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. 2023AP1556.
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 correctly determined that newly discovered evidence would only be material if it was admissible under *Denny*.

II. WHETHER THE COURT OF APPEALS ERRED WHEN IT DID NOT CORRECTLY APPLY *STATE V. DENNY*, 120 WIS. 2D 614, 357 N.W.2D 12 (CT. APP. 1984) TO MR. AVERY'S POTENTIAL THIRD-PARTY SUSPECT EVIDENCE?

The trial court held: No.

The court of appeals held: The trial court correctly applied *Denny* to Mr. Avery's potential third party suspect evidence.

III. WHETHER THE COURT OF APPEALS IMPROPERLY AFFIRMED THE TRIAL COURT'S DECISION TO DENY MR. AVERY AN EVIDENTIARY HEARING?

The trial court held: No.

The court of appeals held: The court of appeals agreed.

CRITERIA FOR GRANTING REVIEW

This case presents "special and important reasons" justifying Supreme Court review. The Court of Appeals conceded that the Sowinski affidavit establishes "a *possible* 'connection between the third party and the crime.'" (Opinion, page 20). The

Court reached this conclusion by improperly weighing the evidence and imposing an improper burden of proof on Mr. Avery to meet the standard for an evidentiary hearing. This misapplication of the law and misinterpretation of the facts has resulted in a constitutional violation of Mr. Avery's due process rights to present a complete defense at his trial. *See Holmes v. South Carolina*, 547 U.S. 319 (2006).

I. Issue One - Misapplication of State v. Edmunds and Brady v. Maryland

The first issue concerns whether the Court of Appeals misapplied the standard for evaluating newly discovered evidence on postconviction, which is governed by *State v. Edmunds*, 2008 WI App 33, 308 Wis. 2d 374, 746 N.W.2d 590, by restricting Mr. Avery's new evidence to the establishment of potential third party suspect evidence governed by *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984), in order to satisfy the materiality prongs of *Edmunds* and *Brady*, even though Mr. Avery offered numerous reasons why his newly discovered evidence is independently material without regard to the *Denny* third party suspect standard.

II. Issue Two - Misapplication of State v. Denny

The second issue concerns whether the Court of Appeals misapplied the standard for potential third-party suspect evidence set forth by *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984) by creating impossible standards for satisfying the motive, opportunity, and direct connection prongs of *Denny* in a postconviction pleading, contrary to Wisconsin law.

This Court should grant review because the Court of Appeals' decision is in conflict with this Court's decision in *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984) (*see* Wis. Stat. 809.62(r1)(1)(d)) and *Holmes v. South Carolina*, 547 U.S. 319, 321 (2006).

III. Issue Three - Misapplication of State v. Balliette

This issue concerns whether the Court of Appeals misapplied *State v. Balliette,* 2011 WI 79, 336 Wis. 2d 358, 805 N.W.2d 334 in denying Mr. Avery an evidentiary hearing and in doing so has deprived Mr. Avery the ability to raise a complete defense, in violation of his constitutional rights.

This case presents unique constitutional issues based on the Court of Appeals' misapplication of the law and a misinterpretation of the facts to Mr. Avery's case and his newly discovered evidence.

STATEMENT OF THE CASE

On March 18, 2007, Mr. Avery was convicted of first-degree intentional homicide and felon in possession of a firearm. He was found not guilty of mutilation of a corpse. He appealed. The Court of Appeals affirmed. In 2009, he filed a § 974.02 motion requesting a new trial. An evidentiary hearing on Mr. Avery's post-conviction motion was held. On January 25, 2010, his motion was denied and he appealed. The Court of Appeals affirmed.

In 2013, Mr. Avery filed a *pro se* § 974.06 motion requesting a new trial. It was denied. On June 7, 2017, Mr. Avery filed a second § 974.06 motion. (603:1-222).[1] The petition was dismissed without an evidentiary hearing. (628:1-6). On October 6, 2017, Mr. Avery filed a § 974.06 motion to vacate, and on October 23, 2017, he filed a motion for reconsideration. The circuit court denied his motions to vacate and for reconsideration. (640:1-5).

On October 11, 2019, Mr. Avery filed an appeal. Mr. Avery filed motions to stay and remand concerning two additional claims. Mr. Avery raised his claims in his motions to the circuit court as supplemental post-conviction motions. The circuit court denied his motions to supplement. On April 12, 2021, a new witness revealed

[1] Citations to the record on appeal appear with the document number before the colon and the page number after the colon. A citation to "429:16," for instance, refers this Court to page 16 of document 429.

exculpatory information impeaching Bobby Dassey by establishing that he put the victim's car on Mr. Avery's property. Mr. Avery filed a motion to the Court of Appeals to stay his appeal and remand to allow Mr. Avery to add a claim based on the new witness.

On July 28, 2021, the Court of Appeals issued a per curium opinion, upholding the circuit court's summary denial of Mr. Avery's claims raised in his § 974.06 petition and two supplemental motions, holding that Mr. Avery's § 974.06 motions were insufficient on their face to entitle him to a hearing, but reserving his ability to refile his Supplemental Motion #6. (1056).

On August 16, 2022, Mr. Avery filed his third motion for post-conviction relief pursuant to § 974.06. (1065, 1066-75). Mr. Avery filed an amended motion on December 6, 2022. (1102). Mr. Avery's § 974.06 motion set forth newly discovered evidence that a third-party Bobby Dassey ("Bobby") was seen in possession of the victim Ms. Halbach's vehicle after her disappearance. Mr. Thomas Sowinski ("Sowinski") contacted the New York Innocence Project about this matter in 2016. Although Sowinski originally believed it was Mr. Avery's trial defense attorneys that he contacted in 2016, after finding an email verification, he realized it was rather the New York Innocence Project he contacted, and thus, he amended his original affidavit which was submitted in Mr. Avery's motion to stay his appeal to the Appellate Court and Sowinski's amended affidavit was filed to the circuit court reflecting this mistake. (1065:76-82). Affidavits from two other new witnesses in Mr. Avery's case, Mr. Kevin Rahmlow ("Rahmlow") and Mr. Thomas Buresh ("Buresh"),[2] corroborate Sowinski's observations.

[2] In Rahmlow's affidavits provided to the circuit court, Rahmlow described observing Ms. Halbach's RAV-4 parked at the turnaround at STH 147 and the East Twin River Bridge on November 3 and 4, 2005. Rahmlow stated that he reported his observation to a Manitowoc Sheriff's deputy he encountered on November 4, 2005 at the Cenex station on STH 147 in Mishicot. (1075:58-68). In Buresh's affidavit, he states that sometime before 2 a.m. on November 5, he was driving a tow truck in the area of Highway 147 and County Road Q in Manitowoc County and saw RAV-4 driving South on County Road Q, turning left off of County Road Q as it passed him. He recognized Bobby as the driver. He did not recognize the passenger in the vehicle, he is 100% sure it was not Mr. Avery (1120:3-5).

In Mr. Avery's § 974.06 motion, Mr. Avery also raised *Brady* claims relating to the information from the new witnesses. Mr. Avery attached affidavits and documents showing that after Sowinski contacted Mr. Avery's current post-conviction counsel and provided the newly discovered evidence, Mr. Avery's current post-conviction counsel, through its investigator, submitted its second Public Records Request pursuant to the Freedom of Information Act ("FOIA") to the Manitowoc Sheriff's Office for audio recordings of incoming and outgoing phone calls and/or radio dispatches between November 3, 2005 and November 9, 2005 relating to the case. The FOIA-produced audio recordings did not contain the Sowinski call, nor did they contain any dates or times of the calls produced. (1068:1-5). In May of 2022, Mr. Avery's current postconviction counsel received the previously suppressed Sowinski call to the Manitowoc Sheriff's Office which contained a partial recording of the Sowinski suppressed call to the Manitowoc Sheriff's Office on November 6. For the first time, current postconviction counsel received the exact dates and times of the Manitowoc County Sheriff's Office incoming calls. (1069:1-2). As part of its investigation, Mr. Avery's investigator then interviewed Sowinski's ex-girlfriend, whom he was dating at the time of the November 5, 2005 incident. Sowinski's ex-girlfriend, Devon Novak, corroborated Sowinski's account of what he had witnessed and what he had relayed to law enforcement. Further, Ms. Novak recognized and identified Sowinski's voice on the recording, played to her by the investigator, of a phone call made to the Manitowoc Sheriff's Office on November 6, 2005 at 10:28 p.m. (1070:1-5). Mr. Avery's investigator interviewed Sowinski again and played the same audio recording of the phone call that was made to the Manitowoc Sheriff's Office on November 6, 2005 at 10:28 p.m. Sowinski identified his voice in the audio recording of the phone call from November 6, 2005. (1071:1-12). The recording of Sowinski's call was never disclosed by the State to Mr. Avery's trial defense counsel prior to or during the trial. Pre-trial, trial defense counsel made two specific requests for all exculpatory evidence and/or information within the possession, knowledge, or control of the State which would tend to negate the guilt of the defendant, or which would tend to affect the weight or credibility of

the evidence used against the defendant, including any inconsistent statements. (1072:1-14). The failure to disclose the audio call to trial defense counsel was a clearcut *Brady* violation. An additional *Brady* claim stems from the evidence from Rahmlow. Rahmlow described, in his affidavit, that he reported his observation of the RAV-4 parked away from the Avery property to a Manitowoc Sheriff's deputy he encountered on November 4, 2005 at the Cenex station on STH 147 in Mishicot. (1075:59, ¶6). No law enforcement report was ever generated by this Manitowoc Sheriff's deputy memorializing the conversation between Rahmlow and this deputy about Rahmlow's observation of Ms. Halbach's vehicle.

The circuit court denied Mr. Avery's motion for post-conviction relief on August 22, 2023. (1132). Mr. Avery filed a timely notice of appeal on August 24, 2023. (1137). On January 15, 2025, the Court of Appeals issued a per curium decision, affirming the circuit courts' denial of Mr. Avery's claims.

Mr. Avery will accept the facts as stated in the Court of Appeals' Opinion on pages 2-8.

ARGUMENT

I. WHETHER THE APPELLATE COURT IMPROPERLY IMPOSED A BURDEN ON MR. AVERY TO CONCLUSIVELY PROVE THE *DENNY* MOTIVE ELEMENT IN ORDER TO SATISFY THE MATERIALITY PRONGS OF *STATE V. EDMUNDS*, 2008 WI APP 33, 308 WIS. 2D 374, 746 N.W.2D 590 AND *BRADY V. MARYLAND*, 373 U.S. 83 (1963)?

Standard of Review

The state's highest court will not disturb a circuit court's decision to admit or exclude evidence unless the circuit court erroneously exercised its discretion. A circuit court erroneously exercises its discretion if it applies an improper legal standard or makes a decision not reasonably supported by the facts of record. *State v. Jackson*, 2014 WI 4, ¶1, 352 Wis. 2d 249, 255, 841 N.W.2d 791.

Imposing Improper Standard on Newly Discovered Evidence

Both the circuit court and Court of Appeals imposed an improper standard in evaluating Mr. Avery's newly discovered evidence. The Court of Appeals found, "The circuit court properly recognized Avery's newly discovered evidence was not independent from Avery's attempt to meet *Denny* and addressed whether the evidence was material within the confines of his third-party perpetrator argument." (Opinion, pg. 11, ¶23). Both lower courts improperly merged two standards into one in order to deny Mr. Avery's newly discovered evidence. The merging of the two different standards – that in *Edmunds* and that in *Denny* – allowed the lower courts to base the materiality of Mr. Avery's evidence on proving that Bobby had a sexual motive to kill Ms. Halbach and also prove beyond a reasonable doubt that he alone made every single pornographic search on the Dassey computer. The lower courts' analysis completely ignores that the Sowinski evidence is independently material for numerous other reasons besides proving that there is a third party suspect for the murder of Ms. Halbach.

In Mr. Avery's third motion for post-conviction relief, Mr. Avery explained how his new evidence was independently material from demonstrating a *Denny* third party suspect. Specifically, he argued,

> The Sowinski evidence is material to several issues in Mr. Avery's case . . . it is material for establishing Mr. Avery's defense, that is, that a third party committed the crime against Ms. Halbach . . . . Additionally, the Sowinski evidence is material to the evidence in the RAV-4 being planted by Bobby, including Mr. Avery's blood and DNA. The RAV-4 also contained the Halbach vehicle key and Ms. Halbach's electronic devices which were discovered in Mr. Avery's bedroom and burn barrel, respectively. Further, the Sowinski evidence is material to impeach Bobby's trial testimony that Ms. Halbach never left the Avery property, and that she was last seen walking towards Mr. Avery's trailer.

(1065:16, ¶24). The Court of Appeals avoided addressing this independently material evidence by inaccurately claiming "Avery only analyzed the Sowinski evidence within the context of a third-party perpetrator defense." (Opinion, page 10).

The Court of Appeals pointed out in Paragraph 4 of its Opinion from July 28, 2021:

> The State's theory was that Avery shot Halbach in the head, in his garage, and threw her in the cargo area of the RAV 4. He then burned the electronics and camera, cremated Halbach in a burn pit, transferred the remains to a burn barrel, and hid the RAV 4 until he could crush it in the Avery car crusher. (1056:3).

Mr. Avery argued that Sowinski's new evidence is material because it shows that the RAV-4 did leave the Avery property and was in possession of a third party, not Mr. Avery, thereby debunking the State's theory that Mr. Avery had *exclusive possession* of the vehicle and the forensic evidence contained therein and that he kept the RAV-4 on the Avery property by the crusher so he could crush it immediately. (*See* 1102:38, 49). The prosecutor in his closing argument told the jury that "only one person" was responsible for the crime and that was Mr. Avery (610:130).

As Mr. Avery argued, the evidence of a third party's possession of Ms. Halbach's vehicle is additionally material because it shows that someone other than Mr. Avery had possession of the forensic evidence used to convict Mr. Avery. The vehicle, by virtue of having all of the relevant forensic evidence in it, including Ms. Halbach's blood, was the most important piece of evidence in the case. In his closing the prosecutor stated, "Because the discovery of that RAV-4, the discovery of Teresa Halbach's vehicle changed the course of not only this case, but the clues and secrets found in that vehicle changed the lives of everybody in this room." (610:036). The prosecutor emphasized to the jury that "nobody had access to the car" and "no one was going to tamper with the SUV after it was located."(610:041-42). However, the Sowinski evidence establishes that Bobby, the State's primary eyewitness, had access to and the ability to tamper with the vehicle before it was located. Mr. Avery was entitled to have presented this critical fact to a jury and not being allowed to do so deprived him of his constitutional right to present a complete defense.

Despite police searches preceding the discovery of Ms. Halbach's vehicle, Ms. Halbach's electronic devices and key were not found until after Ms. Halbach's vehicle was found. The only reasonable inference is that all the items remained in Ms. Halbach's vehicle and were then moved by the third party who had possession of her vehicle and planted in and around Mr. Avery's residence.

If a third party had possession of Ms. Halbach's vehicle, numerous areas of reasonable doubt arise, such as that the forensic evidence in the vehicle was tampered with by the third party having control of it *before* it was discovered by law enforcement on the Avery property. This would have created reasonable doubt in the jurors' minds, particularly since the State's primary eyewitness witness was the one in possession of the vehicle. Thus, Mr. Avery's new evidence also presents an alternative theory for the source of the forensic evidence used against Mr. Avery. *See Edmunds*, ¶15, 386.

Importantly, Mr. Avery also argued that the Sowinski evidence impeaches the credibility of Bobby's trial testimony where he established an alibi for himself while implicating Mr. Avery in the murder. (1102:38). In fact, Mr. Avery spent numerous pages on his third § 974.06 motion explaining the impeachment value of Mr. Avery's new evidence. (1102: 11, 38-41).

Bobby testified that he left the property while Ms. Halbach and her vehicle remained on the property with Mr. Avery. This crucial testimony allowed the State to claim it was Mr. Avery, not Bobby, who murdered Ms. Halbach and concealed her vehicle on the property. (610:91). During its closing argument, the State emphasized the importance of Bobby's testimony, vouching for his credibility; "Again, an eyewitness without any bias. It is a [*sic]* individual that deserves to be given a lot of credit." (610:91).

With the new Sowinski evidence, the State could not possibly have presented an unimpeached Bobby to establish Ms. Halbach never left the property in her vehicle and that she was last seen walking towards Mr. Avery's trailer – its critical eyewitness link to obtaining Mr. Avery's conviction. Bobby was the only witness whose testimony the jury requested to "read or hear a transcript of" (1104:47). Clearly, by Bobby possessing the vehicle, there is a reasonable likelihood it would have affected the judgment of the jury in that Bobby would have emerged as a much more likely suspect in Ms. Halbach's murder than his recently released, wrongfully convicted uncle. Contrary to the State's representations to the jury, Bobby was biased and deserved no credit for his fabricated testimony.

In regard to a motion for a new trial, a reasonable doubt as to a defendant's guilt has been found to exist when the credibility of a witness critical to the State's case is completely called into question by newly discovered evidence. *State v. Wilson*, 2022 WI App 55, 404 Wis. 2d 750, 982 N.W.2d 351. "A new trial is required if the false testimony could . . . in any reasonable likelihood, have affected the judgment of the jury." *Giglio v. United States,* 405 U.S. 150, 154 (1972) (citations omitted); see also *State v. Plude,* 2008 WI 58, ¶47, 310 Wis. 2d 28, 55, 750 N.W.2d 42, 56 ("Wisconsin law has long held that impeaching evidence may be enough to warrant a new trial.").

In *State v. Plude*, the defendant presented newly discovered evidence that an expert witness lied about his credentials. *Id.*, ¶49, 56. The Supreme Court of Wisconsin found that because "[the expert witness's] testimony was a critical link in the State's case" (*Id.* ¶46, 55), "[his] quasi-medical expert testimony creates a reasonable probability that the jury hearing of [his] false testimony about his credentials would have had a reasonable doubt as to Plude's guilt." *Id.* ¶49, 56. Notably, in Justice Annette Ziegler's concurrence, she found the "new allegations" that the expert witness misrepresented his credentials created "a serious question" "as to whether the interests of justice were served." *Id.* ¶¶52-53, 57-58.

Mr. Avery presents a stronger case about the materiality of his newly discovered evidence because his evidence shows that Bobby committed perjury in his trial testimony, and it taints all of the forensic evidence used against Mr. Avery which resulted in his conviction.

Prior to the Sowinski evidence coming to light, the Court of Appeals assessed Bobby's testimony as follows:

> Certainly, this testimony bolstered the State's theory that Halbach visited Avery on that day and did not leave the Avery property thereafter, but absent this testimony the State still possessed significant forensic (and other) evidence implicating Avery in a crime committed on his property.

(1056:42, ¶68). However, in Mr. Avery's third § 974.06 motion, he brought forth newly discovered evidence that does both – it completely impeaches Bobby's testimony while casting doubt on all the forensic evidence used against Mr. Avery. Thus, Mr.

Avery has shown how his evidence is highly material independent of establishing Bobby as a third party suspect.

Besides requiring *Edmunds* materiality to be solely based on being able to meet the *Denny* requirements, the Court of Appeals erroneously found, "Avery did not offer any analysis that explained why his newly-discovered evidence was not cumulative outside of his third-party perpetrator defense." (Opinion, pg. 10). However, even if there were multiple examples of Bobby's impeachment for purposes of a *Brady* claim, the court is not to view each piece of suppressed evidence in isolation, Instead, the court is required to assess the cumulative impact of all the suppressed evidence to determine its materiality. *Kyles v. Whitley,* 514 U.S. 419, 434 (1995).

The continual effort to move the goal post to thwart Mr. Avery's post conviction efforts by employing the use of per curiam opinions, which blatantly violate his constitutional right to present a complete defense, cannot and should not be condoned.

Further, contrary to the Court of Appeals' assertion that "Avery did not offer any analysis that explained why his newly-discovered evidence created a reasonable probability of a different outcome on retrial that was independent from Avery's attempt to meet ***Denny*** and addressed whether the evidence was material within the confines of his third-party perpetrator argument" (Opinion, pg. 11, ¶23), Mr. Avery's third § 974.06 motion and briefs on appeal thoroughly analyze why the Sowinski evidence is independently material and would have created a probability of a different outcome on retrial. (1102:30-31; Appellant's Brief, pgs. 17-18; Reply Brief, pgs. 14-15).

Mr. Avery has not waived his *Brady* and Interest of Justice claims set forth in his petition.

In Mr. Avery's third § 974.06 motion, Mr. Avery raised *Brady* claims relating to the information from the new witnesses and also raised an Interest of Justice argument.

As for his first *Brady* claim concerning the suppression of the Sowinski evidence, Mr. Avery attached affidavits and documents showing that after Sowinski contacted Mr. Avery's current postconviction counsel initially obtained FOIA-produced audio

recordings which did not contain the Sowinski call, nor did they contain any dates or times of the calls produced. (1068:1-5). Then, in May of 2022, Mr. Avery's current postconviction counsel received a partial recording of the suppressed Sowinski call to the Manitowoc Sheriff's Office on November 6. (1069:1-2). Sowinski's ex-girlfriend, Devon Novak, recognized and identified Sowinski's voice on the recording of Sowinski's phone call made to the Manitowoc Sheriff's Office on November 6, 2005 at 10:28 p.m. (1070:1-5). Mr. Avery's investigator interviewed Sowinski again and played the same audio recording of the phone call, and Sowinski identified his voice in the audio recording of the phone call. (1071:1-12). The recording of Sowinski's call was never disclosed by the State to Mr. Avery's trial defense counsel prior to or during the trial. If the call had been disclosed, Mr. Avery's trial defense counsel could have traced the call to Sowinski by subpoenaing the phone numbers.

Mr. Avery sufficiently pled his *Brady* claim concerning the Sowinski evidence in his motion for postconviction relief (1102:31-44), and this was not the issue disputed by the circuit court in denying his claim. The circuit court did not make any finding that Mr. Avery did not sufficiently plead his *Brady* claim; rather, it disputed Mr. Avery's argument regarding the materiality of the evidence. (1132:27-30).

In regard to the *Brady* claim stemming from the evidence provided by Rahmlow, he described, in his affidavit, that he reported his observation of seeing the RAV-4 to a Manitowoc Sheriff's deputy he encountered on November 4, 2005 at the Cenex station on STH 147 in Mishicot. (1075:59, ¶6). No law enforcement report was ever generated by this Manitowoc Sheriff's deputy memorializing the conversation between Rahmlow and this deputy about Rahmlow's observation of Ms. Halbach's vehicle. Again, Mr. Avery sufficiently pled his argument in his motion for postconviction relief. (1102:44-47). The circuit court did not find otherwise, but rather, it disputed the materiality of this evidence. The Appellate Court completely overlooked the Rahmlow evidence.

Mr. Avery properly pled his Interest of Justice claim in his motion (1102:47-48). However, applying the same rationale for denying his *Brady* claims, the circuit court

found that, "[t]he defendant asked that the court grant him a new trial in the interests of justice pursuant to Wis. Stats. §805.15. Given the above conclusions reached with respect to the evidence offered by the defendant, there are no legal grounds to grant such a request." (1132:31).

The Court of Appeals ignored Mr. Avery's actual pleading and circuit court's rationale for denying Mr. Avery an evidentiary hearing and improperly found that Mr. Avery's *Brady* and Interest of Justice claims were waived on appeal because it claimed that Mr. Avery did not argue that the *Brady* and Interest of Justice claims were sufficiently pled. (Opinion, pg. 8). However, this ignores the fact that the circuit court never found that Mr. Avery's claims were insufficiently pled; rather, the circuit court accepted that they were properly pled but concluded that Mr. Avery's evidence that was suppressed was not material and for the same reason denied his Interest of Justice claim. Following the circuit court's rationale for denying his claims, Mr. Avery properly raised the issue as to the circuit court's misapplication of *Brady* to his newly discovered evidence on appeal.

Mr. Avery argued on appeal that the circuit court misapplied the law and required Mr. Avery to also prove *Denny* in order to satisfy the materiality prong for satisfying *Brady*.

In Mr. Avery's brief, Mr. Avery pointed out that in evaluating Mr. Avery's *Brady* claim, the circuit court did not dispute that the prosecution had suppressed the audio recording of Mr. Sowinski's call, but that rather, it disputed the materiality and favorability of the evidence. (Brief of Appellant, pg. 17). Mr. Avery argued that the circuit court's manner in determining Mr. Avery's evidence was not material was improper, because as argued multiple times, the evidence is material for reasons outside of *Denny,* including for its impeachment value.

Mr. Avery could not have waived his *Brady* claims because they are within his argument that the circuit court improperly imposed a burden for him to also satisfy the *Denny* requirements in order to show that his evidence is material for bringing his constitutional claims, which obviously encompasses his multiple *Brady* violation claims.

Because Mr. Avery has not waived his *Brady* claims and argued on appeal that the circuit court improperly held him to an improper standard for evaluating materiality, and the Court of Appeals improperly dismissed his claims as being waived, this Court's review is required to adequately resolve the issue. Additionally, because the Court of Appeals affirmed the circuit court's misapplication of the law in evaluating Mr. Avery's newly discovered evidence and *Brady* claims, this Court's review is required.

II. WHETHER THE COURT OF APPEALS ERRED WHEN IT DID NOT CORRECTLY APPLY *STATE V. DENNY*, 120 WIS. 2D 614, 357 N.W.2D 12 (CT. APP. 1984) TO MR. AVERY'S POTENTIAL THIRD-PARTY SUSPECT EVIDENCE?

Standard of Review

The Appellate Court generally reviews a trial court's decision to admit or exclude evidence under an erroneous exercise of discretion standard. *State v. Wilson*, 2015 WI 48, ¶47, 362 Wis. 2d 193, 864 N.W.2d 52. However, when a defendant's constitutional right to present a defense is implicated by the exclusion of evidence, the decision not to admit the evidence presents a question of constitutional fact that the Appellate Court reviews *de novo*. *State v. Ramsey*, 2019 WI App 33, 388 Wis. 2d 143, 930 N.W.2d 273.

Mr. Avery provided sufficient facts to meet the Denny requirements in his third § 974.06 motion.

In Wisconsin, *Denny* governs the admissibility of potential third-party perpetrator evidence. *Denny* requires a showing that "there must be a 'legitimate tendency' that the third person could have committed the crime." *State v. Denny*, 120 Wis. 2d 614, 623, 357 N.W.2d 12, 17 (Ct. App. 1984). A 'legitimate tendency' is demonstrated where the defendant can establish (1) motive, (2) opportunity to commit the charged crime, and (3) provide "some evidence to directly connect a third person to the crime charged which is not remote in time, place or circumstances." *Id.* at 624.

In deciding Mr. Avery's previous appeal of his second motion for postconviction relief, the Court of Appeals specifically instructed Mr. Avery about the following:

> As discussed below, we are not addressing Avery's most recent filing to *this* court (see our discussion of Motion #6), which seeks to directly connect Dassey to Halbach's murder. If Avery wishes to raise that claim, he will need to bring a new WIS. STAT. § 974.06 motion. That motion would need to survive both *Escalona-Naranjo* scrutiny and be found to have merit—in which case, the evidence presented might supply the missing "direct connection." In that event, the Velie CD evidence might become relevant to showing Dassey's motive, and might bear on whether Dassey is, or should have been, a viable ***Denny*** suspect. We express no opinion on the merit of any such § 974.06 motion, as all such issues would be for the circuit court to decide in the first instance.

(1056:41, emphasis added). Seemingly having forgotten that it previously found that "the Velie CD evidence might become relevant to showing Dassey's motive" if Mr. Avery's third § 974.06 motion showed "the missing direct connection," the Court of Appeals decided to adopt the circuit court's convoluted and faulty analysis of what is required to satisfy the *Denny* tests. Both lower courts improperly elevated the motive prong to the most important of the three prongs and imposed an impossible burden to meet in requiring each element – motive, opportunity, and direct connection – to be conclusively satisfied.

Mr. Avery pled sufficient facts to establish that Bobby had a motive for the murder.

In Mr. Avery's third § 974.06 motion, he alleged that the motive attributed to Bobby for Ms. Halbach's murder could have been sexual and provided evidence supporting this, namely the suppressed evidence from a computer that was in Bobby's bedroom. Further, Mr. Avery supplied evidence showing that Bobby was the primary user of this computer, according to his brother Blaine, whose affidavit Mr. Avery attached. (965:164-67, 1104:115-16). Mr. Avery also showed that Bobby lied to police about the location of the computer claiming it was in the living room, but crime scene footage showed it was in his bedroom. (1104:112). Mr. Avery supplied this additional evidence to the circuit court in his third § 974.06 motion even after the Court of Appeals had previously acknowledged the potential materiality of the Velie CD in proving a third party suspect.

The circuit court's finding and the Court of Appeals' affirmation (contrary to its prior finding that the Velie CD could serve to show Bobby's motive if Mr. Avery

supplied "direct connection" evidence) that Mr. Avery has not established the "motive" element of *Denny* is contrary to Wisconsin law.

Wisconsin cases that discuss the motive element of a *Denny* analysis show that the standard for fulfilling the motive element of *Denny* is not overly burdensome, especially when there is strong evidence of a third party perpetrator's direct connection to the crime.

For example, *State v. Ramsey*, 2019 WI App 33, 388 Wis. 2d 143, 930 N.W.2d 273 is a case in which very weak evidence of motive against a third party was presented by the defendant, however, the appellate court found there was strong evidence of a direct connection and thus, it found "plausible reasons" for the third party to commit the crime. *Id.* ¶ 28.

In *Ramsey*, the victim was found stabbed at a home. The 911 caller told police that the victim had been staying at her sister's home to hide from the defendant. The defendant had been in a relationship with the victim for over 11 years and they had two children together. They had a history of domestic violence. Officers found the defendant, and the defendant admitted stabbing the victim twice. *Id.* ¶ 6. The victim's best friend told police that the day before the stabbing, the victim told the defendant that she was going to leave him. *Id.* ¶7. After fingernail clippings from the victim revealed another man's DNA, the defendant brought forth a *Denny* motion, arguing that a potential third party perpetrator: (1) was a convicted criminal; (2) lived near the crime scene; and (3) his DNA was present at the scene and is unexplained. The defendant alleged two "possible" motives for the third-party perpetrator: irrational rage and antisocial behavior and/or sexual gratification. *Id.* ¶ 25. The defendant argued that it was possible that the third party had no rational motive. *Id.* Thus, the defendant presented evidence of a general motive which was not directed at the particular victim.

In *Ramsey*, the circuit court found that the defendant had failed to establish the third party's "motive" and denied the motion. However, the appellate court reversed the circuit court's ruling, stating: "We conclude that when considered under the applicable law regarding motive, and with the opportunity evidence and the strong

direct connection evidence, Ramsey has presented plausible reasons for [the third party] to commit the crime." *Id.*, ¶¶57, 64. The appellate court found that "under the totality of the circumstances, the evidence suggests a third-party perpetrator actually committed the crime" emphasizing that 'Suggests' is a rather broad term." *Id.* ¶34.

Mr. Avery, in his § 974.06 motion, presented far more evidence than is even required to suggest that a third-party actually committed the crime. The lower courts' failure to consider the *Denny* prongs in the aggregate and their erroneous imposition of a burden of substantial certainty on Mr. Avery's motive evidence to prove beyond a reasonable doubt that Bobby conducted each search is reversible error. Bobby is the only person who has been identified as having taken unlawful possession (theft) of the victim's vehicle and had an abundance of violent porn of young women on the computer in his room for which he has been described as the "primary user." Combined with these damning facts is his role as the primary eyewitness against Mr. Avery at his trial.

Mr. Avery has offered even further evidence of "motive" with the Sowinski evidence because it shows that Bobby had possession of Ms. Halbach's vehicle.

If not sexual, Mr. Avery even offered another potential motive for Bobby. After obtaining the Sowinski evidence that Bobby was in possession of Ms. Halbach's vehicle – a vehicle that he unlawfully obtained – it is only logical to conclude that Bobby's motive could have been theft. The Court of Appeal contended that the theft motive was not properly pled in Mr. Avery's motion, but it was by the submission of an eyewitness account by Sowinski that he saw Bobby in possession of Ms. Halbach's vehicle after her disappearance. Sowinski supplied sufficient detail that this was a theft.

Mr. Avery's evidence satisfies the direct-connection element.

The Court of Appeals in an argument that strains credulity claimed the RAV-4 that Sowinski witnessed was not necessarily Ms. Halbach's vehicle, in order to dismiss Mr. Avery's "direct connection" evidence. Specifically, the Court of Appeals disputed that the RAV-4 belongs to Ms. Halbach, finding "The Sowinski affidavit, however,

only stated that Sowinski saw Bobby and another individual pushing a blue-colored RAV4 on November 5, 2005." (Opinion, pg. 17, ¶37.). Apparently, the Appellate Court believes that Sowinski was required to obtain the VIN number of the RAV-4 that he observed to rule out the completely improbable scenario of Bobby pushing another blue-colored RAV-4 onto the Avery property on November 5, 2005 in the early morning hours.

Unlike the Court of Appeals, the circuit court correctly acknowledged, "The Sowinski affidavit, taken as true for the purpose of this motion, directly links Bobby to possession of the victim's vehicle." (1132:26). The Court of Appeals' rationale is incorrect as it did not take Mr. Avery's pleadings to be true. In *State v. Williams*, 2009 WI App 95, 320 Wis. 2d 484, 769 N.W.2d 878,[3] the appellate court found a direct connection between an individual and the murder because he had possession of the victim's vehicle several days after her murder, specifically, the court explained:

> We agree with the State that: [f]rom all of these circumstances, ***under a common sense, non-technical approach***, a reasonable police officer would draw the reasonable inference that both Williams and [Armstead] had been in possession of Brown's stolen car. There was probable cause to believe that both Williams and [Armstead] probably had committed a crime involving the murder victim's stolen car.

id. (emphasis added). Applying this common-sense approach here, the Sowinski evidence provides the direct connection (that is, Bobby being witnessed in possession of Ms. Halbach's vehicle) to Bobby having committed the murder of Ms. Halbach and planting the evidence to frame Mr. Avery.

The RAV-4 is a material piece of evidence in the crime. *See, e.g., State ex rel. Koster v. McElwain*, 340 S.W. 3d 221, 249 (Mo. App. 2011). Since the only similar Wisconsin case on this point is *State v. Williams*, this Court can look to the Missouri case for guidance. There, the State presented other explanations for the discovery of material evidence. The Court rejected that approach stating:

> The State argues that Ted Helmig's initial possession of some of the canceled checks and their later discovery with the purse only shows an attempt to cover up Dale Helmig's crime. That may be true. However, the fact that there may be other explanations for the discovery of the canceled checks with the purse besides an

[3] Mr. Avery realizes that this case existed two months before it would have had precedential value. The court's common-sense approach is instructive.

> inference that Ted Helmig threw the purse and the canceled checks in the river sometime following his murder of Norma Helmig does not relieve us of the obligation to acknowledge that Ted Helmig has now been connected to the purse—material evidence in Norma Helmig's murder case.

McElwain, at 250-51. The Missouri court found that Ted Helmig's mere possession of the canceled checks was sufficient to connect him to "***a key piece of evidence in the crime--the purse where the cancelled checks were found.***" *Id.* at 249. Here, the circuit court admitted that Mr. Avery established Bobby's possession of the RAV-4, but it created other explanations other than acknowledging that Bobby had possession of the RAV-4 sometime following his murder of Ms. Halbach (1132:25). Bobby is now connected to material evidence in the Teresa Halbach murder case.

The *Denny* test only requires an inference that Bobby is directly connected to the murder of Ms. Halbach, nothing more. By having possession of Ms. Halbach's vehicle after her disappearance, the inference can certainly be made. The Sowinski evidence is being offered as evidence of the "missing" piece, the direct connection between Bobby and Ms. Halbach's murder. (1056:41). Contrary to the lower courts' positions, Mr. Avery does not need to prove Bobby's guilt of the murder beyond a reasonable doubt. *See House v. Bell*, 547 U.S. 518 (2006).

Mr. Avery showed that there is a reasonable probability that presenting Mr. Avery's newly discovered evidence undermines confidence in the outcome of Mr. Avery's trial.

Mr. Avery has adequately shown how his newly discovered evidence would have changed the outcome of his trial.

The new evidence would have allowed the defense to impeach Bobby's trial testimony. During his closing argument, Prosecutor Kratz emphasized the importance of Bobby's testimony and vouched for his credibility:

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

(715:91, emphasis added). Bobby would no longer be the "unbiased witness" described by Prosecutor Kratz. Further, the forensic evidence would have been viewed as planted or at the very least tainted by being in the hands of a third party. With the new evidence, the defense could have argued Mr. Avery returned to his trailer; Ms. Halbach left the property in her vehicle and Bobby followed her, got her to pull over, and assaulted and murdered her at some point. He planted the RAV-4 on the Avery property and proceeded to remove and plant the electronic devices, the key, the bones, her clothing, her DNA on the bullet and Avery's blood.

The Sowinski evidence when viewed in the aggregate including all the false statements made by Bobby to law enforcement and at trial would have provided a reasonable probability of a different outcome at trial.

III. WHETHER THE COURT OF APPEALS IMPROPERLY AFFIRMED THE CIRCUIT COURT'S DECISION TO DENY MR. AVERY AN EVIDENTIARY HEARING?

Standard of Review

Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, the reviewing 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*. If the motion raises such facts, the circuit court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. The reviewing court reviews a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576-77, 682 N.W.2d 433.

Mr. Avery alleged sufficient facts in his third § 974.06 motion, entitling him to a hearing; however, the lower courts disputed those facts instead of taking them to be true.

The circuit court "must determine first whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief." *State v. Ruffin*, 2022 WI 34, ¶35, 401 Wis. 2d 619, 635, 974 N.W.2d 432, 439, citing *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 437. 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. Only after an evidentiary hearing is the court charged with determining the issues and making findings of fact and conclusions of law. Wis. Stat. § 974.06(3)(d).

Both the circuit court and Court of Appeals improperly attempted to weigh Mr. Avery's facts with speculative theories unsupported by the record rather than accepting his facts as true and determining whether they were sufficiently pled to warrant an evidentiary hearing. The Court of Appeals offered the theory that Sowinski saw a different RAV-4 and not Ms. Halbach's RAV-4, as he claimed. (Opinion, pg. 17, ¶37). Both courts failed to conduct any analysis of whether Mr. Avery pled sufficient facts to warrant an evidentiary hearing on his newly discovered evidence. Instead, the lower courts weighed Mr. Avery's evidence as if it had already been presented during an evidentiary hearing.

When the lower courts' analysis begins to weigh the evidence (it inevitably misstates) and the uncontradicted facts a petitioner asserts are not taken as true, the need for an evidentiary hearing becomes apparent. *See U.S. v. Theodore*, 354 F.3d 1, 7 (1st Cir. 2003). In Mr. Avery's case, each court has assumed as true a different theory or a different part of the theory than the other; no court has looked at all of the evidence cumulatively to determine the likely impact on the defense, on the prosecution's case, or on the jury's verdict. *See Kyles v. Whitley,* 514 U.S. 419 (1995).

An evidentiary hearing is nothing more than an intermediate step toward the objective of being granted a new trial. It is not an end in itself. The evidentiary hearing

is a forum to prove allegations in a motion for post-conviction relief. *See State v. Balliette*, 2011 WI 79, ¶69, 336 Wis. 2d 358, 386, 805 N.W.2d 334. Mr. Avery's motion for post-conviction relief states what he is set to prove if he were granted an evidentiary hearing. An evidentiary hearing would provide Mr. Avery with the opportunity to prove his pleaded claims that he is entitled to a new trial. *Balliette*, ¶61, 383. If Mr. Avery's motion contained all the proof necessary to show that he was entitled to a new trial, he would not need an evidentiary hearing. *Id.*

Because Mr. Avery has alleged sufficient facts in his motion that, if true, would entitle him to relief, yet the lower courts keep denying him the opportunity for an evidentiary hearing, Mr. Avery asks this Court to revisit what is required for an evidentiary hearing.

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 law in what is required to bring forth newly discovered evidence.

Second, Mr. Avery presents this Court with an opportunity to return to the issue of the extent of motive, opportunity, and direct connection that is necessary to satisfy the *Denny* third party suspect test for admissibility.

Third, 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.

Fourth, Mr. Avery presents this Court with an opportunity to grant him 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.

Respectfully submitted,

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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 7,750 words.

Dated this 7th day of February, 2025

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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.

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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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