STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 05-CF-381

STEVEN AVERY,

Defendant.

STATE'S RESPONSE TO DEFENDANT'S MOTION TO SUPPLEMENT PREVIOUSLY FILED MOTION FOR POST-CONVICTION RELIEF

Introduction

On June 7, 2018, the Court of Appeals entered a Remand Order to permit the Defendant the opportunity to pursue a supplemental postconviction motion. The Remand Order is quite specific as to the subject matter to be addressed by the Circuit Court. The Defendant claims that a CD contains exculpatory information. Based upon that contention, the Court of Appeals crystallized the issue for litigation in its remand when it stated that "Avery alleges that the CD contains exculpatory, material evidence and that State's failure to disclose the CD earlier violates his due process right to a fair trial under *Brady v. Maryland*, 373 U.S. 83 (1963)." (Ct. of App. Remand Order 1, Jun. 7, 2018.) The Remand Order is limited to the information on the CD received from the State. Legal arguments pertaining to newly discovered evidence, and ineffective assistance of counsel are not envisioned by the Remand Order. Nevertheless, we will briefly address those issues if we have misconstrued the scope

of the Remand Order. The State believes this *Brady* claim can be resolved on the briefs without need for an evidentiary hearing. The same is true for the newly discovered evidence and ineffective assistance claims if this Court concludes that those claims are within the scope of the remand order.

Issue

Should the Defendant-Appellant-Petitioner (hereinafter Defendant) be allowed to supplement the appellate record with a compact disc (CD) that Defendant alleges contains exculpatory evidence allegedly suppressed by the State until April 17, 2018.

Summary of Relevant Facts

All relevant information contained within the CD was provided to the defense. The CD provides no additional, new, or exculpatory information that Defendant did not have prior to trial. The following facts support this claim.

The jury trial of Steven Avery began with jury selection on February 5, 2007. The jury was not sworn, and testimony did not begin until February 12, 2007.

1. On April 21, 2006, Special Agent Thomas Fassbender of the Wisconsin Department of Justice took possession of a personal computer (hereinafter, Dassey computer) from the residence of Barbara Janda, the mother of Brendan Dassey.
2. On April 22, 2006, Fassbender transported the Dassey computer to the Grand Chute Police Department for a forensic examination by Detective Michael Velie.

3. On April 24, 2006, Detective Velie started his analysis of the hard drive on the Dassey computer. Velie transferred a forensic image of the contents of the hard drive to seven DVDs, and issued a final report in the form of a CD (hereinafter, Velie CD) entitled "Dassey's computer, Final Report, Investigative Copy." Exhibit 1, Affidavit of Michael Velie.
4. On May 10, 2006, Detective Velie completed his analysis and returned the Dassey computer to Fassbender on May 11, 2006, with a copy of the Velie CD and the seven DVDs containing a forensic image copy of the hard drive from the Dassey computer.
5. On December 7, 2006, Fassbender prepared investigative report #304 (hereinafter, Fassbender Report) detailing the seizure of the Dassey computer, the transport of the Dassey computer to the Grand Chute Police Department, and the information he received from Detective Velie pertaining to the forensic analysis. Exhibit 2.
6. The Fassbender Report discloses the existence of the Velie CD: "a CD titled 'Dassey's Computer, Final Report, Investigative Copy.'" Exhibit 2.
7. The Fassbender Report also relayed that Fassbender reviewed the images from the Velie CD, which were described graphically: "There were numerous images of nudity, both male and female, to include pornography. The pornography included both heterosexual, homosexual and bestiality. There were images depicting bondage, as well as possible torture and pain. There were also text images with the name, 'Emily'. There were images depicting potential young

females, to include an infant defecating. There were images of injuries to humans, to include a decapitated head, a badly injured and bloodied body, a bloody head injury, and a mutilated body." Exhibit 2.

8. Captain Velie further states in his affidavit (Exhibit 1) that all the images on the Velie CD were obtained from the seven DVDs which contained a copy of the forensic image of the Dassey computer hard drive. Captain Velie further avers that the same images from the Velie CD are reproduceable when the same or similar forensic tools and techniques are used to examine the seven DVDs containing a complete copy of the forensic image of the Dassey computer hard drive. Captain Velie further states in his affidavit that the only information on the Velie CD that is not contained in the seven DVDs would be the typical administrative and procedural files, folders, and techniques routinely utilized by a digital forensic examiner during a forensic examination of digital evidence.

9. During the course of 17 days, Detective Velie completed the forensic analysis of the Dassey computer between April 24, 2006, to May 10, 2006.

10. By letter dated December 14, 2006, Calumet County District Attorney and Manitowoc County Special Prosecutor Kenneth Kratz mailed additional discovery information to Attorney Dean Strang, one of Mr. Avery's trial attorneys. Exhibit 3, itemized discovery list. Item 67 refers to various DCI investigative reports, one of which was the Fassbender Report.

11. By letter dated December 15, 2006, Attorney Kratz mailed an itemized inventory of the discovery provided in the Steven Avery case to Attorney Strang. The letter stated that all of the items on the inventory were previously sent in discovery and encouraged Mr. Strang to carefully review the inventory and to contact Mr. Kratz if unable to locate any of the items. Exhibit 4, itemized inventory. One of the numerous items on the itemized inventory (last page) was described as "*7 CD's (sic): Contents of Brendan Dassey's Computer.*"
12. By letter dated December 19, 2006, a paralegal from Attorney Strang's firm sent the seven DVDs containing the forensic image of the Dassey computer to co-counsel Jerome Buting, noting that the DVDs could only be viewed with Encase V4 or V5. Exhibit 5, Strang letter.
13. Postconviction counsel for Mr. Avery and his trial counsel claim they did not receive the Velie CD in the December 14, 2006, mailing.
14. After receiving the seven DVDs and the Fassbender Report, which summarized the pornography and violence depicted on the Dassey computer, neither Mr. Strang nor Mr. Buting requested additional information about the Velie CD.
15. On January 25, 2007, about 40 days after Mr. Strang and Mr. Buting received the seven DVDs, Attorney Kratz sent proposed stipulations to Attorney Strang. Exhibit 6, Kratz stipulation proposal. At paragraph "R" in the proposal, Kratz refers to the forensic computer analyses by Michael Velie conducted on the Avery, Halbach, and Dassey computers. Kratz indicated his belief there was

"nothing much of evidentiary value" to these examinations and sought a stipulation to eliminate calling Velie as a witness.

16. On February 4, 2007, Attorney Strang responded by email to each of the proposals of Attorney Kratz. Exhibit 6, Strang response attached to Kratz stipulation proposal. As to paragraph "R" pertaining to Michael Velie, Strang wrote "As to Mike Veile [sic], we will not stipulate as to Teresa Halbach's computer because we may want to offer some of her e-mails. Brendan's computer is not relevant unless he is a witness or his statements are offered, so that is premature. We will stipulate that nothing of evidentiary value was found on Steven Avery's computer when the hard drives were analyzed by law enforcement."

17. On February 13, 2007, the 2nd day of trial, Attorney Strang stated on the record that he wanted his February 4, 2007, email (Exhibit 6) to Attorney Kratz to be part of the record. His February 4, 2007, response to Attorney Kratz's proposal, and the Kratz January 25, 2007, stipulation proposal (Exhibit 6), were combined and marked as one exhibit, offered, and received by the court as trial exhibit 36. Exhibit 7, court minutes by clerk Janet Bonin.

18. Current postconviction counsel and trial counsel claim the Velie CD was not provided in discovery. They claim that only the seven DVDs were turned over in discovery. On April 17, 2018, the State provided a copy of the Velie CD to postconviction counsel.

19. In the trial, which began on February 5, 2007, and lasted until March 18, 2007, Detective Velie was not called as a witness by either the State or the defense to testify about his forensic analyses of the Halbach, Avery, or Dassey computers.

20. Mr. Avery hired forensic computer expert Gary Hunt. Mr. Hunt analyzed the Velie CD provided in April 2018 and the seven DVDs that Attorney Kratz sent in discovery on December 14, 2006.

21. Mr. Hunt determined the Velie CD contained " . . . files with few exceptions, PDF and HTML reports that appear to have been generated from the Dassey computer forensic image stored on the 7 Encase DVDs." Third Supplemental Affidavit of Gary Hunt, paragraph 16, Exhibit 8 of the Defendant's Motion to Supplement.

Burden of Proof in Section 974.06 Proceedings

The burden of proof in Wis. Stat. § 974.06 proceedings is on the Defendant to prove his claims by clear and convincing evidence regardless of the particular substantive ground of the motion. *State v. Brunton,* 203 Wis. 2d 195, 204, 552 N.W.2d 452 (Ct. App. 1996).

Argument

What Defendant must establish for a *Brady* violation

In *State v. Harris,* 2004 WI 64, 272 Wis. 2d 80, 680 NW.2d 737 (2004) the court stated that to establish a withholding of exculpatory evidence by the State, the defense must prove:

1. the prosecution suppressed evidence;
2. the evidence was favorable to the defense;
3. the evidence was material to the issue at trial.

Evidence is "material" if there is a reasonable probability that, had the evidence been disclosed, the results of the trial would have been different; and a reasonable probability of a different result means that the suppressed evidence would be such that it would undermine confidence in the outcome of the trial. *Turner v. United States*, 582 U.S. ___, 137 S. Crt. 1885 (2017). A defendant must establish each prong; a failure on any prong means that no *Brady* violation occurred. Here, the Defendant fails to meet any prong.

1. The Prosecution Did Not Suppress Evidence

There is no ***Brady*** violation because the Defendant was in possession of the pertinent information contained on the Velie CD prior to trial. The images on the Velie CD came from the seven DVDs that were provided in discovery on December 14, 2006. Furthermore, the remaining contents of the Velie CD provide no additional, new, or exculpatory information. "Evidence is 'suppressed' when (1) the prosecution fail[s] to *disclose* the evidence in time for the defendant to make use of it, and (2) the evidence was *not otherwise available* to the defendant through the exercise of reasonable diligence." *Carvajal v. Dominguez*, 542 F.3d 561, 567 (7th Cir. 2008) (emphasis added, citation omitted). An "important factor in determining [that] there was no denial of due process is the fact that the defendant failed to pursue

information that was available to him." *State v. Clarke*, 49 Wis. 2d 161, 179, 181 N.W.2d 355 (1970).

The State did not suppress evidence. The seven DVDs containing the contents of the hard drive from the Dassey computer were received by the Defendant prior to trial. The forensic images contained on the Velie CD are also contained on the seven DVDs. The Defendant received the Fassbender Report prior to trial. That report graphically describes the disturbing images on the Velie CD that are also contained on the seven DVDs. The Defendant was aware of the forensic tools and techniques needed to examine the seven DVDs provided by the State in its December 14th letter.

While the Defendant claims that he did not receive the Velie CD with the seven DVDs, it cannot be said that the State suppressed the Velie CD. The State alerted the Defendant to the existence of the Velie CD and that the CD contained pornographic images found on the seven DVDs. The State also revealed, through the disclosure of the Fassbender Report, that a forensic analysis of the Dassey computer was conducted, when it was conducted, where it was conducted, by whom it was conducted, and what the results were.

Importantly, the record conclusively demonstrates the Defendant entered into meaningful discussions about stipulations pertaining to Detective Velie (Exhibit 6) and wanted to make sure these discussions were made part of the record (Exhibit 7). Thus, it is clear that a careful and thoughtful decision was made by the Defendant regarding the necessity to call Detective Velie as a witness regarding his analyses of the Dassey, Halbach, and Avery computers.

The seven DVDs and the Fassbender Report, which disclosed the existence of the Velie CD and its contents, were sent to Attorneys Buting and Strang on December 14, 2006 (Exhibit 3), and an itemized inventory of the Steven Avery file was sent by Kratz the following day on December 15, 2006 (Exhibit 4). In the December 15th cover letter to the Steven Avery file inventory, Kratz asked Strang to "[p]lease review this list carefully. If you are unable to locate any of the items and want us to make another copy, please contact my office" (Exhibit 4). They had the Fassbender Report describing the existence of the Velie CD and its content; and they were invited by letter dated December 15, 2006, to ask for anything they could not locate (Exhibit 4). Thus, Avery had the information and the ability to ask for more detail seven weeks before the start of the trial on February 5, 2007. Avery's trial counsel never asked for the CD. That, however, does not change the fact that the evidence was *disclosed.*

The Defendant's assertion the conduct and actions of the State in disclosing the existence and contents of the Velie CD, but not the CD itself, violated his due process right to a fair trial under *Brady* is simply without merit. The State never suppressed the Velie CD, or its contents. There was no *Brady* violation.

Additionally, the evidence was *otherwise available* to the Defendant through the exercise of reasonable diligence. The State disclosed the existence of the Velie CD. All the Defendant had to do was notify the State that the disclosed Velie CD was not within the discovery materials.

Moreover, Attorneys Buting and Strang had the pornographic and violent images before trial because they had a complete forensic image of the Dassey

computer on the seven DVDs. Thus, they had that evidence within their possession seven weeks before trial. All they had to do was look at it. It took Velie only 17 days to do a complete forensic analysis of the Dassey computer. The Defendant gives no explanation why seven weeks was insufficient for the defense to read the Fassbender Report and determine if they needed to locate an expert and analyze the DVDs. The Defendant likely gives no explanation because there is none. The defense team had the seven DVDs containing a complete forensic image of the Dassey computer. They had the evidence, and the State is not responsible for explaining to the defense possible ways to make use of the evidence provided during the discovery process. Notwithstanding Mr. Strang's averments, the State is not responsible for explaining the significance or meaning of evidence provided in discovery. *State v Schroeder*, 2000 WI App 128, ¶ 9, 237 Wis. 2d 575, 613 N.W.2d 911. The existence of the Velie CD was disclosed and the contents were available from the exercise of reasonable diligence. There was no *Brady* violation.

2. The Evidence Was Not Favorable to the Defense

The second prong the defense must establish to prove a *Brady* violation is that the evidence is favorable to the defense. "Evidence is favorable to an accused, when, 'if disclosed and used effectively, it may make the difference between conviction and acquittal.'" *Harris*, 272 Wis. 2d 80, ¶ 12 (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985)).

The Defendant has not shown the Velie CD was favorable to the defense. It is important to remember the Defendant had a complete image of the hard drive of the

Dassey computer. Thus, the Defendant had the pornography within his possession well before trial. To establish a *Brady* violation, he has to establish that the evidence withheld – the Velie CD – was favorable to the defense. He makes no such argument. Rather, he focuses on the pornography. As trial neared, neither side thought the Velie analysis was relevant. Both sides were correct. The Velie CD, in and of itself, was not favorable to the defense. There was no *Brady* violation here.

For the sake of argument, but not relevant to the *Brady* analysis, the Dassey computer (and the pornography it contained) was not favorable to the defense either. The computer was accessible to numerous people. Brendan Dassey, Blaine Dassey, Scott Tadych, Bryan Dassey, Bobby Dassey, Barb Janda, and Tom Janda all either lived in the house or had visited the house up until October 15, 2005, when Tom Janda moved out. The four Dassey brothers and Barb Janda lived in the residence from October 31, 2005, to March 1, 2006, when Brendan Dassey was arrested. Steven Avery was a regular visitor to the Dassey house, giving him access to the computer as well.

Context is important here. Attorneys Strang or Buting likely did not ask for the Velie CD because it was not relevant to their theory of defense, which centered on the recently discovered vial of Avery's blood. The seven DVDs and the Fassbender Report were provided right after the defense revealed the existence of "the blood vial" containing a sample of Avery's blood. The defense team made the strategic decision to focus on the blood planting defense, making the Dassey computer irrelevant. And the Defendant has not established any logical nexus to the murder of Theresa

Halbach and the pornography on the Dassey computer. Rather, he asserts a far-fetched theory that relies on conclusory assertions and an unpublished decision (*State v. Dressler*, 180 Wis. 2d 468 (Ct. App. 1998)) that cannot be cited as authority. *See* Wis. Stat. § 809.23(3) (a) and (b). Moreover, the *Dressler* case is not on point. Dressler claimed that the pornography in his house should not have been admissible in his murder trial because it was his first amendment right to possess pornography. The appellate court rejected this argument because it was not brought up in the trial court and was therefore waived. In *Dressler v. McCaughtry* 238 F. 3d 908 (7th Circuit 2001), which was the related habeas corpus case brought by Dressler; the court ruled that the only issue before it was the first amendment right of Mr. Dressler to possess pornography and whether the State properly used it as evidence against him in his homicide trial. The habeas court ruled it would not upset the State court ruling. *In dicta*, the court offered the observation there was reason to allow the pornography to be used against Mr. Dressler in his murder trial. This *dictum* cannot be used as precedent. *State v Sartin*, 200 Wis. 2d 47, 546 N.W.2d 549 (1996). The 7th Circuit's analysis of state law, the admissibility of evidence is nonprecedential, regardless of whether it is *dictum* or holding. *Water Quality Store, LLC v. Dynasty Spas, Inc.*, 2010 WI App. 112, ¶ 17, 328 Wis. 2d 717, 789 N.W.2d 595.

Again, the Defendant had to establish that the withheld evidence, the Velie CD itself, was evidence favorable to the accused. He does not. There was no *Brady* violation here.

The Evidence Was Not Material to the Issue at Trial

The third prong Avery must establish in order to prove the State withheld exculpatory evidence, is that the evidence withheld was material. "[T]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Harris*, 272 Wis. 2d 80, ¶ 14. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682. The evidence is not material unless "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). "[S]trictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). *See also, Turner v. U. S.*, 582 U.S. ___ (2017), 137 SCT. 1885 (2017) (materiality is defined as, had the evidence been disclosed, there is a reasonable probability of a different result, which undermines the confidence of the outcome of the trial).

The Defendant does nothing to demonstrate in his pleadings that not having the Velie CD undermines confidence in the outcome of his trial. Rather, he again focuses on the pornography found on the Dassey computer. The entire contents of the Dassey computer were within the Defendant's possession seven weeks before trial. The Defendant must establish how the Velie CD was material. He does no such thing.

Whether the pornography was material is irrelevant to the *Brady* analysis. There was no *Brady* violation here.

Moreover, the Defendant's irrelevant argument regarding the pornography fails as well. He does not demonstrate how that evidence would have been admissible "specific instances of conduct" under Wis. Stat. § 904.05(2) and thus available for impeachment. He simply asserts that it would and that this would have changed the outcome. Saying so without demonstrating how is not enough. The same is true of the Defendant's *Denny* argument. He fails to conduct a *Denny* analysis to show how this evidence would have made a difference in the third party liability determination by the trial court. He cannot simply rely on the affidavits of trial counsel to carry the day. *State v. Allen*, 2004 WI 106, ¶ 23, 274 Wis. 2d 568, 682 N.W.2d 433. "[I]n order to secure a hearing on a postconviction motion, [a defendant] must have provided sufficient material facts — e.g., who, what, where, when, why, and how — that, if true, would entitle him to the relief he seeks." *Id.* ¶ 36; *see also, id.* ¶¶ 2, 23. "A 'material fact' is: '[a] fact that is significant or essential to the issue or matter at hand.'" *Id.* ¶ 22 (quoting Black's Law Dictionary). A defendant must allege sufficient material facts "within the four corners of the [postconviction motion] itself." *Id.* ¶ 23. The Defendant has not done this. Nevertheless, we briefly undertake the analysis now to demonstrate this information would have had no effect on the outcome.

In *State v Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984) the court of appeals adopted the *legitimate tendency test* to determine the admissibility of third party liability evidence. To admit third party liability evidence, the proponent of such

evidence must establish 1) a motive for the identified third party to commit the crime; 2) the third party had an "opportunity" to commit the crime; and 3) there is a "direct connection" between the third party and the crime. *Denny*, 120 Wis. 2d at 624 and *State v Wilson*, 2015 WI 48, ¶ 3, 362 Wis. 2d 193, 864 N.W.2d 52.

The Wisconsin Supreme Court reaffirmed the *Denny* legitimate tendency test in *State v. Wilson, Id.* ¶ 52. In *Wilson* the court clarified the three-part legitimate tendency test. As it relates to "motive" the court stated ". . . the defendant is not required to establish motive with substantial certainty. Evidence of motive that would be admissible against a third party were that third party the defendant is therefore admissible when offered by a defendant in conjunction with evidence of that third party's opportunity and direct connection." *Id.* ¶ 63. In its discussion of the "opportunity" prong of the *legitimate tendency test*, the *Wilson* court opined as follows.

> Courts may permissibly find – as a matter of law – that no reasonable jury could determine that the third party perpetrated the crime in light of overwhelming evidence that he or she did not. *Cf. People v Pouncy,* 437 Mich. 382, 471 N.W.2d 346, 350 (1991) ("When, as a matter of law, no reasonable jury could find that the provocation was adequate [to form the basis of a defense to the charge], the judge may exclude evidence of the provocation.").

Id. ¶ 70.

The Defendant has misrepresented the scope of the trial court's ruling denying third party liability evidence. He states the only reason the motion was lost was for a failure to attribute a "motive" for Bobby Dassey to murder Teresa Halbach. (Def.'[s] Mot. to Suppl. Previously Filed Mot. for Postconviction Relief 19, July 6, 2018). This is incorrect. Before the trial court, the State conceded for the sake of argument, that "opportunity" to commit the crime may be arguable because Bobby Dassey was on the

grounds of the salvage yard on the day in question. But the trial court concluded that there was an absence of evidence for the *motive* and *direct connection* prongs. Specifically, the trial court concluded:

> "However, along with no allegation of any motive, the facts presented by the defendant do not suggest any direct connection that any of the Dassey brothers would have to the crime, other than the fact they happened to be on the Avery property. In the absence of any allegations regarding motive, mere opportunity is insufficient to justify admission of the third party liability evidence."

Exhibit 8, Decision and Order on Admissibility of Third Party Liability Evidence 14-15, January 30, 2007.

In the very next paragraph the court further concluded:

> ". . . . (W)ith the exception of Scott Tadych and Andres Martinez, the other persons identified by the defendant *may* have had an opportunity to commit some or all of the crimes charged in the sense they were near the alleged crime scene at the time of the alleged crimes. The defense fails to offer any meaningful evidence, however, to suggest that any of the persons named were directly connected to the crimes in any way."

Id. at 15. Emphasis added.

Thus, the Defendant's claim that the Velie CD now provides the only missing piece – that is, motive – is incorrect. The Defendant has failed to establish a relevant motive as it relates to Bobby Dassey because he has failed to establish how Bobby Dassey was motivated by his alleged use of pornography to murder Teresa Halbach. He has also failed to establish how Bobby Dassey had an "opportunity" to commit the crime. As noted above, opportunity was assumed for argument purposes, but never proved.

Similarly, the Defendant has failed to establish a "direct connection" between Bobby Dassey and the murder of Teresa Halbach. Nowhere in his pleading does he

tell us how Bobby Dassey killed Teresa Halbach, where he killed her, when he killed her, whether he really was assisted by Scott Tadych, or point to any evidence in the record that would support any of these allegations. Saying so doesn't make it so. There is no direct evidence beyond speculative conjecture. His pleading is woefully deficient, *State v Allen, supra*; and as such does not call for a hearing, let alone undermine the outcome as required by *Brady*.

In evaluating third party liability evidence:

> . . . (C)ircuit courts must assess the proffered evidence in conjunction with all other evidence to determine whether, under the totality of the circumstances, the evidence suggests that a third-party perpetrator *actually committed* the crime. *See, e.g., Shields v. State,* 357 Ark. 283, 166 S.W.2d 28 (2004); State v. Oliver, 169 Ariz. 589, 821 P.2d 250, 252 (Ct. App. 1991) ("The defendant must show that the evidence has an inherent tendency to connect the other person with the actual commission of the crime.") (Citation omitted); *People v. Hall,* 41 Cal.3d 826, 226 Cal. Rptr. 112, 718 P.2d 99 (1986).

Wilson, 362 Wis. 2d 193, ¶ 71. The Defendant has failed this litmus test.

The pornography on the Dassey computer would have had no effect on the jury's verdict. But most importantly, the entire contents of the Dassey computer, including the pornography. were provided to the Defendant seven weeks before trial. Thus, his arguments regarding the potential use of the pornography are irrelevant to his *Brady* claim.

In sum, the Defendant has failed to establish any of the three prongs necessary to establish a *Brady* violation. This Court should deny his claim without a hearing.

The Velie CD is not Newly Discovered Evidence

As addressed above, the State believes that the Defendant's newly discovered evidence claim is outside of the scope of the remand order. However, the State will

briefly address his claim to provide this Court with an argument, should the Court disagree with the State's assessment of that scope.

The Defendant asserts the Velie CD constitutes newly discovered evidence without addressing the criteria for a *newly discovered* evidence claim.

> In a motion for a new trial based on newly discovered evidence, the defendant must prove, by clear and convincing evidence, that " '(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.' " *Id.* (quoting *State v McCallum*, 208 Wis. 2d 463, at 473, 561 N.W.2d 707). If the defendant is able to make this showing, then "the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial." *McCallum,* 208 Wis. 2d at 473.

State v [Brian] Avery, 2013 WI 13, ¶ 25, 345 Wis. 2d 407, 826 N.W.2d 60.

As noted above, the content of the Velie CD that the Defendant finds significant, the pornography, was provided in the seven DVDs, which comprised a complete copy of the forensic image of the hard drive. The Defendant has not proven the evidence is new.

There is a distinction between newly discovered evidence and newly available evidence. *State v. Jackson,* 188 Wis. 2d 187, 198-99, 525 N.W.2d 739 (Ct. App. 1994). Newly available testimony of a witness, like an expert, is not newly discovered evidence when the defendant was aware of the facts underlying that testimony at the time of the trial. *Id.* at 201. That amounts only to a new appreciation of the importance of known evidence. A new appreciation of known evidence does not transform that evidence into newly discovered evidence. *State v. Williams*, 2001 WI App 155, ¶ 16, 246 Wis. 2d 722, 631 N.W.2d 623, *modified on other grounds, State v. Morford,* 2004 WI 5, 268 Wis. 2d 300, 674 N.W.2d 349; *State v. Fosnow*, 2001 WI App

2, ¶¶ 9, 13, 240 Wis. 2d 699, 624 N.W.2d 883; *Vara v. State*, 56 Wis. 2d 390, 394, 202 N.W.2d 10 (1972). And it does not matter what caused the known evidence to acquire new significance. *State v. Bembenek*, 140 Wis. 2d 248, 256-57, 409 N.W.2d 432 (Ct. App. 1987). Recycling and reformulating existing facts into a new format or opinion presented by a new witness does not generate new evidence. *Williams*, 246 Wis. 2d 722, ¶ 16.

Avery's proffered expert witness testimony based on the recent analysis of the Dassey computer is not truly "new" evidence. At best, it is a new appreciation of existing evidence that Avery could have developed for trial in the exercise of due diligence.

The Defendant was aware of the existence of the Velie CD by way of the Fassbender Report (Exhibit 2). He did nothing to procure it, even though he was invited to do it. (Exhibit 4, Kratz December 15, 2006, correspondence). Thus, the Defendant was negligent in procuring the Velie CD and in analyzing the contents of the seven DVDs.

The Defendant fails here, just as he has with the materiality argument, or lack thereof, under *Brady*. He has not proven how the Velie CD would have led to a different result at trial had he possessed the Velie CD before trial. And, lastly, the Velie CD is cumulative. Defense counsel already had the contents of the computer; they had every image contained on the Velie CD. It all came from the hard drive which was completely copied to the seven DVDs.

Thus, this Court should deny the Defendant's newly discovered evidence claim without a hearing.

Ineffective Assistance of Counsel

Again, the State does not believe that this issue was contemplated in the Remand Order. It is not germane to the *Brady* claim nor is it "new information." Nevertheless, we address the issue on the chance we misread the Remand Order.

The Defendant's new ineffective assistance of counsel claim is procedurally barred. In *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 179, 517 N.W.2d 157 (1994), the Wisconsin Supreme Court created a simple rule designed to limit successive postconviction motions and appeals in criminal cases. A defendant must raise all grounds for relief in his or her "original, supplemental, or amended motion" for postconviction relief, or on direct appeal. *See id.* at 181 (applying Wis. Stat. § 974.06(4)). If a ground for relief was not raised or incompletely raised in a prior postconviction motion or direct appeal, it may not become the basis for a new postconviction motion unless the defendant can demonstrate a "sufficient reason" why the new argument was not previously raised. Wis. Stat. § 974.06(4); *Escalona-Naranjo*, 185 Wis. 2d at 185. The purpose behind this rule is clear: the promotion of finality in criminal litigation by requiring defendants to bring all available grounds for relief in a single postconviction motion or appeal, unless there are good and sufficient reasons for not doing so. *Id.*

The Defendant had ample opportunity to review the contents of the Dassey computer hard drive (seven DVDs) well in advance of his direct appeal because he

had the complete contents of the hard drive (seven DVDs) seven weeks before trial. He has not offered, let alone demonstrated, a sufficient reason for failing to bring this claim in one of his many prior postconviction motions. This Court should deny the ineffective assistance of counsel claims, without a hearing, as procedurally barred.

Alternatively, this Court should deny the ineffective assistance of counsel claim as insufficiently pled. A postconviction motion alleging ineffective assistance of counsel does not automatically trigger a hearing. *State v. Phillips*, 2009 WI App 179, ¶ 17, 322 Wis. 2d 576, 778 N.W.2d 157. Whether Avery's new motion sufficiently alleges his claims to require a *Machner* hearing presents a mixed question. *Allen*, 274 Wis. 2d 568, ¶ 9. This Court must first determine if the Defendant alleged sufficient facts that, if true, would entitle him to relief. Meaning, his *motion* must contain sufficient facts to establish that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). He must also allege sufficient facts to establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Under *Strickland v. Washington*, 466 U.S. 668 (1984), the Defendant must demonstrate that trial counsel's failure to pursue the Velie CD constitutes deficient performance. He has not demonstrated, or even argued, that trial counsel's performance was deficient. In addition, he fails to argue and establish how he was prejudiced by the alleged failures of trial counsel. His claim of ineffective assistance

is unsupported by any facts, let alone material facts. It is a conclusory argument if there ever was one. He baldly asserts that counsel was ineffective for not hiring more experts. That is insufficient to warrant a hearing. And the Defendant's passing reference to previous filings will not save this insufficiently pled claim. *See Ellsworth v. Schelbrock*, 229 Wis. 2d 542, 566, 600 N.W.2d 247 (Ct. App 1999) ("we consider 'for-reasons-stated-elsewhere' arguments to be inadequate and decline to consider them").

The Defendant has failed to allege sufficient facts and presented only conclusory allegations. Under these circumstances, this Court should exercise its discretion to deny the claim without a hearing. *See Phillips*, 322 Wis. 2d 576, ¶ 17 (citing *State v. Bentley*, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996)).

Other Assertions

In his brief, the Defendant makes a number of claims or assertions that are not directly related to the issues as framed by the Defendant. Those claims are derived from the findings and conclusions of Gary Hunt's forensic analysis of the Dassey computer. The analysis of the Defendant's expert is not relevant to the claims actually raised by the Defendant in his motion. Thus the State will not lead this Court down that rabbit hole, and will not address the Defendant's assertions related to specific internet searches of the computer, when they occurred, who conducted the searches, and/or whether the computer was subject to someone's effort to delete information.

Similarly, the Defendant devotes a portion of his postconviction motion to discussing the inconsistent statements of Bobby Dassey, comparing his trial testimony to an interview that he gave in 2005 to the appointed attorneys representing the Defendant at that time. (Mot. to Suppl. Previously Filed Mot. for Postconviction Relief 25-26, July 6, 2018.) It is woefully unclear how those inconsistent statements relate to any of the arguments the Defendant has raised in this motion. The State will not make those connections for him, if any exist. Bobby Dassey's 2005 interview has absolutely nothing to do with the Velie CD.

Conclusion

There was no *Brady* violation because the evidence, the Velie CD, was not suppressed, it was not material; and the Defendant has not demonstrated a reasonable probability of a different outcome at trial had he had the Velie CD before trial.

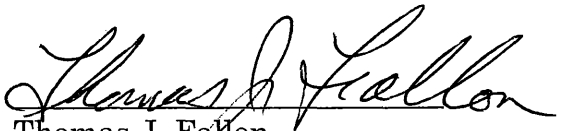
The Velie CD is not *newly discovered evidence* because it was in existence before trial, the Defendant was aware of its existence, and he needed only to ask for the Velie CD to procure it. His newly attributed significance to the Dassey computer does not transform the Velie CD into new evidence.

The ineffective assistance of trial counsel claim fails on two accounts; first, the claim is procedurally barred, and second, the claim is insufficiently pled to warrant a hearing.

Therefore, this Court should deny the Defendant's motion without a hearing.

Dated this 27th day of July, 2018.

Respectfully submitted



Thomas J. Fallon,
Assistant Attorney General
And Special Prosecutor
State Bar No. 1007736

Norman Gahn
Special Prosecutor
State Bar No. 1003025

Mark S. Williams
Special Prosecutor
State Bar No. 1017937

Attorneys for Plaintiff

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
Phone: (608) 266-7340
Fax: (608) 267-2778
E-mail: fallontj@doj.state.wi.us