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SUPREME COURT

Case No.

In the Supreme Court of the State of Wisconsin

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN A. AVERY,

Defendant-Appellant-Petitioner.

On Review of the Decision of the Wisconsin Court of Appeals,
District II, Appeal No. 2017AP2288-CR.
On Appeal from the Circuit Court of Manitowoc County,
Criminal Division, No. 2005CF381.
The Honorable **Angela W. Sutkiewicz**, Presiding Judge.

PETITION FOR REVIEW

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The trial court held: No.

The Court of Appeals held: The trial court did not err in denying the postconviction motion without an evidentiary hearing on the matter.

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The trial court held: No.

The Court of Appeals held: The trial court did not err in denying the postconviction motion without an evidentiary hearing on the matter.

III. WHETHER A STATE ACTOR'S DESTRUCTION OF CONTESTED EVIDENCE IN VIOLATION OF WIS. STAT. § 968.205 IS SUFFICIENT EVIDENCE OF BAD FAITH TO REQUIRE AN EVIDENTIARY HEARING ON A *YOUNGBLOOD V. ARIZONA* CLAIM THAT THE DESTRUCTION OF EVIDENCE VIOLATED A DEFENDANT'S RIGHT TO DUE PROCESS OF LAW?

The trial court held: No.

The Court of Appeals did not address Mr. Avery's Wis. Stat. § 968.205 claim.

CRITERIA FOR GRANTING REVIEW

The primary function of the Wisconsin Supreme Court "is that of law defining and law development." *Cook v. Cook*, 208 Wis.2d 166, 189, 560 N.W. 2d 246 (1997).

Mr. Avery's case has produced an avalanche of coverage on a worldwide stage (P-App. 481-513). It has generated legal commentary that has not been matched in the last 50 years. Law review articles, law school classes, case law, petitions to the White House, and millions of documentary viewers have grappled with one fundamental question: Did Mr. Avery receive a fair trial free of constitutional violations? When Mr. Avery was indigent and unknown, the Wisconsin Courts dismissed his 2013 postconviction motion as lacking any merit and being based on "unsubstantiated claims," "empty and without substance," "wildly speculative," and "contrary to Wisconsin's long standing law and procedures" (R.533).

Now that Mr. Avery has obtained postconviction counsel and nationally renowned experts, the Court of Appeals has applied a greatly enhanced pleading standard to his § 974.06 motion and has failed to look at the cumulative effect of the ineffective assistance of counsel and *Brady v. Maryland*, 373 U.S. 83 (1963) claims. Also, the Court of Appeals has made significant factual errors resulting in an unreasonable application of the facts in its analysis of the bullet and bone evidence which, among other errors, results in its erroneous exercise of discretion in affirming the circuit court's denial of an evidentiary hearing. Mr. Avery should not be held to a higher standard than other movants. This Court should apply the standards it has

so clearly articulated in past cases and allow Mr. Avery to have an evidentiary hearing on the merits of his allegations of constitutional violations. If his conviction truly has integrity, it will withstand the scrutiny of an evidentiary hearing. Without such scrutiny the question of the integrity and fairness of Mr. Avery's trial hangs like a dark cloud over the Wisconsin judicial system.

This case presents "special and important reasons" justifying Supreme Court review.

I. Issue One – Ineffective Assistance of Counsel

The first issue concerns whether the Court of Appeals erroneously exercised its discretion when it applied a standard, contrary to this Court's decision in *State v. Allen*, 2004 WI 106, 274 Wis.2d 568, 682 N.W.2d 433 and contrary to this Court's interpretation of *Strickland v. Washington*, 466 U.S. 668 (1984) by requiring Mr. Avery to conclusively prove in his pleading, without an evidentiary hearing, that his allegations would have acquitted him.

The Court of Appeals failed to analyze the cumulative effect of trial counsel's errors. This Court should review the misapplication of the *Strickland* standard to the ineffective assistance of counsel claim pursuant to Wis. Stat. § (Rule) 809.62(r1)(d).

II. Issue Two - Brady

The *Brady* issue concerns the Court of Appeals' finding that defense counsel has a burden of diligence to replicate, from raw data, the State's exact findings,

contrary to this Court's decision in *State v. Wayerski,* 2019 WI 11, 385 Wis. 2d 344, 372, 922 N.W.2d 468 (2019) and Supreme Court jurisprudence.

This issue also concerns whether *Wayerski* compels this Court to find that the failure to disclose a police report allegedly containing favorable forensic evidence for the defense violates *Brady*, even if the defense could have hired an expert to do its own analysis.

The issue further concerns whether the Court of Appeals erred by failing to consider the cumulative effect of errors in assessing Mr. Avery's claim, in violation of *Kyles v. Whitley,* 514 U.S. 419 (1995). This Court should grant review because the Court of Appeals' decision is in conflict with this Court's decision in *Wayerski* and the Supreme Court in *Kyles* (*see* Wis. Stat. 809.62(r1)(1)(d)).

III. Issue Three - Destruction of Bone Fragments

This issue concerns whether a state actor's destruction of contested evidence in violation of Wis. Stat. § 968.205 is sufficient evidence of bad faith to require an evidentiary hearing on a defendant's *Youngblood v. Arizona*, 488 U.S. 51 (1988) claim that the destruction of evidence violated his right to due process of law.

STATEMENT OF THE FACTS AND THE CASE

On March 18, 2007, Mr. Avery was convicted of first-degree intentional homicide and felon in possession of a firearm (R.719:3). He was found not guilty of mutilation of a corpse (R.712:20-23). He appealed. The Court of Appeals affirmed. In 2009, he filed a § 974.02 motion requesting a new trial. On January 25, 2010,

after an evidentiary hearing, Mr. Avery's motion was denied, and he appealed. The Court of Appeals affirmed.

In 2013, Mr. Avery a filed a *pro se* § 974.06 motion requesting a new trial (R.496), which was denied. On June 7, 2017, Mr. Avery filed a second § 974.06 motion (P-App. 150-271). The motion was dismissed without an evidentiary hearing (R.628:1-6; P-App. 364-69). On October 6, 2017, Mr. Avery filed a § 974.06 motion to vacate (R.629), and on October 23, 2017, he filed a motion for reconsideration (R.631). The circuit court denied his motions to vacate and for reconsideration (R.640:1-5; P-App. 370-74).

On October 11, 2019, Mr. Avery appealed. He filed motions to stay and remand concerning two additional claims. He raised his claims in his motions to the circuit court as supplemental postconviction motions. The circuit court denied his motions to supplement. In April of 2021, after a new witness revealed exculpatory information, he filed a motion to the Court of Appeals to stay his appeal and remand (P-App. 470-76).

On July 28, 2021, the Court of Appeals issued a per curiam opinion, upholding the circuit court's summary denial of Mr. Avery's claims raised in his § 974.06 motion and two supplemental motions, holding "Avery's § 974.06 motions are insufficient on their face to entitle him to a hearing" but reserved Mr. Avery's ability to file a successive § 974.06 motion on his claims in his motion to reconsider and two supplements and his claim in his most recent filing (Motion #6) (P-App. 101-49, *See* ¶1 and note 18).

With the exception of the unreasonable determination of the facts discussed herein on pages 12-13, 29-30, Mr. Avery will accept the facts as stated in the Court of Appeals' opinion on pages 2, 3, and 4 (P-App. 102-104).

ARGUMENT

I. WHETHER THE COURT OF APPEALS' IMPOSITION OF A PLEADING STANDARD REQUIRING MR. AVERY TO PROVE, ON THE FACE OF HIS § 974.06 MOTION, THAT EACH ALLEGATION WOULD RESULT IN AN ACQUITTAL CONFLICTS WITH CONTROLLING OPINIONS OF THE SUPREME COURT, THIS COURT, AND OTHER WISCONSIN COURT OF APPEALS' DECISIONS?

A. Standard of Review

This Court reviews the circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard. *Allen*, 2004 WI 106, at ¶9, 577, 437. Whether a defendant was denied effective assistance of counsel is a mixed question of fact and law. *State v. Thiel*, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305.

B. Impossible Standard to Meet

The Court of Appeals procedurally barred many of Mr. Avery's ineffective assistance allegations, concluding that Mr. Avery could have raised them in his 2013 *pro se* postconviction petition.

The only sufficient reason that the Court of Appeals accepted for Mr. Avery failing to raise seven of his ineffective assistance "claims" previously was that "unique circumstances" existed wherein a pro se defendant is unable to perform or

pay for an investigation but later gains the resources to uncover new material facts and develop alternative theories of the crime" (P-App. 113, ¶22). Finding this reason to be "sufficient," the Court of Appeals parsed out seven of Mr. Avery's forensic expert opinions and reviewed each opinion as if it was a separate claim of its own (P-App. 114-116).

The Court of Appeals, inexplicably, concluded that Mr. Avery could have conducted experiments in his prison cell in Boscobel, 250 miles from the Avery Salvage Yard (P-App. 114, ¶8). Mr. Avery had no more ability to conduct simple experiments than he did to hire nationally renowned experts. All the allegations in his second motion should have been included in the court's reasoning that *Escalona-Naranjo* was not a bar.

This Court should address this issue because of the large number of indigent prisoners, including Mr. Avery, whose diligent efforts to access resources are thwarted. The fact that later an attorney is willing to devote hours of their time and resources because of their belief in their client's innocence should not be held against a prisoner when they later discover support for their ineffective assistance claim.

Further, by parsing each of Mr. Avery's forensic expert opinions into separate "claims" and analyzing each individual opinion as if it were a motion of its own, the Court of Appeals misapplied the standard for an evidentiary hearing and failed to consider the cumulative effect of all Mr. Avery's forensic opinions. A movant's allegations and supporting material facts should be considered as one

ineffective assistance of counsel claim, not transformed into individual ineffective assistance claims.

This Court should determine whether the Court of Appeals misapplied the legal standard of what a movant must allege for an evidentiary hearing and unreasonably determined facts and misstated facts in the record in denying review. *Allen*, 2004 WI 106, ¶12, 579, 438.

"[T]he circuit court must hold a hearing when the defendant has made a legally sufficient postconviction motion, and has the discretion to grant or deny an evidentiary hearing even when the postconviction motion is legally insufficient." *Id*. Mr. Avery has alleged sufficient facts to demonstrate that his trial counsel's performance fell below an objective standard of reasonableness when he alleged that counsel was ineffective for failing to hire experts, failing to investigate and impeach Bobby Dassey, the State's primary witness (P-App. 637-644), failing to establish third-party suspects, and failing in numerous other ways (*See* Avery Br., pp. 68-113, including similar failures of prior postconviction failure, p. 91-97; P-App. 669-714).

Wisconsin cases have found ineffective assistance for the failure to hire experts. *See State v. Zimmerman*, 266 Wis. 2d 1003 (Ct. App. 2003) (trial counsel rendered ineffective for failing to hire a pathologist to refute the State's expert); *State v. Hicks*, 195 Wis. 2d 620, 622, 536 N.W.2d 487, 488 (Ct. App. 1995).

The Court of Appeals erroneously applied *Weatherall v. State*, 73 Wis. 2d 22, 25-26, 242 N.W.2d 220, 221-22 (1976) citing, "Our court has called this

hindsight-is-better-than-foresight approach to be "Monday-morning quarterbacking . . . " (P-App. 117, note 9). Failure to consult with experts was not trial strategy. It was a complete abdication of trial counsel's duty to at least attempt to rebut the most damaging forensic evidence in the case. *See State v. Hicks*, 536 N.W.2d 487, 491 (Wis. App. 1995) (failure to obtain DNA analysis was not a strategic decision when defense counsel knew that the root tissue of hair specimens could be subject to DNA testing and did not pursue such testing); *Wiggins v. Smith*, 510 U.S. 526 (2003) ("failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment."). Current postconviction counsel has demonstrated, among other things, that the blood in the RAV-4 did not come from an EDTA tube as trial counsel claimed, nor did it come from Mr. Avery's actively bleeding finger, as the State claimed (P-App. 658-68). In Mr. Avery's motion, his new experts collectively rebut the State's theory about each piece of forensic evidence (P-App. 645-68).

Mr. Avery has sufficiently pled that counsel was ineffective. In *Allen*, this Court provided numerous examples of motions not sufficiently pled, stating "There is a clear theme running through these and other similar cases." *Allen*, ¶21. In all these cases, the motion presented no material facts, was replete with "bare-bones" allegations, and was only based on the movant's own subjective opinion. Mr. Avery's motion stands in stark contrast.

While the Court of Appeals paid lip service to this Court's *Allen* requirements (*See* P-App. 116-117), it failed to apply the *Allen* criteria to Mr. Avery's claim. Instead, it erroneously applied the ultimate burden of prevailing on

a postconviction motion as though Mr. Avery had received an evidentiary hearing (*See* P-App. 118, ¶27). It improperly weighed the evidence Mr. Avery's new experts would have used to rebut the State's case as a circuit court is tasked with, and then it ruled as if Mr. Avery had an evidentiary hearing and failed. The court unreasonably determined the facts pertaining to the blood, bullet, and bones that would have been prevented if it had a transcript to review of an evidentiary hearing. A court of appeals is certainly not qualified to act as an expert on scientific evidence.[1] Mr. Avery would welcome the opportunity to have his experts' opinions rigorously cross-examined by the State; their ability to withstand adversarial challenge would demonstrate the value of their findings to the jury.

In finding that in order for a movant to be granted an evidentiary hearing, Mr. Avery's experts must prove Mr. Avery's defense unequivocally, the Court of Appeals imposed a burden contrary to this Court's holding in *Allen*. It admitted that Mr. Avery's "[experts'] conclusions tend to support Avery's general theory that he was framed, and their presentation may have been useful at trial," but required that each expert rebut the State's entire case (P-App. 118, ¶27).

After parsing Mr. Avery's forensic evidence into separate "claims," the Court of Appeals improperly imposed a burden of demonstrating that each individual piece of evidence would result in acquittal. It even required Mr. Avery to

[1] The court improperly dissected Mr. Avery's forensic evidence into nineteen separate "claims," to reach the result that each claim resulted in insufficient facts to establish an acquittal (P-App. 115-116).

show that three blood stain experiments each on their own would have achieved an acquittal, as well as required that Mr. Avery's expert findings on the trace material on Halbach's subkey; the DNA quantity on the subkey and hood latch (P-App. 645-657); the #FL bullet; the bones in Avery's burn pit would have each resulted in an acquittal (P-App. 117-118, ¶26). The court required Mr. Avery's new experts to state in their findings the ultimate legal conclusion that Mr. Avery was framed (*See* P-App. 120-121, ¶32), which is ironic considering that the trial court did not require each piece of the State's forensic evidence in and of itself prove guilt beyond a reasonable doubt; the jury was presented with the cumulative effect of all of the forensic evidence.

Moreover, the Court of Appeals misapplied the burden established in *Strickland v. Washington*, 466 U.S. 668, 686 (1984), and concluded that "[Mr. Avery] cannot meet this burden by misrepresenting the expert's results as 'demonstrating' that he was framed. Absent additional facts or argument, we cannot assume that such measured support for Avery's frame-up theory would have led to an acquittal" (P-App. 118, ¶27). The Court of Appeals effectively imposed a standard, completely contrary to any precedent or law that in order for Mr. Avery to have an evidentiary hearing, he would have had to prove ineffectiveness on the face of his motion without the opportunity to cross-examine trial counsel.

This is not the proper standard before or even after an evidentiary hearing. *Strickland* prejudice is established if there is "a reasonable probability that *at least one juror*" would have made a different decision. *Wiggins*, 510 U.S. at 537. "A

reasonable probability, under this standard, is a probability sufficient to undermine confidence in the outcome." *Strickland*, at 694. "The defendant is not required to show 'that counsel's deficient conduct more likely than not altered the outcome of the case." *Strickland*, at 693. The focus of this inquiry is not the outcome of the trial, but rather, the reliability of the proceedings. *Thiel*, 2003 WI 111 ¶20, 264 Wis. 2d at 588, 665 N.W.2d at 314.

Rather than accepting Mr. Avery's facts as true, the Court of Appeals disputed the facts and presented its own inaccurate version of the State's theory in rejecting Mr. Avery's showing of trial counsel's ineffectiveness.

The Court of Appeals grossly misinterpreted the State's forensic evidence. The State's most important evidence was that Halbach's cause of death was a result of 1 or 2 gunshots to her head, and that the bullets (#FL and #FX) used to shoot her were found in Mr. Avery's garage. Halbach's DNA was only found on #FL. The Court of Appeals claimed, "But the State did not argue that this specific bullet entered Halbach's skull or killed her" (P-App. 126-127, ¶45). This is demonstrably false because of the State's expert's testimony that the DNA on #FL was the result of #FL going through Halbach's brain[2] (R.703:64–65). The Court of Appeals made another egregious error when it found that "there is nothing to suggest that shots fired into Halbach's skull were the only shots fired at her or that every bullet fired at her contained skull fragments–there were, after all, eleven casings and only two

[2] Mr. Avery's trace expert—another type of expert not consulted with by trial counsel—determined that #FL has no blood on it but has wood and possible paint on it (628:5).

bullets found in the garage" (P-App. 126-127, ¶45). It failed to recognize that the eleven spent shell casings in Avery's garage were never forensically linked to #FL or #FK or any bullet in the case (R.702:207-08). Dr. Eisenberg testified that there was no evidence of other gunshot wounds to the bones from other parts of Halbach's body (R.706:188). The court's blatant misstatement of the facts about the cause of death of Halbach undermines the integrity of its opinion. *See Brumfield v. Cain,* 576 U.S. 305, 307 (2015).

When a lower court's analysis begins to weigh the evidence (it misstates) and the uncontradicted facts a movant asserts are not taken as true, the need for an evidentiary hearing is apparent. *see Pruitt v. Neal*, 788 F.3d 248, 272-73 (7th Cir. 2015).

The Court of Appeals failed to consider the cumulative effect of trial counsel's numerous unreasonable errors. Without a true cumulative effect analysis, a lower court should not be permitted to conclusively deem that a movant "cannot demonstrate a reasonable probability of a different outcome" citing *Strickland,* at 694. If this test is satisfied, relief is required; no supplemental, abstract inquiry into the "fairness" of the proceedings is permissible. *Williams v. Taylor,* 529 U.S. 362 (2000). In addressing this issue, the Court must consider the totality of the circumstances (*Strickland*, at 695) and must assess the cumulative effect of all errors, and may not merely review the effect of each in isolation. *Thiel,* ¶¶ 59–60 (addressing cumulative effect of deficient performance of counsel).

The State convicted Mr. Avery on the cumulative effect of its forensic evidence. The circuit court and Court of Appeals allowed the State to benefit from the cumulative effect of its largely circumstantial evidence, ignoring the impact that proof that a third-party planted even one item of inculpatory evidence might have on the jury's verdict.

II. WHETHER SUPPRESSING AND WITHHOLDING A CD FOR 12 YEARS CONTAINING A FORENSIC POLICE REPORT OF ALLEGEDLY IMPEACHING AND/OR EXCULPATORY MATERIAL REQUIRES AN EVIDENTIARY HEARING TO DETERMINE IF A *BRADY* VIOLATION HAS OCCURRED?

In light of this Court's holding in *Wayerski* and United States Supreme Court Jurisprudence, this Court should address (1) whether defense counsel's failure to replicate a forensic evaluation relieves the State of its *Brady* obligation to disclose exculpatory and/or impeaching forensic findings; (2) whether the State's conduct constitutes "suppression;" and (3) whether the Court of Appeals erred in failing to consider the cumulative effect of errors, in violation of *Kyles v. Whitley*, 514 U.S. 419 (1995). This Court should determine whether the denial of an evidentiary hearing was due to the lower courts' misapplication of the law governing *Brady*.

This Court determines whether the motion on its face alleges sufficient material facts that—if true—would entitle the defendant to relief. This is a question of law that is reviewed de novo. *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50, 53 (1996). If the motion raises sufficient facts, the circuit court must hold an evidentiary hearing. If the movant presents only conclusory allegations or

if the record conclusively demonstrates that a defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. *Id.* at 310-11.

A. The Velie CD Discovered 12 Years After Mr. Avery's Trial

Mr. Avery alleged the following facts: On April 21, 2006, an agent ("SA Fassbender") and an investigator seized a computer from the Dassey residence (R.740-48). The State's forensic expert, Detective Velie ("Velie"), conducted the forensic examination of the computer (R.636:24-26; 740:6). The State misrepresented to the defense that this examination was of Brendan Dassey's hard drive (R.740:47, 76,78; 741:16).

On May 10, 2006, Velie completed a final investigative report based on his analysis of computer hardware and crime scene facts, which included 2,632 unique word search results and 14,099 refined pornographic images, 1,625 of *which had been deleted* (P-App. 625-632; 633-636). Velie's report was 2,449 pages and was downloaded to a CD (the "Velie CD") (R.740:10). The CD was kept in the exclusive possession of Fassbender (R.636:26).

On April 17, 2018, current postconviction counsel received the Velie CD for the first time from the State (R.740:10).

The Velie CD reveals that the State's forensic analysis is based on the use of the computer by the State's primary witness and trial counsel's potential *Denny* suspect, Bobby Dassey ("Bobby"), and not Brendan Dassey.

The Velie CD creates a timeline impeaching Bobby's testimony that he was sleeping immediately before the time of Halbach's murder. It is evident that the

Court of Appeals was either unfamiliar with the record or disregarded it entirely. It stated that "it was skeptical" that the Velie report impeaches Bobby's testimony about sleeping, and accused current postconviction counsel of misstating that Bobby was home alone on October 31 during the time the computer searches were conducted (P-App. 141; note 25). However, the Court of Appeals did not consider the fact that Bobby himself testified that he was the only person home from 6:30 a.m. until 2:30 p.m. that day (R.298:035), the relevant time period of the searches.

The Velie CD contains thousands of images of violent pornography and word searches revealing a propensity for sexual violence by Bobby. Because there is no possible way, that current or prior counsel could have "guessed" the specific search terms and the results which Velie obtained, Mr. Avery was deprived of material information he could have used to establish a direct link between the specific evidentiary terms related to the Halbach murder (R.738:29–120). Buting attested that trial counsel would have included such information in their *Denny* motion if it had been timely disclosed (R.636:19). This evidence could have established motive for trial counsel's *Denny* motion (R.453:61-62), which the trial court found was the missing element (R.238:15).

1) This Court should address whether there is a burden on the defense to replicate State forensic findings which have been surreptitiously withheld from them.

Brady placed an affirmative duty on the prosecution to disclose exculpatory, material evidence to the defense. In *United States v. Agurs*, 427 U.S. 97 (1976), the

Supreme Court expanded on its holding in *Brady*, reiterating that prosecutors have an affirmative duty to disclose exculpatory evidence. *Id*. at 112.

This Court rejected previous interpretations of *Brady*, finding "The 'exclusive possession and control,' 'reasonable diligence,' and 'intolerable burden' limitations distort the original *Brady* analysis and the purpose behind the prosecutorial obligations enunciated in *Brady*." *Wayerski,* 2019 WI 11, at ¶55, 372, 482. This Court specifically rejected the imposition of a reasonable diligence standard on trial defense counsel, stating, "This court has never analyzed a *Brady* claim through the lens of 'reasonable diligence' and we decline to adopt that requirement now, due to its lack of grounding in *Brady* or other Supreme Court precedent." *Id*. ¶51.

In 2019, this Court articulated that any diligence requirement on the defense contravenes *Brady* and Supreme Court precedent, but in addressing Mr. Avery's *Brady* claim on the suppression of the Velie CD, both lower courts agreed that trial counsel failed to exercise diligence. (R.761:6-7; P-App. 138-139, ¶64). The Court of Appeals imposed a burden on the defense to generate its own report and analysis of raw computer data. However, given *Wayerski*, the pertinent consideration should be whether the material of which the prosecution had possession, not disclosed to the defense, has evidentiary value, not whether the defense could have sought it itself. *See Wayerski*, ¶55 *quoting Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("[a] rule thus declaring 'prosecutor may hide, defendant must seek' is not tenable in a system constitutionally bound to accord defendants due process.")

The weakness of the Court of Appeals' analysis is demonstrated on its exclusive reliance on a Southern District of New York case. Ironically, *United States v. McGuinness*, 764 F. Supp. 888, 896 (S.D.N.Y. 1991; P-App. 139), is inapposite and not controlling or persuasive authority.[3]

The Court of Appeals relied upon *McGuinness* for the proposition that *Brady* does not apply to "secondary compilations or analyses of such" (P-App. 139, ¶65). *McGuinness* has nothing to do with secondary compilations and pertains to the knowledge a defendant would have about whether he took bribes. This would be comparable to Mr. Avery claiming that knowledge that he has about whether or not he committed the murder of Halbach could ever be *Brady* material.

The defense was prevented from making any meaningful use of the raw data because of its untimely disclosure. *See State v. Harris*, 2004 WI 64, 272 Wis.2d 80, 680 N.W.2d 737. The prosecutor misled trial counsel in three significant ways: (1) that all the discs it had were disclosed; (2) that the computer was Brendan's; and (3) that the analysis of the data was of no evidentiary value. The prosecution's lie about whose computer it was certainly affected trial counsel's decision not to evaluate it.

When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight. *Banks*, 540 U.S. at 675-76. The State finally did set the record

[3] *See United States v. Shvarts*, 90 F. Supp. 2d 219 (E.D.N.Y. 2000) (the Eastern District cited *McGuinness* as a case of "ambiguous pronouncements").

straight twelve years later in 2018; it was not until then that Mr. Avery could have realized its evidentiary value.

The lower courts should be barred from imposing any type of reasonable diligence burden on defense counsel especially in light of a prosecutor's dishonest conduct. Prosecutors' unwarranted concealment should attract no judicial approbation. *See Kyles,* 514 U.S. 419 at 440; *Banks,* at 696.

2) This Court should address whether forensic findings contained on a CD that is not disclosed to defense counsel is "evidence suppressed."

This Court, following Supreme Court jurisprudence, defines suppression as "nondisclosure or the withholding of evidence from the defense." *Wayerski,* ¶58. Following Supreme Court reasoning this Court reiterated that "the prudent prosecutor will resolve doubtful questions in favor of disclosure," finding that even a prosecutor's good-faith is irrelevant to the inquiry. *Id. quoting United States v. Agurs,* 427 U.S. 97, 108 (1976). The issue is whether Velie's "final investigative report," although in part based on raw data disclosed to trial counsel, constitutes evidence suppressed.

It is undisputed that the Velie CD was withheld from all prior counsel until April 17, 2018. It was suppressed for 4,360 days after its creation. There is no possible way, prior to April 17, 2018, current or prior counsel could have "guessed" Velie's specific search terms and their results, which were on the CD.

Without an evidentiary hearing, Mr. Avery was denied the opportunity to correct the circuit court's factual error that the CD and 7 DVDs were identical.

Although the Court of Appeals recognized that the CD contained different information than the 7 DVDs, it reached the same conclusion in an equally misguided way. It found, "the Velie CD does not contain any additional information than what is on the seven DVDs" (P-App. 138-139, ¶64), but conversely, it deemed the material on the Velie CD was not evidence ("the Velie CD is not suppressed evidence but merely an investigative summary of evidence . . ." *Id*.

The Court of Appeals ignored Mr. Avery's allegations in his postconviction motion and improperly weighed the evidence. It gave more weight to State forensic investigator Velie's affidavit than to Mr. Avery's allegations and supporting material, including the affidavit of Mr. Avery's expert who reviewed the Velie CD and the 7 DVDs and found the CD contained unique information.[4] In determining the facts, the Court of Appeals improperly took on the role of a circuit court, effectively failing to address whether the circuit court erroneously denied Mr. Avery an evidentiary hearing because he had pled sufficient facts in his postconviction petition, which is the pertinent question. As with any other civil pleading, in assessing the legal sufficiency of the motion, the court must assume the facts alleged therein to be true. *Gritzner v. Michael R.*, 2000 WI 68, ¶ 17, 235 Wis.2d 781, 611 N.W.2d 906. Even if a court is disinclined to believe evidence offered by a movant, the court must hold a hearing before making credibility determinations. *Allen*, 2004 WI 106, at ¶12 (citing *State v. Leitner*, 2001 WI App 172, ¶ 34, 247 Wis.2d 195,

[4] Mr. Avery's new forensic expert listed, in his affidavit, 6 pieces of new information contained in the report on the Velie CD that were not contained in the 7 DVDs (R.747:92-93; P-App.633-34).

633 N.W.2d 207). Only after a hearing is the court charged with determining the issues and making findings of fact and conclusions of law. Wis. Stat. § 974.06(3)(d).

The Court of Appeals erred in rejecting Mr. Avery's argument that he should have had access to the information derived from Velie's "unique word searches," pornographic images "refined" for relevancy, and the like because it incorrectly deemed the report as a "secondary compilation and analyses of such" (P-App. 139). The Velie report is not a secondary compilation and analysis; it is a primary analysis of raw computer data and crime scene facts.

The Court of Appeals did not weigh the fact that the State misrepresented, in writing, to the defense that there was "nothing much of evidentiary value" anywhere within the data extracted from the computer. Importantly, it ignored that the State's forensic investigator, generated a report of Bobby's, and not Brendan's, search history of terms such as "bondage," "gun," "stab," "handcuff," "rav," "throat," "bullet," and "fire" (P-App. 63). It unreasonably determined that the State's representation in its Stipulation Projection was merely an "off-the-cuff description of disclosed evidence" (P-App. 140). No reasonable trial counsel would consider the State's written remarks merely casual. The State's misrepresentation was anything but "off-the-cuff" since it was explicitly written in the prosecutor's prepared Stipulation, a legally significant document. Mr. Avery's trial counsel provided an affidavit concerning the State's nondisclosure of the CD, which the Court of Appeals also failed to consider (R.741:12–13).

Ignoring this affidavit, the Court of Appeals overlooked the State's misrepresentation of whose computer was analyzed. Only Bobby had access to the computer during the day on the weekdays when the violent pornography search was conducted, and on the day of Halbach's murder, so the State's misrepresentations were material. The prosecution misled the defense into believing there was, in fact, nothing of evidentiary value to even seek. The lower court erroneously imposed an additional burden on defense counsel of investigating potential State misrepresentations. *See Banks*, 540 U.S. at 674 (inmate's failure to investigate the informant's status resulted from prosecution's misrepresentations and omissions and inmate was entitled to credit the prosecution's statements.)

This Court should clarify for the lower courts that *Brady* encompasses the suppression of a forensic report just as much as any other form of evidence containing facts that are impeaching or exculpatory.

3) The Court of Appeals misapplied the law concerning the materiality and cumulative effect of the evidence.

The Court of Appeals admitted that "the Velie CD might become relevant to showing [Bobby] Dassey's motive" in a future Wis. Stat. § 974.06 motion (P-App. 141). However, it failed to address the cumulative impact of the CD and the additional evidence undermining the State's case.[5]

[5] The Court of Appeals found that newly discovered evidence of a phone showing Bobby committed perjury at trial was inadmissible "hearsay" (P-App.134-135, ¶59). This conversation is an exception to hearsay.

Without a true cumulative effect analysis, a lower court should not be permitted to conclusively deem that a movant "cannot demonstrate a reasonable probability of a different outcome." *Strickland,* at 694. The Court must consider the totality of the circumstances (*Strickland*, 466 U.S. at 695) and thus may not merely review the effect of each in isolation. *Thiel,* ¶¶ 59–60, 665, 305 (addressing cumulative effect of deficient performance of counsel).

The Court of Appeals failed to consider the cumulative effect when it rejected all Mr. Avery's claims, namely his newly discovered evidence, ineffective assistance of counsel claims, and his five other *Brady* claims (*See* Avery Br 39-63).

By failing to consider the cumulative effect of the errors, the Court of Appeals erroneously applied a standard contrary to even *Strickland* requiring that the Velie CD itself would have acquitted Mr. Avery. This is contrary to well-settled law. *See Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) ("To prevail on his *Brady* claim, Wearry need not show that he 'more likely than not' would have been acquitted had the new evidence been admitted.")

"[A] petitioner shows "cause" when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence; coincident with the third *Brady* component (prejudice), prejudice within the compass of the "cause and prejudice" requirement exists when the suppressed evidence is "material" for *Brady* purposes." *Banks*, 540 U.S. at 691. Knowing its theory was weak, the State relied upon Bobby's testimony (R.689:38-40) to establish that Halbach never left the Avery property on October 31, 2005.

Mr. Avery has shown that the suppressed evidence was favorable and impeaching and has also shown "cause" because he has shown that the reason for his failure to develop facts in his state-court proceedings was due to the State's suppression of the material evidence. Mr. Avery suffered prejudice because the material would have impeached the State's key witness, Bobby; would have revealed his motive; and would have qualified him as a third-party *Denny* suspect.

Considering the cumulative effect of the evidence in light of all the errors combined, there is a reasonable probability it would have undermined confidence in the verdict. This showing warrants an evidentiary hearing.

III. WHETHER A STATE ACTOR'S DESTRUCTION OF CONTESTED EVIDENCE IN VIOLATION OF WIS. STAT. § 968.205 IS SUFFICIENT EVIDENCE OF "BAD FAITH" TO REQUIRE A HEARING ON A DEFENDANT'S *YOUNGBLOOD V. ARIZONA* CLAIM THAT THE DESTRUCTION OF EVIDENCE VIOLATED HIS RIGHT TO DUE PROCESS OF LAW?

In 2011, the State released bone fragments discovered in the Manitowoc Gravel Pit ("Gravel Pit"), placed into evidence as part of the investigation of Halbach's murder, to Halbach's family (R.785:1-2). It did so without giving any notice to Mr. Avery (R.771:15-16). The State removed evidence tags signaling the locations from which the bones were discovered and commingled the Gravel Pit bones with bones from two other areas, the Avery burn pit and the Dassey burn barrel (R.771:30).

Shortly after postconviction counsel moved to remand for additional scientific testing, it was discovered that the State, in 2011, returned bones to the

Halbach family (R.778:1), effectively destroying them, without first giving notice to Mr. Avery's counsel. Mr. Avery then moved the Court of Appeals to stay his appeal and remand for the circuit court to consider his claim relating to destruction of evidence pursuant to Wis. Stat. § 968.205 and *Youngblood v. Arizona*, 488 U.S. 51 (1988) (R.775:1-32). The Court of Appeals directed the circuit court to permit Mr. Avery to pursue a supplemental postconviction motion and conduct any necessary proceedings (780:1-4). The circuit court denied Mr. Avery's motion without a hearing (806:1-13; P-App. 457-69).

The Court of Appeals affirmed the circuit court's decision. This was in error because its decision contravenes Wisconsin law on preservation of evidence. Because there is no remedy for a violation in the relevant statute, this Court should address whether the State's violation of the statute on preservation of certain evidence satisfies the bad faith requirement of *Youngblood*, and in turn, warrants an evidentiary hearing for Mr. Avery.

A. Wis. Stat. § 968.205 - Preservation of certain evidence

In 2001, Wisconsin recognized the importance of the preservation of certain evidence for purposes of postconviction relief in enacting several evidence preservation statutes.[6] (*See* Wis. Stat. § 968.205; P-App. 623-24).

Notably, nowhere in Wis. Stat. § 968.205 did the Wisconsin legislature provide a remedy for its violation, and Article I, Section 9 of the Wisconsin

[6] *Wis. Stat.* § 165.81, § 757.54, § 968.205, § 978.08 (2001-2002).

Constitution requires statutes to provide a remedy for their violation. Wis. Const. Art. I, 9. As such, this Court has been clear: Wisconsin courts have the authority to fashion a remedy for remedy-less statutes. *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 182 (1984).

This Court should find that a showing of violation of Wis. Stat. § 986.205 is a sufficient showing of bad faith, required by *Youngblood*, for an evidentiary hearing. In *Youngblood*, the Supreme Court adopted a test requiring the defendant to show: (1) that the evidence is merely "potentially useful" to his case, and (2) that the police acted in "bad faith" when destroying it. *Youngblood*, 488 U.S. at 58.

Wis. Stat. § 968.205 creates three presumptions: (1) that all evidence covered by the statute and collected in the course of a criminal investigation is material; (2) because of its materiality, it is "potentially useful" (the first *Youngblood* prong); and (3) since the evidence preservation statute effectively codifies "good faith;" every violation thereof indicates "bad faith" (the second *Youngblood* prong) (P-App. 563-598).

Wisconsin has signaled, through the enactment of Wis. Stat. § 968.205 and through Wisconsin Court of Appeals' opinion in *Parker*,[7] that Wisconsin's evidence preservation doctrine applies to the postconviction context.

The circuit court found that because "[n]o DNA testing was performed on material returned to the family that conclusively identified the material as belonging

[7] The Court of Appeals in *Parker* extended destruction of evidence to postconviction proceedings. *State v. Parker*, 2002 WI App 159, ¶ 13, 256 Wis. 2d 154, 160, 647 N.W.2d 430, 433.

to a human being or any specific individual" (806:6), the evidence in question cannot come within the plain meaning of the statute. *Id.*[8]

The plain language of the statute, however, does not require that the biological evidence belonging to the victim be DNA tested to prove it is the victim's. Such a reading of the statute defeats its purpose and allows the destruction of evidence without notice to the defendant. In Mr. Avery's case, the State held bones out to be Halbachs, and when Mr. Avery sought to conduct further DNA testing, he learned the bones had been destroyed without notice to him.

A previously undisclosed police report documents that these bones were held out *to the victim's family as being the victim's bones* (785:1-2). The Court of Appeals erroneously focused only on the testimony of the State's forensic anthropologist, confining its analysis to the "suspected human bone fragment" labeled #8675, the only bones from the Gravel Pit introduced at trial. The court ignored entirely Dr. Eisenberg's reports, which described numerous other human bones found in the Gravel Pit.[9] Therefore, it erroneously concluded that the bones given to the Halbach family were simply of indeterminate origin.

Mr. Avery has alleged sufficient facts to show a violation of the statute in a second way: that the State's effective destruction of the Gravel Pit bones was a

[8] The Court of Appeals never addressed the statutory violation.

[9] Dr. Eisenberg's report containing all of these human bone fragments was referenced in Mr. Avery's Wis. Stat. § 968.205 and *Youngblood* motion (R.771:14-15; R.782:8).

destruction of evidence that "may reasonably be used to incriminate or exculpate any person for the offense." Wis. Stat. § 968.205 (2).

The State went to great lengths to confine the murder to the Avery property and to one person because it made its case against Mr. Avery much easier. It is here where the exculpatory value of bone fragment evidence lies: Mr. Avery was tried and convicted on a theory that (1) he alone killed and burned Halbach in his burn pit; (2) after burning Halbach in his burn pit, must inexplicably have moved her bones over to the Dassey burn barrel;[10] and (3) *that the suspected human bones found in the Manitowoc gravel pit—not on the Avery property—simply "[we]re really not evidence" precisely because they could not be identified through DNA testing to be human or Halbach's*.[11]

The Court of Appeals overlooked that Mr. Avery was found not guilty of mutilation of a corpse (R.791:3). It reasoned, "The apparent thrust of Avery's claim is that, if Halbach's bones were found in the Gravel Pit, then she was killed by someone else. As Avery never explains why he himself would have been unable to dispose of Halbach's remains in the gravel pit, this line of reasoning is wholly speculative" (P-App. 145, ¶75). The very obvious explanation for why Mr. Avery would have been unable to burn Halbach in his burn pit and then transport her remains to the Gravel Pit for purposes of the court's hypothetical, is that *Mr. Avery*

[10] The Court of Appeals erred in asserting that human bone fragments were discovered in Mr. Avery's burn barrel. The bones were discovered in the Dassey burn barrel. (P-App.121, ¶33).

[11] *See* Prosecutor Kratz' closing argument (R.716:79).

was acquitted of burning Halbach's body in his burn pit, or burning or mutilating Halbach's body at all (R.791:3). This gross misunderstanding of the facts caused the Court of Appeals to start from a premise not supported by the record that Mr. Avery is responsible for taking the bones to the Gravel Pit. His jury decided just the opposite. It is undisputed that Halbach's body was mutilated after her death; the potential to inculpate another person for the mutilation of Halbach's body, for which Mr. Avery was acquitted, is strong. The undisputed fact that Mr. Avery was acquitted of mutilating Halbach's body by burning it in his burn pit signals that the bones were planted in Mr. Avery's burn pit. If the bones were planted in Mr. Avery's burn pit, this is potentially exculpatory to him. If Mr. Avery were able to test the Gravel Pit bone fragments, and that testing yielded the DNA of another person, Mr. Avery would be able to provide a suspect for the mutilation of Halbach—and in turn, a *Denny* suspect for the murder of Halbach. *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984).

The State admitted that the bones in this case were moved by the killer (R.716:75-76). It cannot be said that the State would not appreciate the potential for the killer's DNA to be on those items of evidence it claimed the killer must have touched and moved.

The bone fragments in the Dassey burn barrel (*not Mr. Avery's*, as the Court of Appeals incorrectly stated) and the Gravel Pit pelvic bone tagged under evidence tag #8675 had similar kerf marks, suggesting they came from the same source and underwent the same destruction or mutilation. Mr. Avery's expert, Dr. Symes, a

world leader in kerf mark analysis, could have conducted the analysis to determine whether the remainder of the Gravel Pit bones displayed similar cut marks to the Gravel Pit pelvic bone and the bones in the Dassey burn barrel. Testing these bone fragments for the DNA profile of Halbach,[12] the DNA profile of the real killer, could have provided exculpatory evidence for Mr. Avery. The State's destruction of the evidence has deprived Mr. Avery of the opportunity to do so.

The State was well aware of Mr. Avery's theory that he was framed for a murder committed by another person: almost every part of Mr. Avery's defense at both the trial and postconviction stages has been to assert that Halbach and her vehicle left the property, Halbach was killed off the property, and her remains and personal effects were then planted on the Avery property. The State knew the potentially exculpatory value of the bones and that testing them "may reasonably be used to incriminate or exculpate any person for the offense." Wis. Stat. § 968.205(2).

Because the State violated Wis. Stat. § 968.205, Mr. Avery has sufficiently demonstrated the "bad faith" requirement of *Youngblood* for an evidentiary hearing.

Alternatively, this Court should grant a new trial to Mr. Avery in the interest of justice. Mr. Avery has demonstrated that the real controversy in the trial was not fully tried, and therefore, it is probable that there was a miscarriage of justice. Mr.

[12] Mr. Avery hired an expert who opined, as clearly stated in Mr. Avery's motion to stay and remand for consideration of his Wis. Stat. § 968.205 and *Youngblood* claims, that to a reasonable degree of scientific certainty, he would be able to extract DNA profiles from the charred bone material using new technology he used to extract DNA profiles in the November 2018 Butte County, California Camp Fire (R.798:7).

Avery's jury was not presented with the suppressed evidence revealed in his subsequently discovered *Brady* claims or Mr. Avery's new experts' findings, which completely refute the State's theory and create a reasonable doubt about Mr. Avery's guilt. *State v. Hicks*, 202 Wis. 2d 150, 159-60, 549 N.W.2d 435 (1996).

CONCLUSION

Petitioner Steven Avery's case raises three critical issues on which this Court's guidance is needed.

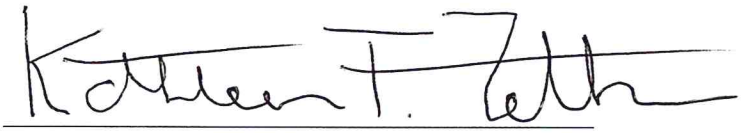
First, Mr. Avery presents this Court with an opportunity to correct the lower courts' misinterpretations of the pleading standard to obtain an evidentiary hearing on Mr. Avery's claims.

Second, Mr. Avery presents this Court with an opportunity to decide whether Mr. Avery has sufficiently alleged *Brady* claims warranting an evidentiary hearing, or in the alternative, a new trial.

Third, Mr. Avery presents this Court with the opportunity to fashion a remedy for a state actor's destruction of evidence in violation of Wis. Stat. § 968.205 and decide whether the violation of the statute is sufficient evidence of "bad faith" to warrant an evidentiary hearing on a *Youngblood* claim, or in the alternative, grant Mr. Avery a new trial in the interest of justice.

Petitioner Steven Avery respectfully asks this Court to grant him leave to appeal the issues raised herein.

Signed:



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CERTIFICATION AS TO FORM / LENGTH

I hereby certify that this petition confirms to the rules contained in Rules 80919(8)(b) and 809.62(4) for a petition for review produced with a professional serif font. The length of the petition is 7,968 words.

Dated this 25th day of August, 2021

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that the text of the electronic copy of this petition is identical to the text of the paper copy of the petition.

Dated this 25th day of August, 2021

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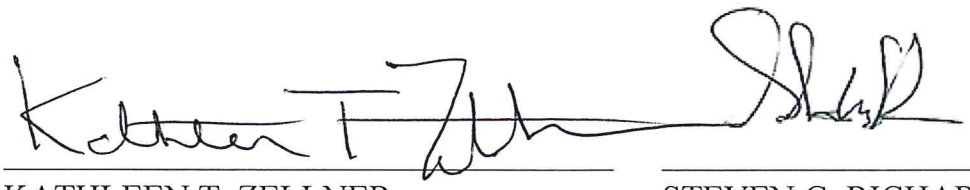
CERTIFICATE OF COMPLIANCE WITH RULE 809.19(2)(b)

I hereby certify that filed with this Petition, either as a separate document or as a part of this brief, a separate appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; and (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions, showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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



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