to Mr. Avery's burn pit to frame him. In order to successfully convict Mr. Avery, the State presented a false forensic story to the jury, which claimed that the bones in the Gravel Pit were "not evidence" because they were not human and, therefore, could not have been Ms. Halbach's.

The issue on remand to the circuit court was whether the State violated *Youngblood v. Arizona* and Wis. Stat. § 968.205 when it returned the human bones to the Halbach family in 2011, without giving notice to Mr. Avery or his counsel. Mr. Avery's supplemental § 974.06 motion alleged material facts sufficient to establish a violation of the Wisconsin evidence preservation statute, Wis. Stat. § 968.205, and *Youngblood.*

Because § 968.205 does not provide a remedy for convicted persons in the event of a violation, fashioning a remedy is left to the courts—an action Wisconsin courts have yet to take. Mr. Avery's supplemental § 968.205 motion contained

sufficient material facts for the circuit court to fashion a remedy for such evidence preservation violations, controlled by United States Supreme Court precedent addressing evidence preservation violations. *See, e.g.*, *California v. Trombetta*, 467 U.S. 479, 488–89 (1984) and *Youngblood v. Arizona*, 488 U.S. 51, 56–58 (1988). Taken together, *Trombetta* and *Youngblood* comprise the line of constitutional jurisprudence that outlines the extent of the State's duty to preserve evidence. *Youngblood*, 488 U.S. at 56–58; *Trombetta*, 467 U.S. at 488–90. While the *Trombetta* test focuses on the probative value of the destroyed evidence and whether the evidence possessed exculpatory value that was apparent before its destruction (467 U.S. at 488–89), the *Youngblood* test examines the government's role in the circumstances that led to the destruction of the evidence. 488 U.S. at 56–58. If a criminal defendant can satisfy either test, then a court will rule the destruction of evidence was a violation of due process and reverse the defendant's conviction. *Youngblood*, 488 U.S. at 54; *Trombetta*, 467 U.S. at 484.

The due process clause of the Fourteenth Amendment to the United States Constitution imposes a duty on the State to preserve exculpatory evidence. *State v. Greenwold*, 181 Wis. 2d 881, 885 (Ct. App. 1994) (*Greenwold I*). The State's failure to preserve evidence violates a defendant's due process rights if police: (1) failed to preserve evidence that is apparently exculpatory; or (2) acted in bad faith by failing to preserve evidence that is potentially exculpatory. *State v. Greenwold*, 189 Wis. 2d 59, 67 (Ct. App. 1994) (*Greenwold II*).

The circuit court mistakenly found that the evidence destroyed by the State through the CCSD and Prosecutors Gahn and Fallon was not material because it was not human. The circuit court's finding reveals that failure of the court to acknowledge and understand the Eisenberg reports provided to the court by Mr. Avery.

***(a) Materiality***

The applicability of either *Trombetta* or *Youngblood* depends upon the materiality of the evidence that was lost or destroyed. A hurdle to applying these tests is the difficulty of definitively knowing the material value of evidence that no longer exists. However, in the context of addressing the materiality of evidence lost or destroyed in violation of Wis. Stat. § 968.205, the Wisconsin legislature has already resolved that problem. Especially when considered together with § 974.07, the DNA evidence preservation statute demonstrates the Wisconsin legislature's recognition of the importance of postconviction DNA testing. These statutes taken together provide for the preservation of biological evidence and, in many instances, subsequent DNA analysis. The codified right to DNA preservation and testing shows the legislative intent to ensure that DNA testing of biological evidence plays "a significant role in the suspect's defense," and efforts to obtain postconviction relief. *Trombetta*, 467 U.S. at 488–89.

Therefore, the Wisconsin legislature, through the DNA preservation statute, has placed preserved biological evidence in the class of evidence the United States Supreme Court deemed material as defined in *Trombetta* and *Youngblood*.

***(b) Potentially exculpatory evidence preserved under Wis. Stat. § 968.205***

Second, following from this presumption of materiality, the DNA evidence preservation statutes further presume that, in every case, biological evidence collected in the course of a criminal investigation is at least "potentially exculpatory" as defined in *Greenwold II*.

In the context of DNA evidence, "apparently exculpatory" evidence includes instances where results from testing—or retesting—of biological evidence that excluded the petitioner would exonerate him or her of the crime of conviction. *See* Nat'l Comm'n on the Future of DNA Evidence, U.S. Dep't of Justice, Postconviction DNA Testing: Recommendations for Handling Requests 4 (1999).

Similarly, "potentially exculpatory" DNA evidence refers to evidence in cases where "if . . . subjected to DNA testing or retesting, exclusionary results would support the petitioner's claim of innocence." *Id.* at 5. In line with the Supreme Court's reasoning in *Youngblood*, this category includes evidence that was "simply an avenue of investigation that might have led in any number of directions," and evidence about which "no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." 488 U.S. at 57.

These categorical requirements for "potentially exculpatory" evidence necessarily apply to biological evidence covered by the DNA evidence

preservation statute, because preserved evidence test results allow "reasonable persons [to] disagree as to whether the results [of DNA testing] rule out the possibility of guilt or raise a reasonable doubt of guilt." *Youngblood*, 488 U.S. at 57. Therefore, evidence covered under the biological evidence preservation statute must be deemed at least "potentially exculpatory" and the loss or destruction of such evidence triggers, at minimum, the *Youngblood* due process analysis. *Youngblood*, 488 U.S. at 58; *Greenwold II*, 189 Wis. 2d at 67–68.

***(c) The DNA evidence preservation statute presumes that every violation constitutes "bad faith."***

The *Youngblood* Court reasoned that law enforcement actions suggesting "bad faith" arise when the "police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." 488 U.S. at 58. This consideration, in turn, hinges "on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Id*. at 57. In these cases, "bad faith" exists when the conduct of the police is outside the scope of normal practice. *Id.* at 56–58.

The *Youngblood* Court's definition of "bad faith" takes for granted that there are times when the police will not know whether evidence was material before its loss or destruction. The DNA preservation statute eliminates this assumption by creating an affirmative duty to preserve all biological evidence taken from the crime scene. Therefore, law enforcement agencies are on notice that biological evidence is deemed important to the successful administration of

criminal justice and may not claim ignorance that the destroyed evidence was at least "potentially exculpatory." *Id.* 56–58.

Wis. Stat. § 968.205 imposes certain duties upon law enforcement agencies. *See* § 968.205(2). At the most basic level, the State bears a duty to preserve all biological evidence collected during the course of an investigation that leads to a conviction. Additionally, the statute sets forth the steps the State must take before lawfully destroying such evidence in its possession. § 968.205(3)(a), (3)(b), (4). Because a violation of the DNA preservation statute means the State did not abide by either the requirements for preservation or the proper destruction of the evidence as required by law, such conduct constitutes "bad faith."

*Youngblood's "potentially exculpatory" combined with "bad faith" requirement is met*

Under the *Youngblood* test, courts would examine whether the evidence was "potentially exculpatory," and, if so, whether the police acted in "bad faith" when they destroyed the evidence. *Id*. In light of the presumptions created by the DNA evidence preservation statute, the trial Stipulation, the pre-trial FBI examination, and the April 4, 2007 order, mandates that the evidence be considered "potentially exculpatory."

As set forth above, the presence of "bad faith" should be presumed every time the Wis. Stat § 968.205 DNA evidence preservation statute is violated. Here, the failure to give notice to Mr. Avery and his attorneys violated the statute and constituted "bad faith," as did returning the Gravel Pit bones to the Halbach family

in violation of Wis. Stat § 968.205 and the April 4, 2007 trial court order. The State cannot credibly argue that it returned animal bones to the Halbach family for burial or cremation.

Based on the foregoing, Mr. Avery set forth sufficient material facts pertaining to the destruction of apparently exculpatory or potentially exculpatory human bone fragments to warrant an evidentiary hearing. Despite the circuit court's erroneous ruling to the contrary, Mr. Avery is entitled to such a hearing on his claims because the material facts he alleged in his supplemental § 974.06 motion, (*i.e.*, who, what, when, where, why, and how) are sufficient to show that he is entitled to relief. *See Allen*, 2004 WI 106, ¶ 23.

Second, the circuit court erred when it found that Mr. Avery's motion did not, on its face, state material facts that, if true, would entitle him to relief. This Court reviews the circuit court's decision to deny Mr. Avery's supplemental § 974.06 motion without a hearing under the deferential erroneous exercise of discretion standard. *Allen*, 2004 WI 106, ¶ 9. The circuit court failed to analyze the sufficiency of the material facts he alleged in his motion. (775:1-32).

Instead, the circuit court denied Mr. Avery's claims by blatantly misstating the evidence in the record. Specifically, the circuit court erred in concluding that the Manitowoc County Gravel Pit bones were non-human, when, in fact, the Manitowoc Quarry bones were labeled as "human" by Dr. Eisenberg in her reports describing property tag numbers #7411 ("Calcine human bone frags"), #7412 (Human and non-human bone [...] 5 of 13 burned/calcined with cut edges; most

bone fragments are all cut bone fragments are human"), #7413 ("one burned human frag[ment]"), #7414 ("Burned/calcined human bone fragments"), #7416 ("Human . . . bone fragments; human is calcined with one cut edge"), and #7419 ("Cut/burned human bone"). (772:16-18). The circuit court appears to have ignored the key report of Dr. Eisenberg, which is clearly referenced in paragraph 14 of Mr. Avery's 968.205/*Youngblood* motion (775:6). As stated in paragraph 14 of Mr. Avery's motion, Dr. Eisenberg's critical report is attached to Mr. Avery's December 17, 2018 Motion. (772:16-28).

Inexplicably, and although Mr. Avery supplied all of the relevant property inventory item numbers for the Gravel Pit bones relevant to his claim, the circuit court reviewed Dr. Eisenberg's trial testimony, which only addressed #8675 and dismissed Mr. Avery's claims based solely on that testimony. Mr. Avery has never contended and does not contend now that #8675 contains bones determined by Dr. Eisenberg to be human; Dr. Eisenberg testified at trial, consistently with her forensic anthropology report, that #8675 contained only "suspected" human pelvic bones. (707:11). As noted above, Mr. Avery had an agreement with the State to test #8675 as part of the agreement reached between the parties in September 18. 2017.

By completely ignoring the relevant Eisenberg report, the circuit court abused its discretion by concluding that Dr. Eisenberg was testifying about <u>all</u> the Gravel Pit bones. Dr. Eisenberg was only referring to the pelvic bones that were labeled #8675. (707:11). At no time did Dr. Eisenberg testify at trial about her

other report which identified numerous Gravel Pit bones as being human. (772:16-28). All of these bones were returned to the Halbach family for burial or cremation.

Because the circuit court's analysis of Mr. Avery's claim related to Dr. Eisenberg's findings was so deeply flawed, the trial court erroneously exercised its discretion. If the circuit court had granted an evidentiary hearing, the single but fatal mistake would have never occurred. Therefore, the circuit court's order denying Mr. Avery's supplemental § 974.06 motion without an evidentiary hearing must be reversed.

## CONCLUSION

For the reasons stated herein, Steven Avery respectfully requests that this Court grant him one of the following alternative remedies: 1) reverse the Orders Denying Postconviction Relief and remand for the State to file a response to the Motion for Postconviction Relief, and/or grant an evidentiary hearing; 2) reverse the judgments of conviction and the orders denying Postconviction Relief and remand for a new trial.

Dates this 11th day of October, 2019.

Respectfully submitted,

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## CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief contains 32,241 words as permitted by an Order of this Court dated September 18, 2019.

Dated this 11th day of October, 2019.

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## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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.

Dated this 11th day of October, 2019

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