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COURT OF APPEALS

Case No. 2017 AP 002288

In the State of Wisconsin Court of Appeals District II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN A. AVERY,

Defendant-Appellant.

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

REPLY BRIEF OF DEFENDANT-APPELLANT STEVEN A. AVERY

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INTRODUCTION

Steven Avery ("Mr. Avery") has spent 5,343 days (128,232 hours) behind bars for his second wrongful conviction. He has endured the mental anguish of knowing that he is innocent and his constitutional rights to a fair trial were violated.

The State, in a desperate effort to keep Mr. Avery imprisoned, devotes 104 pages to arguing that Mr. Avery's claims are procedurally barred. However, the State ignores the most important undisputed fact that refutes its entire argument that Mr. Avery is procedurally barred from bringing his new claims: there was an agreement on September 18, 2017 between the State and Mr. Avery that Mr. Avery could *amend his June 2017 § 974.06 motion without opposition from the State, perform additional scientific testing, and schedule a four-week evidentiary hearing if needed.* (629:1-5). Proof of the agreement is evidenced by the undisputed fact that *the State did not object to Mr. Avery's October 6, 2017 motion to vacate* the October 3, 2017 court order dismissing his June 2017 § 974.06 motion. (629:1-5). The circuit court also recognized that the State and Mr. Avery had made an agreement as described above. (640:2). Because of the undisputed agreement between Mr. Avery and the State that he could amend his June 2017 § 974.06 motion, all the State's current arguments about Mr. Avery being procedurally barred

are waived and the State should be estopped from raising the procedural bar arguments.

The circuit court orders are replete with legal errors (as the State points out in State's Br. 17, 20, 102, 103, 104, 108). Because of its legal errors, the circuit court failed to address many of the issues Mr. Avery raised, so there is no record of those for this Court to determine whether the circuit court erroneously exercised its discretion. In fact, it is an erroneous exercise of discretion to fail to exercise discretion over multiple issues.

Alternatively, if this Court engages with the State's arguments, Mr. Avery presents sufficient reasons why his claims are not procedurally barred, including the two supplements to his June 2017 § 974.06 motion allowed by this Court, which conclusively defeat the State's claim that successive, and not supplemental, motions were filed. Additionally, Mr. Avery presents *Brady* and *Youngblood* claims discovered *after* his June 2017 § 974.06 motion, and new evidence, which are not procedurally barred.

At trial, the State's primary witness Bobby Dassey ("Bobby") committed perjury when he testified that Ms. Halbach never left the Avery property and that he was asleep when he was doing internet searches. He has a direct connection to the murder by his subsequent

admissions, violent pornography and word searches that reflect knowledge of the crime and the victim, motive and opportunity to commit the crime and plant evidence against Mr. Avery, including bones from his burn barrel and blood from Mr. Avery's sink.

Trial defense counsel failed to hire the necessary experts and failed to investigate and establish third-party suspects pursuant to *State v. Denny* 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), most importantly, the State' primary witness Bobby. Prior postconviction counsel was ineffective in all the same ways.

Current postconviction counsel has uncovered numerous *Brady* and *Youngblood* violations, the cumulative effect of which undermines confidence in the verdict. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). (Avery's Br. 39-49).

The State's brief fundamentally misunderstands the basic facts of the case, the "law-of-the-case" effect of the supplements that this Court allowed, the effect of the circuit court's legal errors, and the estoppel effect of the 2017 agreement between Mr. Avery and the State.[1]

[1] The State argues that Mr. Avery relies upon the incorrect standard of review for a trial court's rulings (State's Br. 1) by using the term "abuse of discretion." Wisconsin's change from "abuse of discretion" to "erroneous exercise of discretion" language is a distinction without a difference. As the court stated, "We are not changing the standard of review, just the locution." *Brookfield v. Milwaukee Metropolitan Sewerage District*, 171 Wis. 2d 400, 423, 491 N.W.2d 484, 493 (1992).

ARGUMENT

I. The State is estopped from bringing procedural bar claims.

In Wisconsin, the doctrine of judicial estoppel is used to prevent litigants from playing fast and loose with the judicial system by maintaining inconsistent positions during the litigation. *Salveson v. Douglas Cty.*, 2001 WI 100, ¶1, 245 Wis. 2d 497, 630 N.W.2d 182. Specifically, judicial estoppel precludes a party from asserting a position in a legal proceeding and subsequently asserting an inconsistent position. *Id.* ¶1.

Contrary to the State's argument that it does not matter what the parties agreed to (State's Br. 73), the State's prior agreement with Mr. Avery's counsel utterly disqualifies the State's procedural bar arguments (the focus of the State's brief). The State is estopped from entirely changing its position in arguing that Mr. Avery is procedurally barred from raising his claims after it agreed that Mr. Avery could amend his motion, conduct additional scientific testing, and, if needed, schedule a four-week evidentiary hearing. (629:1-5) (*See* Avery's Br. 33). Judicial estoppel applies to the parties' positions, not that of the judge. *State v. McFarland*, 2007 WI App 162, 303 Wis. 2d 746, 735 N.W.2d 193; *State v. Johnson*, 2001 WI App 105, P10, 244 Wis. 2d 164, 628 N.W.2d 431.

A reviewing court determines *de novo* whether the elements of judicial estoppel apply to the facts of a case. *Salveson*, 2001 WI 100, ¶1. Three elements are required for a court to invoke the doctrine of judicial estoppel: (1) the later position must be clearly inconsistent with the earlier position; (2) the facts at issue should be the same in both cases; and (3) the party to be estopped must have convinced the first court to adopt its position. *Id*. Mr. Avery meets all three elements for the following reasons:

(1) The State's current position that Mr. Avery is procedurally barred is clearly inconsistent with the State's September 18, 2017 agreement with Mr. Avery that he could amend his petition. (State's Br. 70-71).

(2) The facts at issue are the same before this Court and the circuit court.

(3) The State, by not objecting to the existence of the agreement described in Mr. Avery's motion to vacate, convinced the circuit court that there was, in fact, an agreement. (629:1-5) (640:1-5).

The State failed to object to Mr. Avery's motion to vacate.

The State had the opportunity to object, and failed to do so, when Mr. Avery submitted his § 974.06 motion to vacate on October 6, 2017,

which described the agreement for amending his motion; conducting additional scientific testing; and scheduling a four-week evidentiary hearing if necessary. In his motion for relief from judgment, Mr. Avery specifically pled,

> On October 6, 2017, [current postconviction] defense counsel spoke [to] the prosecutors and informed them that this motion would be filed today to vacate the order. This motion has been presented to and reviewed by the prosecutors and the prosecutors agree to the factual accuracy of the representations regarding the content of the September 18, 2017 meeting made in this motion. (629:3).

When current postconviction counsel asked whether the circuit court should immediately be informed of the agreement, Prosecutor Fallon stated that once he had finalized the scheduling of the RAV-4 examination with law enforcement, a stipulated order could be presented to the circuit court, similar to the original Stipulated Order for Independent Scientific Testing entered on November 23, 2016. (582:1–4; 629:2) (App. 167–70). Mr. Avery relied upon the agreement with the State and the State's request for additional time to schedule the testing of the RAV-4.[2] By not objecting to Mr. Avery's motion to vacate, the State has waived this argument on appeal. The State should be estopped from

[2] Vitally important evidence must be tested with more sensitive DNA testing, including the following: the blood stain (#A-23) on the RAV-4's rear cargo door and 8 latent prints found on the RAV-4, both of which exclude Mr. Avery; unidentified male DNA on the license plate (WSCL Items AJ and AK); potential DNA on the battery cables, hood latch, interior hood release, and lug wrench (WSCL Item A-16); the suspected human pelvic bones; and any other DNA-testing of the interior and exterior of the RAV-4 that could produce new evidence of a third-party suspect.

changing its position now. Mr. Avery relied upon the State's representations that it agreed to allow him to amend his motion, conduct new scientific testing, and schedule a four-week evidentiary hearing if needed. *Mowers v. City of St. Francis,* 108 Wis. 2d 630, 633, 323 N.W.2d 157, 158 (Ct. App. 1982).

II. The State's erroneous application of the fundamental principles of postconviction review.

Pleading standard

The State argues that Mr. Avery must affirmatively allege that his facts were sufficiently pled (State's Br. 42), which is not the actual standard. The proper standard is from *State v. Allen*, 2004 WI 106, ¶24, 274 Wis. 2d 568, 682 N.W.2d 433, which Mr. Avery satisfied in his brief, even presenting a chart for greater clarity. (Avery's Br. 99-103).

Standard governing a petitioner's right to an evidentiary hearing:

The State argues thirteen times that Mr. Avery failed to "prove" his facts and "disprove" the State's case (*See* State's Br. 4, 18, 32, 33, 39, 44, 54, 55, 64, 66, 69, 106-07; *but see* State's Br. 23 (conceding that "an evidentiary hearing is a forum to prove factually-supported claims . . . "). The standard is that the facts must be assumed to be true in determining whether to grant an evidentiary hearing. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50, 54 (1996). The State fails to assume Mr. Avery's

facts are true, as the standard requires. The State reverts to a "sufficiently proven" standard, which does not exist.[3] Mr. Avery is not required to prove the facts supporting his claims before this Court.

The State's brief inadvertently concedes the need for a hearing by creating numerous factual disputes in arguing and weighing the evidence. *See* Factual Dispute Chart *infra*. Ironically, the State uses the term "conclusory" twenty-five times in a conclusory fashion—to describe Mr. Avery's arguments without explaining what is conclusory about them. "*[A] postconviction movant need only provide sufficient objective factual assertions to be entitled to an evidentiary hearing. That is, a movant need not demonstrate theories of admissibility for every factual assertion he or she seeks to introduce*." *Love*, 2005 WI 116, ¶1, 284 Wis. 2d 111, 115, 700 N.W.2d 62; *State v. Balliette*, 2011 WI 79, ¶¶42-59, 336 Wis.2d 358, 805 N.W.2d 334 (emphasis added).

III. Mr. Avery's claims are not procedurally barred.

Mr. Avery is not procedurally barred by his 2013 pro se § 974.06 motion

The State argues Mr. Avery failed to show sufficient reasons for not raising his June 2017 claims in his 2013 *pro se* motion, arguing that

[3] The State relies on cases where the court conducted an evidentiary hearing *e.g. State v. Carter*, 131 Wis. 2d 69, 389 N.W.2d 1 (1986) (State's Br. 104).

Mr. Avery's indigence and lack of legal training were not "sufficient reason[s]." (State's Br. 11). The State's brief claims: "[A]very'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." (State's Br. 14). However, the circuit court's recent opinion is disingenuous because the circuit court previously ruled that Mr. Avery's claims, in his *pro se* motion, were "unsubstantiated," "empty and without substance," "completely meritless," "border[ing] on frivolous" and "wildly speculative." (533:4–6, 13) (Avery's Br., App. 115, 154–56, 163). Miraculously, the State has transformed Mr. Avery into a legal scholar to serve its own purposes.

Mr. Avery has demonstrated "sufficient reason" throughout his brief and supporting affidavits. (604:28–29) (Avery's Br. 16-17) (App. 518–19). Affidavits are considered part of the pleading. *Love*, 2005 WI 116, ¶50 (the Wisconsin Supreme Court found that an affidavit was *not insufficient* to make a valid claim for newly discovered evidence, reasoning that "a movant need not demonstrate the admissibility of the facts asserted in the postconviction motion, but rather must show sufficient objective material factual assertions that if, true would warrant the movant to relief.")(emphasis added).

The State misinterprets Mr. Avery's argument to conclude that Mr. Avery's claims were available to him since 2013. In 2013, Mr. Avery lacked legal knowledge, had cognitive deficiencies, and had no way of knowing the factual and legal basis of the claims in the instant appeal. Mr. Avery's 2013 *pro se* motion demonstrates this, as none of his eleven issues were meritorious or could have possibly raised the subsequently discovered *Brady*, *Youngblood,* new evidence, or ineffective assistance of counsel arguments. He had no way of acquiring knowledge of the factual or legal basis for his current claims.

The State concedes that Mr. Avery's pursuit of his *pro se* petition was diligent, but he failed despite his diligence. The fact Mr. Avery, in 2013, was diligent despite the unavailability of the necessary information supports his position. *See Williams v. Taylor*, 529 U.S. 420 (2000)(where the Supreme Court found that the habeas petitioner was entitled to an evidentiary hearing on a juror bias claim since he was diligent in his efforts to develop the facts). Because Williams was not on notice of the juror bias issue, the Supreme Court found that Williams did not fail in his duty of due diligence. The Supreme Court held that, unless there is a lack of diligence or some greater fault attributable to the prisoner or the prisoner's counsel, a failure to develop the factual basis of a claim is not established. *Id.* at 424.

Applying *Williams*, Mr. Avery did not "fail" to assert claims of which he had no notice. Further, as in *Williams*, Mr. Avery's claims were unavailable to him even if he did have legal knowledge because they are based on evidence withheld by *Brady* and *Youngblood* violations, discoverable by only expert examination, and not pursued or recognized by his prior attorneys.

Because Mr. Avery is a learning-disabled, indigent prisoner; he simply could not have been aware of the factual basis of his claims. (603:217-18). The Wisconsin Supreme Court has also found "sufficient reason" where the movant lacked factual awareness of the claim. *State v. Allen,* 2010 WI 89, 328 Wis. 2d 1, 786 N.W.2d 124. Even if Mr. Avery knew he needed experts, he could not persuade any experts to assist him. Therefore, he could not have known that the blood had been selectively planted in the RAV-4, the bullet fragment #FL had wood, and not bone, embedded in it, the hood latch swab never swabbed a hood latch, Ms. Halbach's sub-key could not have fallen from the bookcase, and the subsequent discovery of numerous *Brady* and *Youngblood* violations. (Avery's Br. 39-49). Mr. Avery wrote to dozens of attorneys—all of whom rejected his requests—after his direct appeal was denied. Mr. Avery also wrote to laboratories that would not respond unless he had an attorney. (604:28– 29) (App. 518–19) (Avery's Br. 16-17). Mr. Avery described the

impossibility of his efforts to get experts due to his *pro se* status, not lack of awareness that he needed them. (604:28-29) (App. 518-19). The circuit court should have granted an evidentiary hearing on Mr. Avery's allegation that he lacked the factual basis in 2013 to make the current claims.

Significantly, the State ignores *State v. Anderson,* 2013 WI App 30, 346 Wis. 2d 278, 827 N.W.2d 928, which Mr. Avery relied upon in his June 2017 § 974.06 motion. (603:217). In *Anderson*, the defendant, like Mr. Avery, argued that his cognitive deficiencies provided a sufficient reason for not raising certain claims prior to his § 974.06 motion. The court was skeptical of Anderson's claims regarding his disability, but the court assumed Anderson's disabilities excused his failure to raise the claims earlier. *Id.* Applying *Anderson*, Mr. Avery is not barred from raising his claims because he raised several sufficient reasons, including his cognitive deficiencies; impossibility of hiring experts; and lack of factual and legal awareness, for explaining why he could not raise his claims in his 2013 motion.

The circuit court failed to rule on prior postconviction counsel's ineffectiveness:

The circuit court failed to address prior postconviction counsel's ineffectiveness because it applied the wrong legal standard. (628:2-3). The circuit court stated:

> A circuit court is not authorized by statute to resolve claims of ineffective assistance of appellate counsel. *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). In this matter, if the defendant wishes to pursue the claims regarding his appellate counsel, the defense may file a *Knight* motion with the Court of Appeals.

(628:2-3).

Wisconsin law requires a defendant to present a claim of ineffective assistance of postconviction counsel to the trial court in the first instance. *See State ex rel. Rothering v. McCaughtry,* 205 Wis.2d 675, 556 N.W.2d 136 (Ct. App. 1996). A *Knight* petition is only appropriate for claims of ineffective assistance by appellate counsel. *See Jackson v. Baenen,* 12-CV-00554, 2012 WL 5988414, (E.D. Wis. Nov. 29, 2012). Because Mr. Avery alleges ineffective assistance of postconviction counsel, not appellate counsel, the circuit court improperly refused to rule on his claim.

The State acknowledges that the circuit court "was wrong about the law on postconviction procedure" because it "confused the procedure for raising ineffective assistance of postconviction counsel with the procedure for raising ineffective assistance of appellate counsel when

rejecting this claim." (State's Br. 17, 20). However, the State argues that if the trial court reaches the proper result for the wrong reason, it will be affirmed citing *State v. Holt,* 128 Wis. 2d 110, 124, 382 B.W.2d 679 (Ct. App. 1985) (State's Br. 20). *Holt* is distinguishable from this case. *Holt* involved the trial court's decision to deny a jury instruction. The appellate court found that the trial court's refusal to give the instruction was proper, even though the trial court's reasoning was incorrect. Unlike *Holt*, where the record was sufficient to resolve the issue, in Mr. Avery's case, there is no underlying record or discretionary decision to review because the circuit court failed to rule on the issue.

Because the circuit court applied the wrong standard and believed that the Appellate Court had to address the ineffectiveness of prior postconviction counsel, it did not evaluate the substance of the claim, nor create a record for this Court's review. (628:2-3). Stated differently, the record lacks any discretionary decision for this Court to review. *Laiter v. Lyubchenko*, 2020 WI App 1, 389 Wis. 2d 623, 937 N.W.2d 293. In *Laiter,* the Appellate Court remanded an issue for an evidentiary hearing, because the circuit court failed to make a discretionary decision, so there was no record or decision for the Appellate Court to review. In Mr. Avery's case, in addition to failing to create a record for this Court to review, the circuit court abused its discretion by refusing to rule on his

ineffective assistance claim. "The failure to exercise discretion is an abuse of discretion." *McCleary v. State*, 49 Wis. 2d 263, 282, 182 N.W.2d 512, 522 (1971); *State v. Jaworski*, 168 Wis. 2d 357, 485 N.W.2d 838 (Ct. App. 1992).

In *State v. Kuenzi*, 2014 WI App 97, 356 Wis. 2d 829, 855 N.W.2d 720, when faced with a similar legal error by the trial court that resulted in no record for appellate review, the court held: "If the circuit court is able to conduct an adequate retrospective hearing, it *shall* do so; . . ." (emphasis added). Therefore, in the instant case, the court must hold an evidentiary hearing about the allegations of prior postconviction counsel's ineffectiveness.

Mr. Avery pled sufficient reasons for failing to raise prior postconviction counsel's ineffectiveness in his pro se motion:

The State argues Mr. Avery fails to establish a sufficient reason for not including his current ineffective assistance of prior postconviction counsel claim in his *pro se* direct appeal. Mr. Avery not only alleged a reason, he has demonstrated a "sufficient reason" consistent with Wis. Stat. § 974.06(4) and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 182, 517 N.W.2d 157 (1994). What constitutes a "sufficient reason" pursuant to Wis. Stat. § 974.06(4) is determined on a case-by-case basis. The Wisconsin Supreme Court has held that ineffective assistance of

postconviction counsel may constitute a sufficient reason. *State v. Romero-Georgana,* 2014 WI 83, 360 Wis. 2d 522, 849 N.W.2d 668; *see also State ex rel. Rothering v. McCaughtry,* 205 Wis. 2d 675, 556 N.W.2d 136 (Ct. App. 1996).

Mr. Avery's pleading alleged sufficient facts for his claim of prior postconviction counsel's ineffectiveness:

Mr. Avery alleged sufficient facts about prior postconviction counsel's ineffective failure to hire experts, conduct a significant investigation, or review discovery regarding potential third-party *Denny* suspects to warrant an evidentiary hearing. (603:203, at ¶ 424; 631:22–25).

Clearly, prior postconviction counsel recognized the need for experts on Mr. Avery's behalf because they asked the court for an extension to retain experts, stating, "*Counsel would be remiss if they did not consult with scientific experts on matters beyond their own knowledge and expertise, just as counsel would fail to satisfy their ethical obligations if they did not pursue potential leads for postconviction relief.*" (421:3)(emphasis added). Despite recognizing the need, prior postconviction counsel did not retain any experts.

The pivotal question is whether Mr. Avery's § 974.06 motion is sufficient to entitle him to an evidentiary hearing, where he would have

the opportunity to show that his trial and prior postconviction attorneys rendered ineffective assistance of counsel. *Balliette*, 2011 WI 79, 336 Wis. 2d 358, 805 N.W.2d 334. Determining whether counsel's performance was deficient requires the court to "focus on counsel's perspective at the time of trial" or postconviction. *State v. Foy,* 206 Wis.2d 629, 640, 557 N.W.2d 494 (Ct. App. 1996). This determination often cannot be made without counsel's testimony, without which, a court cannot "focus on counsel's perspective" and "cannot otherwise determine whether . . . counsel's actions were the result of incompetence or deliberate trial strategies." *Foy,* 206 Wis.2d at 640. Additionally, in *State v. Curtis*, 218 Wis. 2d 550, 554, 555 n.3, 582 N.W.2d 409 (Ct. App. 1998), the court held, "assuming there are factual allegations which, if found to be true, might warrant a finding of ineffective assistance of counsel, an evidentiary hearing is a prerequisite to appellate review of an ineffective assistance of counsel issue." This Court must assume, as true, trial defense counsel Strang's affidavit that Strang and Buting were ineffective in that they failed to hire ballistics, trace, and blood experts. (636:105) (App. 765). The Court must also assume that trial defense counsel were ineffective in failing to investigate and impeach the State's primary witness, Bobby, at trial as evidenced by their investigator's affidavit. (630: 32-45)

Additionally, trial defense counsel was ineffective in numerous other ways. (603: 136-149).

IV. The circuit court erroneously exercised its discretion in denying Mr. Avery's motion to vacate and motion for reconsideration in contradiction of the 2007 Order by Judge Willis

Mr. Avery properly argued that the State's refusal to vacate its judgment violated the 2007 Preservation and Testing Order:

The State incorrectly asserts that Mr. Avery failed to raise the argument regarding the circuit court's violation of the 2007 Preservation and Testing Order, claiming: "This argument appeared in none of Avery's motions to the circuit court. (*See* 629; 631; 632; 633; 635; 636.)" (State's Br. 72-73). However, it did. In his second amended supplement to his motion for reconsideration, Mr. Avery pled: "The effect of the Court's failure to vacate its October 3, 2017, ruling is that it has unilaterally blocked all future scientific testing in the Avery case, in direct contravention of the April 4, 2007, order entered by Judge Willis." (636:2) (395:1-3).

The State cites *Schonscheck v. Paccar, Inc.*, 2003 WI App 79, 261 Wis. 2d 769, 661 N.W.2d 476 (State's Br. 73). *Schonscheck* is inapposite as it is not a postconviction case—rather, a products liability case in

which a defendant manufacturer failed to mention, even once, that the plaintiff violated a Wisconsin statute until his appeal.

Mr. Avery's newly discovered evidence in his motion for reconsideration

The State disputes Mr. Avery's evidence is "newly discovered," citing to *State v. Fosnow*, 2001 WI App 2, ¶ 9, 240 Wis. 2d 699, 624 N.W.2d 883 and *Vara v. State*, 56 Wis. 2d 390, 202 N.W.2d 10 (1972) to argue that "newly discovered evidence . . . does not include the 'new appreciation of the importance of evidence previously known but not used.'" In *Fosnow*, the defendant's new diagnosis was merely the new interpretation of existing evidence. Similarly, in *Vara*, the evidence was "newly discovered importance of evidence previously known and not used" where both trial defense counsel and the defendant knew of the defendant's head injury which could have supported an insanity defense. Both cases are inapposite because Mr. Avery's newly discovered evidence does not consist of already known facts; rather, post-trial experts revealed facts that were unavailable at trial.

In denying Mr. Avery's motion, the circuit court erroneously applied the newly discovered evidence standard to mean that the test could not be 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. (640:3).

The circuit court believed that the new evidence could not have existed before 2017. That is not the standard. When moving for a new trial based on newly discovered evidence, a defendant must prove: (1) the evidence was *discovered after conviction*; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. *State v. McCollum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997)(emphasis added). If the defendant can prove all four of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the evidence, it would have had a reasonable doubt as to the defendant's guilt. *Love,* 2005 WI 116, ¶ 44.

Here, Mr. Avery presented the following new evidence: Dr. Christopher Palenik, using a 2016 state-of-the-art microscope, examined #FL and the hood latch swab, and his findings have produced new evidence that is totally inconsistent with the State's theory that Ms. Halbach was shot in the head while lying on Mr. Avery's garage floor and that the hood latch swab was actually used to swab a hood latch. (603:154) (App. 406) (621:35). Dr. John DeHaan, a forensic fire expert, determined that no body was ever burned in Mr. Avery's burn pit, based upon data he collected from his experiments burning human cadavers since 2012. (615:90) (615:99–151) (App. 447–99). Dr. Karl Reich was able,

through the use of new source testing (RSID testing) developed after the trial, to eliminate blood, semen, and saliva as the sources of DNA from the hood latch swab, and offered the opinion that the DNA was consistent with what would be found on Mr. Avery's groin swab from his skin cells. (604:103–05) (App. 523–24).

V. The State mischaracterizes Mr. Avery's argument regarding trial defense counsel's ineffectiveness

The State mischaracterizes Mr. Avery's argument that trial defense counsel was ineffective, stating: "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.)" (State's Br. 24-25). Mr. Avery never argued that trial defense counsel were ineffective for failing to present his planted evidence defense. Instead, Mr. Avery argues that they were ineffective for failing to hire experts, failing to investigate and impeach Bobby Dassey, failing to establish third-party suspects, and failing in numerous other ways. (Avery's Br. 65-89). *See Hinton v. Alabama,* 571 U.S. 263 (2014), where trial counsel was ineffective for failing to hire a competent expert to

bolster his trial defense that the defendant was misidentified as the killer.

The State cites *Lee v. State*, 65 Wis. 2d 648, 223 N.W.2d 455 (1974) for the proposition that permitting postconviction counsel "to argue a different game plan, after the contest is over, would be Monday morning quarter-backing." However, *Lee* is distinguishable. Lee's defense was available at the time of trial, but his counsel merely chose not to pursue it. Conversely, Mr. Avery is not arguing that his counsel could have chosen a different defense out of those available, rather, he argues his counsel for ineffective for failing to hire experts or investigate.

The State again misstates Mr. Avery's argument by claiming that Mr. Avery is contending that trial defense counsel should have hired his specific current experts, when Mr. Avery actually argues that trial defense counsel was ineffective for failing to hire experts in these specific areas of expertise: blood spatter, DNA, trace, ballistics, police procedure, forensic fire, and anthropology with kerf mark specialization. Mr. Avery never argued that trial defense counsel should have hired his specific experts; instead, Mr. Avery argues that trial defense counsel was ineffective for failing to hire experts. (Avery's Br. 65-89).[4]

[4] The State claims Wisconsin has never found that a "police procedure" expert is admissible. (State's Br. 28). However, Gregg McCrary has been admitted by the

Besides this, the State grossly mischaracterizes Mr. Avery's ineffective assistance of counsel argument as being "that the quantity testing results were both newly discovered evidence and that Strang and Buting were ineffective for failing to present them." (State's Br. 59). The newly discovered evidence supports Mr. Avery's argument that trial defense counsel failed to present an expert to establish that law enforcement planted Mr. Avery's DNA on the sub-key (603:83). The reason trial defense counsel did not discover this evidence was their failure to hire experts, which trial defense counsel admits. (Avery's Br., App. 765-66, 834-38). Thus, the State cannot, even by misstating Mr. Avery's whole argument, rebut trial defense counsel's ineffectiveness.

VI. Mr. Avery's *Brady* and *Youngblood* claims are not barred because they were raised in supplemental motions.

The State claims that Mr. Avery's motions are successive. (State's Br. 89). However, per the Appellate Court's orders, Mr. Avery's motions are supplemental motions (*See* June 11, 2018 Order (729) and February 27, 2019 Order (770)). The law of the case doctrine is a "longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in

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Seventh Circuit as a police procedure expert in *Jimenez v. City of Chicago*, 732 F.3d 710, 719 (7th Cir. 2013).

the trial court or on later appeal." *State v. Stuart*, 2003 WI 73, ¶23, 262 Wis. 2d 620, 633, 664 N.W.2d 82 citing *Univest Corp. v. General Split Corp.*, 148 Wis. 2d 29, 38, 435 N.W.2d 234 (1989) (internal citation omitted). Even so, the State accuses Mr. Avery of filing in a piecemeal fashion. Filing under the same case number is, by nature, not piecemeal litigation. *See Banister v. Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division*, ___U.S.___ (2020) (where the Supreme Court recently held that a Rule 59(e) motion to alter or amend a habeas court's judgment is not a second or successive habeas petition but rather part of the first full petition).

Mr. Avery's motions and supplements were all filed under the same case number and are simply a continuation of the same proceeding. *See Gonzales v. Crosby,* 545 U.S. 524 (2005). Issue preclusion doctrines are inappropriate where the record reflects that the petitioner is diligently pursuing his claims and supporting facts in his first meaningful postconviction review. *See Lonchar v. Thomas,* 517 U.S. 314 (1996), holding that abuse of the writ doctrines have no application in a first habeas corpus proceeding, and *Williams,* 429 U.S. 420 (2000), holding that a prisoner who acts diligently to pursue his claims has not "failed" to preserve his right to a hearing on his claims.

Mr. Avery has sufficiently pled his Youngblood claim.

Even though it is undisputed that the State violated the notice requirement of Wis. Stat. § 968.205(2) on evidence preservation (805:7), the State claims that Mr. Avery cannot prove its bad faith, and thus makes an insufficient claim under *Youngblood*. (State's Br. 104). The argument that Mr. Avery alleges "a statutory claim" overlooks that Mr. Avery only uses the violation of the statute to show the State's bad faith in breaching its duty of notice. ("A prosecutor has a duty to preserve potentially useful evidence for trial." *Arizona v. Youngblood*, 488 U.S. 51, 56–58 (1988); *California v. Trombetta*, 467 U.S. 479, 488–90 (1984).)

While the *Trombetta* and *Youngblood* evidence preservation doctrines originally applied only when evidence was destroyed pretrial, the Wisconsin Court of Appeals stated that *Trombetta* and *Youngblood*—and Wisconsin's two-part *Greenwold* test—are applicable to the postconviction destruction of evidence in *State v. Parker*, 2002 WI App 159, ¶¶ 13-14, 256 Wis. 2d 154, 647 N.W.2d 430. The State claims that *Parker* should be overturned after "a quick read;" however, *Parker* has been followed and affirmed by numerous decisions and is void of any

negative analysis. (State's Br. 108).[5] Therefore, the State's argument is devoid of any rationale for overturning this Court's prior decision.

The bone fragments recovered from the Gravel Pit constitute apparent or potentially exculpatory evidence:

The State misconstrues the apparent or potential exculpatory nature of the Manitowoc County Gravel Pit ("Gravel Pit") bone fragments. Mr. Avery presented the affidavit of Dr. DeHaan that Ms. Halbach did not burn in Mr. Avery's burn pit and her bones were planted there. (795:2-3, ¶ 10(a)-(d)). Dr. DeHaan opined that Ms. Halbach was burned in a burn barrel, and it is undisputed that larger human bones were found in the Dassey burn barrel (# 7964): a human scapula, portions of a spinal column, metacarpals, and long-bone fragments. (795:4, ¶ 13) (633:11) (706:231-33). The Dassey burn barrel bones had cut marks. (756:29) The Gravel Pit bones had cut marks. (772:16-18). By destroying the Gravel Pit bones, the State prevented Dr. Symes, Mr. Avery's expert, from matching the cut marks between the burn barrel and Gravel Pit; thereby establishing that the Dassey burn barrel was the primary burn site. This evidence would establish a direct connection between the Dassey burn barrel, the mutilation of Ms. Halbach and the

[5] The State incorrectly argues that *District Attorney's Office for the Third Judicial District v. Osborne,* 557 U.S. 52 (2009) should control rather than *Parker*. However, *Osborne* does not apply because it is a 1983 claim and the petitioner did not attempt to follow the State procedure.

subsequent planting of bones in Mr. Avery's burn pit. Clearly, the killer performed all of these tasks.

Dr. DeHaan ruled out tires as the accelerant. (795:5, ¶ 15). Dr. Eisenberg claimed that she detected the odor of a flammable liquid and not burned rubber from the bones in the Dassey barrel, which the State claimed was the accelerant used by Mr. Avery. (707:6-7). Mr. Avery was deprived of the opportunity to link the Gravel Pit bones accelerant to the Dassey burn barrel bones.

The evidence against Bobby of motive and opportunity is apparent. (Avery's Br. 49-65, 82-87, 119-20). Additionally, if the Gravel Pit and Dassey burn barrel bones had been linked, the State's star witness would be converted into the primary suspect. Dr. DeHaan opines that the bones in Mr. Avery's burn pit were planted after being burned in a burn barrel. Dr. DeHaan stated: "the discovery of larger fragments outside the margins of [Avery's] burn pit and the finding of human bone fragments with similar degrees of fire damage in numerous other areas . . . is also consistent with the "dumping" of burn remains into the alleged burn pit, with some rolling or landing outside the pit. (615:95)." (795:3-4, ¶ 11).

If Mr. Avery establishes in an evidentiary hearing that the primary burn site was the Dassey burn barrel and the bones from that

barrel were planted in Mr. Avery's burn pit, that evidence would be potentially exculpatory and would undermine confidence in his verdict.

Mr. Avery has established that the State acted in bad faith. (Avery's Br. 124) "Bad faith can be shown by proof of an official animus or a conscious effort to suppress exculpatory evidence." *See Jimerson v. Payne*, 957 F.3d 916 (8th Cir. 2020). Further, "under certain circumstances, it is permissible to draw an adverse inference against the government when it destroys evidence." *United States v. Davis*, 690 F.3d 912, 925 (8th Cir. 2012), vacated on other grounds by 570 U.S. 913 (2013). Bad faith can also be inferred from the fact that the prosecutor deliberately misled the jury into believing that there was no possibility of human bones in the quarry. (716:78).

In *Jimerson v. Payne*, 957 F.3d 916 (8th Cir. 2020), the Eighth Circuit held that the defendant established a *Youngblood* violation regarding a recording that was either lost or destroyed. The Eighth Circuit acknowledged, "Without the recording, we cannot ascertain its significance." *Id*. at 20. However, the fact that it existed, and the State failed to disclose it, demonstrated a "conscious effort to suppress evidence." *Id*. The reasoning in *Jimerson* should be applied to Mr. Avery's case to find that the "bad faith" element has been satisfied because the prosecutor deliberately failed to preserve relevant evidence.

VII. Because Mr. Avery's factual allegations must be assumed as true, he is entitled to an evidentiary hearing.

Mr. Avery's motion for relief was filed pursuant to Wis. Stats. § 974.06 which requires a hearing unless the motion and the files and records of the action conclusively show that the person is entitled to no relief. Wis. Stats. § 974.06(3)(c). The statute requires that the circuit court hold an evidentiary hearing when the movant states sufficient material facts that, if true, would entitle the defendant to relief. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. In making this determination, the court *must assume* the facts alleged are true. *Id*. at ¶ 12 (citing *State v. Bentley*, 201 Wis. 2d 303, 310-11, 548 N.W. 2d 50 (2004)) (emphasis added); *State v. Ziehli*, 2017 WI App 56, 377 Wis. 2d 729, 902 N.W.2d 809 ("Because the circuit court did not hold an evidentiary hearing on *Ziehli*'s motion, we will assume that the factual allegations in her motion are true."). Even if the facts assumed to be true seem questionable in their believability, the circuit court *must* hold a hearing. *State v. Leitner,* 2001 WI App 172, ¶ 34, 247 Wis.2d 195, 633 N.W.2d 207 (stating that when credibility is an issue, it is best resolved by live testimony). Further, factual disputes may only be resolved at an evidentiary hearing. *State v. Hampton*, 2004 WI 107, ¶70, 274 Wis. 2d 379, 683 N.W.2d 14.

The following chart illustrates the facts that must be assumed as true for Mr. Avery and the factual disputes raised by the State, which necessitate an evidentiary hearing:

Topic	**Facts Assumed to be True**	**State's Dispute of Mr. Avery's Facts**
***Brady* Violations**		
Rahmlow Affidavit: RAV-4 Planted	The Rahmlow affidavit is true and Mr. Rahmlow saw the RAV-4 on November 4, 2005, illustrating that it was planted and the State's theory that the RAV-4 never left the Avery property is demonstrably false. Rahmlow's affidavit impeaches Sgt. Colborn's testimony that he was not looking at the RAV-4 when he made the dispatch call regarding the vehicle's license plate. (701:187). Because trial defense counsel did not have a police report documenting Sgt. Colborn's conversation with Mr. Rahmlow, they could not impeach Sgt. Colborn. (701:185, 187). The chronology of the 30 tracks of the MCSD calls to dispatch shows that the Sgt. Colborn's call was made on November 4, 2005. (603:137–38, at ¶¶ 266–69; T.E. 212). (Avery's Br. 42-43).	"Rahmlow's seeing a similar car somewhere fails to establish any fact about the RAV-4 being planted. (State's Br. 87-88).

	The photograph of the poster seen by Rahmlow at the gas station included a photograph of Halbach's car. (630:21). (Avery's Br. 40-43; Rahmlow's Affidavit, App 279-80).	"[A]ssuming 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.)" (State's Br. 87).
Radandt Affidavit: RAV-4 Planted:	The Radandt affidavit is true. The Department of Justice Agents knew that the RAV-4 was planted on the Avery property. (621:224–28)(App. 292).	"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.)" (State's Br. 22).
	"[M]r. Radandt affidavit contradicts the State's representation to the jury that the Avery property was inaccessible from the Radandt pit. (715:53–54; 697:70–71)." (Avery's Br. 45).	"[…] [T]here 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.)" (State's Br. 39).
Flyover Video: RAV-4 Planted After 11/4/2005:	The flyover video was deliberately edited to conceal that the RAV-4 was not present on the Avery property on November 4, 2005. "On November 4, 2005 Wendy Baldwin ("Ms. Baldwin") and CCSD Sheriff Jerry Pagel conducted a flyover searching for the RAV-4. (621:114). They were in the air for around 4 hours yet produced only 3 minutes of flyover footage. Prosecutor Kratz made a material admission when he told the jury that the RAV-4 was not visible in the flyover video." (Avery's Br. 46). A credibility determination must be made of the Kratz statement that the vehicle was not present.	"[A]very'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 min-utes of footage. (603:152.)" (State's Br. 23).
Zipperer Answering Machine: Ms. Halbach Killed After She Left the Avery Salvage Yard:	The Zipperer voicemail was concealed because it demonstrated that Ms. Halbach's final stop was the Zipperer's and not the Avery's. "The contents of the Zipperer voicemail may have contradicted the timeline established by the State that Ms. Halbach's last stop was the Avery salvage yard." (694:152)(Avery's Br. 47-48). Ms. Zipperer testified at trial that Ms. Halbach arrived at their property at 3 p.m. The State placed Ms.	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 at 3 pm does anything to "contradict[ ] the timeline established by the State." (Avery's Br. 47; 621:186.)" (State's Br. 24).

	Halbach at the Avery property at approximately 2:30 p.m.	
Heitl's Affidavit: Ms. Halbach's Day Planner was in the RAV-4 on 10/31/2005 and then in the possession of Ryan Hillegas:	Ryan Hillegas is established as a third party *Denny* suspect because he was in possession of Ms. Halbach's day planner. (Avery's Br. 48).	There is no proof that this was Ms. Halbach's day planner. (State's Br. 86).
Det. Velie's CD:	Det. Velie's CD contained new material evidence that had been previously concealed from prior counsel. "[T]he forensic findings and opinions of Detective Velie were *entirely* contained on the CD in his Final Report and *not* on the 7 DVDs." The CD contained recovered pornography. (Avery Br, App. 1118; Hunt's Affidavit). "The 7 DVDs did not contain the results of Detective Velie's unique search terms found exclusively on the CD. Those search results are as follows: 2,632 search results for the terms: blood (1); body (2,083); bondage (3); bullet (10); cement (23); DNA (3); fire (51); gas (50); gun (75); handcuff (2); journal (106); MySpace (61); news (54); rav (74); stab (32); throat (2); and tires (2). (741:23)." (Avery's Br. 51).	"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.)" (State's Br. 92).

Impeachment of Bobby Dassey's Trial Testimony[6]	Bobby committed perjury at Mr. Avery's trial when he testified that he never saw Ms. Halbach leave the Avery property. (797:44).	"Avery fails to explain why a single statement from Bryan to the police that Bobby 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" (State Br. 82)
	This CD contained exculpatory, material evidence that was directly relevant to the credibility of Bobby and would have allowed trial defense counsel to allege Bobby committed the crime, and the State's failure to disclose it violated Mr. Avery's due process right to a fair trial. (740:5.) (636:19). Only Bobby had access to the computer during the day on the weekdays when the violent pornography searches were	"The fact that someone views violent porno-graphy does not diminish their credibility as a witness, as Avery claims. (Avery's Br. 58–59.) Though dis-tasteful, it has nothing to do with their truthfulness.

[6] Wis. Stat. § 904.04(2)(a), provides that "[e]vidence of other crimes [and/or] wrongs [and/or] acts . . . when offered . . . as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" is admissible. The court in *Dressler v. McCaughtry*, 238 F.3d 908, 910, 913–14 (7th Cir. 2001), held that the "acts" admitted pursuant to this section were the defendant's possession of the pornographic videotapes and pictures.

	conducted. (737:69–70; 636:27-37, 39; 689:35; 705:56-57; 630:28-29; 633:47; 400:131; 743:12). Bobby's trial testimony that he asleep from 6:30 a.m. to 2:30 p.m. was contradicted by current postconviction counsel's expert, Mr. Hunt, who found that Bobby accessed the computer 6 times during that timeframe.	Nor would viewing violent pornography refute anything about Bobby's claim that he never saw Ms. Halbach leave the Avery property." (State's Br. 96).
Factual Disputes re: Ineffective Assistance of Counsel Claims		
Blood Spatter Expert Stuart James:	The blood spatter in the RAV-4 was selectively planted and did not come from an actively bleeding finger. (Avery's Br. 70).	"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 some-where. 13 (604:134–36.)" (State's Br. 33-34).

Bullet Fragment #FL:	Bullet fragment #FL never passed through Ms. Halbach's skull as the State's expert opined. (703:62–63; 716:98). (Avery, Br. 106). "The State's forensic pathologist, Dr. Jentzen, testified that Ms. Halbach's cause of death was the result of 1 or 2 gunshot wounds to her head (703:62–63). [D]r. Jentzen testified that Ms. Halbach's DNA got on #FL when it travelled *through her brain* causing her death. (703:64–65). Dr. Eisenberg testified that there was no evidence of other gunshot wounds to the bones from other parts of Ms. Halbach's body. (706:188)." (Avery's Br. 21).	"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).)" (State's Br. 66)
Groin Swab Planted:	The groin swab was substituted for the hood latch swab by Inv. Wiegert. (603:87–88, at ¶¶ 166–68; 615:45–46, 64) (Avery's Br. 75) (604:113). Inv. Wiegert hand-printed Dep. Hawkins' name on the form, again deliberately misidentifying Dep. Hawkins as the submitting officer, which was a complete misrepresentation. (615:66). The State fails to acknowledge the significance of Inv. Wiegert signing Dep. Hawkins' name on the WSCL form when he delivered the alleged hood latch swab. (State's Br. 61).	"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.)" (State's Br. 73).
Hillegas Evidence:	Trial defense counsel was ineffective in failing to investigate Hillegas as a third party *Denny* suspect (694:158-60,187,194) (603:123–35) (621:86-91) (631:41–49) (615:287) (657:85) (Avery's Br. 87-88).	"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.)." (State's Br. 41).

	It must be assumed that Hillegas was in possession of Ms. Halbach's day planner. (Avery's Br. 48-49) (630:91).	There is no proof that this was Ms. Halbach's day planner. (State's Br. 86).
Sub-Key Planted: Location	Bookcase experiment demonstrates that State's trial theory about the discovery of Ms. Halbach's key in Mr. Avery's bedroom was false. (Avery's Br. 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." (State's Br. 38).
Sub-Key Planted: DNA Quantity	The sub-key was planted in Mr. Avery's bedroom, as evidenced by the bookcase experiment and DNA quantities. "Dr. Reich opines that the DNA found on the Toyota sub-key found in Mr. Avery's bedroom was planted. Dr. Reich conducted experiments which demonstrated that Mr. Avery deposited 10 times less DNA on the exemplar subkey than what was discovered by the WSCL and used to convict Mr. Avery. (604:110; 631:2; 604:110) (App. 529)." (Avery's Br. 77-78).	"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."(State's Br. 63).
Significance of Sub-Key	Dr. Reich opines that the DNA found on the Toyota sub-key found in Mr. Avery's bedroom was planted. Dr. Reich conducted experiments which demonstrated that Mr. Avery deposited 10 times less DNA on the exemplar subkey than what was discovered by the WSCL and used to convict Mr. Avery. (Avery's Br. 77).	"Second, like his hood latch experiment, Avery's experiment holding an exemplar key bolsters, rather than weakens, the State's case." (State's Br. 63)
Electronic Devices Planted	"Current postconviction counsel's investigator conducted a series of experiments refuting Mr. Fabian's trial testimony that on October 31, 2005, he was in the vicinity of Mr. Avery's burn barrel and smelled the distinct odor of burning plastic coming from Mr. Avery's burn barrel. (615:194–99; 705:112, 114) (App. 1120–25)." (Avery's Br. 80).	"[A]very'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.)" (State's Br. 37)
***Youngblood* Violations**		
Destruction of the Bones:	"[T]he circuit court erred in concluding that the Manitowoc County Gravel Pit bones were non-human, when, in fact, the	"None of the bone fragments recovered from locations in the

	Manitowoc Quarry bones were labeled as "human" by Dr. Eisenberg in her reports describing property tag numbers #7411 ("Calcine human bone frags"), #7412 (Human and non-human bone […] 5 of 13 burned/calcined with cut edges; most bone fragments are all cut bone fragments are human"), #7413 ("one burned human frag[ment]"), #7414 ("Burned/calcined human bone fragments"), #7416 ("Human . . . bone fragments; human is calcined with one cut edge"), and #7419 ("Cut/burned human bone"). (772:16-18)." (Avery's Br. 130-31).	quarry were positively identified as human, let alone the remains of Teresa Halbach." (State's Br. 105).
Brady Violation Leading to *Youngblood* Violation	It must be assumed that there was a *Brady* violation when the State failed to disclose the police report. (775:23). The failure to disclose the police report led to the destruction of the gravel pit bones, of which prior postconviction counsel was unaware. There must be an evidentiary hearing to determine whether prior postconviction counsel knew of the specific bone fragments that were given to the Halbach family. (*See* 772:16-18; 775:23)	The State has conceded that there would have been a *Brady* violation if prior postconviction counsel did not know about the evidence that was destroyed. (State's Br. 109, footnote 26).

CONCLUSION

For the reasons stated herein, Steven Avery respectfully requests that this Court grant him one of the following alternative remedies: 1) reverse the Orders Denying Postconviction Relief and remand for the State to file a response to the Motion for Postconviction Relief and order additional scientific testing per the September 18, 2017 agreement and/or grant an evidentiary hearing; 2) reverse the judgments of conviction and the orders denying Postconviction Relief and remand for a new trial.

Dates this 25th day of June, 2020.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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

A copy of this certificate has been served with the paper copes of this brief filed with the court and served on all opposing parties.

Date this 25th day of June, 2020.

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief contains 8,901 words as permitted by an Order of this Court dated June 4, 2020.

Dated this 25th day of June 2020.

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