STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2017AP2288

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN A. AVERY,

Defendant-Appellant.

ON APPEAL FROM ORDERS DENYING MULTIPLE MOTIONS FOR POSTCONVICTION RELIEF ENTERED IN THE MANITOWOC COUNTY CIRCUIT COURT, THE HONORABLE ANGELA W. SUTKIEWICZ, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED[1]

1. Did the circuit court erroneously exercise its discretion[2] in denying Steven A. Avery's June 2017 Wis. Stat.

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[1] The State has reorganized and restated the issues to clearly address the only question before this Court: whether the circuit court erroneously exercised its discretion when it denied each of Avery's five separate motions without a hearing. Avery has presented his claims to this Court as if he presented all of his arguments to the circuit court at the same time, and as if the circuit court rejected them all on the merits. That is not what happened.

Avery filed his second section 974.06 motion in June 2017, and the circuit court denied it without a hearing on October 3, 2017. (603; 628.) Avery then filed a motion to vacate judgment on October 6, 2017, seeking to vacate the court's order so he could amend his June 2017 motion. Before the court ruled on that motion, Avery filed a motion for reconsideration and two supplements to it, raising a host of new arguments. (629–636.) The circuit court denied Avery's motion to vacate judgment and motion for reconsideration in a single order, finding no cause to vacate its judgment and finding the new claims and arguments raised in Avery's motion for reconsideration procedurally barred. (640.) Avery filed another motion on July 6, 2018, alleging a *Brady* violation about the State's examination of the Dassey computer, and another on March 11, 2019, alleging a *Youngblood* violation. (736–741; 771–800.) These were denied without hearings on September 6, 2018, and August 8, 2019, respectively. (761; 805.)

Accordingly, whether the circuit court erroneously exercised its discretion each time when it denied the respective motion in front of it is the only question properly before this Court. That question cannot be coherently addressed in the way Avery has organized his brief, with arguments that were raised in different motions and that were denied on different grounds lumped together topically. Further, to the extent that Avery has addressed his separate motions separately, he has done so non-chronologically. The State has therefore reorganized the issues.

[2] The Wisconsin Supreme Court abandoned the term "*abuse of discretion*" in favor of "*erroneous exercise of discretion*" over two decades ago. *City of Brookfield v. Milwaukee Metropolitan Sewerage Dist.*, 171 Wis. 2d 400, 423, 491 N.W.2d 484 (1992).

§ 974.06 motion, which was his second section 974.06 motion, without holding an evidentiary hearing?

The circuit court concluded that Avery's motion was insufficiently pled, and that he did not show a sufficient reason for failing to raise these claims on direct appeal or in his first section 974.06 motion. It further concluded that none of Avery's alleged newly discovered evidence raised a reasonable probability of a different result at a new trial if admitted.

This Court should affirm the circuit court.

2. Was the circuit court required to allow Avery to pursue his section 974.06 motion piecemeal for any of the following reasons: (1) because the parties had reached an agreement about how Avery would proceed with scientific testing; (2) because Avery planned to supplement his motion, but did not alert or seek approval to do so from the court, or (3) because of the circuit court's 2007 preservation order?

The circuit court was presented only with the first two of these arguments, and noted that Avery never requested that the court withhold decision on his section 974.06 motion, nor informed the court that he planned to supplement the motion, until after a final ruling denying his claims. It determined that Avery could not amend a motion that was filed without reservation "after [he] receives an adverse ruling."

This Court should affirm the circuit court.

3. Did the circuit court erroneously exercise its discretion when it denied Avery's motion for reconsideration and multiple supplements to it without holding an evidentiary hearing?

The circuit court noted that Avery mischaracterized as "new evidence" what were really new claims, and he did not set forth a sufficient reason why these many claims could not

have been raised in a single section 974.06 motion, nor did he give a sufficient reason for filing his June 2017 motion when he knew his investigation was incomplete and that he planned on raising additional claims. It denied the claims raised in the motion and supplements as procedurally barred.

This Court should affirm the circuit court.

4. Did the circuit court erroneously exercise its discretion in denying, without a hearing, Avery's motion alleging that the State violated *Brady v. Maryland* by failing to supply the defense with a CD containing material Detective Michael Velie copied from the Dassey hard drive, and Avery's attendant ineffective assistance of counsel claim?

The circuit court found that the State turned over all of the evidence to the defense, and the defense simply failed to assign it any significance and pursue it. It further determined that Avery's ineffective assistance claim was conclusory and undeveloped.

This Court should affirm the circuit court.

5. Did the circuit court erroneously exercise its discretion in denying, without a hearing, Avery's motion alleging that the State violated Wis. Stat. § 968.205 and *Arizona v. Youngblood* by releasing portions of the bone fragments collected in this case to the victim's family?

The circuit court found that, though the State failed to abide by the notice provisions contained in the statute, it had not violated the substantive subsections, and that the material returned was neither apparently nor potentially exculpatory. Accordingly, Avery failed to allege sufficient facts showing that the State violated either the statute or his constitutional rights.

This Court should affirm the circuit court.

6. Does this Court lack jurisdiction to review Avery's motion to compel postconviction discovery?

The circuit court never ruled on this motion. Avery forfeited any complaints about this motion by failing to ask the circuit court to rule on it before filing his appellate brief, which this Court lacks jurisdiction to review in any event because there is no written order denying it.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not believe that oral argument or publication are warranted. This case involves only the application of well-settled law on the procedural bar and postconviction pleading standard to the facts, which can be adequately addressed on briefs.

INTRODUCTION

Avery has embarked upon a significantly different venture than this appeal presents. He seems to erroneously believe that he is appealing the jury's determination of guilt. He further seems to believe, also erroneously, that if he can identify any conceivable alternate theory of the crime, he has "disproven" the State's case against him and "proven" the existence of the constitutional violations he alleged, no matter how insufficiently-supported, speculative, inconsistent, far-fetched, or belatedly-raised his argument is. Accordingly, the bulk of his brief is dedicated to relitigating his trial defense—though he cannot seem to settle on any particular theory.

But, as he did in the circuit court, Avery has all but ignored the actual issue at the heart of this appeal: the procedural posture of his case.

This case is before this Court on appeal of the circuit court's orders denying, without hearings, Avery's second–through–sixth motions attempting to collaterally attack his conviction. These motions were denied without hearings on the grounds that they were procedurally barred, insufficiently

pled, or that the record conclusively demonstrated Avery was due no relief.

Accordingly, the question on appeal is not whether Avery is guilty of killing Teresa Halbach. That question was for the jury, which many years ago answered yes, beyond a reasonable doubt. Nor is the question on appeal whether Avery's latest counsel can construct a different trial defense, find new ways to attack the trial evidence, or identify issues that have not been raised previously.

The only question before this Court in this appeal is whether any of Avery's motions entitled him to an evidentiary hearing. The answer to that question is no.

Though Avery made a litany of allegations across his many motions, three critical things were absent from his forests of paper: sufficient reasons for failing to raise all his postconviction claims at the same time, sufficient material facts of record to support his allegations, and any developed argument applying the law to explain why the facts of record led to the legal conclusions Avery claimed. It is too well-settled for argument that a circuit court has discretion to deny insufficient motions such as Avery's without a hearing.

Avery has now glossed over his piecemeal litigation and the deficiencies in his motions by simply rearguing the merits of his claims in his appellate brief, without any reference to how or when he presented them to the circuit court. But on review of a circuit court's decision to deny a postconviction motion without a hearing this Court looks only to the sufficiency of allegations contained in the four corners of the motion filed in the circuit court. And Avery has fallen far short of showing that any of his motions were sufficient to entitle him to a hearing—indeed, he has almost entirely failed to address the issue, despite it being his burden and the only issue on appeal.

The circuit court appropriately exercised its discretion in denying each of Avery's motions without a hearing, and Avery has failed to show otherwise. This Court should affirm the circuit court.

STATEMENT OF THE FACTS

Pursuant to Wis. Stat. § (Rule) 809.19(3)(a)2., as Respondent the State opts to omit a statement of the facts. Pertinent facts will be provided in the argument section.

FUNDAMENTAL PRINCIPLES OF POSTCONVICTION REVIEW

A. Criminal defendants are required to raise all postconviction claims at the same time, absent a sufficient reason for failing to do so.

"We need finality in our litigation." *State v. Escalona–Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994). Accordingly, after the time for a direct appeal has passed, a defendant's ability to attack a conviction or sentence is limited. Jurisdictional or constitutional challenges to a conviction or sentence may be brought pursuant to Wis. Stat. § 974.06(1). But, Wis. Stat. § 974.06(4) bars successive postconviction litigation absent a "sufficient reason" for not raising any issue advanced in a later postconviction motion on direct appeal or in an earlier motion. *State v. Lo*, 2003 WI 107, ¶¶ 17–20, 264 Wis. 2d 1, 665 N.W.2d 756. "Successive, and often reformulated, claims clog the court system and waste judicial resources." *State ex rel. Macemon v. Christie*, 216 Wis. 2d 337, 343, 576 N.W.2d 84 (Ct. App. 1998). Thus, "the statutorily mandated review process" under § 974.06(4) requires that all of a defendant's claims for postconviction relief be "consolidated into one motion *or* appeal." *Id.* at 344; *Lo*, 264 Wis. 2d 1, ¶ 44.

In other words, convicted defendants are not entitled to pursue an endless succession of postconviction remedies: "Successive motions and appeals, which all could have been brought at the same time, run counter to the design and purpose of the legislation." *Escalona-Naranjo*, 185 Wis. 2d at 185.

B. To warrant a hearing, motions must contain sufficient material facts that would warrant relief, if true, and the record cannot conclusively demonstrate otherwise.

"To move beyond the initial prerequisites of Wis. Stat. § 974.06(4) and *Escalona-Naranjo*, and to adequately raise a claim for relief, a defendant must allege 'sufficient material facts—*e.g.*, who, what, where, when, why, and how—that, if true, would entitle the defendant to the relief he seeks.'" *State v. Romero-Georgana*, 2014 WI 83, ¶ 37, 360 Wis. 2d 522, 849 N.W.2d 668 (citing *State v. (John) Allen*, 2004 WI 106, ¶ 23, 274 Wis. 2d 568, 682 N.W.2d 433). Conclusory statements that do not contain these key facts are insufficient to entitle the defendant to a hearing. *John Allen*, 274 Wis. 2d 568, ¶ 12.

The sufficiency of the allegations in the motion, however, is not the end of the inquiry. "[A] circuit court has the discretion to deny a defendant's motion—even a properly pled motion . . . without holding an evidentiary hearing if the record conclusively demonstrates that the defendant is not entitled to relief." *State v. Sulla*, 2016 WI 46, ¶ 30, 369 Wis. 2d 225, 880 N.W.2d 659.

C. Standard of review.

"This court will uphold the circuit court's findings of fact unless they are clearly erroneous." *State v. Thiel*, 2003 WI 111, ¶ 21, 264 Wis. 2d 571, 665 N.W.2d 305. A circuit court's factual findings are clearly erroneous only if they have no

support in the record. *Schreiber v. Physicians Ins. Co. of Wis.*, 223 Wis. 2d 417, 426, 588 N.W.2d 26 (1999).

Whether claims are barred by Wis. Stat. § 974.06(4) and *Escalona-Naranjo* is a question of law this Court reviews de novo. *State v. Tolefree*, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). Likewise, "[w]hether a defendant's [postconviction motion] 'on its face alleges facts which would entitle the defendant to relief' and whether the record conclusively demonstrates that the defendant is entitled to no relief' are questions of law that [an appellate court] review[s] de novo." *Sulla*, 369 Wis. 2d 225, ¶ 23 (citation omitted).

This Court reviews "only the allegations contained in the four corners of [the defendant's] motion, and not any additional allegations that are contained in [the defendant's] brief." *John Allen*, 274 Wis. 2d 568, ¶ 27. If the defendant's motion fails to adequately allege a sufficient reason to overcome *Escalona-Naranjo*, does not contain the requisite material facts, "presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," then this Court reviews the circuit court's decision to grant or deny a hearing "under the deferential erroneous exercise of discretion standard." *Id.* ¶ 9; *see also State v. Balliette*, 2011 WI 79, ¶ 18, 336 Wis. 2d 358, 805 N.W.2d 334.

"A court exercises discretion when it considers the facts of record and reasons its way to a rational, legally sound conclusion." *State v. Jeske*, 197 Wis. 2d 905, 912, 541 N.W.2d 225 (Ct. App. 1995). "The court's discretionary determinations are not tested by some subjective standard, or even by [this Court's] own sense of what might be a 'right' or 'wrong' decision in the case, but rather will stand unless it can be said that no reasonable judge, acting on the same facts and underlying law, could reach the same conclusion." *Id.* at 913.

Additionally, "[i]t is well-established that if a trial court reaches the proper result for the wrong reason, it will be affirmed." *State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985) *superseded by statute on other grounds*.

ARGUMENT

I. The circuit court properly denied Avery's June 7, 2017 motion without holding an evidentiary hearing.

Allegations in Avery's June 2017 Motion

As relevant here, Avery raised the following claims in his June 27, 2017 section 974.06 motion:[3]

1. Avery's trial attorneys, Dean Strang and Jerome Buting, were ineffective for failing to obtain six additional expert witnesses in blood spatter patterns, trace evidence examination, forensic anthropology, burned remains, DNA testing, and "police procedure."[4] (603:61–114.)
2. Trial counsels were ineffective for failing to conduct various "experiments." (603:71–107.)
3. That "only one person," Ryan Hillegas, "meets the requirements of *Denny* as a third party suspect." (603:122–36 (capitalization omitted).)

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[3] Avery raised several claims in each of his motions that he has not pursued on appeal. (*See, e.g.,* 603:145–54, 162–85.) By failing to brief those issues Avery has abandoned them, and the State will not discuss them further. *A.O. Smith Corp. v. Allstate Ins. Companies*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998).

[4] Avery relied on other experts in this motion but either never made any argument that Strang and Buting were ineffective for failing to hire them, or has failed to pursue that argument on appeal. (*See, e.g.*, 603:31, 119–20, 128.)

4. "Trial defense counsel failed to properly investigate a variety of topics" about several evidentiary items. (603:136–47 (capitalization omitted).)

5. The State withheld, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963): (1) a CD of a voicemail Teresa Halbach left on the Zipperer family's answering machine the day of her murder, stating that Ms. Halbach was having trouble finding their house; (2) "unedited flyover video" from an air search of the Avery property; and (3) investigators' purported "[k]nowledge" that Teresa Halbach's Toyota RAV-4 was driven onto Joshua Radandt's property, because Radandt provided an affidavit stating that some unknown person from the Department of Justice told him they "believed" the RAV-4 was driven onto the Avery property. (603:149–53.)

6. That Avery had newly discovered evidence establishing that: (1) one of the damaged bullets introduced at trial (#FL) was not shot through the victim's skull; (2) Avery's DNA on the RAV-4's hood latch was planted; and (3) Avery's DNA on the key to the RAV-4 was planted. (603:136–45, 155–58.)

Avery alleged that his sufficient reason for failing to raise these claims on direct appeal was ineffective assistance of postconviction counsel. (603:203–10.) Avery further alleged that his sufficient reason for failing to raise all of these claims in his 2013 pro se section 974.06 motion was that he "had no way of knowing" about his claims because he was a "learning disabled, indigent prisoner." (603:218.)

The Circuit Court's Order Denying the Motion

On October 3, 2017, the circuit court denied the motion without an evidentiary hearing. (628.) The court determined

Avery had not shown a sufficient reason why these issues could not have been raised in his 2013 motion or other prior postconviction litigation. (628:3; *see* 533.) It further found that Avery's arguments stemming from his new experts' reports omitted "several significant facts" showing that the results of the testing did not show what Avery claimed they did, and that he relied mainly on "conclusory allegations." (628:3–5.) Accordingly, it found Avery had not met his burden to show that there was a reasonable probability of a different result at a new trial where these results were admitted. (628:5–6.)

A. Avery failed to show a sufficient reason for failing to raise his June 2017 claims in his February 2013 motion or on direct appeal, so they are procedurally barred.

Avery's June 2017 Wis. Stat. § 974.06 motion was his third attempt at postconviction relief. For the court to reach the merits of his allegations, then, Avery had to overcome *Escalona-Naranjo* twice: he had to adequately plead a sufficient reason for failing to raise his June 2017 claims in his Wis. Stat. § 974.02 motion, and his 2013 section 974.06 motion. *See, e.g., Romero-Georgana*, 360 Wis. 2d 522, ¶¶ 51–52. Avery showed neither, so the circuit court properly exercised its discretion in denying his motion without a hearing.

1. Avery's conclusory allegation that he did not raise these claims in his 2013 motion because he is indigent and has no legal training was not a sufficient reason.

Avery failed to properly plead a sufficient reason for not raising his 2017 claims in his 2013 motion, and therefore this Court need go no further to determine that the circuit court properly denied his June 2017 motion without a hearing. *Romero-Georgana*, 360 Wis. 2d 522, ¶ 37.

Avery devoted a mere two paragraphs of his 200-plus-page motion to alleging a reason for failing to raise his claims in his 2013 motion. (603:217–18.) The sole reason Avery offered was a conclusory statement that he had a "lack of legal knowledge" and unspecified "cognitive deficiencies," and claimed he therefore "had no way of knowing the factual and legal basis the claims [sic] set forth herein. As a learning disabled, indigent prisoner, Mr. Avery simply could not have known them." (603:218.) The only facts he supplied about this claim were that his current attorney had spent a lot of time and money preparing the motion. (603:218.)

Avery's allegation was factually and legally insufficient.

First, assuming that cognitive difficulties and a lack of factual and legal knowledge could have been a sufficient reason, Avery failed to allege sufficient material facts to support his assertion. *See State v. (Aaron) Allen,* 2010 WI 89, ¶¶ 85–86, 328 Wis. 2d 1, 786 N.W.2d 124 (to be "sufficient," defendant's reason for failing to raise claims previously must be supported by more than conclusory allegations). Avery claimed that "numerous unique circumstances are present here that provide sufficient reasons the current claims were not previously presented," but he did not attempt to explain what those circumstances are. (603:218) He did not explain why the circumstances are unique; why or how they precluded Avery from knowing about his claims; what legal or factual knowledge was required that Avery lacked, particularly in light of his many pro se filings setting forth relevant law and discussing his case; what Avery's "cognitive deficiencies" are or how they prevented him from knowing about and raising his claims; or why current counsel's decision to spend vast sums of money meant that Avery was unaware of his claims previously. (603:218.) Avery's claim that he had no way to know the "factual basis" for his claims was particularly insufficient—it amounted to a bare passing mention of the term "factual basis." (603:218.)

In other words, Avery provided no "facts that allow[ed] the reviewing court to meaningfully assess" his reason. *State v. Bentley*, 201 Wis. 2d 303, 314, 548 N.W.2d 50 (1996); *see also State v. Saunders*, 196 Wis. 2d 45, 52, 538 N.W.2d 546 (Ct. App. 1995). The circuit court was well within its discretionary authority to deny the motion without a hearing for failing to overcome the procedural bar.

Avery's allegation was insufficient for a second reason: while a lack of knowledge of the factual basis for a claim may be a sufficient reason, it has long been recognized that a defendant's pro se status or lack of legal knowledge is not. *See State v. Jensen*, 2004 WI App 89, ¶ 30, 272 Wis. 2d 707, 681 N.W.2d 230 ("Ignorance of the law is no defense."); *see also Jackson v. Baenen*, 12-CV-00554, 2012 WL 5988414, *1, (E.D. Wis. Nov. 29, 2012) ("No Wisconsin court has recognized ignorance of the law as a 'sufficient reason' under § 974.06(4)," and collecting cases). Nearly all collateral attacks are raised by pro se prisoners, many of whom have intellectual challenges and very few of whom are lawyers. While the Wisconsin courts liberally construe pro se prisoners' filings, prisoners are still expected to properly raise claims for relief, including sufficiently overcoming the procedural bar. *Romero-Georgana*, 360 Wis. 2d 522, ¶ 69.

None of the cases Avery cited support his claim that lack of legal knowledge, indigency, or pro se status is a sufficient reason; Avery misrepresented or misread them all. (603:217–218; Avery's Br. 113–16.)

In *Aaron Allen*, the court rejected the defendant's claim that his unawareness of the *factual* basis for his claims was a sufficient reason, because the record showed that the claims "involve[d] events in which Allen was personally involved and had personal knowledge." *Aaron Allen*, 328 Wis. 2d 1, ¶ 48, *see also id.* ¶¶ 43–52. That has nothing to do with the defendant's "unawareness of the legal basis of his claim." (Avery's Br. 115 (citing *Aaron Allen*, 328 Wis. 2d 1, ¶¶ 44,

81[5].) And *Aaron Allen* establishes that lack of knowledge of the "factual basis" for a claim does not mean what Avery appears to think it means. Lack of knowledge of the factual basis for a claim means an event occurred that supported a claim and the defendant had no way of knowing about the event. *See Aaron Allen*, 328 Wis. 2d 1, ¶¶ 43–52. It does not mean that the defendant simply did not know what facts an attorney might use to argue the claim. (603:218.) Avery knew all about the facts of his case.

Also in *Aaron Allen*, the court rejected Avery's precise argument that *State v. Howard*, 211 Wis. 2d 269, 564 N.W.2d 753 (1997), established lack of legal sophistication as a sufficient reason. (603:217.) *Aaron Allen*, 328 Wis. 2d 1, ¶ 44. *Howard* established that lack of knowledge of the legal basis of the claim may be a sufficient reason "where a subsequent supreme court decision 'constituted a new rule of constitutional law.'" *Id.* (citation omitted). Like in *Allen*, *Howard* is inapposite here: "[t]here is no question that *Strickland v. Washington*," and *Brady*, 373 U.S. 83, were "established law at the time" Avery filed his 2013 section 974.06 motion. *Aaron Allen*, 328 Wis. 2d 1, ¶ 44 (citation omitted).

State ex rel. Kyles v. Pollard, 2014 WI 38, ¶¶ 55–57, 354 Wis. 2d 626, 847 N.W.2d 805, does not stand for the proposition that lack of legal knowledge due to pro se status is a sufficient reason, either. In *Kyles*, the defendant was denied counsel during a critical stage of the proceeding. *Id.* ¶¶ 55–57. The supreme court determined that his *Knight*

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[5] Neither paragraph Avery cites for this proposition even arguably supports that statement. Paragraph 44 is the court's rejection of Allen's allegation that *Howard* supported his claim. *See Aaron Allen*, 2010 WI 89, ¶ 44, 328 Wis. 2d 1, 786 N.W.2d 124. Paragraph 81 is not a statement of any legal principle, but a quote from this Court about whether the *Anders* procedure was followed in Allen's case. *Id.* ¶ 81.

petition was not procedurally barred by his previous attempts to reinstate his direct appeal. *Id.* ¶ 57. But that was because the court found it "incongruous to state that a defendant was denied the right to counsel and then preclude the defendant from raising a claim because of errors made due to the absence of counsel." *Id.* ¶ 56. There is no right to counsel on collateral attack. *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 579 N.W.2d 698 (1998). So, Avery cannot plausibly argue that *Kyles* established that pro se status is a sufficient reason for failing to raise a claim in an earlier section 974.06 motion where he had no right to counsel. Neither this Court nor the Wisconsin Supreme Court has ever construed *Kyles* in the manner Avery suggests.

2. Avery has not shown that his motion was sufficiently pled.

Avery has failed to show that his June 2017 motion's two conclusory paragraphs about his 2013 pro se motion were sufficiently pled or that the record does not conclusively refute them. (Avery's Br. 113–16.)

Avery claims in his brief that he "has met all of the *Allen* requirements" for his claims, but he has misunderstood the pleading standard. (Avery's Br. 99.) Avery directs this Court only to where he purportedly met those requirements in his appellate brief. (Avery's Br. 99–103.) To be entitled to a hearing, Avery had to meet those requirements in his motion to the circuit court; he cannot cure the deficiencies in his motions in his appellate brief.[6] *John Allen*, 274 Wis. 2d 568, ¶ 27.

Avery complains that the circuit court "did not analyze whether these collective circumstances constituted a

[6] Avery has made this same error in regard to all of his claims, not just the claims he raised in his June 2017 motion. (Avery's Br. 99–103.)

sufficient reason," but he's made no showing that he pled sufficient facts for the court to analyze. (Avery's Br. 115.) The court noted that Avery claimed that his pro se motion "should not preclude [his June 2017] motion [from] being heard." (628:3.) But the court found, "[t]here is no argument or showing of a sufficient reason why these issues could not have been raised in prior motions." (628:3.) Avery's simply stating he was incapable of raising the claims is not a factually supported argument explaining why not, and the circuit court was not required to develop it for him.

Furthermore, Avery's assertion that he was incapable of recognizing and raising legal claims was demonstrably false: the circuit court remarked that Avery's pro se motion "recognize[d] significant legal issues which the court . . . previously ruled on." (628:3.) Those issues included ineffective assistance of trial and postconviction counsel. (496:26–33.) The fact that the court rejected those claims does not mean that Avery was incapable of raising legal claims, as Avery appears to believe. (Avery's Br. 114–15.)

Avery now attempts to bolster his motion by asserting that his reason is sufficient because he "wrote to dozens of attorneys" and "wrote to laboratories that would not respond unless he had an attorney." (Avery's Br. 116.) Avery did not make these assertions in his June 2017 motion and therefore they are irrelevant to evaluating whether the circuit court properly denied the motion it had before it.[7] Regardless, these allegations refute Avery's assertion. Obviously if Avery

[7] Avery alleged this in his affidavit, but exhibits do not relieve a defendant of alleging the pertinent facts in the motion. *See State v. Love*, 2005 WI 116, ¶ 27, 284 Wis. 2d 111, 700 N.W.2d 62 (The facts to support a claim must be alleged "within the four corners of the document itself.").

contacted attorneys and laboratories in an attempt to raise these issues, he knew that they were available to be raised.

Otherwise, Avery simply reiterates that he told the circuit court that he lacked the legal sophistication to raise the claims, quotes his own section 974.06 motion as legal authority,[8] and directs this Court to the same inapposite case law he cited below. (Avery's Br. 113–16.) None of that shows that he sufficiently pled his motion.

In short, Avery's bare-bones assertion in his June 2017 motion was not enough to allow the circuit court to meaningfully evaluate his alleged reason for failing to raise his June 2017 claims in his 2013 motion, so the court found that he had not shown a sufficient reason. (628:3.) That was a reasonable evaluation of Avery's motion, and he has failed to show otherwise. The circuit court properly exercised its discretion in denying Avery's June 2017 motion without a hearing.

3. Avery's allegation that postconviction counsels were ineffective was insufficiently pled and meritless.

Even if this Court overlooks Avery's failure to show a sufficient reason for failing to raise his current claims in his 2013 motion, it should still affirm the circuit court. Avery failed to sufficiently show that either trial or postconviction counsel were ineffective. Although the circuit court was wrong about the law on postconviction procedure, the record shows that it still reached the right conclusion, and accordingly this

[8] (Avery's Br. 115 (putting his statement that "[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" in quotation marks, with a citation to his June 2017 section 974.06 motion).)

Court must affirm its decision to deny this motion without a hearing.

a. Law governing ineffective assistance of counsel.

"Wisconsin criminal defendants are guaranteed the right to the effective assistance of counsel through the Sixth and Fourteenth Amendments to the federal constitution and Article I, Section 7 of the Wisconsin Constitution." *State v. Domke*, 2011 WI 95, ¶ 34, 337 Wis. 2d 268, 805 N.W.2d 364. Ineffective assistance claims are evaluated using the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prevail under *Strickland*, a defendant must prove that his counsel's performance was both deficient and prejudicial. *Strickland*, 466 U.S. at 687.

"The defendant does not show the first element simply by demonstrating that his counsel was imperfect or less than ideal." *State v. Balliette*, 2011 WI 79, ¶ 22, 336 Wis. 2d 358, 805 N.W.2d 334. Rather, "[t]o prove deficient performance, a defendant must show specific acts or omissions of counsel that are 'outside the wide range of professionally competent assistance.'" *State v. Arredondo*, 2004 WI App 7, ¶ 24, 269 Wis. 2d 369, 674 N.W.2d 647 (citation omitted). Counsel's decisions based on a reasonably sound strategy are "virtually unchallengeable," and do not constitute deficient performance. *Strickland*, 466 U.S. at 690–91.

"The defendant may not presume the second element, prejudice to the defense, simply because certain decisions or actions of counsel were made in error." *Balliette*, 336 Wis. 2d 358, ¶ 24. To prove prejudice, "the defendant must show that [counsel's deficient performance] actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. Further, the defendant must do more than "show that his counsel's errors 'had some conceivable effect on the outcome of the proceeding.'" *Domke*, 337 Wis. 2d 268, ¶ 54 (citation omitted).

The defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Romero-Georgana*, 360 Wis. 2d 522, ¶ 41 (citation omitted).

b. Avery did not show that postconviction counsels were ineffective.

(1) Law governing ineffective assistance of postconviction counsel as a sufficient reason

Avery claimed that his sufficient reason for failing to raise on direct appeal his ineffective assistance of trial counsel claims regarding hiring experts, performing experiments, and attempting to pin the crime on Ryan Hillegas, along with his *Brady* claims regarding the Zipperer voicemail, the flyover video, and Radandt's allegations,[9] was that his postconviction counsel, Suzanne Hagopian and Martha Askins, were ineffective. (603:202–13.) Ineffective assistance of postconviction counsel may constitute a sufficient reason for failing to include claims in earlier motions. *Romero-Georgana*, 360 Wis. 2d 522, ¶ 36.

To overcome the procedural bar on that ground, though, the defendant must allege sufficient facts that are supported

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[9] Avery has falsely represented that he raised his *Brady* claims regarding Denise Heitl, Kevin Rahmlow, and Detective Velie's CD in his "second motion pursuant to Wis. Stats. § 974.06," (Avery's Br. 39; 40–45; 48–63), and implies that the circuit court denied them in its October 3, 2017 order. (Avery's Br. 40 (quoting (628:1–3)).) These claims were raised in Avery's October 23–November 17, 2017 motion for reconsideration (630–636) and his July 2018 section 974.06 motion (740), and denied in subsequent orders. (640:3–5; 761.) The State addresses whether the circuit court properly rejected these claims in Issues III and IV and will not address them here.

by the record and would show that postconviction counsel's failure to raise the claim was both deficient and prejudicial; if the defendant makes "a mere conclusory allegation that his [postconviction] counsel was ineffective . . . his 'reason' is not sufficient." *Id.*

Additionally, "a defendant who alleges in a § 974.06 motion that his postconviction counsel was ineffective for failing to bring certain viable claims must demonstrate that the claims he wishes to bring are clearly stronger than the claims postconviction counsel actually brought." *Id.* ¶ 4. "This standard is difficult to meet because the comparative strength of two claims is usually debatable." *Shaw v. Wilson*, 721 F.3d 908, 915 (7th Cir. 2013).

(2) Avery's allegations about postconviction counsels were conclusory and meritless.

The State does not dispute that the circuit court confused the procedure for raising ineffective assistance of postconviction counsel with the procedure for raising ineffective assistance of appellate counsel when rejecting this claim. (628:2–3; Avery's Br. 89–90.) However, whether a section 974.06 motion adequately pleads a sufficient reason for failing to bring available claims is a question of law reviewed de novo, *Romero-Georgana*, 360 Wis. 2d 522, ¶ 30, and this Court will affirm if the circuit court reached the right result for the wrong reason. *Holt*, 128 Wis. 2d at 124–25.

And here, the record shows that the circuit court still properly denied Avery's motion. Avery's motion "was conclusory because it failed to carefully address the two elements of ineffective assistance for postconviction counsel set out in *Strickland*, and [the motion] generally ignored the 'five 'w's' and one 'h" methodology outlined in *John Allen*." *Balliette*, 336 Wis. 2d 358, ¶ 79.

Hagopian and Askins raised four issues on Avery's direct appeal: (1) the court had improperly barred Avery from admitting third party perpetrator evidence; (2) multiple searches had violated Avery's 4th Amendment rights; (3) the trial court had improperly excused a deliberating juror; and (4) trial counsels were ineffective for acquiescing to the dismissal. (427; 447:9–10.)

Avery stated that postconviction counsels were ineffective "because they failed to argue that Mr. Avery's trial defense counsel was ineffective as described" in his June 2017 motion. (603:203.) He then claimed that "[ineffective assistance of trial counsel] was clearly stronger than the issues . . . raised in their § 974.02 motion." (603:203.) Avery recited how the postconviction court ruled on the third-party perpetrator claim, and reiterated his alternate theory of events constructed with his new experts and "experiments." (603:204–07.) He then stated that Hagopian and Askins "should have" raised these ineffective assistance and *Brady* claims, "should have" learned this alternate theory of events from Avery, and declared postconviction counsel ineffective. (603:211–13.)

Though Avery cited to cases about ineffective assistance in his June 2017 motion, he failed to apply that law to the facts and explain how or why Hagopian's and Askins's failure to raise his new claims was objectively unreasonable, and that there was a reasonable probability of a different result if they had. (603:202–13.) His motion was insufficient on multiple fronts, and accordingly Avery failed to overcome the procedural bar.

(i) Avery's claims about the Zipperer CD, Radandt's alleged conversation, and the flyover video were insufficiently pled.

Avery's bald allegation that Hagopian and Askins "should have" raised the *Brady* claims is facially insufficient, because it simply concludes that failure to do so was deficient and prejudicial without providing any facts or developing any argument. (603:213); *John Allen*, 274 Wis. 2d 568, ¶ 24; *Romero-Georgana*, 360 Wis. 2d 522, ¶ 36. Avery made no attempt to show why it was unreasonable not to raise these claims, provided no evaluation of the comparative strength of these claims to the claims postconviction counsels raised, and made no attempt to show that there was a reasonable probability of a different result. (603:211–13.)

The underlying claims were insufficiently pled as well. Avery's allegation that Radandt supposedly spoke with some unidentified DOJ personnel fails to provide any material facts about this claim. Avery does not say who Radandt had this conversation with, when it occurred, what the context was, what this person's "belief" was based on, or why Radandt did not tell trial counsel or anyone else about it in the twelve years between trial and his affidavit. (603:153; 604:224–28.) Further, Avery did not provide any facts to establish that it would be material. He said only that "this information could . . . have been used to impeach the State's witnesses," with nothing about who it would have impeached or why that would raise a reasonable probability of a different result at trial, considering the rest of the evidence. (603:153.) Avery further claimed Radandt's testimony "would have provided exculpatory evidence . . . that the RAV-4 was planted on his property," but Avery failed to plead any facts establishing this, either, because he alleged no facts about when this conversation took place, who said it, and why, when, or from where they believed the RAV-4 was driven onto Avery's

property. (603:153.) An unidentified DOJ employee purportedly saying they "believed" the RAV-4 was driven onto the Avery property at some unidentified time fails to establish that it was driven onto the property after the murder or by someone other than Avery.

Avery has made no attempt on appeal to show that his motion was sufficiently pled on this claim, either as a stand-alone claim or on his allegation that postconviction counsels were ineffective, and simply reargues the *Brady* claim. (Avery's Br. 45; 89–103.) But again, the merits of this claim are not before this Court: the issue is whether Avery sufficiently pled that Hagopian and Askins were ineffective for failing to raise it. By failing to address the issue on appeal, Avery has failed to meet his burden.

Similarly, Avery's claim that the flyover video was edited was utterly devoid of facts and relied wholly on Avery's speculation that more footage must have existed because the prosecutor said the RAV-4 was not visible on the video and the flyover produced only three minutes of footage. (603:152.) And Avery has again failed to show that his motion was sufficiently pled either as a claim against postconviction counsel or on his *Brady* claim, and simply reargued the *Brady* claim—but still provided nothing more than his unsupported speculation that the video was edited. (Avery's Br. 46.) He then asks this Court to authorize an impermissible fishing expedition, stating that "[a]n evidentiary hearing is necessary to determine the credibility of the State's claim that only 3 minutes of flyover footage exists . . . ." (Avery's Br. 46.) An evidentiary hearing is a forum to prove factually-supported claims, not a fishing expedition to discover them. *Balliette*, 336 Wis. 2d 358, ¶ 68. Postconviction counsels were not ineffective for failing to raise a claim based on nothing.

Avery's *Brady* claim about the message the victim left on the Zipperer's answering machine was insufficiently pled, too, because Avery failed to establish that the message was

suppressed, exculpatory, or material. Avery did not provide anything from Strang or Buting showing this was not turned over to the defense, and simply declared it wasn't because the State can't locate it now. (603:150; 621:143–44.) That shows nothing. Avery then mused that the 2:12 p.m. voicemail Teresa Halbach left on the Zipperer's answering machine about having trouble finding their house must have been exculpatory because the prosecution failed to play it for the jury. (603:151.) That is nothing more than speculation.

Besides, JoEllen Zipperer testified at trial and said Teresa Halbach was at their house "around 3:00," (694:129), and that JoEllen heard the message later that evening, but had missed the call because she was outside (694:134). Nothing about Halbach leaving a voicemail at 2:12 p.m. stating that she can't find the Zipperer's house but then later arriving does anything to "contradict[ ] the timeline established by the State." (Avery's Br. 47; 621:186.) And Avery still provides only speculation about this claim. (Avery's Br. 47.) He again just says the voicemail "may have contradicted the timeline established by the State" that Ms. Halbach's last stop was Avery's. (Avery's Br. 47.) He fails to explain how, though. (Avery's Br. 47–48.) The claim was, and is, insufficiently pled.

(ii) Avery's claims about ineffective assistance of trial counsel were insufficiently pled and conclusively refuted by the record.

That leaves Avery's claim that Hagopian and Askins were ineffective for failing to claim Strang and Buting were ineffective for failing to pursue and present the retooled "planted evidence" defense he created in his June 2017 motion, alleging that "the killer" planted the blood evidence and the victim's remains and effects, and relying on a multitude of experts to conduct experiments about the trial

evidence. (603:60–148, 202–13; Avery's Br. 39–97.) In a nutshell, Avery argued in his June 2017 motion that Strang and Buting were ineffective because Avery believes he could have prevailed at trial if Strang and Buting had presented his "planted evidence" defense in the manner current postconviction counsel formulated. (603:60–148, 202–13; Avery's Br. 65–89.) Therefore, he concluded, Hagopian and Askins must also have been ineffective for failing to allege that Strang and Buting were ineffective on that ground. (603:202–13; Avery's Br. 91–97.) That is a fundamental misunderstanding of what is required to show ineffective assistance of counsel, trial or postconviction.

Avery's simply alleging that Strang and Buting could have presented a "planted evidence" defense differently by hiring experts, performing experiments of dubious reliability, and claiming that the blood evidence was planted by "the killer" and not law enforcement does not provide anything that would establish Strang and Buting were ineffective even if the facts Avery alleged were true. *See, e.g., State v. Breitzman*, 2017 WI 100, ¶ 77, 378 Wis. 2d 431, 904 N.W.2d 93 ("An accused cannot follow one course of strategy at the time of trial and if that turns out to be unsatisfactory complain he should be discharged or have a new trial." (citation omitted)); *Lee v. State*, 65 Wis. 2d 648, 657, 223 N.W.2d 455 (1974) ("To permit postconviction counsel to argue for a different game plan, after the contest is over, would be Monday-morning quarter-backing . . . ." (footnote omitted)). After all, there are "countless ways to provide effective assistance in any given case," *Strickland*, 466 U.S. at 689, and "[c]ounsel [is] entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Harrington v. Richter*, 562 U.S. 86, 107 (2011). Neither a disappointed defendant nor a court may "second-guess

counsel's performance solely because the defense proved unsuccessful." *Balliette*, 336 Wis. 2d 358, ¶ 25.

Second-guessing supported by speculation is all Avery provided, though, either in his motion or his brief. (603; Avery's Br. 65–89, 91–96.) Avery has simply taken the trial record and, working backwards, "stress[ed] what [current postconviction counsel] would have done differently had [she] conducted the defense at the time of trial." *Weatherall v. State*, 73 Wis. 2d 22, 25–26, 242 N.W.2d 220 (1976). But it has long been settled that "it is the considered judgment of trial counsel that makes the selection among available defenses, not the retroactive conclusion of postconviction counsel," *Weatherall*, 73 Wis. 2d at 26 (citation omitted), and that a court must not evaluate counsel's performance based on hindsight, like Avery has done here. *Strickland*, 466 U.S. at 689–91.

Rather, to show deficient performance, a defendant must show that counsel's acts or omissions were objectively unreasonable from counsel's perspective at the time; that is, counsel's decisions were outside the boundaries "of reasonable professional judgment" under the circumstances. *Strickland*, 466 U.S. 690. So, Avery had to show that, from Strang and Buting's perspective before trial and balancing limited resources, it was objectively unreasonable for Strang and Buting not to consult and present this bevy of experts and "experiments," not to construct this alternate theory of events alleging that Ryan Hillegas abducted and killed the victim and then planted the RAV-4, the blood evidence, and the victim's remains and personal effects to frame Avery,[10] and

[10] Avery's "'kitchen sink' approach to the issues on appeal" has left the State unable to discern what defense he is actually alleging Strang and Buting were ineffective for failing to present. *Howard v. Gramley*, 225 F.3d 784, 791 (7th Cir. 2000). What Avery

not to present that defense instead of the one they chose. *Richter*, 562 U.S. at 107, 110. He also had to show there was a reasonable probability the jury would have acquitted him if they did these things. *Id.* at 104.

And despite Avery's laundry-list of Strang and Buting's alleged failures, Avery alleged no material facts of record that would establish that *Strickland* required them to do any of this, or that Avery was prejudiced by these alleged failures. (603:60–148.) His ineffective assistance of trial counsel claims were insufficiently pled, so his ineffective assistance of postconviction counsel claim was as well. *State v. Ziebart*, 2003 WI App 258, ¶ 15, 268 Wis. 2d 468, 673 N.W.2d 369 ("[T]o establish that postconviction or appellate counsel was ineffective, a defendant bears the burden of proving that trial counsel's performance was deficient and prejudicial" as well.).

(a) Several of Avery's claims about trial counsel are misframed, inappropriately raised, or not argued in his brief.

Several of Avery's claims in his brief on this point do not warrant discussion because they are misframed, insufficiently developed, or forfeited by his failure to raise them in the trial court.

Avery's single sentence that he "describe[d] in [his June 2017 motion] a variety of failures of trial defense counsel to conduct a significant investigation before trial" is devoid of any facts or argument that the circuit court erroneously

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claimed in his June 2017 motion was that Ryan Hillegas was the "only" person who could have committed the crime, and that Strang and Buting were ineffective for failing to present this theory. (603:6, 43–148.) As that is what was presented to the circuit court when it denied this motion, that is what the State will discuss here. Whether Avery's later motions alleging other theories were properly denied will be discussed in later sections.

exercised its discretion or even any explanation what "failures" he is discussing. (Avery's Br. 89.)

Similarly, Avery never mentions hiring a "police procedure" or "forensic pathology" expert in his appellate brief until his summary sentence on this point. (*Compare* Avery's Br. 68–81 *with* Avery's Br. 82.) Though he references experts in these subjects later in his brief, he provides no developed argument about why Strang and Buting were ineffective for failing to hire them. (Avery's Br. 86, 92.) Further, no Wisconsin case has ever found that a "police procedure" expert is admissible. Given the high likelihood of such testimony devolving into a mini-trial about the propriety and protocols of the police department, a "police procedure expert" would be excluded under Wis. Stat. § 904.03 for causing confusion of the issues, undue delay, and waste of time.

"It is insufficient to just state an issue on appeal without providing support for the position and providing legal authority supporting the position," and issues raised in the trial court but not argued on appeal are deemed abandoned *A.O. Smith Corp. v. Allstate Ins. Companies*, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998). Avery's conclusory allegations on these claims are insufficient to warrant consideration—indeed, they are insufficient to even allow the State to formulate a response. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992); *Waushara County v. Graf*, 166 Wis. 2d 442, 456, 480 N.W.2d 16 (1992). Avery did not provide any argument on these points, and the State is not required to develop them for him in order to refute them. *See State v. Jackson*, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999). These claims are abandoned.

Furthermore, it is "[a] fundamental appellate precept" that this Court "will not . . . blindside trial courts with reversals based on theories which did not originate in their forum." *Schonscheck v. Paccar, Inc.*, 2003 WI App 79, ¶ 11, 261 Wis. 2d 769, 661 N.W.2d 476 (citation omitted).

Accordingly, "[a]rguments that are raised for the first time on appeal by an appellant are deemed [forfeited]."[11] *In re Commitment of Bollig*, 222 Wis. 2d 558, 564, 587 N.W.2d 908 (Ct. App. 1998). Several of Avery's appellate arguments about these experts are forfeited.

In Avery's June 2017 motion he claimed that Dr. Christopher Palenik's examination of bullet fragment #FL, and ballistics expert Lucien Haag's conclusions about #FL, were newly discovered evidence. (603:153–162, 172–73.) Avery never alleged that Strang and Buting were ineffective for failing to hire Haag or for failing to have Palenik conduct a trace evidence examination of #FL, as he now claims. (*Compare* 603:60–148 *with* Avery's Br. 72–73.)

Avery's claim that he hired an "audio expert" also appeared nowhere in his motions to the trial court and is insufficiently developed to warrant discussion. (Avery's Br. 79; *see also* 603; 629; 631; 632; 633; 635; 636.) In Avery's motion he simply declared what the audio clip supposedly said in a single sentence. (603:137.) Avery failed to even identify who this supposed "audio expert" is or what "enhancement" they allegedly did, let alone argue anything related to sufficiency of his motion or the two prongs of *Strickland* on this point. (Avery's Br. 79; 603:137.)

Avery cannot show that the circuit court erroneously exercised its discretion by presenting arguments on appeal that he did not present to the circuit court. These claims are forfeited. *Binder v. City of Madison*, 72 Wis. 2d 613, 621, 241 N.W.2d 613 (1976) (Issues not raised in the trial court will not be considered for the first time on appeal.).

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[11] The Wisconsin Supreme Court in *State v. Ndina*, 2009 WI 21, ¶¶ 28–33, 315 Wis. 2d 653, 761 N.W.2d 612, discussed the difference between "waiver" and "forfeiture" and recognized that this rule is more consistent with the concept of forfeiture than waiver.

Later in Avery's brief he claims that Strang and Buting "could have hired a forensic pathologist," Dr. Larry Blum, to opine that the scratches on Bobby Dassey's back are inconsistent with a dog's paw, but this claim was never raised in the circuit court, and certainly not in Avery's June 2017 motion. (Avery's Br. 86–87.) Avery simply offered Blum's opinion in his July 6, 2018 motion. (740:29.) Even if that were construed as an ineffective assistance claim, the circuit court denied Avery's ineffective assistance claims raised in that motion as insufficiently pled, which is supported by the record. (761:10–11.) Avery's ineffective assistance claim in that motion was a final catch-all paragraph stating that if the court rejected his *Brady* claims it should find counsel ineffective, without developing any argument on the issue. (740:33.) There is no question the circuit court properly denied that allegation without a hearing.

Additionally, all of Avery's claims that Strang and Buting were ineffective for their "failure to investigate and impeach" Bobby Dassey were not raised until Avery's October 23 motion for reconsideration. (*Compare* Avery's Br. 82–87 *with* 603; 631:33–39.) The circuit court denied the claims in Avery's motion for reconsideration as procedurally barred because Avery did not offer a sufficient reason for failing to raise these arguments in his June 2017 motion. (640:3–5.) Avery has inappropriately reargued those claims here in an effort to overleap the procedural bar without making any argument that he showed a sufficient reason for failing to raise these claims in his June 2017 motion. (Avery's Br. 82–87.) This Court should decline to address these claims. The State will address whether Avery's motion for reconsideration was sufficiently pled in section III of this brief.

(b) Avery's remaining ineffective assistance of trial counsel claims did not warrant a hearing.

The ineffective assistance claims Avery both actually raised in his June 2017 motion and has provided some argument about in his appellate brief did not warrant a hearing.

Avery claimed Strang and Buting were ineffective for failing to hire blood spatter expert Stuart James (603:72–74), trace evidence expert Christopher Palenik to determine whether the RAV-4 key found in Avery's house was a sub-key (603:80–84), "DNA expert" Karl Reich to test how much DNA a person leaves on a hood latch by touch (603:91–92), and forensic anthropologist Steven Symes (603:101–02).[12] He further claimed Strang and Buting were ineffective for failing to conduct various experiments themselves (603:77–80, 103–05); failing to "discover" that Avery's blood in the RAV-4 did not come from the vial of his blood located in the Manitowoc County Clerk of Circuit Court's office (603:74–77); failing to "investigate" Avery's claim that his blood from his bleeding finger was removed from the sink by the "real" killer, who then planted the blood evidence in the RAV-4 (603:67–71, 116–22); and failing to "establish" Ryan Hillegas as a *Denny* suspect (603:122–36; Avery's Br. 65–88.) Avery did not provide sufficient material facts in his motion that would show counsels were ineffective for failing to do any of these things.

Counsels were not ineffective for failing to hire more experts and perform experiments

"*Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution

[12] Avery claimed Palenik and Reich's other tests were newly discovered evidence, which is addressed in section I.B.

expert an equal and opposite expert from the defense." *Richter*, 562 U.S. at 111. "In many instances cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict." *Id.* And here, Avery did not show that *Strickland* required Strang and Buting to call these experts or perform these "experiments," or that there was a reasonable probability of a different result if they had. Cross-examination and the experts they did call effectively established Avery's defense, and Avery's new experiments prove nothing.

As a preliminary matter, unlike Avery's other ineffective assistance claims, the circuit court addressed the merits of Avery's claims that Strang and Buting were ineffective for failing to present Reich's experiments about the quantity of DNA left on the hood latch, and Palenik's conclusions about the key being a sub-key. (628:3–6.) The circuit court discussed them in the portion of its order concluding there was not a reasonable probability of a different result at trial if Avery's DNA-testing-related experiments were admitted. (628:3–6.) To avoid duplication and clearly address the reasons the court gave for denying Avery's motion, the State addresses these arguments (Avery's Br. 72–78) in section I.B.

That leaves Avery's claims that Strang and Buting were ineffective for failing to hire blood spatter expert Stuart James (Avery's Br. 68–72; 603:72–77), forensic anthropologist Steven Symes (Avery's Br. 78; 603:101–02), and for failing to conduct various "experiments" themselves.

First, Avery has again failed to argue on appeal that his motion was sufficiently pled to warrant a hearing on these claims and merely reargues their merits. (Avery's Br. 68–72, 78.) Because Avery has failed to address the issue on appeal, he has failed to meet his burden. *State v. Sholar*, 2018 WI 53,

¶¶ 50–51, 381 Wis. 2d 560, 912 N.W.2d 89. Nevertheless, nothing he alleged in his motion met the pleading standard anyway, either because Avery's allegations were conclusory, or because the record conclusively demonstrated that he was due no relief, or both.

Avery's blood spatter expert, James, far from "demonstrated that Mr. Avery's blood was planted in Ms. Halbach's RAV-4." (603:118.) For this proposition Avery relied on an experiment conducted by James in which blood was dripped from James' middle finger, and he left blood in a test RAV-4 in several more places than where Avery's blood was found in Ms. Halbach's RAV-4. (603:72–73.) Avery then concluded that he proved the blood in Ms. Halbach's RAV-4 was planted by being "selectively dripped" and "applied with an applicator" because James was able to construct similar bloodstains to those in Ms. Halbach's RAV-4 by that method. (603:72–73; 604:134.) Avery further asserted that he proved that the blood flakes found on Ms. Halbach's RAV-4 were scraped off of Avery's sink and planted because when James dripped blood on the floor of a RAV-4, it soaked into the carpet, and James was able to create blood flakes by scraping dried blood off of a sink with a scalpel. (603:73; 604:134–35.)

None of that proves anything. James's being able to recreate something by a particular method doesn't show that no other method was possible. And James never opines that "the most likely source" of the blood in the RAV-4 was the blood in Avery's sink," as Avery claims. (Avery's Br. 69, 72; 604:134–36.) James's affidavit says only that the blood in the RAV-4 is "consistent with an explanation other than" Avery's being in the RAV-4 with an actively bleeding finger, and that James would expect an actively bleeding finger to leave blood in other places. (604:134.) But James's "experiments" simply assume a number of variables James cannot account for, such as how deep Avery's reopened cut was, how much a partially-healed cut would have bled, how he moved about the RAV-4,

and the many other ways blood flakes could end up somewhere.[13] (604:134–36.)

James's next experiment purportedly "proving" that the blood spatter on the rear cargo door was caused by Ms. Halbach being "struck with an object such as a hammer" with the cargo door open rather than being thrown into the cargo area is irrelevant even if true; the point was that Ms. Halbach's blood was in the cargo area showing that she was at some point bleeding there, not the exact method of how the blood got there. (699:149–54; 604:130–31; Avery's Br. 71.) And nothing in Avery's motion or the exhibits he cited supports his conclusion that those bloodstains occurred as "the result of the RAV-4 being driven" anywhere. (Avery's Br. 71; *see* 603:130; 621:14–18.)

But again, the question here isn't whether Strang and Buting could have presented James's experiments and opinions or what those experiments could show. The question is whether Avery sufficiently pled that it was objectively unreasonable for them not to do so and that he was prejudiced as a result. *Strickland*, 466 U.S. at 689; *Balliette*, 336 Wis. 2d 358, ¶ 18. An explanation why or even an allegation that it *was* unreasonable for them not to do so is absent from Avery's motion. (603:72–74.) Nor did Avery explain how he could possibly be prejudiced by his attorneys' failure to hire an expert that did not rule out anything relevant about the State's case. (603:72–74.)

And Avery has failed to argue on appeal that his motion was sufficient, or even that it was objectively unreasonable for Strang and Buting not to hire James—he again merely attacks the evidence submitted at trial. (Avery's Br. 68–72.)

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[13] Avery claims in his brief that these experiments were "conducted . . . with 1 to 2 milliliters" of blood, but James's affidavit never says that, either. (Avery's Br. 70; 604:134–36.)

Whether current postconviction counsel can attack the trial evidence is not the issue on appeal.

Avery makes much of Strang's affidavit stating that he should have hired a blood spatter, ballistics, or trace evidence expert. (Avery's Br. 68, 72; 635:112–13.) But what Strang thinks now is irrelevant: "[a]fter an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome." *Richter*, 562 U.S. at 109. "*Strickland*, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Id.* at 110. At any rate, Avery did not provide this affidavit to the circuit court until his motion for reconsideration, and therefore it has no bearing on whether the circuit court properly denied the claims raised in Avery's June 2017 motion. (636:105.)

Avery's claim that Strang and Buting were ineffective for failing to hire Symes was, and is, particularly insufficient. (603:101–02; Avery's Br. 78–79.) They did hire and present a forensic anthropologist who specialized in burned remains, Dr. Scott Fairgrieve. (708:105–94.) So, Avery's claim really is, they were ineffective for failing to hire *this particular* expert, Symes. But an attorney is not deficient for hiring one qualified expert over another. *See Hinton v. Alabama*, 571 U.S. 263, 274–75 (2014) (ineffective assistance "does not consist of the hiring of an expert who, though qualified, was not qualified enough. The selection of an expert witness is a paradigmatic example of the type of 'strategic choic[e]' that, when made 'after thorough investigation of [the] law and facts' is 'virtually unchallengeable'") (citation omitted). Neither Avery's motion nor his brief says anything about why, from Strang and Buting's perspective before trial, it was unreasonable for them to rely on Fairgrieve—who had testified for the prosecution in every case in his career until

this one, and who refuted the State's forensic anthropologist, Dr. Leslie Eisenberg's, conclusions. (708:112, 114–45, 151–55.)

Avery gave no evaluation of Fairgrieve's trial testimony nor discussed why Symes could accomplish something that Fairgrieve's testimony coupled with cross-examining Eisenberg did not. (603:101–02; Avery's Br. 78–79.) Nor did Avery provide any explanation why it would matter if the charred bones found in the Manitowoc County gravel pit were determined definitively to be human, which is all he claims Symes' revelation could have been. (603:101–02; Avery's Br. 78.) Though Avery did not even establish that Symes would have said this: Symes' affidavit says only that he believes a microscopic examination could have determined whether the bones in the gravel pit were human (though it gives no explanation why Symes believes he could have accomplished this through microscopic examination when the FBI could not). (615:166; 806:11.) It's entirely possible Symes would have been unable to do so, or would have determined the bones were *not* human. So, Avery again simply relies on unfounded speculation that Symes would have even established anything relevant.

Avery claims that if Symes determined the bones in the Manitowoc pit were human, "the State's entire theory against Mr. Avery would have collapsed," but that is simply false. (Avery's Br. 78.) Both Eisenberg and Fairgrieve testified that some of the bones in the Manitowoc County gravel pit could possibly be human. (707:8–23; 708:136–37.) Ms. Halbach's remains were already found in multiple places, meaning they were obviously moved, which both Eisenberg and Fairgrieve testified to. (706:227–28; 708:134–44, 152.) Avery failed to explain why if the bones in the pit were human and Ms. Halbach's, he or his accomplice, Brendan Dassey, could not have put them there. (603:101–02; Avery's Br. 78.) And Fairgrieve testified that in his professional opinion Ms.

Halbach's remains had been moved *to* Avery's burn pit and it was not the primary burn site. (708:152–53.) Adding one more location for Ms. Halbach's remains to be found does not shake the State's case against Avery at all. Finally, Avery's speculative leap that if any of Ms. Halbach's remains were found in the Manitowoc County Gravel Pit then she must have been murdered there is supported neither by Symes' affidavit nor anything else. (Avery's Br. 78; 615:166–67.) Symes would have added nothing.

Not only did Avery insufficiently plead his claim that Strang and Buting were ineffective for failing to have someone stand "in the vicinity of Mr. Avery's burn barrel" while it was burning and see if they smelled any plastic, but this claim is also frivolous in the context of this case. (603:103–05; Avery's Br. 80.) The evidence that Avery burned Ms. Halbach's devices in his burn barrel was far from supported only by Fabian's testimony that he smelled burning plastic, as Avery claimed. (603:103.) It was also supported by the burned remains of those things found in Avery's burn barrel, and by the testimony of Blaine Dassey that he saw Avery toss a plastic bag in his actively burning burn barrel. (705:66–67, 101–02.) Further, Avery's experiment could not account for environmental conditions on October 31, 2005, any sensitivities of Mr. Fabian's, or the fact that Avery clearly put other items in the barrel as well. (603:104–05; 705:66–68.) More importantly, Avery again did not provide any argument that trial counsel were objectively unreasonable for failing to conduct this experiment, or that there was a reasonable probability of a different result if they had. (603:104–05.)

Avery's argument on this point on appeal consists of a single sentence stating that he "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" burning plastic. (Avery's Br. 80.) That

does not establish anything about Avery's motion or either prong of *Strickland*.

Avery's claim that Strang and Buting were ineffective for failing to conduct an "experiment" on a similar bookcase to Avery's bookcase that Ms. Halbach's Toyota key fell out of the back of when Sergeant Colburn jammed material back into it is even further afield. (Avery's Br. 79; 603:78–80; *see also* 701:132–34.) First, Avery did not conduct an experiment "with *the* bookcase and Toyota Key." (Avery's Br. 79 (emphasis added).) Avery conducted his "experiment" with a substitute bookcase (603:79), which his video shows was in better condition than Avery's actual bookcase (615:41; Tr. Ex. 168–69, 210),[14] and an "experiment key" (603:79). Importantly, the experiment key and lanyard *were* able to be pushed through the back of his experimental bookcase by striking it with a photo album. (603:79–80.) Further, Avery admitted that "[Buting] argued that it was impossible for [Ms. Halbach's] key to have landed in the position it did if it had fallen out of the back of the bookcase" and that it was "incredibly improbable" that the key would do so. (603:50.) Buting's arguing this without providing the jury with Avery's new bookcase experiment definitively proving that the State's theory that the key was pushed out of the back of the bookcase *was* possible was neither deficient nor prejudicial.

Counsel were not ineffective for failing to pursue Avery's new blood-planting theory and accusing Hillegas

This claim, too, was insufficiently pled. Avery did not say who, how, or why someone would have the knowledge and

[14] These trial exhibits and other items not electronically maintained are in the appellate record. (*See* 807.) However, these non-electronic items were not given record numbers by the clerk of circuit court. The State therefore references them by exhibit number, but notes that they are found in the non-electronic materials.

tools necessary to collect or transport his blood from his sink to create the bloodstains found in Teresa Halbach's RAV-4, or how they could have accomplished this while leaving no trace of themselves. (603:67–71, 119–20.) Avery's blood spatter expert, James, used pipettes and an applicator to create similar bloodstains in a test RAV-4, which Avery claims "proves" that the killer planted Avery's blood in this manner. (604:134–35; Avery's Br. 69–72.) Why anyone would just happen to have pipettes and an applicator on hand while trying to plant the RAV-4 defies explanation, and Avery offered none. (603:67–71, 119–20; Avery's Br. 69–72.) It is also utterly unsupported by any fact of record. (*Id.*) Nor did Avery explain how someone would have kept his blood liquid long enough to plant it in droplets, or why someone would come back half an hour later, this time apparently with a scalpel, to collect dried blood flakes from his sink. (603:119–20; 604:135; Avery's Br. 69–72.) And Avery did not explain how a person would have successfully transported those to the victim's RAV-4, either. (603:119–20; Avery's Br. 69–72.)

Moreover, the only way onto the portion of the property with Avery's trailer on it required a person to drive west past Barb Janda's trailer and all of the business buildings to get there, because there was a 20 foot berm separating Avery's trailer from access to the rest of the salvage yard and the Radandt pit. (Tr. Ex. 85.) Avery claims he and his brother Chuck saw taillights near Avery's trailer while the two were "leaving [the] Avery property" and they turned around to investigate, (604:26), at which time someone purportedly drove the RAV-4 back to Kuss Road (603:119). But to get anywhere near Kuss Road, the person would have had to drive directly toward Avery and Chuck before turning south into the salvage yard. (Tr. Ex. 85.) Avery fails to explain how a person could have driven the RAV-4 to and from his trailer undetected, twice, in this scenario. (603:67–71, 119–20; Avery's Br. 69.)

Avery particularly failed to explain how Ryan Hillegas, Ms. Halbach's former boyfriend and longtime friend, could have accomplished any of these things. (603:114–36; Avery's Br. 69–88.) Avery did not explain: (1) how or why Hillegas would have had any familiarity with the Avery property or surrounding area; (2) where, how, or when Hillegas could have killed Ms. Halbach and burned her remains; (3) how or where Hillegas sat for days, undetected, in the RAV-4, waiting to see Avery leave the property; (4) when Hillegas could've planted the blood evidence in the RAV-4 or the RAV-4 itself when multiple people were with Hillegas all night on November 3 and all day and late into the night on November 4 (694:158–67); (5) who this alleged "accomplice" was who Avery claimed helped Hillegas leave the property (or that one even existed); (6) how or when Hillegas could have transported and disposed of the victim's remains and effects with no one noticing; (7) how he would have gotten Ms. Halbach's DNA onto bullet #FL and placed it in Avery's garage; (8) how anyone could have driven Ms. Halbach's RAV-4 onto the property near Avery's trailer (*See* Tr. Ex. 85); or (9) where Hillegas supposedly hid Ms. Halbach's RAV-4 between October 31 to November 4 that precluded it from being found. (603:67–71, 116–23; 694:158–67.)

Additionally, and perhaps more importantly, Avery provided not one shred of evidence from the record to establish that any of the facts he alleged about this theory existed, other than his own self-serving affidavit and rank speculation. (603:67–71, 116–36.) Nearly all his alleged "facts" are unsupported by any record citations, and the few things Avery does cite to do not establish what he concludes. (603:116–23.) For example, Avery provides nothing showing that Ms. Halbach's RAV-4 collided with a post on Kuss Road—he simply provided a picture of the post and concludes that because the RAV-4's directional light was knocked out, "the killer . . . collided with this post [while attempting to plant the

RAV-4].” (603:122.) The existence of the post is not a fact that supports Avery’s conclusion that Ms. Halbach’s RAV-4 collided with it, let alone that “the killer” did so while trying to plant the RAV-4 on Avery’s property. That assertion remains “mere speculation” and insufficient to support granting a hearing. *Bode v. Buchman*, 68 Wis. 2d 276, 228 N.W.2d 718 (1975). And every “fact” Avery alleged about this tale suffers the same failing. (603:116–35.) Counsel are not ineffective for failing to investigate “facts” that don’t exist, and allegations with no factual support are insufficient to entitle Avery to a hearing.

Nor would Avery’s non-existent facts be enough to prevail on a *Denny* motion alleging Ryan Hillegas was a possible third-party suspect. (603:123–35.) Nothing he alleged in his motion established jealousy as a motive—it was, like the rest of Avery’s allegations, unsupported by the record and spun entirely from conjecture. (603:123–24; Avery’s Br. 87.) Avery provided nothing establishing: (1) that the “abusive relationship” Halbach supposedly was in was with Hillegas, (*compare* 603:123 *with* 615:288); (2) that Hillegas knew about Halbach’s sexual history with Bloedorn (603:123); and (3) even if Hillegas did know about it, that he cared (603:123). Avery just proclaimed, with no evidence whatsoever, that Hillegas committed perjury about it. (603:123.) Nor did Avery point to anything suggesting, or attempt to explain why, after four years of uneventful platonic friendship where Hillegas saw Halbach at least once a week, (694:156–57, 174–85), Hillegas suddenly became jealous about Halbach’s seeing other men—and not just jealous, but out of the blue Hillegas became so enraged as to commit murder (603:123–24). Further, Avery did not provide anything directly connecting Hillegas to the crime. (603:123–36.)

Avery could not have prevailed on a *Denny* motion alleging Hillegas was the killer because all of his alleged facts are pure speculation. Counsel is not ineffective for failing to

bring claims that would have been denied. *State v. Maloney*, 2005 WI 74, ¶ 37, 281 Wis. 2d 595, 698 N.W.2d 583.

Avery's appellate brief on this claim is even further off-point. (Avery's Br. 87–88.) Not only does he make no argument that he sufficiently pled his motion, he now claims trial counsel were ineffective for failing to establish Hillegas as a *Denny* suspect by impeaching his testimony at trial in various ways. (Avery's Br. 87–88.) That does not make sense. A *Denny* motion would have to be filed before trial, and obviously trial counsel cannot rely on trial testimony as support for a pretrial motion. And Avery has, once again, attempted to obscure his piecemeal litigation by including several arguments about what counsel should have done to "establish Mr. Hillegas as a *Denny* third-party suspect" (Avery's Br. 87), that either weren't raised until his motion for reconsideration (Avery's Br. 88 ¶ 8), or were not raised in the circuit court at all (Avery's Br. 88 ¶ 7). These are inappropriate considerations for determining whether the circuit court properly denied this claim, which was raised in Avery's June 2017 motion. (603:123–36.) Avery's claims on this point on appeal are insufficiently briefed and to the extent they state any claim, they are impermissibly based purely on hindsight evaluation of Hillegas's testimony. That is insufficient to show ineffective assistance. *Strickland*, 466 U.S. at 689.

And considering the actual facts of record from counsel's perspective at the time of trial, as *Strickland* requires, the record conclusively demonstrates that it was not only reasonable trial strategy, but the best possible trial strategy, to allege that the blood in Halbach's vehicle came from the blood vial and was planted by law enforcement. Avery had a pending lawsuit against Manitowoc County law enforcement officers. Law enforcement obviously had far more control over the scene and the evidence than anyone else. Trial counsel knew that they could show that law enforcement potentially

had access to a vial of Avery's blood. (347:1.) And before trial, there was no existing protocol for testing EDTA anticoagulation preservative in blood, which is what the purple stopper on top of the vial indicated was in the tube. (190:6; 710:91–92.) Once the State learned of the vial it sought to adjourn the trial so it could attempt to find a lab to create and validate a testing protocol, and to test the vial of blood and Avery's blood found in the RAV-4 for EDTA, but the trial court refused. (190:1; 195; 347:1–4.) Trial counsel could not know before trial that the State would successfully procure the FBI to create and validate a protocol to test for EDTA, complete the testing before the end of the trial, and that the circuit court would admit the expert's testimony about the results showing that the blood from the vial had EDTA in it, but the blood in the RAV-4 did not. (346; 347; 348; 370; 710:133–35.)

And even then, defense counsel had the reasonable option of attacking the newly-created protocol on the theory that the FBI's test was hurried and unreliable, and that the detection threshold used was too high to show EDTA in the blood from the RAV-4; which is exactly what defense counsel did, including by calling their own expert chemist to say so. (708:5–65, 96–103; 710:141–253; 715:201–05; 716:39–42.)

And though current postconviction counsel now faults them for that decision, that fault is based entirely on hindsight. (Avery's Br. 68.) Reasonable tactical choices "that [make] particular investigations unnecessary" are "virtually unchallengable," *Strickland*, 466 U.S. at 690–91, and trial counsel's strategic decision not to seek to test the blood samples so that there was no definitive finding on the presence or absence of EDTA in the vial of blood or the RAV-4, and hope the State would not be able to do tests in time, was a reasonable tactical decision before trial. (*See* 347:1–3.) Avery has simply declared that in hindsight this strategy was

foolish because it failed. (Avery's Br. 68–69.) That does not show ineffective assistance.

Furthermore, defense counsel did not "[commit] themselves to [one] theory about the source of the planted blood." (Avery's Br. 68.) At trial they specifically established through cross-examination of the FBI expert that the blood could "have been planted from some other blood source, that didn't have EDTA already." (710:230.) The jury heard the theory that the blood could have been planted from some other source than the vial; it just rejected it. Avery cannot show that counsel were ineffective for failing to make an argument that they did, in fact, make.

None of Avery's allegations sufficiently meet either prong of Strickland

In sum, in both Avery's motion and his brief, he relied on the erroneous conclusion that if he were able to come up with any theoretical explanation for the evidence that aligned with his alternative planting theory—no matter how speculative—or achieved any outcome that aligned with it by conducting a loosely analogous "experiment," then he had "proved" that what the State alleged was impossible, "proved" that his alternate scenario is what happened, and therefore "proved" that Strang and Buting were ineffective for failing to do these things. (603:63–179; Avery's Br. 65–82.)

But as shown, Avery proved nothing. His experts did not come to any conclusions that were inconsistent with the trial evidence. And Avery's "experiments" showed only that these experts—and sometimes merely postconviction counsel and her law clerks—could make a certain result occur, if they tried. It is basic logical fallacy to conclude (1) that if A could lead to B, it must lead to B; and (2) if this particular A leads to B, *no* A could lead to anything but B. Given the conditions under which most of Avery's experiments were conducted, and that they were biased toward trying to achieve a

particular result, Avery's reasoning was even more flawed than that. What Avery really concluded was that he was able to make some particular A lead to B; therefore, no X could ever lead to Y.

Nevertheless, faulty logic in hand, both here and in the trial court, Avery noted that there were cases where counsel was found deficient for failing to consult an expert, but failed to show they were in any way comparable to this case. (603:63–67; Avery's Br. 66–67.) He concluded that his spurious "experiments" would have been admissible without any developed argument applying the law to show that was true. (603:71–72; Avery's Br. 80.) And, based on these unsupported premises, declared that he had shown that Strang and Buting were ineffective. (603:63–179; Avery's Br 80.)

But Avery uniformly failed to address the two prongs of ineffective assistance. (603:63–179; Avery's Br. 39–89.) He failed to show that it was objectively unreasonable, from Strang and Buting's perspective at the time of trial, to opt to suggest to the jury that law enforcement had a vendetta against Avery and planted the evidence against him using the blood vial and other sources. He failed to show it was unreasonable to cross-examine the State's 14 experts instead of using their entire budget[15] to consult these additional experts with no idea what they might say. And he failed to show that *Strickland* required them to attempt to construct a narrative, no matter how flimsy, that a particular person somehow collected Avery's blood from his sink and planted it in the RAV-4 to account for the EDTA evidence—evidence

[15] (*Compare* 603:62 n.5 (stating that Strang and Buting "were retained by Mr. Avery for $220,000") *with* 603:218 n.16 (stating that current postconviction counsel has spent $232,541.98 in retaining these experts)).

that, again, trial counsel did not think would be available and made a strategic decision not to pursue.

Perhaps most importantly, Avery failed to show there is any reasonable probability that the jury would have acquitted him if, instead of Strang and Buting's easily-understood defense of suggesting that law enforcement framed Avery and planted the evidence, the jury was presented with a "battle of the experts" in an attempt to support the frankly fantastical theory that Hillegas[16] inexplicably flew into an unprecedented fit of rage, secretly abducted the victim, shot her and burned her remains in some unidentified location, somehow knew his way around the Avery property, and decided to frame Avery.

Then on November 3, according to Avery's new theory, despite having spent all afternoon and late into the night with multiple people who could confirm his whereabouts, Hillegas was also somehow at the Avery property around 7:30 p.m., knew Avery left the property, knew how to access the property, drove the RAV-4 onto the property, broke into Avery's trailer unnoticed, ran to Avery's sink in the half an hour after Avery bled, conveniently had pipettes and an applicator on hand, successfully "collected" enough liquid blood to plant, and planted the blood evidence in the RAV-4 before the blood coagulated. (603:120; 604:135.) Hillegas then inexplicably waited half an hour until the blood dried and went back in, this time with a scalpel, and scraped some flakes off of Avery's sink, somehow transported *those* to the RAV-4 unharmed, planted those as well, and then drove away and hid the RAV-4 somewhere.

And then a day later, as Avery's new theory continues, between organizing search parties all day with multiple other

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[16] Avery's later claims that Strang and Buting were ineffective for failing to claim that Bobby Dassey, rather than Hillegas, was the "real killer" fail for many of the same reasons.

people, Hillegas somehow, again unnoticed and at some unidentified time, snuck back onto the property and covered the RAV-4 with debris. He further managed to creep around Avery's property at some other unspecified time and again unnoticed, to plant the victim's burned personal effects in Avery's burn barrel and her remains in at least two places. He also managed to arrange for and escape with some unidentified accomplice, *again* unnoticed.

All this, yet Hillegas left no trace of himself nor anything else supporting this theory anywhere, nor did his spectral accomplice. And Avery said nothing about how Hillegas could've placed Halbach's DNA on bullet #FL, which was shot from the gun in Avery's possession and found in Avery's garage.

Avery made no showing, nor really even any argument, that there is any probability any rational jury would have rejected Strang and Buting's reasonable doubt defense and believed this. (603:60–148; Avery's Br. 65–89.) Likely because there isn't any.

Accordingly, Avery did not allege sufficient material facts that even if true would show that Strang and Buting were ineffective. And by failing to meet his pleading burden regarding trial counsel's performance, Avery necessarily failed to meet it as to Hagopian and Askins, as well. *Ziebart*, 268 Wis. 2d 468, ¶ 15.

Moreover, the record conclusively refutes Avery's ineffective assistance of trial counsel claims. "[A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Strickland*, 466 U.S. at 685. Avery provided nothing showing that Strang and Buting did not show active and capable advocacy, or did not subject the State's case to meaningful adversarial testing. (603:60–135; Avery's Br. 65–89.) All of the State's witnesses and

evidence were thoroughly contested at trial by the defense. (688 – 719.) And trial counsel gave compelling closing argument suggesting that several people—and specifically Bobby Dassey—could have committed the crime, and that the State's evidence was too unreliable and likely planted by law enforcement. (715:132–214; 716:5–53.) That was the best defense available because it was the most believable defense that accounted for the physical evidence, and trial counsel ably presented it. They thoroughly—sometimes even doggedly—cross-examined the State's witnesses, presented their own forensic anthropologist to opine that the victim's remains were brought *to* Avery's burn pit, and presented their own chemist to point out flaws in the FBI's EDTA protocol and conclusions about the EDTA tests. (688 – 719.) Avery did not set forth a single fact showing that Strang and Buting's performance was objectively unreasonable in any respect or that he was prejudiced; he merely pointed out things they could have done differently. That is manifestly insufficient to warrant a hearing on an ineffective assistance of counsel claim.

Because Avery received effective assistance from his trial attorneys, his postconviction attorneys were not ineffective for failing to raise the claims Avery now advances. "Failure to raise a losing argument, whether at trial or on appeal, does not constitute ineffective assistance of counsel." *Stone v. Farley*, 86 F.3d 712, 717 (7th Cir. 1996).

(c) Avery failed to sufficiently plead that Hagopian and Askins were ineffective for failing to raise his new ineffective assistance of trial counsel claims

Even assuming Avery had properly alleged sufficient facts supported by the record and developed an argument that would show ineffective assistance of trial counsel, though, he still did not do so for Hagopian and Askins. His motion still

would have been properly denied for failing to overcome the procedural bar under section 974.06.

Avery just proclaimed that if Hagopian and Askins hired these experts they would have been able to present Avery's new defense, and they "should have interviewed Mr. Avery to learn" the allegations he made to support this new defense. (603:213.) That provides no facts showing why or how Hagopian's and Askins's decision to present the claims they raised was objectively unreasonable. *Richter*, 562 U.S. at 106–07. Nor does Avery explain why he never bothered to give Hagopian or Askins this purported information about these events, if any of it were true. (603:213; 604:22–30); *see Strickland*, 466 U.S. at 691 ("[W]hat investigation decisions are reasonable depends critically on [information supplied by the defendant]."). Those were the key requirements for Avery to sufficiently allege deficient performance. *John Allen*, 274 Wis. 2d 568, ¶ 24.

Additionally, nowhere in Avery's motion or his brief did he give any real evaluation of the comparative strength of the claims from the objective perspective of an attorney looking at the record immediately after trial; he just repeatedly described his new claims as "clearly stronger" and his previous claims as "clearly weaker." (603:210–13; Avery's Br. 91–97.) But he again provided no actual analysis to support those statements. (603:204–05; Avery's Br. 91–97.) For example, he restated the "legitimate tendency" test from *Denny*, and then stated that "[t]here was no realistic possibility that the post-conviction attorneys would be successful in reversing the trial court's decision barring the third-party evidence at trial." (603:204.) But that "is the defendant's opinion only, and it does not allege a factual basis for the opinion." *John Allen*, 274 Wis. 2d 568, ¶ 21. Avery "must say why the claim[s] . . . w[ere] clearly stronger than the claims actually raised. His motion is devoid of any such

explanation" and is thus "conclusory." *Romero-Georgana*, 360 Wis. 2d 522, ¶ 62.

What Avery did allege amounts to more "Monday-morning quarter-backing" with the benefit of hindsight. *Lee,* 65 Wis. 2d at 657. Avery just listed the reasons the court rejected the third-party perpetrator evidence claim and reiterated that if Hagopian and Askins had hired these experts, they could have presented his new defense. (603:205–13.) That does not support Avery's allegation that this claim was "clearly weaker" than the claims he now raised, because it says nothing about the apparent strength of the claim "from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. A defendant doesn't show that one claim is weaker than another simply by showing the claim failed. *Balliette*, 336 Wis. 2d 358, ¶ 25. Hagopian and Askins could not have known how the trial court would rule on the claim at the time they filed their motion.

And fatally, Avery never even mentioned the Fourth Amendment, juror dismissal, or ineffective assistance claims pursued by Hagopian and Askins, apart than to note they were raised on direct appeal. (603:202–13.)

The juror dismissal and ineffective assistance claims were particularly strong: the circuit court engaged in *ex parte* communication with a juror that it later excused, arguably in violation of controlling case law. (468:32.) Moreover, Wis. Stat. § 972.10(7) required a court to discharge alternate jurors before deliberations, which the trial court failed to do. (468:37.) Avery had a particularly compelling argument that the trial court misapplied *State v. Lehman*, 108 Wis. 2d 291, 321 N.W.2d 212 (1982), which stated that "in the absence of consent by the defendant to such substitution . . . it is reversible error for a circuit court to substitute an alternate juror . . . after jury deliberations have begun." (468:38.) And *then* Hagopian and Askins argued that Strang and Buting were ineffective for "agreeing that . . . the juror would be

excused" if a sheriff's deputy verified the facts the juror told the judge, and "entering into a stipulation allowing the court to substitute an alternate juror . . . a procedure not permitted by statute." (468:40.)

Hagopian and Askins found concrete legal issues where the court had erred, and two instances where his attorneys had agreed to things that, had they disagreed to, would have resulted in a mistrial—one of which was contrary to statute. (468:40–44.) They had a much more compelling argument that those actions were objectively unreasonable and that they prejudiced Avery than his new ineffective assistance of trial counsel claims, which are supported by no facts of record and which say nothing about the reasonableness of Strang and Buting's decision making. (Avery's Br. 91–97.) The fact that Hagopian's and Askins's claims did not prevail does not mean that they were not the strongest claims they could have brought. And Avery failed to discuss the strongest claims at all in his postconviction motion. (603:202–17.) Accordingly, he failed to plead sufficient facts to show that Hagopian and Askins performed deficiently.

And on top of failing to allege any material facts that would show deficient performance, Avery's motion said nothing about prejudice. (603:202–13.) The closest it came was Avery's repeated assertion that if Hagopian and Askins had hired these experts, they could have alleged that Strang and Buting were ineffective in this manner. (603:211–13.) A defendant who presumes prejudice fails to sufficiently plead his motion. *Balliette*, 336 Wis. 2d 358, ¶ 24.

Again, to be entitled to a hearing, Avery had to meet the *Allen* requirements in his motion to the circuit court; he cannot cure the deficiencies in his motions in his appellate brief. (Avery's Br. 96 (directing this court to his chart where he allegedly meets these requirements in his brief, pp. 99–103.).) Still, Avery's brief on this point is no better pled or argued than his motion. (Avery's Br. 91–96.) Avery again

relies entirely on conclusory allegations. For example, he claims trial counsel "presented no real defense" because they "called [seven] witnesses and only [two] experts." (Avery's Br. 96.) But nowhere does he explain *why* objectively reasonable trial strategy *required* more witnesses, why calling two experts was insufficient, or what was insufficient about Strang and Buting's cross-examination of the State's experts. (Avery's Br. 96.) Avery never discusses any of the testimony at trial to show what was lacking in trial counsels' performance.

In short, "[i]n attempting to construct a better defense for a retrial, [Avery] did not do enough to show that a new trial was required." *Balliette*, 336 Wis. 2d 358, ¶ 79. Avery's claims raised in his June 2017 motion were insufficiently pled, meritless even if the facts he alleged were true, and his motion is procedurally barred because he lacks a sufficient reason for failing to raise his claims previously. The circuit court properly denied his motion without a hearing.

B. The circuit court properly exercised its discretion in denying without a hearing Avery's claims related to the 2016 and 2017 scientific testing.

Avery's scientific-testing-related ineffective assistance of trial counsel and newly discovered evidence claims

Avery raised two ineffective assistance of trial counsel claims in his June 2017 motion that the circuit court addressed on the merits: (1) that trial counsel were ineffective for failing to have trace evidence expert Dr. Christopher Palenik establish that the key to Ms. Halbach's RAV-4 found in Avery's trailer was not the primary key; and (2) trial counsel were ineffective for failing to have DNA expert Dr. Karl Reich perform experiments about the quantity of DNA left on a test Toyota key and a test hood latch through touch. (603:80–92.)

Avery also alleged that the additional scientific testing he performed yielded newly discovered evidence warranting a new trial. (603:153–62, 172–79.) This testing was performed on the following: damaged bullet fragment #FL (Tr. Ex. 277), which was collected from Avery's garage and was found to have Teresa Halbach's DNA on it (716:96–97); source testing the swab from the RAV-4 hood latch which had yielded Avery's DNA; and source testing and quantity testing the swab from the key to the RAV-4 found in Avery's residence, which had also yielded Avery's DNA (715:120). (603:153–62, 172–79.)

Regarding bullet fragment #FL, Avery procured Dr. Lucien Haag, a ballistics expert, (603:154–56), to shoot similar .22 caliber long rifle bullets through some bone samples. (603:155.) Palenik then examined both the test bullets and #FL using advanced microscopy techniques. (603:155–62.) Particles "consistent with the appearance of bone" appeared on the test bullets. (603:157–58.) He alleged that "[n]o particles consistent with bone" appeared on #FL. (603:160.) Palenik noted, though, that the observations he conducted were "not necessarily inclusive of all particle types that may be present," and he could not definitively say what any of the particles were without further testing. (603:160.) Haag opined that bone fragments would have been detected on #FL by the state's forensic expert, William Newhouse, who microscopically examined it before trial. (603:155–56.)

Avery alleged that "[b]ecause no bone fragments were identified in the damaged bullet (Item FL) over the course of its examination" (603:155), at the Wisconsin State Crime Lab, and Palenik did not see anything he believed was bone particulate on #FL, the damaged bullet "was never fired through Ms. Halbach's skull." (603:155.) Avery alleged this "completely disprov[ed]" that she was fatally shot in the head. (603:26–27.)

Next, Avery alleged that Palenik "used a microscope developed in 2016 to analyze the hood latch swab." (603:172.) Avery provided no other information about this examination. (603:172.)

Dr. Reich conducted source attribution testing to see if it could be determined what body secretion had yielded Avery's DNA on the hood latch. He noted that there are only four forensic body fluids for which reliable forensic tests exist: blood, semen, saliva, and urine. (604:103.) He acknowledged that humans "make a variety of other body fluids," but "[t]here are no tests for these . . . and thus these other fluids are invisible to forensic analysis." (604:103–04.) Reich ruled out all four detectable fluids. (604:106–07.) He concluded that the DNA's source could not be determined. (604:107–08.)

Reich also conducted an experiment in which individuals opened the hood of a RAV-4. (603:91–92.) The hood latch was then swabbed and tested for DNA. (603:91.) The experiment was conducted 15 times. (603:91.) In 11 of them, the volunteers did not deposit a detectable amount of DNA, but in four of them they did. (603:91–92.) Avery claimed this demonstrated that his "DNA was never deposited on the RAV-4 hood latch" and therefore Strang and Buting were ineffective for failing to hire Reich to perform this experiment. (603:91 (capitalization omitted).)

During execution of the search warrant for Avery's DNA, a swab of Avery's groin had been collected by a nurse, but was thrown away when Investigator Wiegert and Agent Fassbender conferred and determined groin swabs were not authorized by the warrant. (604:64.) Reich speculated that the discarded swab from Avery's groin could have yielded a large quantity of DNA. (603:92.) Avery concluded that this proved that the discarded groin swab was substituted for the hood latch swab, notwithstanding Fassbender's report stating the groin swab was discarded. (603:92; 604:64.)

Finally, Avery claimed that Palenik had determined that the RAV-4 key collected from Avery's residence was likely a sub-key due to its shape and the amount of debris on it, which Avery claimed proved it was planted. (603:82.) Reich applied source DNA testing to the swab of the key and determined that Avery's DNA on the item likely came from skin cells, because he again ruled out the four bodily fluids for which there were tests. (603:173.) He then conducted an experiment having Avery hold a similar key in his hand for 12 minutes. (603:83, 173.) The experimental key "yielded ten times less DNA" than what the crime lab had extracted from the RAV-4 key, which Avery contended proved that his DNA on the RAV-4 key was planted by someone having stolen his toothbrush. (603:173.)

The Circuit Court's Decision

The circuit court noted that Avery's argument about the results of this testing "le[ft] out several significant facts." (628:3.) First, Reich had conceded "that there is no forensic test available that can conclusively determine whether DNA was left by sweat. As such, the report cannot conclusively state that the DNA on the hood latch could not have been left by the sweat of the defendant's hand." (628:3.) "Furthermore, while 11 of the test subjects did not leave detectible DNA on the hood latch, the fact remains that 4 of the test subjects did leave detectible DNA by touch." (628:3–4.) The circuit court concluded that "[c]ontrary to the defendant's assertions, the test of the DNA on the hood latch does not rule out the defendant's hand as the source of the DNA," and "[i]n fact, the report declines to make such a conclusion . . . ." (628:4.)

Regarding Avery's arguments about the RAV-4 key, the court noted that "[t]here is no question that the DNA found on the key was [Avery's]." (628:4.) It noted that "[s]econdary keys are frequently used when an individual misplaces the primary key," and Avery had provided nothing showing that the victim was not using a sub-key on the day of her murder.

(628:4.) It found Avery's assertion that "someone took his toothbrush and planted the DNA on the subkey" supported by only Avery's own conclusory allegations. (628:4–5.)

Finally, the court noted that Palenik's report about his observations of bullet fragment #FL was not as "clear cut" as Avery claimed. (628:5.) Palenik's report indicated that the tests were not completely inclusive of everything that may be present on the bullet and to do that, a "more detailed analysis would be necessary." (628:5.) The report therefore did "not support [Avery's] position." (628:5.)

The circuit court further noted that all these items were admitted at trial and "[e]ach was thoroughly contested by defense counsel." (628:5.) "The reports submitted by [Avery] are equivocal in their conclusions and do not establish an alternate interpretation of the evidence." (628:5.) It found that "[g]iven the totality of evidence submitted at trial and the ambiguous conclusions as stated in the experts' reports, it cannot be said that a reasonable probability exists that a different result would be reached at a new trial based on these reports." (628:5–6.)

1. Legal standard and standard of review for newly discovered evidence claims.

Where a defendant seeks a new trial based on newly discovered evidence, he must show, "by clear and convincing evidence, that (1) the evidence was discovered after conviction, (2) the defendant was not negligent in seeking to discover it, (3) the evidence is material to an issue in the case, and (4) the evidence is not merely cumulative." *State v. Vollbrecht*, 2012 WI App 90, ¶ 18, 344 Wis. 2d 69, 820 N.W.2d 443. If the defendant satisfies all four criteria, "then 'the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial.'" *State v. Avery*, 2013 WI 13, ¶ 25, 345 Wis. 2d 407, 826 N.W.2d 60 (citation omitted). "A reasonable probability of a

different result exists if there is a reasonable probability that a jury, looking at both the old and the new evidence, would have a reasonable doubt as to the defendant's guilt." *Id.*

"Newly discovered evidence, however, does not include the 'new appreciation of the importance of evidence previously known but not used.'" *State v. Fosnow*, 2001 WI App 2, ¶ 9, 240 Wis. 2d 699, 624 N.W.2d 883 (citation omitted). Evidence previously known includes evidence that was "knowable" by counsel. *Id.* Additionally, a new expert opinion based on facts available at the time of trial is not newly discovered evidence as a matter of law; it is a new appreciation of the importance of evidence previously known but not used. *Vara v. State*, 56 Wis. 2d 390, 394, 202 N.W.2d 10 (1972); *State v. Krieger*, 163 Wis. 2d 241, 256, 471 N.W.2d 599 (Ct. App. 1991).

"If the newly discovered evidence fails to satisfy any one of these five requirements, it is not sufficient to warrant a new trial." *State v. Eckert*, 203 Wis. 2d 497, 516, 553 N.W.2d 539 (Ct. App. 1996). "The decision to grant or deny a motion for a new trial based on newly discovered evidence is committed to the circuit court's discretion," and this Court reviews that decision "for an erroneous exercise of discretion." *Avery*, 345 Wis. 2d 407, ¶ 22.

2. The circuit court properly rejected Avery's claims related to the DNA testing.

The circuit court properly exercised its discretion in denying Avery's newly discovered evidence and ineffective assistance claims related to this testing.

Avery failed to meet the first four prongs of the newly discovered evidence test

Avery provided no facts or argument showing that any of this evidence met the first four prongs of the newly discovered evidence test, and again relied on conclusory

allegations. (603:176.) Avery said only that "through the use of new technology previously unavailable, Mr. Avery has discovered new evidence that shows his conviction was the result of a manifest injustice. Much of the evidence was discovered diligently after the new technology became available. Further, the evidence is crucial to the issue of Mr. Avery's guilt or innocence and is not cumulative." (603:176.) He further alleged that he "satisfied the first four prongs of the test" because unexplained "technological advancements" occurred after Avery's trial, "[t]herefore, Mr. Avery was not negligent in failing to have any of these tests conducted," and "[c]learly" they are material and noncumulative. (603:177.)

None of that relates any facts about Avery's alleged new evidence to prongs of the test to show that it actually meets them; it is simply a recitation of the test. Avery does not explain to what technology he is referring, when this technology became available, what this technology can show that previous technology could not, or why his various experiments could not have been conducted at the time of trial or during any of his other postconviction litigation. In fact, Avery's conclusory statement admits that some of Avery's evidence *cannot* meet the first four prongs of the test, considering that only "much of" it—and what "much" includes is unclear—was "discovered diligently" and with "technology previously unavailable." (603:176.)

Further, Avery's own motion refutes that this evidence was unknowable at the time of trial. Haag claimed that Newhouse's microscopic examination would have revealed bone particles on bullet fragment #FL during Newhouse's examination at the time of trial. (603:156.) Avery has now attempted to recast this as an ineffective assistance claim, but that is not the argument he made in the circuit court, so it is forfeited. (*Compare* Avery's Br. 72–73 *with* 603:154–56.)

Similarly, Dr. Kenneth Olsen, the State's trace evidence expert, used the exact same technology and performed the

same type of elemental analysis on the charred bone fragments before trial that Palenik performed on bullet fragment #FL in 2017; Palenik just used a newer microscope.[17] (603:154, 172–73.) But the date the microscope was manufactured doesn't show that the technology used advanced in any material way since Olsen's examination in 2005. Avery could have conducted this type of examination on #FL then.

The technology obviously existed in 2005 to determine how much DNA was deposited on an item seeing as the Wisconsin Crime Lab did so with the evidentiary swabs.[18] (603:91, 173.) That means Avery's key experiment holding a key in his hand provides nothing that was unknowable at the time of trial, either, because all of Avery's new conclusions were based on comparing the amount of DNA left on the key during his experiment to the amount of DNA the crime lab detected on the key swabs. (603:173.)

The record conclusively demonstrates that Avery merely provided new expert opinions based on facts available at the time of trial. That is not newly discovered evidence as a matter of law. *Vara*, 56 Wis. 2d at 394.

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[17] (703:7 (Olsen explaining that he used a "scanning electron microscope with an energy dispersive x-ray analyzer" to identify different elements present on the bone fragments)); (603:157 (Explaining that Palenik used "Scanning Electron Microscopy and Energy Dispersive X-Ray Spectroscopy" to determine whether elements characteristic of bone could be detected on #FL.))

[18] Avery dichotomously claimed in his motion that the quantity testing results were both newly discovered evidence and that Strang and Buting were ineffective for failing to present them. (603:83–84, 173.) Though by definition an attorney cannot be ineffective for failing to present newly discovered evidence, the State will address both contentions, because Avery can meet neither.

In short, Avery's motion failed to show, by clear and convincing evidence, that he meets the first four prongs of the test for a newly discovered evidence claim.

Avery failed to show a reasonable probability of a different result

Even so, as the circuit court aptly concluded, Avery failed to meet the fifth prong as well. (628:5–6.) And because that prong required the circuit court to assess whether there was a reasonable probability of a different result if the DNA quantity experiments on the hood latch and key, and establishing that the key may be a sub-key, were admitted at trial, it properly denied Avery's claim that Strang and Buting were ineffective for failing to have these experiments performed, because Avery failed to show that it was prejudicial. (*See* 603:91–92; Avery's Br. 73–77.) It further properly denied Avery's groin swab and toothbrush stories as insufficiently pled. (628:3–6.)

Avery's experiments on the hood latch would actually support the State's case more than Avery's. As the circuit court noted, Reich admitted that there is no forensic test that can detect sweat. (628:3; 604:103–04.) Reich later also admitted that while sweat "technically" has no DNA itself, it can have sloughed skin cells in it that do carry DNA. (630:1–2.) And Reich's source attribution testing found that "[a]ll four body fluid tests provided negative results . . ." for the hood latch swab, meaning Avery's expert ruled out any of those substances, showing the DNA could indeed have been left by Avery's touching the latch and depositing sweat with his skin cells in it. (604:107; Avery's Br. 103–04.)

The touch experiment on the hood latch supports the State's case, as well. In Avery's experiment individuals left their DNA on the hood latch four out of fifteen times—which is 26%, or better than one in four—showing that it is possible to do so even when someone opens the hood under controlled,

non-stressful, low-exertion conditions. (603:91–92.) Given that Reich's experiment cannot account for the environmental factors and the many other variables that could have led to Avery's depositing more skin cells on the hood latch than the individuals in his experiment, Reich's experiment does not undermine the State's case against Avery at all. Avery omits any mention of this result in his brief. (Avery's Br. 73–74.)

Avery's elaborately woven scene where Investigator Wiegert and Agent Fassbender intentionally directed the nurse to take the groin swab, confiscated it, and surreptitiously substituted it for the hood latch swab has no factual support in the record and therefore cannot support either Avery's ineffective assistance or newly discovered evidence claims. (603:89–92; Avery's Br. 74–78.) Avery based this scenario entirely on the failure of the nurse to note on her report that a groin swab had been taken but discarded, which according to him "a well-qualified nurse" would have done, and the fact that Wiegert and Fassbender instructed Deputy Hawkins and Sergeant Tyson to swab the hood latch, battery cables, and interior and exterior door handles, but did not include the interior hood release lever and hood prop. (603:87–91; Avery's Br. 75–76.) Avery claimed this showed the investigators were not making "a good faith effort" to collect evidence. (603:89–91; 615:44.) Avery then apparently concluded that this supplied the factual support for any nefarious scenario about the DNA evidence he could envision. (603:90–91; 615:44; Avery's Br. 75–76.)

Avery's opinion that Wiegert and Fassbender should have instructed the investigators to swab more areas is not a fact, and it supports nothing. It certainly lends no support to his claim that Wiegert and Fassbender intentionally and in bad faith confiscated and substituted the groin swab for the hood latch swab. (Avery's Br. 75–78.) Avery's unfounded speculation about what "a well-qualified nurse" would log on the form is also his opinion, supported by nothing, and is not

evidence. (603:87.) The perspicuous and factually supported reason the groin swab is not listed on the nurse's report is because it was discarded, as Fassbender's report shows, (604:64), and therefore not "obtained for DNA and released to Sgt. Bill Tyson." (615:44–46; Avery's Br. 75.) Something discarded would not be entered on a report intended to document what the hospital is transmitting to law enforcement for the obvious reason that it is not being transmitted to law enforcement. Anything else is pure speculation.

Avery has also materially misrepresented Reich's affidavit. At no point does Reich "[offer] the opinion that a rubbed groin swab taken from the defendant was relabeled and thus became evidence from a hood latch." (Avery's Br. 77.) Reich said "it is hypothesized that a rubbed groin swab" could have been relabeled. (604:113.) Reich specifically opined that "[t]he convenience of this explanation . . . does not prove evidence tampering, or more precisely, evidence reassignment." (604:112.) In short, all parts of this tale are unsupported by any facts.

Avery's experiments about and tests on the RAV-4 key suffered similar flaws to his arguments about the hood latch.

First, even if the key was a sub-key, "that does not establish that the key was planted." (628:4.) Avery provided nothing establishing "that the key that the victim used on the day of her murder was not the subkey." (628:4–5.) Moreover, Ms. Halbach's employer testified that she was "misplacing her keys all the time." (696:207.) Strang and Buting could not be ineffective for failing to procure an expert to say that the key was a sub-key, because there is no probability a different result would occur at trial if an expert offered that the key was a sub-key without also showing that Ms. Halbach was not using the sub-key on the day of her murder, especially when someone who knew her well testified that she was prone to misplacing her keys. (603:80–81.)

Second, like his hood latch experiment, Avery's experiment holding an exemplar key bolsters, rather than weakens, the State's case. Avery concluded that his experiment "demonstrate[s] that the DNA on the sub-key was planted because the amount of DNA detected by the [crime lab]" was much greater than the amount of DNA Avery deposited on the exemplar key by holding it in his hand for 12 minutes. (603:83; Avery's Br. 77.) What Avery glossed over was that he undeniably left his DNA on the exemplar key during this experiment (604:110; Avery's Br. 77–78), which, again, was obviously conducted in a controlled environment and cannot account for the many other variables that could lead to Avery depositing more skin cells on the key, and with Avery in a different physical condition than one would be when trying to hide evidence of a murder.

And as the circuit court again correctly noted, Avery's claim that Avery's "toothbrush was taken by law enforcement from his bathroom but suspiciously never logged into evidence," and that was the source of his DNA on the key, was supported only by his own conclusory, self-serving allegation. (603:84; 628:5.) Furthermore, Avery has again materially misrepresented Reich's opinion. Reich never once "opines that the DNA found on the Toyota sub-key found in Mr. Avery's bedroom was planted." (Avery's Br. 77.) A citation to where this claim appears in Reich's affidavit is conspicuously absent from Avery's brief, likely because such an opinion is conspicuously absent from Reich's affidavit. (604:112–13.) Avery cannot obtain relief by falsifying his expert's findings on appeal.

Moreover, this theory was put forth at trial and rejected by the jury. (704:102–03.) There is not a reasonable probability that rehashing this unsupported speculation would produce a different result at a new trial, meaning Avery showed neither ineffective assistance nor what was needed to prevail on a newly discovered evidence claim.

Finally, Avery's expert reports about bullet fragment #FL do not support his position that he has "completely disproven" the State's assertion that the victim's cause of death was being shot twice in the head, for two reasons. (603:26–27.)

First, Avery sought to "disprove" something the State never alleged: that #FL went through the victim's skull. (Avery's Br. 105–06.) The State did not rely on the two recovered bullet fragments to show that the victim was shot in the head, and never alleged that either recovered fragment went through her skull. Showing that bullet #FL did not go through bone therefore would not disprove any part of the State's case even if that were what Palenik's report actually concluded. (*See* Avery's Br.105–06.)

The State's forensic anthropologist, Dr. Leslie Eisenberg, and the medical examiner, Dr. Jeffrey Jentzen, testified that the cause of Ms. Halbach's death was two gunshot wounds to her head. (603:38; 706:150; 703:50–54.) Avery's own forensic anthropologist, Dr. Scott Fairgrieve, agreed with that assessment. (708:122; 716:91.) But these experts came to that conclusion by examining the bone fragments recovered from Avery's burn pit, not from anything about the recovered bullet fragments. (706:132–66; 703:50–54.) Dr. Eisenberg found skull fragments that showed "unnatural openings" in two different skull bones, one in the parietal bone and one in the occipital bone. (706:150–58.) These openings showed internal beveling, and X-rays of these unnatural openings showed radiopaque flecks surrounding them that were not bone. She testified that to a reasonable degree of scientific certainty, the internal beveling in the left parietal bone and in the occipital bone indicated "gunshot or bullet entrance wound[s]." (706:172.)

Dr. Kenneth Olsen, the State's trace evidence expert, testified that he conducted an elemental analysis and learned that the flecks around the openings were lead. (703:12–27.)

Dr. Jentzen confirmed that the bone fragments showed two gunshot entrance wounds to the head, which were the cause of death. (703:50–54, 62–63.) No expert found any evidence of an exit wound. (*See*, *e.g.*, 703:62–63.)

None of the experts who testified at trial claimed that bullet fragment #FL or #FK was used in the fatal shots. What the State submitted about the two bullet fragments and eleven casings recovered from Avery's garage was ballistics expert Newhouse's opinion that all eleven casings and bullet fragment #FL were fired from the .22 rifle taken from Avery's residence; the other bullet fragment, #FK, was in too poor a condition to tell whether it was fired from that gun. (707:103, 108–09, 112–16.) But Newhouse never opined that either bullet fragment went through bone, let alone that they were the bullets from the fatal shots. (707:103–85.) He simply said that #FK, at least, looked like "a bullet that has passed through or has struck some harder object than the bullet." (707:111.) But that could be anything. And the State's DNA expert, Sherry Culhane, testified that Halbach's DNA was found on #FL, but she never suggested it had a specific tissue source. (699:163–67.)

In other words, it was the skull bone fragments showing bullet holes in them that the State used to prove that the victim was shot twice in the head, not the bullet fragments. (*See* 715:80, 128–29; 716:98.) Avery has misunderstood why #FL was significant: #FL was significant because it was both fired from the gun in Avery's bedroom and had Teresa Halbach's DNA on it, meaning the bullet touched some part of Ms. Halbach's tissue at some point and therefore linked the gun to Ms. Halbach's murder. (715:79–81, 113–15.)

But contrary to what Avery claims, no one ever said that #FK and #FL were the two bullets fired into Ms. Halbach's skull—Avery made that inferential leap on his own. (*See* 603:153–54; Avery's Br. 106 (citing 703:62–63; 716:98).) Jentzen said, as explained, that the *bones* showed two

gunshot wounds. (703:62–63.) He said nothing about #FK or #FL going through the skull. Nor did the prosecutor. (716:98.) Indeed, the prosecutor told the jury that he could not say how many times Avery shot Ms. Halbach (and never suggested that the State had identified all the places on her body she may have been shot), because only two bullet fragments, but eleven cartridge casings, were recovered; but the evidence showed that she was shot "at least twice, and it's at least twice to the head." (716:98.) But again, that was because the forensic anthropologists and medical examiner found two gunshot entrance wounds in her skull bones. (715:107, 127–28; 716:91–92, 98.) Had no bullet fragments been found at all, the State's argument about the cause of death being two gunshots to the head would have remained the same. Accordingly, even if Palenik's report about whether bone particles were present on #FL were as conclusive as Avery represents, Avery would have disproven nothing. (*See* Avery's Br. 105–06.)

Second, as the circuit court noted, Palenik admitted that he could not state with certainty that his observations were inclusive of all types of particles that may be on #FL (603:160; 621:37), and further admitted that he could not say with certainty what any of the particles on any bullet, exemplar or #FL, was without further scientific testing. (621:36 ¶ 11, 37 ¶ 16.) Putting Palenik on the stand to say that he could not state with certainty anything about the absence or presence of bone on a bullet fragment that the State never alleged went through bone anyway would not create a reasonable probability of a different result at trial.

In sum, Avery's allegations did not meet any part of the test for newly discovered evidence, and accordingly failed to meet the test for prejudice on his ineffective assistance claims, as well. The circuit court appropriately exercised its discretion in denying his motion.

3. Avery's arguments do not persuade.

Avery alleges that the circuit court "erred in weighing the scientific evidence rather than granting an evidentiary hearing" (Avery's Br. 103), and "appl[ied] the wrong standard" to this evidence because it noted that his "arguments ignore[d] 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." (Avery's Br. 107 (citations omitted.) Relying on *State v. Edmunds*, 2008 WI App 33, ¶¶ 10–15, 308 Wis. 2d 374, 746 N.W.2d 590, and *Avery*, 345 Wis. 2d 407, Avery contends that because the defendants in those cases did not establish precisely when the technology was developed, he only had to show "the technology [his experts used now] was not available at the time of his trial" to prove that his evidence was newly discovered (which, as explained, he did not establish anyway). (Avery's Br. 108.) He is wrong.

Avery has conflated the standard for prevailing on the merits of a newly discovered evidence claim with the standard for overcoming the procedural bar on a successive section 974.06 motion to reach those merits. (Avery's Br. 107); *Lo*, 264 Wis. 2d 1, ¶¶ 17–20. To overcome the procedural bar and reach the five-prong newly discovered evidence test, Avery first had to show a sufficient reason his newly discovered evidence claims could not have been brought in his other postconviction litigation. *See Edmunds*, 308 Wis. 2d 374, ¶¶ 10–13. He did not do so. (603.)

Nothing in *Edmunds* or *Avery* supports Avery's conclusion to the contrary. The supreme court in *Avery* did not discuss the procedural bar under section 974.06(4), and simply noted that the parties agreed that the defendant had met the first four prongs of the test. *Avery*, 345 Wis. 2d 407, ¶ 31. In *Edmunds*, the circuit court found that the defendant had met the first four prongs of the test, and this Court upheld

that determination as a proper exercise of discretion. *Edmunds*, 308 Wis. 2d 374, ¶¶ 14–15. The unavailability of the defendant's new scientific evidence during his previous appeal was relevant only to the second prong of the test, whether the defendant was negligent in seeking it. *See id.* ¶ 15. Nothing in *Avery* or *Edmunds* supports Avery's suggestion that he can meet the first four prongs of the relevant test and overcome the procedural bar just by asserting that his "new" evidence was unavailable at trial.

At any rate, the circuit court did not reject Avery's claims on that basis. The circuit court rejected his newly discovered evidence claims on the merits of the fifth prong, as explained above. (628:3–6.) The court did not "improperly weigh" the scientific evidence, either: a circuit court must weigh the new evidence against the evidence presented at trial to determine whether a jury looking at the new evidence and the old evidence would have a reasonable doubt about the defendant's guilt. *See Avery*, 345 Wis. 2d 407, ¶ 32. (Avery's Br. 103–07.) Avery really just argues that the circuit court misread his experts' reports. (Avery's Br. 103–07.) But the court quoted facts directly from Avery's experts' reports, finding that they did not come to the definitive conclusions Avery claimed in his motion. (628:3–6.) Those findings are supported by the experts' affidavits in the record. (604:101–14; 615:9–12; 621:33–39.) They therefore cannot be clearly erroneous. *Schreiber*, 223 Wis. 2d at 426.

Avery appears to have misunderstood what Dr. Reich concluded and what the circuit court found about the hood latch source testing. (Avery's Br. 103–04.) The circuit court did not "conclude[ ] that the DNA on the hood latch was deposited by sweat from Mr. Avery's hand." (Avery's Br. 103.) It noted that Reich's source attribution testing could not test for sweat. (628:3.) And while it is true that "there is no DNA in sweat" (Avery's Br. 104), Reich admitted that there can be skin cells in sweat, and that is how sweat transmits DNA.

(630:1–2.) Reich couldn't test for sweat but he ruled out all of the detectable bodily fluids, meaning his tests left open the possibility that Avery's DNA was deposited on the hood latch by skin cells transmitted in sweat. (628:3–4.) Neither the State at trial nor the court said the sweat itself had to carry DNA which he has now "disproven," as he seems to believe.[19] (603:91; Avery's Br. 74, 103–04.)

Contrary to what he states in his brief, Avery's claim in his motion that Palenik's examination of the hood latch swab yielded newly discovered evidence amounted to one sentence that did not relay any facts about what Palenik did, what he found, how he reached any conclusions about it, or why any findings he made were significant. (603:172; Avery's Br. 109.) And again, the fact that Palenik used a microscope manufactured in 2016 does not make the technology new. (Avery's Br. 109–10.)

Regarding #FL, Palenik only said he couldn't see anything that looked like bone on bullet fragment #FL, but "further analytical approaches" would be needed to "more specifically confirm" its absence. (Avery's Br. 104.) That is exactly what the circuit court said Palenik said, and it is far from the definitive conclusion Avery claims. (628:5; Avery's Br. 104–05.) But again, while it's true that "the State's theory as to the cause of death was gunshots to Ms. Halbach's skull," (Avery's Br. 106), neither the State nor any of the state's experts ever alleged that #FL was one of the bullets that went through her skull; Avery just jumped to that conclusion. Palenik's examination therefore disproves nothing, no matter

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[19] Avery's citation for this proposition in his motion does not support his claim. (603:91) At two of the points to which he directs, the State was discussing how likely individuals are to leave latent fingerprints, not touch DNA. (711:102–03; 716:82–83.) In the third, the State said what Reich said: that sweat sometimes carries skin cells and other material that carries DNA. (715:119–20.)

what conclusion he reached about the particles on #FL (Avery's Br. 104–06).

Avery never alleged in the trial court that DeHaan performed any experiments that amounted to newly discovered evidence. (*See* Avery's Br. 109; 603:153–79.) And he offers nothing now attempting to show that DeHaan's independent research since 2012 somehow meets any part of the newly discovered evidence test. (Avery's Br. 109.) Avery just relies on another conclusory, factually unsupported assertion, stating that because DeHaan has performed more experiments on cadavers than anyone else since 2012, they must "refute" that Ms. Halbach's remains were burned in Avery's burn pit. (Avery's Br. 109.) That would be insufficient to meet any part of the newly discovered evidence test even if Avery had not forfeited the claim by failing to raise it in the circuit court.

The court found that because Avery's experts did not actually rebut anything the State put forth at trial, there was no reasonable probability of a different result at a new trial. (628:3–6.) It specifically relied on facts stated in Avery's expert reports to come to that conclusion. It issued a reasoned opinion applying the law to the facts of record, or in other words, a proper exercise of discretion. *Jeske*, 197 Wis. 2d at 912. This Court should affirm the circuit court's denial of Avery's June 2017 motion.

II. Nothing required the circuit court to allow Avery to pursue his claims piecemeal, so it appropriately denied his October 6, 2017 motion for relief from judgment.

On October 6, 2017, Avery filed a "motion for relief from judgment." (629:1 (capitalization omitted).) There, he stated that on September 18, 2017, he met with the State and reached an agreement to schedule additional tests on the victim's RAV-4. (629:1–2.) Avery said that "[t]he parties also

had an agreement that the previously filed § 974.06 Motion For Relief would be amended." (629:1–3.) He claimed that after this meeting he "intended to inform the court that an amended motion would be filed," but that he "did not anticipate" the court denying his motion while he pursued further testing. (629:3.) He asked the court to vacate its October 3 order denying his motion. (629:3.)

The circuit court denied this motion in its November 28, 2017 order. (640:1–3.)

A. The circuit court reasonably explained its decision denying Avery's motion to vacate judgment.

"The decision to grant relief from a judgment is discretionary." *Johnson v. Johnson*, 157 Wis. 2d 490, 497, 460 N.W.2d 166 (Ct. App. 1990). "[I]t is also within the discretion of the trial court whether to allow an amendment to a motion for post-conviction relief pursuant to sec. 974.06, Stats." *State v. Rohl*, 104 Wis. 2d 77, 93, 310 N.W.2d 631 (Ct. App. 1981).

The circuit court properly exercised its discretion when it denied Avery's motion to vacate its judgment denying his June 2017 motion. The court explained that it was denying Avery's request because Avery chose to file an incomplete motion and never asked the court not to rule on it, nor alerted the court to any negotiations about "the scheduling of a hearing that the court had yet to grant." (640:2.) It was "[o]nly after the court fully considered the evidence submitted and issued its final ruling" that Avery "finally alert[ed] the court" that he was working on further evidence to support his arguments, and no agreements on scheduling "were submitted to the court for its approval until after the final decision was made [to deny] the defendant's original motion." (640:2.) The court determined that Avery "cannot try to amend a motion that was filed without reservation only after

[he] receives an adverse ruling," and denied the motion for relief from judgment. (640:2–3.)

That is a reasonable decision that is based on the facts of record, and accordingly the court did not erroneously exercise its discretion. *Jeske*, 197 Wis. 2d at 913. Avery provided nothing in his October 6, 2017 motion showing the circuit court should have withheld ruling on his June 2017 motion—he essentially just told the circuit court that he didn't realize the court might rule on it and that he'd intended to tell the court he planned to supplement his arguments later. (629; Avery's Br. 35.)

The circuit court was not required to let Avery supplement his motion even if he'd timely requested to do so, let alone allow him to supplement an already-denied motion that he filed without reservation. It adequately explained its reasons for refusing to do so. The court properly exercised its discretion when it denied Avery's motion for relief from judgment.

B. Avery improperly argues for the first time on appeal that the court's refusal to vacate its judgment violated the 2007 preservation and testing order; nevertheless, the claim is meritless.

1. Avery forfeited his argument that the 2007 preservation order allowed him to pursue his claims piecemeal.

Avery has not attempted to show that the circuit court erroneously exercised its discretion in denying his motion to vacate judgment based on the reasons Avery actually offered to it, and instead makes a new argument on appeal. (Avery's Br. 33–39.) Now, Avery claims that the circuit court's refusal to reopen his June 2017 motion violated the 2007 court order for preservation and scientific testing of certain evidence. (Avery's Br. 36–39.) This argument appeared in none of

Avery's motions to the circuit court. (*See* 629; 631; 632; 633; 635; 636.)

Again, this Court "will not . . . blindside trial courts with reversals based on theories which did not originate in their forum." *Schonscheck*, 261 Wis. 2d 769, ¶ 11 (citation omitted). Avery cannot show that the circuit court erroneously exercised its discretion by relying on an argument on appeal that the circuit court never heard. The argument is forfeited.

Avery has also attempted to unfairly deflect blame onto the State for the result of Avery's own decision to prematurely file an incomplete section 974.06 motion and then fail to alert the court to that fact. (Avery's Br. 34.)

No matter what was agreed to by the parties about scheduling forensic testing, particularly at the *September* 2017 meeting, it doesn't explain why Avery filed an incomplete motion in *June* 2017 and never alerted the court that he planned to supplement it. (Avery's Br. 34.) Wisconsin Stat. § 974.06(2) states that there is no statute of limitations for bringing a section 974.06 motion. As the circuit court aptly observed, Avery has never offered any reason why he filed his June 2017 motion at all if he had further investigation he wanted to complete, or why he waited months to even think about alerting the court that he planned to supplement it—and then still didn't notify the court until after he received an adverse ruling. (640:3–5.) Indeed, Avery still has offered nothing in this regard.

The State is not responsible for Avery's unilateral decision to file an incomplete motion and presume the court would not decide it while he conducted further investigation. (640:4.) That choice, and its consequences, rest solely with him.

The circuit court properly exercised its discretion in denying Avery's motion to vacate the October 3 order.

2. The 2007 preservation order does not give Avery a license to pursue available claims piecemeal.

Regardless, Avery's argument that the circuit court's refusal to vacate its judgment violated the 2007 order is meritless. (Avery's Br. 33–39.) The 2007 preservation order requires the State to preserve indefinitely "all *bloodstains*," and "all swabs or other collected samples of *bloodstains* that the State believes contain Steven Avery's DNA and that were found in or on Teresa Halbach's vehicle," and "portions of all items submitted by the State to the FBI Laboratory" for EDTA testing. (395:1–2 (emphasis added).) Paragraph 4 of the order further states that Avery "may at any time submit the bloodstains, swabs, and items described in paragraphs 1 through three . . . for independent scientific testing . . . without further order of this Court." (395:2.)

The 2007 order says nothing about collection or "further forensic testing" of other evidence, or about relieving Avery of the rules of postconviction procedure when raising claims related to forensic testing. (395; Avery's Br. 38–39.)[20] And the circuit court's October 3 order did not prevent Avery from seeking any further testing. To overcome the procedural bar and raise claims related to that testing, though, Avery would still have to meet the postconviction pleading requirements. That includes showing a sufficient reason why he could not have sought this testing and brought any claims

[20] Avery attempts to bootstrap into his appellate brief an argument that he was due additional testing pursuant to Wis. Stat. § 974.07. (Avery's Br. 38–39.) This Court explicitly refused to allow Avery to litigate a Wis. Stat. § 974.07 motion as part of this appeal, stating that "[t]he scope of this appeal is limited to a review of the circuit court's orders denying Avery's Wis. Stat. § 974.06 motions." (769:2.) Whether Avery could meet the requirements for testing and postconviction relief under Wis. Stat. § 974.07 is not at issue here. The State will not discuss it further.

related to it at the time he filed his earlier motions, if he wants to raise claims related to subsequent testing. *See* Wis. Stat. § 974.06(4).

In any event, none of the additional items on which Avery relied in his motion to vacate fall within the 2007 order. (629:2.) Avery claimed he planned to test for DNA swabs from the RAV-4's battery cables, to collect and test new swabs from the bar under the driver's seat, hood crutch, interior hood release, license plates, a lug wrench, and to conduct "[a] complete examination of the interior and exterior of the RAV-4 for additional forensic evidence." (629:2.) None of that is bloodstain evidence collected from the RAV-4 or items submitted to the FBI for EDTA testing. An examination of the RAV-4 "for additional forensic evidence" is not even a request for scientific testing of anything. Even if Avery were correct that the 2007 order relieved him of showing a sufficient reason why claims related to scientific testing of the evidence listed within it could not all be raised in a single motion, which he is not, nothing Avery submitted to the circuit court would have triggered the 2007 order.

The 2007 preservation order does not give Avery a license to pursue his claims piecemeal, nor did it require the circuit court to allow him to amend his motion after he received an adverse ruling. The court appropriately denied Avery's motion to vacate its October 3, 2017 order.

III. The circuit court properly exercised its discretion when it denied the claims raised in Avery's motion for reconsideration as procedurally barred.

On October 23, 2017, Avery filed a motion for reconsideration of the circuit court's order denying his June 2017 motion. (631.) There, he alleged:

1. The circuit court "failed to properly accept the factual allegations in Mr. Avery's motion as true" (631:5–9);

2. The circuit court misconstrued his expert opinions (631:10–18);

3. The circuit court erred when it concluded that ineffective assistance of postconviction counsel must be pursued via a *Knight* petition (631:18–22);

4. The circuit court erred in finding that he did not show a sufficient reason why his claims could not have been raised earlier (631:22–31);

5. He had "new evidence" of a *Brady* violation consisting of a "new witness," Kevin Rahmlow, who allegedly told Sergeant Colburn that he saw a car similar to the victim's RAV-4 outside the Avery property on November 3 and 4, but no police report existed about the conversation (631:31–32);

6. That he had "new evidence" that trial counsel were ineffective by failing "to investigate and present to the jury" impeachment evidence related to Bobby Dassey, consisting of Bryan Dassey's 2005 statement to police that Bobby said he saw the victim leave the property (631:33–39 (capitalization omitted));

7. Avery had "new evidence" purportedly providing a motive for Bobby Dassey to murder Ms. Halbach, consisting of forensic computer examiner Gary Hunt's examining the forensic image of the Dassey computer provided to the defense before trial, and finding violent pornography and images of dead bodies, (631:46–48);

8. Avery had "new evidence of a Brady violation" consisting of Denise Heitl stating that she had a phone conversation with the victim at 11:35 on October 31 about an appointment, which Heitl told the authorities (631:48–49 (capitalization omitted));

Avery filed two supplements to this motion adding arguments and claims.

Avery alleged in his first supplement that "[a]s undersigned counsel's investigation remains ongoing, additional new evidence continues to develop . . . ." to support his claims. (633:2.) He then raised five new ineffective assistance and newly discovered evidence claims related to the contents of the Dassey computer, and provided an affidavit from Bryan Dassey as "further" impeachment evidence related to Bobby's testimony about Halbach leaving the property. (633:2–9.)

In his second supplement, Avery alleged that the State committed a *Brady* violation by failing to disclose to the defense a CD containing Detective Mike Velie's investigative report of his forensic investigation performed on the Dassey computer, which he alleged "must contain evidence favorable to Mr. Avery." (636:3–5.) Avery also added additional argument from his police procedure expert that Scott Tadych was not sufficiently investigated, and provided an affidavit from Attorney Strang concurring that he was ineffective for failing to hire a blood spatter or ballistics expert. (636:11–15.)

A. Legal standards and standard of review for motions for reconsideration

"To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact." *Midland Funding, LLC v. Mizinski*, 2014 WI App 82, ¶ 20, 355 Wis. 2d 475, 854 N.W.2d 371 (citation omitted).

Again, to qualify as newly discovered, the evidence must meet the five-prong test stated in *Avery*, 345 Wis. 2d 407, ¶ 25; *see supra* I.B.1. It "does not include the 'new appreciation of the importance of evidence previously known but not used.'" *Fosnow*, 240 Wis. 2d 699, ¶ 9 (citation omitted). Evidence previously known includes evidence that was "knowable" by counsel. *Id.*

This Court "review[s] a circuit court's denial of a motion for reconsideration to determine if the court properly exercised its discretion." *State v. White*, 2008 WI App 96, ¶ 9, 312 Wis. 2d 799, 754 N.W.2d 214.

B. The circuit court appropriately exercised its discretion to deny Avery's motion for reconsideration.

1. The circuit court properly found that the claims raised in Avery's motion for reconsideration were procedurally barred.

The circuit court applied the correct law to the facts and gave a rational explanation for denying Avery's motion for reconsideration. Accordingly, it properly exercised its discretion in doing so. *Jeske*, 197 Wis. 2d at 912.

The circuit court observed that in Avery's "numerous filings after October 6th, [he] submit[ted] a substantial amount of what [he] calls newly discovered evidence. That characterization is incorrect." (640:3.) Instead, Avery's motion for reconsideration and subsequent supplements "outlin[ed] new arguments and new theories of the case for the court to consider." (640:3.) But "[w]hat [was] missing in the wealth of arguments and documentation is any explanation as to why the defendant filed his motion on June 7, 2017, knowing that further scientific testing was required to complete his motion and that considerable investigation was still being conducted by the defense." (640:3.) *Escalona-Naranjo*, 185 Wis. 2d 168, expressly bars such claims "unless good cause is shown as to why the issue was not included in the original filing." (640:3.)

The court explained that "there is no reason asserted or good cause shown as to why the motion was submitted . . . ." before all of Avery's investigation was finished. (640:3) In Avery's post-October3 filings he "[made] it abundantly clear that [he] knew [he] had substantial investigation to

complete," but provided "no explanation as to why, without an impending deadline to meet, the defense rushed ahead and filed the motion prior to [his] investigation being completed." (640:4.)

The court stated that it "finds no basis to reverse its previous decision" and Avery's new arguments and alleged "new evidence" to back up his old arguments "should have been asserted in the defendant's first motion, pursuant to the holding in *Escalona-Naranjo*." (640:5.)

That was a legally and factually sound evaluation of Avery's post-October3 motions. (631–636.) "The purpose behind Wis. Stat. § 974.06 is to avoid *successive* motions for relief by requiring a defendant to raise all grounds for relief in one motion." *Aaron Allen*, 328 Wis. 2d 40. Avery repeatedly claimed that everything he alleged was "new evidence," but it was "new" only in the sense that Avery did not investigate and develop an argument about it before filing his June 2017 motion. Indeed, Avery admitted that the only reason "additional new evidence continue[d] to develop" was because "undersigned counsel's investigation remain[ed] ongoing." (633:2.)

As the circuit court correctly observed, that is exactly what *Escalona-Naranjo* and Wis. Stat. § 974.06(4) prohibit: successive motions based on new arguments that are only "new" because the defendant filed a motion without investigating and presenting them. The mere fact that an argument was not raised in a prior motion is not a sufficient reason for raising it in a subsequent one. *See State v. Kletzien*, 2011 WI App 22, ¶ 17, 331 Wis. 2d 640, 794 N.W.2d 920. And what was uniformly absent from Avery's post-October3 motions was "any explanation as to why the defendant filed his motion on June 7, 2017, knowing that further scientific testing was required to complete his motion and that considerable investigation was still being conducted by the defense." (640:3.)

Avery still does not attempt to direct this Court to any point in the record where he provided any sufficient reason why these claims could not all have been raised in a single motion or why he filed his June 2017 motion prematurely. (Avery's Br. 82–87, 116–21.) He claims that his motion for reconsideration was "properly filed" under Wis. Stat. § 805.17(3) (Avery's Br. 117), but that statute applies only to bench trials. *Schessler v. Schessler*, 179 Wis. 2d 781, 784, 508 N.W.2d 65 (Ct. App. 1993). Regardless, the circuit court did not deny his motion as improperly filed. It denied it because it found all of the arguments within it procedurally barred. (640.)

Avery has provided no real argument that the circuit court's ruling on the procedural bar was legally or factually unsound. Instead, Avery has simply pretended that he submitted these arguments and evidence in his first motion by conglomerating his ineffective assistance of counsel and *Brady* claims into topical issue sections in his appellate brief, arguing their merits, and using these belatedly-raised arguments and exhibits to support them. (Avery's Br. 39–89 (citing 630; 631; 632; 633; 635; and 636).) Apart from being a disingenuous presentation of his claims on appeal, by arguing the merits of these claims in his appellate brief Avery failed to address the issue on appeal, which is whether the circuit court properly exercised its discretion in finding these claims procedurally barred and denying his post-October-3 motions without a hearing.

What little argument Avery has provided on this point again reflects a misunderstanding of the procedural bar. (Avery's Br. 116–21.) The question is not whether Avery had all his evidence in hand in June 2017. (Avery's Br. 116–21.) That would amount to allowing defendants to escape the procedural bar by simply failing to investigate their available claims, which is what Wis. Stat. § 974.06(4) was designed to prevent. *Escalona-Naranjo*, 185 Wis. 2d at 185.

The question is whether all of Avery's claims "could have been brought at the same time" if he had completed his investigation before filing his section 974.06 motion. *Id*. That means any claim that was available to be raised, if Avery could have discovered it by investigating it in June 2017, is procedurally barred. Since the answer to that question is yes, nearly all of Avery's later claims could have been raised in June 2017 if he had investigated them—and particularly the multitude of new ineffective assistance claims, considering that an attorney can only be ineffective for failing to take actions available at the time of trial—Avery had to show a sufficient reason why these claims could not have been developed in June 2017 to overcome the procedural bar. *See Aaron Allen*, 328 Wis. 2d 1, ¶ 40. He also had to sufficiently plead the claims. Avery failed to do either, in his motions or his appellate brief.

Moreover, Avery failed to recognize that his June 2017 motion was not his first attempt at postconviction relief. So, Avery also had to provide sufficient material facts to show a sufficient reason why the claims raised in his motion for reconsideration could not have been raised on direct appeal or in his pro se motion. Avery made no real attempt to do that, either, and to the extent he addressed it at all, he just made conclusory allegations of ineffective assistance of postconviction counsel. (*See, e.g.*, 632:1–2.)

In particular, Avery's unmade argument that he could not have raised in his June 2017 motion his claim that Strang and Buting were ineffective for failing to "investigate and impeach" Bobby Dassey based on Bryan Dassey's discussion with police would fall flat, given that it is based on a police report made before trial. (Avery's Br. 82–86.) But, so does the underlying claim.

The record shows that trial counsel thoroughly cross-examined Bobby (697:7–42), including establishing that all he could say was he saw Halbach taking a picture and then saw

her RAV-4 when he was leaving to go deer hunting (697:33–41). Avery's attorneys further discredited Bobby's testimony about Halbach being at the Avery property at 2:30 p.m. through JoEllen Zipperer's testimony that Halbach could have been at the Zipperer household as late as 3:30 p.m., (694:137), and through bus driver Lisa Buchner's testimony that she saw Halbach there while dropping off the Dassey boys from school. (712:111–12.) Buchner testified that her regular route put her at the Avery property at the same time every day, which was between 3:30 p.m. and 3:40 p.m. (712:107–10.)

Avery fails to explain why a single statement that Bryan Dassey told police that Bobby said he saw Halbach leave the property would have tipped the scales, when the wealth of other evidence pointed at Avery, and when the jury already heard multiple other accounts that conflicted with Bobby Dassey's testimony. (Avery's Br. 82–86.)

Avery's complaints about trial counsel not using Bryan Dassey's statement to impeach Bobby simply amount to another claim that trial counsel was ineffective for failing to conduct the defense the way postconviction counsel would have, which is insufficient to state a claim for ineffective assistance. (Avery's Br. 82–86.) *Weatherall*, 73 Wis. 2d at 25–26. But, again, the merits of this claim are not before this Court. *Sholar*, 381 Wis. 2d 560, ¶¶ 50–51. The circuit court properly found that this claim was procedurally barred, because there is no reason Avery could not have raised it in his June 2017 motion. That was a legally and factually sound decision. Denying this claim without a hearing was an appropriate exercise of discretion, and Avery has failed to show otherwise.

Avery further asserts that the Dassey computer would have provided a possible third-party suspect defense that Bobby Dassey killed Ms. Halbach, and that his forensic

computer expert, Gary Hunt, found "new evidence" on the computer to support that.[21] (631:46–48; Avery's Br. 120.)

But Avery again lacks a sufficient reason why he didn't raise this claim in his June 2017 motion or any of his previous postconviction litigation. This evidence isn't new. Avery simply relied on the fact that Hunt used a 2017 forensic computer program to allege that his examination could not have been performed earlier. But when Hunt's program was available is not the question. When the information on the hard drive was capable of being found is the question, and Hunt's own affidavit states that was 2006. (630:94.) Hunt's affidavit acknowledges that the *EnCase* forensic examination software technology was available and used in 2006, and that "the corpus of data contained within the forensic image [of the hard drive] has not changed" since then. (630:94.) He further acknowledges that his investigation was guided by Fassbender's report about the State's pretrial examination of the hard drive finding this same material. (630:93.) If it could be found in 2006, it could be found, and a claim could have been raised about it, at any time after that. At any rate, the fact that Hunt used a 2017 program would fail to show why this claim could not have been raised in Avery's June 2017 motion.

Apart from the claims raised in Avery's post-October-3 motions that he has obscured by amalgamating elsewhere in his brief, Avery just lists some of the things he investigated after filing his June 2017 motion and again calls it "new evidence." (Avery's Br. 119–21.) He claims that all of these belatedly-raised issues "were based on the discovery of new

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[21] Avery raised different claims about the Dassey computer in different motions, but has combined them into a single section in his brief. (Avery's Br. 50–62.) Because they were different claims raised at different times and denied on different grounds, the State has addressed Avery's claims about the Velie CD raised in Avery's May 2018 motion in Issue IV.

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." (Avery's Br. 121.)

Avery's claim is false—the only reason this purported evidence was "not in [his] possession at the time he filed his prior postconviction motions" was because he failed to investigate these claims before filing. (Avery's Br. 82–86, 121.) Newly discovered evidence "does not include the 'new appreciation of the importance of evidence previously known but not used,'" and evidence previously known includes evidence that was "knowable" by counsel. *Fosnow*, 240 Wis. 2d 699, ¶ 9 (citation omitted). None of this is newly discovered evidence—it was all knowable by counsel, inadmissible, or, as explained in section 2. below, immaterial.

Avery easily could have procured these affidavits from Strang, Baetz, Brad Dassey, and Blaine Dassey, and affidavits from Scott and Barb Tadych about whether Halbach left the Avery property, had postconviction counsel investigated all of Avery's claims before filing Avery's June 2017 motion. (Avery's Br. 119–20.) And Scott and Barb Tadych's phone conversations with Avery, along with Barb Tadych's Facebook statement, are inadmissible hearsay and therefore they are not newly discovered evidence as a matter of law no matter when they took place. *State v. Bembenek*, 140 Wis. 2d 248, 253, 409 N.W.2d 432 (Ct. App. 1987) (Avery's Br. 121.)

Finally, Avery's claim that he found "deletions" on the Dassey computer (Avery's Br. 120) was not raised in his 2017 motion for reconsideration. (631, 633, 635.) Indeed, Avery never raised any constitutional claim or developed any argument about this at all, in any motion. This was a bare allegation in a letter Avery wrote to the circuit court in August 2018, indicating that he would not be supplementing his July 6, 2018 motion. (760.) Again, Avery cannot show that

the circuit court erroneously exercised its discretion in denying a motion by relying on things not presented in that motion.

The circuit court denied Avery's motion for reconsideration as procedurally barred for raising only claims that could have been brought in a single motion, if Avery would have completed his investigation before filing his motion, and failing to provide any reason, let alone a sufficient one, why he filed his Wis. Stat. § 974.06 motion prematurely while knowing that he "had substantial investigation to complete before [having] a full picture of all the evidence" he wanted the court to consider. (640:3–4.) That was a reasonable assessment by the circuit court, and denying these claims as procedurally barred was an appropriate exercise of discretion. Avery is due no relief.

2. Avery insufficiently pled his *Brady* claims about Heitl and Rahmlow, which are nevertheless meritless.

Avery claims that he could not have included his *Brady* claims based on Rahmlow's or Heitl's information in his June 2017 motion because they did not provide their information until after he filed it. (Avery's Br. 40–45, 48–49.) Even assuming that could be a sufficient reason for failing to raise these claims then, and assuming these events actually happened, Avery did not establish that either of these affidavits provided material evidence, and therefore they cannot support a *Brady* claim. (631:48–49; Avery's Br. 40–45, 48–49.)

The defense does not show a *Brady* violation by showing that the prosecutor failed "to disclose evidence favorable to the accused, no matter how insignificant." *United States v. Bagley*, 473 U.S. 667, 675 n.7 (1985). Evidence is only material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the

proceeding would have been different." *Id.* at 682. The Supreme Court adopted that standard directly from *Strickland*. *Bagley*, 473 U.S. at 682. And to meet that standard, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. But that is all Avery alleged, for either Heitl or Rahmlow, and even that was based on speculation that had no basis in the record.

Heitl's affidavit says Ms. Halbach "pull[ed] over to check her calendar" as she was on the phone with Heitl at 11:35 a.m. on the day of her murder. (630:151.) Nowhere does Heitl say that Halbach was "mak[ing] notations in her day planner," as Avery claims. (630:150–52; Avery's Br. 48.) Avery claims that Halbach making notes in her day planner would help tie Hillegas to the murder because a "friend" said Hillegas had Ms. Halbach's day planner after the murder. (Avery's Br. 48–49.) But that is also false. The friend said Hillegas "had found a schedule of Halbach's for the week of October 31 to November 6." (630:91.) Nothing suggests that what Hillegas had was her day planner. Avery further assumes, with no support, that Halbach can't have kept more than one copy of her schedule. Avery then claims that Heitl's affidavit shows that Halbach's day planner was in the RAV-4 (it doesn't), assumes it must have stayed there until after the murder, (there are no facts to support this), assumes that the "schedule" Hillegas found was the day planner (there are no facts to support this, either), leaps to the conclusion that Heitl's affidavit shows that Hillegas retrieved whatever schedule he had from the RAV-4 (again with no factual support), (Avery's Br. 49), and claims this would have allowed him to meet the *Denny* third-party-suspect test for Hillegas by providing a direct connection to the crime. (631:49; Avery's Br. 49.)

Apart from relying on too many speculative leaps to count and therefore failing to allege what was needed for a

hearing, Avery failed to allege any facts showing that there is a reasonable probability that Heitl's testimony would have led to a different outcome of the trial even if Avery's many misrepresentations were true. (631:48–49; Avery's Br. 49.) He simply proclaimed it would have done so, which is nothing more than a conclusory allegation. (631:49; Avery's Br. 49.) Materiality requires more. *See State v. Wayerski*, 2019 WI 11, ¶¶ 61–62, 385 Wis. 2d 344, 922 N.W.2d 468. There was an overwhelming amount of evidence against Avery, and he failed to explain why it's reasonably probable that he would have prevailed at trial if Heitl told the jury Halbach said she was "checking her calendar" during a phone conversation—especially considering that Avery has uniformly failed to suggest how Hillegas or anyone else realistically could have acquired Avery's blood from his sink and then planted it in the RAV-4, and failed to provide anything directly connecting anyone else to the crime.

Avery's claims about Rahmlow suffer similar flaws. (631:31–32.) Avery did not allege anything showing a reasonable probability of a different outcome at trial. Rahmlow simply said he saw a car on the side of the road that he thought matched "the written description of [Ms. Halbach's RAV-4]" on a missing person poster at the gas station; so, assuming Rahmlow's contentions are true, Rahmlow never even knew what Ms. Halbach's car actually looked like, because he never saw a picture. (630:18–20; 631:19.) There is not a reasonable probability that a jury would have acquitted Avery if counsel produced Rahmlow just to say he saw a car parked on the road that he thought was similar to a written description of a car he never actually saw.

And Avery has again misunderstood what he had to show: he says only that Rahmlow's testimony "supports trial defense counsel's theory that the RAV-4 was planted" on Avery's property, and further alleges that Rahmlow seeing a similar car on a road somehow inexplicably shows that "it was

possible to access the Avery property and plant the vehicle." (Avery's Br. 42.) Setting aside that Rahmlow's seeing a similar car somewhere fails to establish any fact about the RAV-4 being planted or accessibility to the Avery property, let alone a material fact, what Avery alleges again amounts to only a conceivable effect on the proceeding, at best. And that is insufficient. *Strickland*, 466 U.S. at 693.

Once more, Avery has tried to cure the deficiencies in his motions by adding new allegations in his brief. (*Compare* 631:31–32 *with* Avery's Br. 42–45.) He now attempts to rely on another affidavit from a "Paul Burdick" that Avery procured "on June 28, 2018" to corroborate Rahmlow's tale. (Avery's Br. 44–45 n.8.) Obviously, the court did not have this affidavit when it denied his *Brady* claim about Rahmlow in November 2017, therefore Avery cannot rely on it to show the circuit court erroneously exercised its discretion in denying Avery's 2017 claim about Rahmlow. Further, when Avery filed this affidavit in 2018, he buried it in a pile of exhibits with no argument or even any mention of it in the motion then at issue. (*Compare* 740 *with* 739:75–76.) Avery cannot show that the circuit court improperly denied his October and November 2017 claims based on documents he did not provide the court until eight months later and then made no argument about, nor can he rely on new arguments in his appellate brief. *Schonscheck*, 261 Wis. 2d 769, ¶ 11.

The circuit court articulated a legally and factually sound rationale for determining that Avery's motion for reconsideration raised only claims and arguments that were procedurally barred, and thus refusing to hold an evidentiary hearing on them. Moreover, the record conclusively demonstrates that Avery's "new evidence" was only new because he did not exercise due diligence to discover it before filing his motion, that the claims were insufficiently pled, and meritless at any rate. Avery has provided nothing to the contrary. Accordingly, this Court must affirm the circuit

court's discretionary decision to deny Avery's motion for reconsideration without a hearing.

IV. The circuit court properly exercised its discretion when it denied, without a hearing, Avery's July 2018 motion regarding Detective Velie's compilation of items copied from the Dassey computer.

On July 6, 2018, Avery filed his fifth collateral attack postconviction motion in the circuit court.[22] (740.) This time, he alleged that the State violated *Brady* by failing to provide him with a CD containing copies of material that Detective Mike Velie located on the Dassey hard drive in 2006. (740:6–7.) Avery claimed that this CD contained exculpatory, material evidence that was "directly relevant to the credibility of Bobby Dassey," and would have allowed him to raise a third-party perpetrator defense alleging Bobby committed the crime, and therefore the State's failure to disclose it violated his due process right to a fair trial. (740:5.)

The circuit court denied the motion without a hearing, finding that Avery failed to show that any evidence was suppressed by the State because everything on the Velie CD was copied from the forensic copy of the Dassey hard drive that the State turned over to the defense. (761:5.) The circuit court further rejected Avery's claim that the forensic copy of the hard drive was disclosed too late for effective use, noting it was turned over two months before trial along with Special

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[22] Though this Court and Avery referred to Avery's July 2018 and March 2019 motions as "supplemental" motions, a motion brought after a previous motion has been decided is a successive motion, not a supplement to the already-decided motion. *State v. Evans*, 2004 WI 84, ¶ 10, 273 Wis. 2d 192, 682 N.W.2d 784 *abrogated on other grounds by State ex rel. Coleman v. McCaughtry*, 2006 WI 49, 290 Wis. 2d 352, 714 N.W.2d 900. Each of Avery's previous motions had been decided when he filed these, so they each were new section 974.06 motions.

Agent Fassbender's report summarizing what was found. (761:6–7.) Avery "made the strategic decision to rely on the opinion of the prosecutor" about the import of that evidence rather than review the evidence himself, and he cannot show the prosecution deliberately misled him about it or withheld anything. (761:9.)

The circuit court did not erroneously exercise its discretion when it denied this motion without a hearing.

In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. In *State v. (Kevin) Harris*, 2004 WI 64, 272 Wis. 2d 80, 680 N.W.2d 737, the Wisconsin Supreme Court stated the three prerequisites a defendant must establish to prevail on a *Brady* claim:

1. The evidence at issue must be favorable to the accused, either because it is exculpatory, or it is impeaching;

2. The evidence must have been suppressed by the State, meaning the defendant must not have had it in time to make effective use of the evidence; and

3. The evidence must be material, meaning that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

Kevin Harris, 272 Wis. 2d 80, ¶¶ 12–14, 35 (citations omitted).

Avery's *Brady* claim must fail because he cannot meet two prongs of the test.

First, assuming that this evidence is favorable to Avery, the State did not suppress anything. It turned over, two months prior to trial, a complete copy of the Dassey hard drive and Fassbender's report alerting Avery to what was found on it. (761:9; *see* 741:8–10.) Avery does not dispute this. (Avery's Br. 49–63.) And the Velie CD contained only copies of the pictures and search terms Velie located on the hard drive. (739; 741:25.) Indeed, Avery's own expert, Gary Hunt's, affidavit admits that all "the information contained on the [CD] is derived from the forensic image contained across the DVDs." (741:25; *see also* 741:25 ("In my opinion, based upon a reasonable degree of certainty in the field of computer forensic science, the CD contains information and files extracted from the 7 DVDs that, in Detective Velie's opinion, were relevant to the investigation of Ms. Halbach's murder.").) And there is no dispute that Avery has always had the DVDs.

The State further provided Avery with Fassbender's report disclosing the results of Velie's investigation and informing Avery the State kept Velie's CD. (744:4–6.) The report stated that on the computer the State located "[p]hotographs of both Teresa Halbach and Steven Avery . . . ," "numerous images of nudity, both male and female, to include pornography," which "included both heterosexual, homosexual and bestiality." (741:10.) Fassbender's report also informed Avery that the hard drive contained "images depicting bondage, as well as possible torture and pain," "images depicting potential young females," "images of injuries to humans, to include a decapitated head, a badly injured and bloodied body, a bloody head injury, and a mutilated body." (741:10.) The report further states that "[t]he disc received from Detective Velie, as well as the hardcopy pages of instant message conversations were maintained in S/A Fassbender's possession." (741:10.) The record also shows that the prosecution discussed Velie's

investigation with Avery's trial counsel before trial, meaning they were clearly aware of it. (744:36, 38.)

The State certainly does not "admit[ ]that the CD was suppressed" from May 10, 2006 until April 17, 2018, as Avery claims. (Avery's Br. 53.) To "disclose" means "to make known or public" or "expose to view."[23] Avery fails to explain how the State "suppressed" something it told him about, described, discussed, and provided him with all the contents of well before trial; in other words, the definition of "disclosed."

Avery does not point to items of evidence he did not have that were on the Velie CD but not the hard drive. (Avery's Br. 51–52.) He just complains that he could not have "guessed" what search terms Velie used during his examination. (Avery's Br. 51; 741:25.) But that is not what he is entitled to under *Brady*. The State must provide the defendant with *the evidence*. *Brady*, 373 U.S. at 87. Here, that means the hard drive containing these items, and there is no dispute that the State did that. *Brady* does not require the State to walk the defense through how to evaluate the evidence nor to do their trial preparation for them. And that is really all Avery complains he lacked. (Avery's Br. 51–63; 741:25.) But it is the material on the hard drive, again, that is the evidence that Avery claims he could have used to impeach or establish Bobby Dassey as a *Denny* suspect. Avery always had that, along with Fassbender's report telling him it was there.

The notion that Avery was deprived of the evidence because, although he had the evidence itself and had the State's summary of the evidence, he did not have a copy of the State's copy of the evidence, is absurd.

Avery's argument is akin to saying that if the State made a one-page test sheet with thumbnails of the crime

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[23] *https://merriam-webster.com/dictionary/disclose*.

scene photos it found relevant that it kept for itself, and provided him with a summary of the relevant photo evidence and full size copies of all the crime scene photos in a sealed envelope that he did not bother to open, it "suppressed" the photo evidence because it did not give him the State's test sheet of the thumbnails. That defies common sense. The circuit court properly determined that the State did not suppress any evidence favorable to Avery.

Avery makes no real argument that he did not have possession of this evidence, likely because he cannot dispute that he did. (Avery's Br. 51–52.) Indeed, Avery's own expert, Gary Hunt, attested that he found this very same evidence during his independent examination of the hard drive in 2017, before he even had Velie's CD. (630:93–113.)

Perhaps recognizing that he cannot make a credible claim that the State suppressed evidence that he had in his possession two months before trial and that his attorneys discussed with the prosecution, Avery pivots to alleging that though he had the evidence in his possession, he did not have it in time to "effectively identify a motive in its *Denny* motion, filed on January 8, 2007" and alleges that the State "deliberately misled" him about the contents of the hard drive. (Avery's Br. 52–53.) Both contentions are unsupported.

The circuit court did not "ignore[ ]" Avery's argument that trial counsel received the hard drive too late to use it; it found that Avery had it months before trial and opted to do nothing with it. (Avery's Br. 52; 761:7.) That was an accurate assessment of the record. Avery complains that Velie's investigation was completed several months before he received the hard drive, but that is irrelevant. (Avery's Br. 53.) "[I]mmediate disclosure is not required under *Brady*." *Kevin Harris*, 272 Wis. 2d 80, ¶ 35. *Brady* does not require that the defendant be provided with the evidence on his own timeline, either; it requires "that the prosecution disclose evidence to the defendant in time for its effective use." *State*

v. (Ronell) Harris, 2008 WI 15, ¶ 63, 307 Wis. 2d 555, 745 N.W.2d 397. Avery alleged nothing showing that he did not receive the hard drive in time for its effective use. (Avery's Br. 52–55; 740).

The State sent Avery the seven DVDs and Fassbender's report explaining what was found on them on December 14, 2006. (744:9 (listing DCI Narrative Report 05-1776/303), 32 (listing the forensic image of the hard drive).) That was seven weeks before trial and nearly four weeks before Avery filed his *Denny* motion. It took Velie only 16 days to perform his examination of the hard drive. (740:8.) Avery provided nothing explaining why ten days was too short a time to procure a computer expert who then would have had just as much time as the State's expert to examine the hard drive before the motions deadline, or that Avery even tried to find one. (740:8–9, 17; Avery's Br. 52–53.)

And the motions date is not set in stone. If Avery needed more time to assess the hard drive in order to effectively develop his *Denny* motion, he could have, and should have, asked the court to extend the motions deadline and possibly adjourn the trial date, if necessary. Avery made no showing that he asked for more time to investigate, indicated that he could not access the hard drive, or said anything about trying to investigate the hard drive at any point. (740:8–9, 17; Avery's Br. 52–54.) Finally, nothing precluded Avery from seeking to amend his motion after it was filed, if he found anything relevant on the hard drive. He did not attempt to do that, either. In short, Avery had the hard drive in plenty of time to make effective use of it before trial. He just did not attempt to do so.

And, contrary to Avery's suggestion, the State did not "deliberately [mislead]" anyone about what was on the hard drive: it provided the defense with Fassbender's report revealing all of this information, and discussed with Strang that it did not believe the investigation turned up much of

evidentiary value.[24] (744:36) That was an accurate assessment, and Strang agreed. (744:36, 38.) The circuit court did not "ignore[ ]" this argument, either. (Avery's Br. 53.) The circuit court explained that Strang's discussions with the State showed that he knew what was found and did not think it was relevant. (761:8.) That the circuit court rejected Avery's arguments does not mean it overlooked them.

In short, the State disclosed and provided to Avery both the evidence itself and a summary of what the State found on the hard drive. (744:4–6.) It further disclosed that it kept a copy of Velie's itemization of these things. (744:4–6.) It discussed Velie's investigation with Avery's attorneys and whether Velie would be a necessary witness. (744:36, 38.) The bottom line is neither the prosecution nor the defense found the pornography and other computer evidence relevant to their case. The fact that Avery would like to create a different trial defense out of it now does not mean the State suppressed or misled him about it.

Moreover, Avery has again failed to establish that the contents of the Velie CD were material. (Avery's Br. 52–65.) To show that something is material Avery had to show that there is a reasonable probability that the *outcome of the trial* would have been different if the defendant had the evidence (which, again, Avery had in hand and simply ignored). *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

The evidence from the hard drive would not have altered the outcome of Avery's trial. Avery claims the

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[24] Avery again falsifies the record. The prosecutor did not say the State found "nothing of evidentiary value." (Avery's Br. 53.) He said it found "*nothing much* of evidentiary value." (744:36.) *Strang* said the report showed "nothing of evidentiary value" on Avery's computer, and that the Dassey computer "was not relevant unless [Brendan] is a witness or his statements are offered." (744:38.)

pornography and violent images and search terms would have impeached Bobby Dassey's credibility. (Avery's Br. 58–59.) But he fails to explain how. The fact that someone views violent pornography does not diminish their credibility as a witness, as Avery claims. (Avery's Br. 58–59.) Though distasteful, it has nothing to do with their truthfulness. Nor would viewing violent pornography refute anything about Bobby's claim that he never saw Ms. Halbach leave the Avery property. Moreover, Avery's claim that this evidence would have impeached Bobby about his timeline of events fails to recognize that this would be cumulative: Bobby's timeline of events was refuted by multiple other witnesses who testified. (694:137; 712:107–110; Avery's Br. 57–58.) There is not a reasonable probability that the outcome of the trial would have been different if Avery used this pornography to "impeach" Bobby Dassey.

Avery's discussion about Bobby's 2017 interview with law enforcement is irrelevant to his claim. (Avery's Br. 58–59.) Nothing about an interview conducted ten years later can possibly be relevant to the plausible outcome of Avery's 2007 trial if Avery had Velie's CD then.[25]

Avery's materiality argument severely oversells Bobby Dassey's testimony, as well; he was far from "the State's primary witness." (Avery's Br. 62.) As explained above, there was a wealth of forensic evidence pointing directly to Avery,

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[25] Further, Avery's claim that Bobby was "searching for key terms relevant to the murder" and "created folders labeled 'Teresa Halbach' and 'DNA'" is supported by nothing in that interview, which at any rate is irrelevant to the question at issue here. (Avery's Br. 59; 737:63–67.) Again, the issue on appeal is whether Avery sufficiently pled his in motions that constitutional violations happened at his trial in 2007 and on appeal in 2011. This appeal is not about whether Avery can concoct speculative scenarios about events occurring long after Avery's trial to try to prop up whatever latest unsupported theory has occurred to the defense.

which the State established through fourteen expert witnesses, law enforcement officers, and several other citizen witnesses. Avery doesn't explain why Bobby Dassey's testimony saying he did not see Halbach leave the property was the critical evidence tying Avery to the crime, rather than the fact that Avery's blood was found in the victim's hidden car, his DNA was found in multiple places on it, the victim's remains were found in his burn pit, the victim's personal property was found in his burn barrel, and the victim's DNA was on a bullet fired from a gun in his possession. (Avery's Br. 57.) Nor does he explain how Bobby was the "primary witness" and not the other members of his family or citizen witnesses who testified—many of whom contradicted Bobby—or the countless law enforcement officers and experts who collected and evaluated the evidence. (Avery's Br. 57.) Even if Bobby said nothing, or if the defense put forth cumulative witnesses to "impeach" Bobby further, the State still would have made a compelling case that Ms. Halbach never left the property.

At no point has Avery ever shown that there is a reasonable probability a *Denny* defense would have succeeded, either—indeed, Avery has again failed to show that he even would have prevailed on a *Denny* motion had this evidence been included in the motion. (Avery's Br. 59–63.) Setting aside Strang's and Buting's belated revelations about how crucial this pornography on the computer was, though for some unexplained reason they took no steps to analyze it despite discussing it with the prosecution and Fassbender's report clearly alerting them it was there (Avery's Br. 52–54), Avery still has not established how the pornography and other violent images would establish a motive to murder Ms. Halbach, nor established anything directly connecting Bobby to the crime. (Avery's Br. 59.)

First, Avery cites to inapposite law to attempt to establish his proposition that pornography establishes a motive for murder. *Dressler v. McCaughtry*, 238 F.3d 908 (7th

Cir. 2001), on which he relies, is a nonbinding Seventh Circuit federal habeas corpus case that addressed whether introducing at the defendant's murder trial under Wis. Stat. § 904.04(2) the defendant's other acts of owning violent videos violated the First Amendment. *Dressler*, 238 F.3d at 913. Absent from Avery's appellate brief is any discussion of any Wisconsin case actually discussing the *Denny* standard. (Avery's Br. 59–60.)

Even if *Dressler* were relevant, Avery still doesn't offer anything showing that pornography consumption would have established a motive in this case. (Avery's Br. 60.) He says, with no support, that "[a]n obsession with images depicting sexual violence," which he never pled any facts showing that anyone had, "made it more likely that person would commit a sexual homicide." (Avery's Br. 60.) But his expert simply states that there is a connection between pornography consumption and violent behavior. (Avery's Br. 60.) That is insufficient to establish a motive for murder.

Nor did Avery offer anything that would establish a direct connection to the crime. Direct connection requires "evidence that the alleged third-party perpetrator actually committed the crime." *State v. Wilson*, 2015 WI 48, ¶ 59, 362 Wis. 2d 193, 864 N.W.2d 52. In other words, it has to "firm up the defendant's theory of the crime and take it beyond mere speculation." *Id.* And there is literally no evidence connecting Bobby Dassey to this crime: Avery's claims are again nothing but "mere speculation" unsupported by any facts. (603; 631.)

Avery has never pointed to anything directly connecting Bobby Dassey to any of the evidence at all, and therefore he's offered nothing showing "a *legitimate* tendency" Bobby Dassey committed the crime. *Wilson*, 362 Wis. 2d 193, ¶ 59. Avery has particularly failed to offer anything showing that Bobby Dassey (or anyone else) somehow had the tools and ability to collect his blood from the sink, on which his new defense relies. (Avery's Br. 59–89.) The fact that Avery has

now pointed the finger at five different people during these proceedings shows that there is no evidence actually connecting *anyone* else to the crime, let alone anyone in particular as is required to raise a *Denny* defense. *See infra* section V.C. Indeed, multiple places elsewhere in his brief he claims *Hillegas*, not Bobby Dassey, was the real perpetrator. (Avery's Br. 48–49; 88.)

Instead, Avery just proclaims that if he established motive for Bobby Dassey, he would prevail on *Denny*, and assumes that means he would prevail at trial. (Avery's Br. 59–62.) But *Denny* is a three-pronged test, and requires a *legitimate* showing that the third person committed the crime—including showing a direct connection. And *Brady* requires a showing that there is a reasonable probability that a *Denny* defense using the computer contents and accusing Bobby Dassey would have succeeded. Avery has not made either showing.

Moreover, Avery overlooks the fact that Attorney Buting told the jury that Bobby Dassey could have been the killer during closing argument. He noted that Bobby stated they only had three burn barrels but four were outside of the house. (715:147–48.) He pointed out that Bobby, too, had a .22 rifle in his bedroom. (715:188.) He illustrated for the jury that Bobby's timeline did not match up with anyone else's and argued that Bobby couldn't know that Scott Tadych would know "precisely" when they passed each other on the road unless they concocted a story about it together, that no one going deer hunting would shower beforehand, and that Bobby was home by 5:00—before deer would be out. (715:205–06.) He then specifically suggested Bobby was the killer. (715:208–09.)

The jury heard this theory, coupled with a far more believable planting defense than Avery's new one. Even if Avery further discredited Bobby, or presented Avery's new "the killer planted the blood evidence" defense and alleged

that Bobby was the killer because he allegedly viewed violent pornography, and there is no probability of a different result at trial.

But again, it does not matter if the contents of the Velie CD were material, because nothing was suppressed. Everything on the CD came from the hard drive, which Avery undeniably had in his possession. Avery also had the State's report showing what the State found on the hard drive. Avery was not entitled to the State's distillation of the evidence; he was entitled to the evidence, which is what he received. Avery had everything on the Velie CD in hand two months before trial. Avery's *Brady* claim simply fails. He established no part of the test.

Avery's claim that this is somehow newly discovered evidence fails multiple prongs of that test, as well. (Avery's Br. 61.) Avery cannot possibly establish that he was not negligent in seeking the evidence when Fassbender's report telling him what Velie found on the hard drive and alerting him that the State kept the CD was in the record both before trial and the whole 12 years that passed since then. The Velie CD is also cumulative with the hard drive that Avery had in his possession the whole time. Finally, as explained, Avery has not established that there is any probability that the result of his trial would have been different had he presented a porn-based defense that Bobby was the killer and planted the evidence. The CD is not newly discovered evidence.

Finally, there is no "cumulative effect of the *Brady* violations" because Avery did not establish any *Brady* violations. (Avery's Br. 63–65 (capitalization omitted).) As explained previously, Avery failed to allege sufficient facts showing that the Zipperer CD, Radandt's testimony, the flyover video, Heitl's information or Rahmlow's information were suppressed, exculpatory, or material. All the facts he alleged about these things were pure speculation that did not follow from any facts in the record, or even from the affidavits

he submitted. Accordingly, there cannot be any cumulative effect of these "violations" because Avery did not establish any violations. "Adding them together adds nothing. Zero plus zero equals zero." *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

V. The circuit court properly exercised its discretion in denying Avery's March 2019 motion without a hearing.

In his March 2019 motion, Avery sought reversal and a new trial based on an alleged violation of *Arizona v. Youngblood*, 488 U.S. 51 (1988). (771.) The basis for his claim was that the State effectively destroyed evidence by releasing bone fragments found in a quarry to the Halbach family in 2011, and thus, he can no longer seek and possibly obtain postconviction DNA testing of that evidence. (771:13–17.) In considering Avery's motion, the circuit court made the following findings of facts.

Bone fragments found in the quarry were released to the Halbach family after trial. (806:7.) The bone fragments were previously examined by Dr. Leslie Eisenberg, who had produced reports of her findings and testified at trial. (806:9.) In Dr. Eisenberg's December 6, 2006 report, she identified what material supplied for analysis contained human bone fragments and what material was other than human in origin. (806:9.) The individuals involved in releasing the bone fragments to the Halbach family used Dr. Eisenberg's report, to select what material would be given to the Halbach family. (806:11.)

Dr. Eisenberg's testimony at trial, however, qualified the findings in her report. Dr. Eisenberg's trial testimony established that none of the material found in the quarry could definitively be identified as human bone fragments. (806:11.) And the FBI confirmed that the fragments could not be tested for DNA to determine whether the fragments could

be identified as human or identified as those of the victim. (806:11.)

From those facts the circuit court made the reasonable inference that "[t]here was no scientific evidence or record, at the time that the material was released, to support that human biological material was being released or that the material was known to be the remains of the victim." (806:11.)

The circuit court then analyzed Avery's claim and denied his motion without a hearing. The circuit court's rationale for doing so will be addressed in the subsections below. This Court should affirm the circuit court's decision to deny the motion without a hearing for three reasons. First, Avery's claim is procedurally barred. Second, even if it is not barred it is not cognizable in a Wis. Stat. § 974.06 motion. Third, even if there were a procedural mechanism for Avery to obtain relief, his claim would fail on the merits.

A. Avery's claim is procedurally barred because he has not established a sufficient reason for not bringing his claim in any of his prior postconviction motions.

The circuit court concluded, based upon this court's remand order, that Avery's claim was not procedurally barred. (806:5.) That conclusion was incorrect.

As this Court is aware, if a ground for relief was not raised or incompletely raised in a prior postconviction motion or direct appeal, it may not become the basis for a new postconviction motion unless the defendant can demonstrate a "sufficient reason" why the new argument was not previously raised. Wis. Stat. § 974.06(4); *Escalona-Naranjo*, 185 Wis. 2d at 185.

Avery could have raised any claim regarding the bone fragments when Avery filed his second Wis. Stat. § 974.06 motion on June 7, 2017, his motion for reconsideration between October 23, 2017 and November 17, 2017, or his third

section 974.06 motion filed July 6, 2018. Had Avery attempted to investigate whether the bone fragments could be determined to be human before filing any of these motions, he would have learned of their disposal, and could have raised this claim in any of them.

Even absent his request to test the fragments, Avery had the information that the fragments were given to the Halbachs before he filed his July 6, 2018, motion. (740.) On April 19, 2018, Avery's private investigator, James R. Kirby, filed a Freedom of Information Act (FOIA) request with the Calumet County Sheriff's Department requesting, among other things, all investigative reports on the Avery case beginning October 31, 2005, through the date of the request, April 19, 2018. (802:23.) The reports were mailed to Mr. Kirby on May 29, 2018. (802:17.) Included in the investigative reports was the report of evidence custodian Jeremy Hawkins detailing the disposition of certain bone fragment evidence. The report was dated September 20, 2011. Deputy Hawkins' report is numbered pages 1114 – 1115. (802:15–16.) Current postconviction counsel acknowledged receiving the investigative reports on or about May 30, 2018, in her Motion to Compel Production filed in this Court on July 3, 2018. (735:1.) Armed with this additional information, current postconviction counsel could have—and should have—filed a motion in the court of appeals asking for leave to expand the scope of the Remand Order issued by the court of appeals on June 7, 2018, to include claims based on the disposition/return of the bone fragments.

Avery did not provide a sufficient reason—or any reason—for failing to investigate and raise this claim in his prior motions. The circuit court should have denied Avery's motion as procedurally barred. And this Court should do so now because it can affirm on alternative grounds. *See Holt*, 128 Wis. 2d at 125.

B. If this Court chooses not to apply the procedural bar, Avery's claim is not cognizable on collateral review.

If this court declines to apply the procedural bar, it should nonetheless conclude that Avery cannot raise this claim in a Wis. Stat. § 974.06 motion.

First, Avery cannot raise a statutory claim in a Wis. Stat. § 974.06 motion. *State v. Carter*, 131 Wis. 2d 69, 82, 389 N.W.2d 1 (1986). A motion under section 974.06 is limited to jurisdictional and constitutional issues. *Balliette*, 336 Wis. 2d 358, ¶ 34. So, "an alleged statutory violation is beyond the scope of a section 974.06 motion." *Carter*, 131 Wis. 2d at 82. Avery's statutory claim has no cognizable constitutional or jurisdictional claim.

Avery's claim that the State violated Wis. Stat. § 968.205(2) also fails on the merits. (Avery's Br. 127–32.) Respectfully, the circuit court decision to the contrary was incorrect.

Wisconsin Stat. § 968.205(2) reads:

> Except as provided in sub.(3), if physical evidence that is in the possession of a law enforcement agency includes any biological material that was collected in connection with a criminal investigation that resulted in a criminal conviction, delinquency adjudication, or commitment under s. 971.17 or 980.06 and the biological material is from a victim of the offense that was the subject of the criminal investigation or may reasonably be used to incriminate or exculpate any person for the offense, the law enforcement agency shall preserve the physical evidence until every person in custody as a result of the conviction, adjudication, or commitment has reached his or her discharge date.

The State preserved the biological material that was from the victim or that could be used to incriminate or exculpate any person of the offense. The State preserved

samples of the bone fragments that were clearly identified as being female, human, bone fragments. The State also preserved crime lab item BZ (# 7926), the thigh bone fragment collected from the Avery burn pit, with attached human tissue. Subsequent nuclear DNA testing developed a partial DNA profile that was consistent with the nuclear DNA profile of Teresa Halbach. Additionally, the State preserved two tubs of cranial fragments: occipital and parietal bones showing high velocity bullet impact and lead spray, and fragments identified as facial bone reflective of human female skeletal anatomy. (802:5–7, 15–16; 781; 783).

Section 968.205(2) cannot be interpreted as a mandate to preserve in whole every single piece of biological evidence recovered during an investigation from any source. When interpreting a statute, a court gives words and phrases their "common, ordinary, and accepted meaning." *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. And a court is to interpret statutory language reasonably, "to avoid absurd or unreasonable results." *Id.* ¶ 46.

To read section 968.205(2) as requiring the preservation of all biological material whatsoever would read the conjunctive "and" out of the statute and would place an unreasonable, if not impossible, burden upon law enforcement. Law enforcement cannot be expected to indefinitely preserve biological material that had no identifiable connection to the crime. None of the bone fragments recovered from locations in the quarry were positively identified as human, let alone the remains of Teresa Halbach. Section 968.205(2) does not mandate the preservation of suspected, unknown, or undetermined biological evidence. Therefore, the State was under no obligation to preserve those bone fragments.

There is also no claim that the bone fragments could "reasonably be used to incriminate or exculpate any person

for the offense." Wis. Stat. § 968.205(2). The bone fragments alone, if tested, would not prove Avery innocent or guilty. Nor anyone else.

In short, Avery's claim that the State violated Wis. Stat. § 968.205 is not cognizable in a Wis. Stat. § 974.06 motion. And the State did not violate Wis. Stat. § 968.205(2) when it released some of the quarry bone fragments to the Halbach family for burial.

Second, Avery has not asserted a true constitutional claim. Avery's motion is based on the premise that if the bones that were released to the family could be tested, and if those tests produced results favorable to Avery, those test results might exonerate Avery. *Youngblood* itself expressly rejected the type of claim Avery brings to this Court. The Supreme Court reasoned, "[W]e think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Youngblood*, 488 U.S. at 57. Part of the reason the Court distinguished these types of claims "is found in the observation made by the Court in *Trombetta*, that '[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.'" *Id.* (citing *California v. Trombetta*, 467 U.S. 479, 486 (1984)). Another part stemmed from the Court's "unwillingness to read the 'fundamental fairness' requirement of the Due Process Clause, as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Id.* at 58 (citations omitted). Avery's claim is not cognizable.

Moreover, *Youngblood* and its progeny do not apply to the posttrial destruction of evidence. The Supreme Court's "decision in *District Attorney's Office for the Third Judicial*

District v. Osborne, 557 U.S. [52] (2009), indicates that an individual does not have a right under the Due Process Clause to access lost or destroyed evidence during post-conviction proceedings." *Reid v. State*, 984 N.E.2d 1264, 1267 (Ind. Ct. App. 2013). Osborne sought access to state evidence so that he could apply new DNA-testing technology that might prove him innocent. Osborne claimed he had a due process right to access evidence during postconviction proceedings so that he could do further testing. However, the Supreme Court rejected his invitation to recognize a freestanding liberty right to DNA evidence testing in postconviction proceedings. *Osborne*, 557 U.S. at 72. The Court determined once a defendant has been proven guilty beyond a reasonable doubt, he does not have the same liberty interests as a free man. *Id.* at 68–69. The Court further opined that establishing such a right would raise other issues, such as whether there is a constitutional obligation to preserve evidence postconviction, which it was unwilling to recognize:

> Establishing a freestanding right to access DNA evidence for testing would force us to act as policymakers and our substantive-due-process rule-making authority would not only have to cover the right of access but a myriad of other issues. *We would soon have to decide if there is a constitutional obligation to preserve forensic evidence that might later be tested*. *Cf. Arizona v Youngblood*, 488 US 51, 56–58 [ ] (1988). If so, for how long? Would it be different for different types of evidence? Would the state also have some obligation to gather such evidence in the first place?

Id. at 73–74 (emphasis added).

Since there is no procedural or substantive due process right to conduct DNA testing, and no recognized constitutional obligation on the State to preserve forensic evidence after trial, Avery has no basis to bring this claim in a section 974.06 proceeding. Wis. Stat. § 974.06(1).

Avery's argument to the contrary is not persuasive. In his postconviction motion, Avery spent much time and effort arguing the State violated his due process rights when it disposed of some of the bone fragments recovered during the investigation. He asserted that *Youngblood* and its progeny do apply to postconviction proceedings, citing *State v. Parker*, 2002 WI App 159, 256 Wis. 2d 154, 647 N.W.2d 430. The circuit court agreed. (806:7–8.)

A quick read of *Parker* does suggest that a due process violation may result from the destruction of evidence after trial. In *Parker*, postconviction counsel learned that a tape of the alleged drug transaction between Parker and an undercover officer that was not used at trial had been destroyed. *Parker*, 256 Wis. 2d 154, ¶¶ 3–4. On appeal, Parker asserted that destruction of the tape denied his due process right to a meaningful appeal and effective assistance of appellate counsel. *Id.* ¶ 7.

The *Parker* decision contains no citation to *Youngblood*, but this Court wrote: "[T]he parties have not cited to, nor have we located, any case law addressing the posttrial destruction of evidence. There is a long line of cases addressing the pretrial destruction of evidence and a defendant's due process rights. We see no reason why this line of cases should not apply to the situation at hand." *Id.* ¶ 13.

There is a very good reason not to apply pretrial destruction of evidence cases to the posttrial destruction of evidence. The due process concern in the pretrial destruction of evidence cases concerns "the defendant's right to fundamental fairness by giving the defendant a chance to present a complete defense." *State v. Greenwold*, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994). Avery had his trial. He is not arguing that his trial was not fair because of some issue with these bone fragments, nor that he did not have the opportunity to present a complete defense. He is simply arguing that he *might* have a different or stronger defense, if,

and it is a big if, the bone fragments could be tested *and* the testing revealed that the fragments belonged to the victim.

Moreover, and more problematically, the *Parker* decision is internally inconsistent. While the court reasoned, with no analysis, that there was no reason not to apply the pretrial destruction of evidence cases to a postconviction claim, it also concluded, citing an earlier court of appeals decision, that "[a] defendant may not sit back while evidence is available and then argue for a new trial on the grounds that evidence is no longer available to him or her." *Parker,* 256 Wis. 2d 154, ¶ 15. The State sees no way to reconcile those inconsistent holdings.[26]

Holt predates *Parker*, and thus, *Holt* is controlling. *See State v. Kempainen*, 2014 WI App 53, ¶ 14, 354 Wis. 2d 177, 848 N.W.2d 320 (when a decision of the court of appeals cannot be reconciled with an older decision, the older decision controls). Holt was charged and convicted in Illinois for aggravated kidnapping, battery, and felony murder, and then, years later, charged in Wisconsin for acts involving kidnapping, sexual assault, and murder of the same victim. *Holt*, 128 Wis. 2d at 116–17. After the trial in Illinois, vaginal swabs taken from the victim during the autopsy were destroyed. *Id.* at 132. In Holt's Wisconsin trial, the prosecution introduced testimony about destroyed vaginal swabs. *Holt*, 128 Wis. 2d at 132. Holt alleged that he was denied due process when the prosecution was allowed to introduce testimony about the swabs because "the state had not preserved the swabs for analysis by him." *Id.*

The due process issue in *Holt* was whether the posttrial destruction of evidence is a cognizable due process claim when

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[26] If evidence was destroyed after trial and the defendant did not know that evidence ever existed, that is a completely different type of claim. That would be properly analyzed under *Brady* and its progeny, not under *Youngblood*.

the defendant is facing a new trial. Even in that circumstance, this Court held that, regardless if Holt could establish the *Trombetta* elements, he had no due process claim: "[a] defendant may not sit back for years while evidence is available and then successfully move to suppress testimony about such evidence on the ground that the evidence is no longer available to the defendant for further testing." *Id.* at 134.

Like Holt, Avery has no due process claim. There is no constitutional mandate that the state preserve evidence post-trial for further potential testing, and Avery sat back for over a decade before requesting further testing on the fragments.

Furthermore, *Parker* conflicts with *Osborne*. This Court must follow a United States Supreme Court decision on a matter of federal law if it conflicts with an earlier Wisconsin appellate decision. *State v. Jennings*, 2002 WI 44, ¶ 19, 252 Wis. 2d 228, 647 N.W.2d 142. As just explained, *Osborne* shows that there is no constitutional right to postconviction testing. *Osborne*, 557 U.S. at 68–69. The *Osborne* Court indicated that *Youngblood* had not created a constitutional obligation on law enforcement to preserve evidence postconviction. *Id.* at 73–74. *Osborne* controls over *Parker*. Under *Osborne*, Avery has no cognizable *Youngblood* claim because his claim alleges postconviction destruction of evidence. And without a constitutional claim, Avery has no justiciable basis for his Wis. Stat. § 974.06 motion.

C. Even if *Youngblood* applied to the postconviction destruction of evidence, which it does not, Avery has not met his pleading burden.

"[I]n order to secure a hearing on a postconviction motion, [a defendant] must have provided sufficient material facts-e.g., who, what, where, when, why, and how-that, if true, would entitle him to the relief he seeks." *John Allen*, 274

Wis. 2d 568, ¶ 36. "A 'material fact' is: '[a] fact that is significant or essential to the issue or matter at hand.'" *Id.* ¶ 22 (citation omitted). Avery was required to allege sufficient material facts "within the four corners of the [postconviction motion] itself." *Id.* ¶ 23. As with his other claims, Avery failed to meet his burden.

There is a well-developed body of Wisconsin case law that follows and applies *Trombetta* and *Youngblood*. To put it succinctly, "[a] defendant's due process rights are violated if the [State]: (1) failed to preserve the evidence that is apparently exculpatory; or (2) acted in bad faith by failing to preserve evidence which is potentially exculpatory." *State v. Huggett*, 2010 WI App 69, ¶ 11, 324 Wis. 2d 786, 783 N.W.2d 675 (citation omitted).

Trombetta, 467 U.S. 479, and *Youngblood*, 488 U.S. 51, address the due process analysis applicable to the pretrial loss or destruction of evidence. Under *Trombetta*, due process is violated when the defendant shows that the State lost evidence before trial that might be expected to play a significant role in the defense. *Trombetta,* 467 U.S. at 488. To satisfy this standard, the evidence must possess an exculpatory value that was apparent before the evidence was lost or destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. *Id.* at 489. Evidence does not have apparent exculpatory value if it would have provided "simply an avenue of investigation that might have led in any number of directions." *Hubanks v. Frank*, 392 F.3d 926, 931 (7th Cir. 2004) (quoting *Youngblood*, 488 U.S. at 57 n.*).

The first step in the analysis then is whether the bone fragments recovered from the quarry constitute exculpatory evidence. They do not. The bone fragments are not apparently or potentially exculpatory in any way. Avery has not established how these bone fragments are anything other

than an avenue of investigation that might lead in any number of directions.

Over the course of the past two and a half years, since the filing of the original Motion for Post-Conviction Scientific Testing on August 26, 2016, Avery has changed his theory of who the "real murderer" is at least three times. Initially the focus was on Individual A (later determined to be Joshua Radandt), and Individual B (later determined to be Scott Bloedorn). (573.) Avery then shifted focus to Ryan Hillegas, who he described as the "only" person who could have committed the crime, and absolved Radandt in a footnote. (603:114–19, 153 n.12.) Shortly thereafter, in the summer and fall of 2017, Avery turned his attention to Bobby Dassey and Scott Tadych. (631:3.) Since that time, Avery claimed Bobby Dassey and Tadych are the killers. (631:33–38, 43–46.) Notably, Bobby Dassey and Scott Tadych were included in trial counsels' original Third-Party Liability Motion as viable suspects. (198:9.) On appeal, Avery has added Hillegas back to the equation as well. (Avery's Br. 87–89.)

Avery asserts only that, if testing revealed that the bone fragments in the quarry belonged to the victim, it would establish that the victim's remains were not under Avery's "exclusive control." (Avery's Br. 124.) That is a conclusory assertion unsupported by any facts. Avery never explains why, if the bone fragments belonged to the victim, it would be impossible for Avery to have planted the fragments in the quarry. Or how his not having exclusive control of the victim's remains after the murder would establish, or even suggest, that Avery was not the real killer. He fails to argue how the existence of human bone fragments found in the quarry support any of his arguments that Individual A, Scott Bloedorn, Ryan Hillegas, Bobby Dassey, or Scott Tadych is the real killer. Thus, the only thing Avery has established is that testing the bone fragments found in the quarry may lead to an investigation that could go in any number of directions.

He has not established how the bone fragment evidence has apparent exculpatory value. *Hubanks*, 392 F.3d at 931.

Avery tries to do an end run around the apparently exculpatory analysis by asserting that the bone fragment evidence is material evidence because the combination of Wis. Stat. §§ 968.205 and 974.07 codified a right to postconviction DNA testing. (Avery's Br. 126.) Whether evidence is material has nothing to do with those statutes. Constitutionally material evidence means evidence that creates a reasonable probability that, if the evidence had been available to the defense, the result of the trial would have been different. *Bagley*, 473 U.S. at 682. But, the bone fragments *were* available to the defense and they *did not* make a difference at trial. The bone fragments were not apparently exculpatory.

Additionally, there are fragments from the quarry that may or may not be human still in evidence available for testing. Thus, Avery has also failed to establish that he cannot obtain comparable evidence for testing.

Regarding the "potentially exculpatory" standard under *Youngblood*, Avery has also failed to establish that the bone fragments were potentially exculpatory. A criminal defendant must show bad faith on the part of the State when the State fails to preserve evidence "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *State v. Greenwold*, 181 Wis. 2d 881, 885, 512 N.W.2d 237 (Ct. App. 1994) (citation omitted). Absent such a showing, there is no due process violation. *Id*.

Avery has not established any potential usefulness of further testing of the evidence found in the quarry. At trial, defense counsel made use of the State's inability to discern whether the fragments recovered from the quarry were human. (715:138–46; 716:51.) Avery does not argue how a definitive determination that the fragments were human is

material. There is no discussion of how or why these remains being found to be human would support a claim that Avery was not the killer. There are no asserted facts establishing how, if the quarry bone fragments are human, that Avery would have a viable third-party suspect defense under the rules of *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984) and *Wilson*, 362 Wis. 2d 193,. There is no analysis of motive, opportunity, or a direct connection to the crime related to these fragments.

Avery offers no fact or analysis demonstrating why it's not possible that Avery himself (or his convicted accomplice, Brendan Dassey) placed the bones in the quarry to divert attention from himself and escape detection. Avery fails to tell us how a possible third location of Halbach's remains possesses any exculpatory value.

Even if Avery could establish that the bone fragments were potentially exculpatory, which he has not, he failed to establish that the State acted in bad faith. A defendant can prove bad faith "only if '(1) the officers were aware of the potentially exculpatory value or usefulness of the evidence they failed to preserve; and (2) the officers acted with official animus or made a conscious effort to suppress exculpatory evidence.'" *State v. Luedtke*, 2015 WI 42, ¶ 46, 362 Wis. 2d 1, 863 N.W.2d 592 (citation omitted). Avery established neither.

The State released some, but not all, of the bone fragments on September 20, 2011. By that time, this Court had issued a decision denying Avery's request for new trial. (468.) The bone fragments were not part of Avery's direct appeal. *State v Avery*, 2011 WI App 124, ¶¶ 1–3, 337 Wis. 2d 351, 804 N.W.2d 216. There was no pretrial request made by trial counsel and there was no request by appellate counsel during direct appeal to examine any of the bone fragments at issue. The State made reasonable efforts to determine the identity of the bone fragments at issue when it sent the items to the FBI. (802:28.) The FBI could not test the items. (802:6–

7, 29–30.) When these items were released to the family, the State did not know their origin.

The State did preserve the bone fragments clearly identified as the remains of Teresa Halbach and those that could be identified as being female, human bone. Under these circumstances there is no bad faith. Avery is due no relief.

VI. This Court lacks jurisdiction to review Avery's motion to compel discovery.

Avery complains that the circuit court "never ruled on" his motion to compel discovery he filed on July 3, 2018. (Avery's Br. 121–22.) He doesn't actually make any argument or claim related to it, though; it appears to just be a lament that it is unresolved. (Avery's Br. 122.) Regardless what argument Avery meant to make about this motion, this Court lacks jurisdiction to review it.

Motions seeking postconviction discovery under *State v. O'Brien*, 223 Wis. 2d 303, 588 N.W.2d 8 (1999) are considered section 974.06 motions pursuant to *Kletzien*, 331 Wis. 2d 640, ¶ 2, meaning Avery's motion to compel discovery of the State's 2018 examination of the Dassey computer was a new action in the circuit court. "[A]n appellate court has no jurisdiction to review the denial of a postconviction motion if there is no final written order denying that motion on file in the office of the clerk of court." *State v. Malone*, 136 Wis. 2d 250, 252, 401 N.W.2d 563 (1987).

Avery never received or requested a final judgment or order denying this motion. No written order was entered, as required to bring it before this Court pursuant to Wis. Stat. § 808.03(1). This Court lacks jurisdiction to review arguments about this motion.

CONCLUSION

Though Avery raised a litany of claims in his motions, none of them entitled him to a hearing. The circuit court properly exercised its discretion to deny his motions without one. This Court should affirm the circuit court.

Dated this 27th day of May 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 34,874 words.

Dated this 27th day of May 2020.

LISA E.F. KUMFER
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 27th day of May 2020.

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