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Manitowoc County, WI
2005CF000381

STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 05-CF-381

STEVEN A. AVERY,

Defendant.

RESPONSE OPPOSING A MOTION FOR AN EVIDENTIARY HEARING AND POSTCONVICTION RELIEF UNDER WIS. STAT. § 974.06

The State of Wisconsin, by undersigned counsel, opposes Defendant Steven A. Avery's motion for postconviction relief and request for an evidentiary hearing pursuant to Wis. Stat. § 974.06. He claims that his newly discovered purported witness's, Thomas Sowinski's, testimony would have allowed him to meet the three-part *Denny*[1] test to introduce third-party perpetrator evidence at trial and allege that Bobby Dassey, Avery's nephew, committed the murder and then planted all of the evidence to frame Avery. He also claims that the State committed a violation of *Brady v. Maryland*[2] by failing to turn over to defense counsel a snippet of audio recorded by the

[1] *State v. Denny*, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984).
[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

Manitowoc County Sheriff's office when Sowinski called them on November 6, 2005, which Avery claims would have led defense counsel to Sowinski and allowed them to present this theory of defense instead of the one they chose. He also attempts to relitigate his *Brady* claim regarding Kevin Rahmlow's assertion that he told Sergeant Andrew Colborn on November 4 that he saw a car that looked like the victim's parked on the side of the road. Finally, he asks this Court to order a new trial in the interests of justice.

The motion is insufficiently pled, unsupported by sufficient facts, and the record conclusively demonstrates that Avery is due no relief on either his newly discovered evidence or his *Brady* claims. And circuit courts have no authority to order a new trial in the interests of justice unless the request is raised on direct appeal. Accordingly, no evidentiary hearing is necessary, and this Court should summarily deny the motion.

BACKGROUND

Teresa Halbach, a 25-year-old professional photographer, disappeared on October 31, 2005. (Doc. 1056:2.)[3] She was last seen walking toward Steven Avery's trailer after photographing a van on the Avery Salvage yard, per Avery's request. (Doc. 1056:2.) She was reported missing on November 3 and her RAV-4 was found on the Avery property November 5. Police searched the

[3] A copy of the Wisconsin Court of Appeals decision is included as Ex. 4, 001-049.

Avery property and found burned bone fragments from nearly every bone in the human skeleton in Avery's burn pit with DNA matching Ms. Halbach's and two skull fragments with bullet holes in them, along with rivets from a type of jeans she owned; Avery's and the victim's blood in the RAV-4; the burned remnants of Ms. Halbach's camera and other items; Ms. Halbach's RAV-4 key in Avery's bedroom with Avery's DNA on it; Avery's DNA on the hood latch of the RAV-4; and shell casings and bullet fragments in Avery's garage that were fired from the gun in Avery's bedroom and one of which had Ms. Halbach's DNA on it. (Doc. 1056:3; 596:160–64; 597:38–43; 600:166; 601:88–89, 100–03, 107–18.)

A five-week trial commenced where "[t]he State's theory was that Avery shot Ms. Halbach in the head, in his garage, and threw her into the cargo area of the RAV-4." (Doc. 1056:3.) He then burned the electronics and the camera and cremated Ms. Halbach's remains, transferred some of them to a burn barrel, and hid the RAV-4 until he could crush it in the Avery car crusher. (Doc. 1056:3.) Avery's theory of defense was that the police were biased against him because of a wrongful conviction lawsuit he had pending against Manitowoc County and the Sheriff's Department and planted the evidence against him. (Doc. 1056:3.)

"The jury found Avery guilty of first-degree intentional homicide and felon in possession of a firearm." (Doc. 1056:3.) He was sentenced to life

without the possibility of extended supervision. (Doc. 1056:3–4.) Avery appealed and the conviction was affirmed. (Doc. 1056:4.) Avery filed a Wis. Stat. § 974.06 motion pro se in 2013. (Doc. 1056:4.) The motion was denied, and the subsequent appeal was stayed and later dismissed on Avery's motion. (Doc. 1056:4.) Avery then, between 2017 and 2019, filed an additional six postconviction motions alleging myriad claims of error, all of which were denied. (Doc. 1056:4.) Avery appealed and the court of appeals affirmed. (Doc. 1056:4.) The Wisconsin Supreme Court denied his petition for review on November 17, 2021.

Avery then filed the motion at issue here seeking an evidentiary hearing. He claims that the State committed a *Brady* violation by failing to provide his defense counsel with a snippet of audio recorded by the Manitowoc County Sheriff's Office on November 6, 2005, when Thomas Sowinski, who used to deliver newspapers to the Avery property, called to report that he needed to speak to someone about the investigation into Halbach's disappearance. (Doc. 1065:8, 31–74.) He also alleges that Sowinski claims he saw Bobby Dassey and an "unidentified older male" pushing a dark blue RAV-4 down the road sometime after Ms. Halbach's disappearance, which Avery alleges is newly discovered evidence warranting a new trial because it would allow him to set forth a third-party perpetrator defense.

(Doc. 1065:24–46, 79–80.) Finally, he additionally seeks a new trial in the interest of justice. (Doc. 1065:46–50.)

ARGUMENT

A circuit court may deny a postconviction motion without a hearing if the facts alleged do not entitle the movant to relief, or "if one or more key factual allegations in the motion are conclusory." *State v. Allen*, 2004 WI 106, ¶ 12, 274 Wis. 2d 568, 682 N.W.2d 433. To sufficiently plead a postconviction motion, the defendant must present, within the four corners of the document, the "who, what, where, when, why, and how" that would entitle him to the relief he seeks. *Id.* ¶ 23. Mere speculation presented as fact is a conclusory allegation insufficient to meet this standard. *See, e.g.*, *State v. Burton*, 2013 WI 61, ¶ 69, 349 Wis. 2d 1, 832 N.W.2d 611; *State v. Lock*, 2013 WI App 80, ¶¶ 42–47, 348 Wis. 2d 334, 833 N.W.2d 189; *State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999).

A sufficiently pleaded motion, however, is not enough to require a hearing. The Wisconsin Supreme Court has recently underscored that "an evidentiary hearing is not mandatory if the record as a whole conclusively demonstrates that [the] defendant is not entitled to relief, even if the motion alleges sufficient nonconclusory facts." *State v. Ruffin*, 2022 WI 34, ¶ 37, 401 Wis. 2d 619, 974 N.W.2d 432 (citation omitted).

I. Avery failed to plead sufficient facts to meet any of the prongs of the *Denny* test.

"When a defendant seeks to present evidence that a third party committed the crime for which the defendant is being tried, the defendant must show 'a legitimate tendency' that the third party committed the crime; in other words, that the third party had motive, opportunity, and a direct connection to the crime." *State v. Wilson*, 2015 WI 48, ¶ 3, 362 Wis. 2d 193, 864 N.W.2d 52 (citation omitted). A defendant's offer of proof on these three prongs is insufficient if it merely establishes a bare possibility that the third party could have been the perpetrator. *Id.* ¶ 83. Rather, "[i]t is the defendant's responsibility to show a *legitimate* tendency that the alleged third-party perpetrator committed the crime." *Id.* ¶ 59 (emphasis in original).

Whether Sowinski's testimony and the other allegations Avery presented actually allow him to meet the prongs of *Denny* is a threshold question; if it does not, Avery cannot meet his burden on either his newly discovered evidence claim or his *Brady* claim. And, as explained below, Avery has not pled sufficient facts to meet the *Denny* test and thus no hearing is necessary on these new claims.

A. Motive

"'Motive' refers to a person's reason for doing something." *Wilson*, 362 Wis. 2d 193, ¶ 62 (citation omitted). Avery claims that he has established

that Bobby Dassey had a motive to kill the victim because pornography and some gory images were found on the communal computer in the Dassey home. (Doc. 1065:17–24.) But what Avery presents is, on the whole, a misrepresentation of the facts, and those assertions that are minimally consistent with the record consist of tenuous conjecture only. He falls far short of presenting facts that would establish that Bobby Dassey is the person who accessed the pornography and other images, let alone that anything found on the Dassey computer plausibly establishes that Bobby (or anyone else) had a motive for Ms. Halbach's murder.[4] The facts of record show that these computer searches are neither relevant to nor probative to establish that anyone, but particularly not that Bobby, had a motive for murder in October 2005.

First, Avery has once again failed to supply sufficient facts to prove that Bobby conducted any of these searches. As the court of appeals noted previously in this case, the mere fact that Bobby could have been at home when some of these searches were conducted fails to establish anything about

[4] Avery's contention that "[l]aw enforcement considered pornography as evidence of motive in Ms. Halbach's murder" merely because they collected it and wrote a report about it is false. (Doc. 1065:18.) Law enforcement conducting an examination during a murder investigation gather anything that could conceivably be relevant to the case; vast portions of what the police collect is later determined to be of no importance. Avery's contention that they seized and reported about this pornography because they believed it was evidence of motive is pure speculation which he has not supported with any record evidence at all.

who actually conducted them, and Avery cannot rely on his computer expert's or anyone else's speculation on what Bobby's schedule might have been on those days. *See, e.g.*, *State v. Avery*, No. 2017AP2288-CR, 2021 WL 3178940, ¶¶ 67 n.25, 68 (Wis. Ct. App. July 28, 2021) (unpublished). But speculation based on the timestamps from a fraction of the searches is once again all Avery has provided, with no citations to any actual facts of record about Bobby's whereabouts at those times nor anyone else's who may have had access to the home. (Doc. 1065:20–21.)[5] As the court of appeals previously observed, the existence of the searches is not a fact that would establish Bobby was even in the house at those times, let alone that he was the person using the computer or accessing these images. *Avery*, 2021 WL 3178940, ¶ 67 n.25.

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[5] Avery's record citations do not make sense. He cites to "689:35; 705:56–57; 630:28–29; 633:47; 737:164; 739:154; [and] 743:12." (Doc. 1065:21.) Document 689 is a single-page receipt of the circuit court file and document 705 is similarly a single-page document regarding Avery's visits by his defense counsel. Documents 630 and 633 are extension motions. Document 737 is a two-page email between law enforcement about license plate photos, 739 is a single-page exhibit about a 1994 jail phone call, and 743 is a single-page exhibit detailing evidence collected from Avery's garage floor. Avery appears to be working off of the record index numbers in the court of appeals and referring to his own previous arguments in those filings. Those document numbers do not correspond to the record index in this Court; therefore, it is impossible to ascertain what Avery is attempting to pinpoint. (E.g., Avery's App. Vol I–III (Doc. 1073; 1074; 1075.).) The State thus makes educated guesses at which exhibits Avery means to cite.

Furthermore, Avery has failed to support his allegations with sufficient factual particularity to establish anything related to Bobby Dassey or even to a crime. There are no timestamps given for the searches Avery points to in Velie's report and no explanation of how any of them are relevant to an individual's motive for this murder. (Doc. 1065:17–24; 1074:50.) Most of them are generic and mundane—the mere fact that someone searched for "[n]ews," "[b]ody," "[j]ournal" and "[c]ement" doesn't show anything similar or related to this crime. (Doc. 1074:50.)

Additionally, Avery's own submitted exhibit shows that the bulk of the searches for pornography or gory material that he relies upon for this allegation of motive had no similarity to this crime and either occurred on a weekend when anyone there could have accessed the computer, or occurred after 3:45 p.m. on a weekday when Blaine indisputably also had access to it. (Doc. 1065:20–21; 1074:62–66.) Nor did Avery account for the fact that Mishicot School District had spring break from March 24, 2005, to March 30, 2005, meaning Blaine and Brendan and anyone they invited over also could have been in the home on weekdays during that time, and from April 7, 2006,

to April 18, 2006, meaning Blaine at least also had access during those weekdays.[6]

Indeed, of the 128 searches listed only 28 of them occurred between 7:00 a.m. and 3:45 p.m. on a weekday. (Doc. 1065:20–21; 1074:62–66.) And of those 28 searches, only 3 of them occurred before Ms. Halbach's murder—two at 8:14 a.m. on Tuesday, September 13, 2005, and one at 7:54 a.m. on Thursday, September 15, 2005. (Doc. 1074:62–66.) Avery fails to explain how Bobby Dassey's only possibly having searched for pornography a mere three times before Ms. Halbach's murder is sufficient to show he was a voracious violent pornography consumer on October 31, 2005, who was thus motivated to abduct and kill a stranger that day because of it. (Doc. 1065:17–24.)

Avery once again attempts to rest this theory on *Dressler v. McCaughtry*, 238 F.3d 908 (7th Cir. 2001), as if it held that any and all pornography consumption establishes a motive for murder regardless of circumstances. (Doc. 1065:22–24.) *Dressler* held no such thing and is not remotely on point (not to mention that as a federal habeas corpus case it is not binding law in Wisconsin). The facts of the underlying Wisconsin case in *Dressler* are a vast departure from the facts of this case. There, the male

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[6] Records of the academic calendars for all Wisconsin school districts for the dates in question can be found at https://dpi.wi.gov/cst/data-collections/school-directory/calendar (*last accessed* November 1, 2022).

victim was last seen approaching Dressler's house for political campaign activity; he was assaulted and murdered in an extremely specific and particularly brutal way that included binding, mutilation, and dismemberment; and police found myriad weapons and restraints, along with pictures, magazines, and videos depicting similarly murdered and mutilated victims and homosexual pornography in Dressler's home. *Dressler*, 238 F.3d at 910–11. These items were admitted as other acts evidence of Dressler's intent, motive, and plan to assault and kill the victim in that particular manner. *Id.* at 914.

But in that case: (1) there was no dispute that the materials were Dressler's, unlike in this case where anyone could have been responsible for these searches and Avery has not provided any facts showing otherwise; (2) the materials found in Dressler's home depicted things that very closely mirrored the brutal crime, whereas here the searches Avery is attempting to rely on vary widely from the obscene to the mundane with no relation to how Ms. Halbach's murder occurred—indeed, Avery fails to point to a single image or search for someone who was shot and the body burned nor anything that would suggest that these widely varying types of pornography had any similarity whatsoever to Ms. Halbach's murder, and has included such irrelevant and off-point searches as "MySpace," "tires," "race car accidents," "ford focus accident," "diseased girls" and "big woman naked" (Doc. 1074:50,

62–66); and (3) in *Dressler* there was no dispute that Dressler owned all of the pornographic and violent material *before* the murder occurred, and they were deemed relevant to show that he was both homosexual and had a fascination with mutilation and dismemberment and thus a motive, intent, and plan to act out his violent sexual fantasies in this particular manner by the time the male victim arrived at Dressler's home. *Dressler*, 238 F.3d at 914. Here, the vast majority of the material on which Avery relies and actually provides some timestamp for has no similarity or even relation to how Ms. Halbach's murder occurred, and it was not searched for until months *after* the murder. (Doc. 1074:62–66.) Avery fails to explain how motive to fulfill a violent porn-fueled sexual fantasy can be formed or proven by someone not viewing any of this material until months after the murder already occurred.

To the extent that *Dressler* is relevant at all, it actually shows that Avery has not met his pleading burden because a comparison to it shows why these computer contents would not be admissible as other acts evidence to prove motive if Bobby were the defendant. *See Wilson*, 362 Wis. 2d 193, ¶ 63. Other acts evidence is admissible if it meets the familiar three-part test from *State v. Sullivan*, 216 Wis. 2d 768, 772, 576 N.W.2d 30 (1998), requiring it to be offered for permissible purpose, relevance, and that the probative value of

the evidence is not outweighed by unfair prejudice. The latter two prongs are not met.

Motive is a permissible purpose for introducing other acts evidence. *Id.* But as explained, none of what Avery has presented is relevant to show motive to commit this specific crime. The court of appeals already determined that Avery's contention that these images are similar to the violent murder of Ms. Halbach was false. *Avery*, 2021 WL 3178940, ¶ 67 n.25, 68. The pornography and videos of murder and mutilation deemed relevant in *Dressler* were indisputably Dressler's, they closely mirrored what happened to the victim in that case, and were collected by the defendant long before the murder occurred. *See Dressler*, 238 F.3d at 910–14. Nothing about an unidentified person searching a communal computer for various types of pornography and pictures of race car accidents or drowning victims months after Ms. Halbach's murder occurred shows an interest in anything similar to this crime, nor makes it any more or less likely that Bobby Dassey had a motive to shoot and kill Ms. Halbach in October 2005. The computer contents are simply not relevant. These searches and images also would be excluded because, without some closer tie to the events of October 31, 2005, their prejudicial value would greatly outweigh whatever minimal relevance they might have and influence the jury to convict because they believed whomever

conducted the distasteful searches must be a bad person. *Sullivan*, 216 Wis. 2d at 783.

Finally, apart from the lack of evidentiary support, Avery's theory that this pornography, accessed months later in 2006, shows that Bobby Dassey had a motive to murder a stranger within minutes of meeting her in October 2005 ignores basic human experience. Despite Avery's inadmissible "police procedure" expert's opinion,[7] it is no surprise to find pornography and gore accessed on a communal computer available to at least four teenage boys—not to mention anyone else permitted in the Dassey home. But viewing pornography or searching for "race car accidents" does not create a motivated murderer. Even if Avery could show that Bobby was the one who performed these searches or accessed these images (which, again, he has provided no facts to support), he provides nothing establishing that viewing these images would give someone a motive for this murder, and certainly nothing establishing that Bobby Dassey specifically had such a motive in October 2005. Avery did not plead sufficient facts to establish Bobby's motive.

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[7] Avery failed to show that Gregg McCrary has even one relevant credential to give the type of opinion referred to in Avery's motion (Doc. 1065:23), and no Wisconsin case has ever permitted a "police procedure" expert due to the high likelihood of turning the proceedings into a minitrial on the propriety of law enforcement's protocols. Wis. Stat. §§ 904.03, 907.02.

B. Opportunity

"The second prong of the 'legitimate tendency' test asks whether the alleged third-party perpetrator *could have* committed the crime in question." *Wilson*, 362 Wis. 2d 193, ¶ 65 (emphasis in original). Evaluation of this prong is guided by the defense's theory of the third party's involvement in the crime. *Id.* ¶ 68. Sometimes, opportunity can be established by simply showing the third party was at the crime scene. *Id.* ¶ 65. When, as here, the theory of how the third party committed the crime requires that person to have carried out a series of complicated and difficult tasks, it is not enough to show the third party's mere presence at the scene and an unaccounted-for period of time. *Id.* ¶¶ 65, 68, 85. In this situation, to meet the opportunity prong, the defendant has to offer evidence that the alleged third-party perpetrator had the skills, contacts, tools, time, and/or other means necessary to have committed the crime and staged the scene in the manner the defendant alleges—in other words, "evidence that the third party had the realistic ability to engineer such a scenario." *Id.* ¶¶ 10, 85; *see also State v. Krider*, 202 P.3d 722, 729 (Kan. Ct. App. 2009) (holding that a third-party's possible access to hair and blood samples from the victim was mere conjecture insufficient to establish opportunity to frame the defendant). Avery's submissions do not meet this threshold.

Avery fails to acknowledge that his "defense theory" has changed drastically from the time of trial. (Doc. 1065:25.) Then, his contention was that he was framed by law enforcement, who had plenty of time, knowledge, and access to the evidence to plausibly doctor the crime scene. Now, he claims his nephew Bobby Dassey framed him, and did so in a very short time period. That means that to sufficiently plead his motion, he had to provide more than just a showing that Bobby physically "had access to" the evidence because he was on the property. (Doc. 1065:25–26); *Krider*, 202 P.3d at 729. He had to show that Bobby had the actual ability to both commit the murder and then complete each step of this framing process, and to do so before November 5. And Avery has not provided facts that would establish at least four key components necessary to sufficiently plead that Bobby had the opportunity to kill the victim and plant all the evidence against his uncle: the "why," the "when," the "where," and the "how."

Assuming for the sake of argument that Avery had pled facts that would establish Bobby's motive to kill in the first place (and as explained above, he has not), Avery has not offered anything that would suggest *why* Bobby would want to frame Avery, especially given the grave risks and extreme difficulty of doing so. (Doc. 1065:24–27); *see Krider*, 202 P.3d at 729. Anyone who murders someone typically wants to escape detection. But that does not explain *why Bobby would frame Avery for it*, especially when doing

so would ensure that law enforcement would be taking a close and intense look at the entire Avery property and everyone who lived on it. He offers no reason why Bobby would want to send him to prison. If Bobby Dassey truly wanted to hide the evidence of a crime he committed, there were limitless ways to do so that would not have led law enforcement directly to the Dassey's door—Lake Michigan, for example, was a mere few miles from the Avery property, and the property was surrounded by vast tracts of undeveloped land. Nor has Avery explained why someone who wanted to frame him would go to such lengths to *hide* the evidence. Surely if Bobby or anyone else wanted to frame Avery, they wouldn't have gone out of their way to make all of the evidence difficult for law enforcement to detect, gather, and connect to Avery—it makes no sense to burn the victim's remains and personal property in an attempt to conceal them, or to drip Avery's blood around the RAV-4 but then remove the license plate from and attempt to hide the vehicle by covering it with debris at a point far away from Avery's trailer. Avery has provided no facts explaining why Bobby Dassey's framing him is plausible when he has given no reason whatsoever that would explain why Bobby would do this.

Avery's argument fails on the "when" and the "how," as well, as he's provided nothing that could plausibly establish that Bobby had the knowledge, skills, tools, or time to engineer this elaborate ruse. The mere fact

that Bobby was on the Avery property at some time when Avery's hand was bleeding falls far short of facts necessary to establish that Bobby had the opportunity to successfully orchestrate this extremely complicated supposed frame-up. (Doc. 1065:26); *see Wilson*, 362 Wis. 2d 193, ¶ 85 (third party's mere presence at the scene of a shooting was insufficient to show that the defendant had the contacts and resources necessary to have had the opportunity to orchestrate a "hit" on the victim). The complete absence of the necessary facts to support several crucial elements of how Bobby could have accomplished staging this scene demonstrate that Avery has failed to plead sufficient facts to show that Bobby had any opportunity to kill the victim and frame Avery in this manner. *See id.* ¶ 69.

Avery has offered no facts at all that would establish *how* Bobby Dassey—an 18-year-old high-school graduate with no criminal record whatsoever and who was working third shift at a furniture factory (Doc. 581:34–35):

(1) managed to steal, at some unidentified time prior to October 31, the rifle hanging above Avery's bed with which the victim was shot, and at some other unidentified time before November 5 managed to replace it, with Avery's never noticing (Doc. 594:92–93, 100–02, 108–12; 596:134–39; 597:163–65; 601:88–89, 100–03, 107–18);

(2) could have abducted and killed the victim and hidden both her body and her car in some unknown area in the minutes between her arrival on the property and Scott Tadych passing Bobby Dassey on the highway around 3:00 p.m. on October 31, 2005 (nor has Avery provided any facts to establish where the killing could have happened apart from a nondescript "in the [RAV-4]," or where Bobby could have hidden the RAV-4 and the victim's remains in this short period of time) (Doc. 581:36–45; 599:123; 1065:24–27.)

(3) had the scientific sophistication and knowledge necessary for it to occur to Bobby to collect, transport, and plant Avery's blood from his sink and—as Avery has completely overlooked—his non-blood touch DNA on the hood latch of victim's RAV-4 and her keys, or how Bobby acquired the skills to do this successfully (Doc. 597:122, 125–26, 168–83, 185–96; 1065:24–27);

(4) had a convenient stash of unidentified instruments capable of collecting and transporting liquid blood on hand or what those might have been;

(5) planted the keys to the RAV-4 in Avery's trailer unnoticed and at some unspecified time between November 3 and November 5, yet also either managed to move the RAV-4 off of the 40-acre property without the keys or drive it away and return on foot from wherever he supposedly took it and then sneak into Avery's trailer again to hide the keys, at some other unidentified time, once again unnoticed (Doc. 596:35–36; 1065:24–27);

(6) found, and then planted, a tiny, mangled bullet fragment that Bobby inexplicably knew had the victim's DNA on it underneath items in Avery's garage, or alternatively how he shot the victim in Avery's garage on October 31 and then at another unidentified time scrubbed the scene with Avery remaining unaware—this despite Avery indisputably having been working on his Suzuki and other vehicles in and around the garage around this time (Doc. 581:48; 594:99–100; 596:134–39, 185–86; 597:163–68);

(7) burned the victim's body in some undisclosed location and then moved the remains to Avery's burn pit, again completely undetected, and did it so thoroughly as to include "at least a fragment or more of almost every bone below the neck" in the entire human skeleton, along with the rivets from her jeans (nor has Avery provided any facts showing where and when this occurred) (Doc. 596:160–64; 597:38–40; 600:166.);

(8) convinced his younger brother Brendan to go along with this plan and fabricate a confession implicating himself and Avery, or why Brendan would do so (Doc. 179:172–86).

Even if one accepts at face value Avery's theory that Bobby was scientifically sophisticated and equipped enough for it to occur to him to do all of the blood-evidence-gathering-and-planting, Avery provides nothing that would explain how Bobby could have done so in the roughly half an hour window before the blood would have coagulated or dried when Avery was at

Menards on November 3. (Doc. 1065:24–29.) And Avery has not pled even a single fact to establish how or when Bobby could have planted any of the rest of the mountain of forensic evidence against Avery, particularly the victim's remains, the non-blood DNA evidence, and the bullet, and also successfully eliminate any trace of his own involvement or physical presence. (Doc. 597:127–32, 175–76, 182–96; 1065:24–29).

In sum, Avery has provided no facts in his motion that would establish why Bobby would want to frame him or when, where, or how Bobby could have even possibly accomplished any of the necessary tasks to make this theory plausible. (Doc. 1065:24–27.) He has supplied nothing other than a series of constantly-shifting affidavits about his and others' activities during the relevant time frame and then backfilled it with speculation—with zero factual support—about how a small fraction of the evidence against him (the blood and the car only) could have ended up where it was if someone else was the perpetrator and pretends the rest of the evidence does not exist. (*Compare* Docs. 1065:24–27; 179:22–30; 965:1–7; 1071; Exhibit 3 (Sowinski's April 10, 2021 Affidavit).) That is flatly insufficient to provide facts that could show that Bobby had the opportunity to engineer this complicated scheme.

C. Direct Connection

Direct connection is assessed by considering "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" and take the defendant's theory "beyond mere speculation." *Wilson*, 362 Wis. 2d 193, ¶¶ 59, 71 (emphasis in original). "No bright lines can be drawn as to what constitutes a third party's direct connection to a crime," but it must be more than "a connection between the third party and the crime"; it requires "some direct connection between the third party and the *perpetration of* the crime." *Id.* (emphasis in original).

Sowinski's averments that he purportedly saw Bobby pushing a RAV-4 on November 5—several days after Ms. Halbach's murder—do not provide a link between Bobby Dassey and *perpetration of the murder*. At the most generous, the exhibits Avery has submitted could establish that Bobby was involved in moving the RAV-4 to the location where it was eventually found.[8] That is nothing more than a possible "connection between the third party and

[8] This would require a reading of Avery's submissions that ignores their glaring inconsistencies. The information Sowinski initially provided in his emails to counsel does not at all match up with what his affidavits now say about what or who he observed, when he observed them, and who he spoke to at the Manitowoc County Sheriff's office. (*Compare* Exhibit 1 (Sowinski's Dec. 26, 2020 email), Exhibit 2 (Sowinski's Jan. 7, 2016 email) and Exhibit 3 (Sowinski's April 10, 2021 Affidavit) *with* Doc. 1071.) And, in fact, Sowinski's original information to current defense counsel would have *eliminated* Bobby Dassey as a suspect, because Bobby was at work during the time frame Sowinski gave, and Mike Osmunson was nowhere near age 60 in 2005. (Doc. 581:25–26; Exhibit 1.) Sowinski's account changed drastically after having his memory "refreshed" by counsel and her investigators. (Doc. 1071:3). *See, e.g.*, *State v. Avery*, 2017AP2288-CR, 2021 WL 3178940, ¶¶ 26, 31–33, 67 n.25, 79 (Wis. Ct. App. July 28, 2021) (unpublished).

the crime." *Wilson*, 362 Wis. 2d 193, ¶ 71. It provides no link at all between Bobby and the perpetration of the actual killing. It also does nothing to establish that Avery was *not* the killer—even if believed, all Sowinski's evidence would show is that perhaps Bobby was involved in trying to cover up Avery's crime. *See State v. Bembenek*, 140 Wis. 2d 248, 257, 409 N.W.2d 432 (Ct. App. 1987). After all, Avery recruited Brendan to help him try to cover his tracks; the same could be true about Bobby. Nothing Sowinski avers connects Bobby to the actual killing in any way.[9] Direct connection requires a showing that "under the totality of the circumstances, the evidence suggests that a third-party perpetrator *actually committed* the crime." *Wilson*, 362 Wis. 2d 193, ¶ 71. Avery's multiple layers of conjecture, piled on top of an allegation that Sowinski maybe saw Bobby pushing a car similar to the victim's at some point, do nothing to establish any fact showing that Bobby actually murdered the victim.

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In short, Avery's claim that "the *Denny* requirements are now satisfied" is wrong. (Doc. 1065:18.) The "tendency" that Bobby committed this crime

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[9] All of Avery's salacious claims that Mike Osmunson must somehow be involved because he and Bobby spoke frequently and the two of them did not remember many years later precisely what date they had a conversation with Avery or when or what they did when they spent time together do nothing to support this theory and have no relevance whatsoever to Avery's ability to meet any of the three prongs of *Denny*. (Doc. 1065:27–29, 61–62.)

based on what Avery has presented here has not even entered the ballpark of "legitimate." *Wilson*, 362 Wis. 2d 193, ¶ 59. Avery's allegations are conjecture and speculation plugged in to unaccounted-for periods of Bobby's time. That is insufficient to meet *Denny*. *Id.* ¶ 68, 84. The dearth of facts in Avery's motion necessary to establish Bobby's motive or opportunity to commit this crime and then carry out an elaborate planting scheme, along with nothing tying Bobby to perpetration of the actual killing, means Avery has failed to establish a *legitimate* tendency that Bobby was the killer. Avery thus failed to meet his pleading burden on both his newly discovered evidence and his *Brady* claim. No hearing is necessary.

II. Avery is not entitled to an evidentiary hearing on his newly discovered evidence claim.

Avery's newly discovered evidence claim is multilayered. To be entitled to a hearing, Avery had to plead sufficient facts to establish not only that Sowinski's alleged testimony would have allowed him to meet the *Denny* test (which, as explained above, he did not do), but also sufficient facts to establish that if he had presented this third-party perpetrator defense at trial, a jury would have had a reasonable doubt about his guilt. He has not done so.

A. Defendants must meet a five-part test to obtain a new trial based on newly discovered evidence.

"To set aside a judgment of conviction based on newly discovered evidence, the evidence must be sufficient to establish that the defendant's conviction resulted in a 'manifest injustice.'" *State v. Avery*, 2013 WI 13, ¶ 25, 345 Wis. 2d 407, 826 N.W.2d 60 (citation omitted). When moving for a new trial based on the allegation of 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, 473, 561 N.W.2d 707 (1997)).

"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.'" *Id.* "A court reviewing the newly discovered evidence should consider whether a jury would find that the evidence 'had a sufficient impact on other evidence presented at trial that a jury would have a reasonable doubt as to the defendant's guilt.'" *Id.* (citation omitted). "While the court must consider the new evidence as well as the evidence presented at trial, the court is not to base its decision solely on the credibility of the newly discovered evidence." *Id.* Instead, the court must ask

whether a jury presented with this evidence, regardless of its lack of credibility, would have had a reasonable doubt about the defendant's guilt when considered along with the evidence presented against the defendant at trial.

The State disputes that the evidence Avery submitted is material for the reasons explained above. Even if Avery could meet the first four prongs of the newly discovered evidence test, though, he cannot show that this evidence would cause a jury to have a reasonable doubt about his guilt.

B. Because Avery failed to plead facts that would sufficiently establish the three prongs of *Denny*, his allegations that Bobby was the perpetrator would be inadmissible at a new trial.

If the newly discovered evidence presented by a defendant would be inadmissible at a new trial, there is no way it could have an impact on the jury's evaluation of the other evidence and the defendant fails to meet his burden. *Bembenek*, 140 Wis. 2d at 256–57.

As *Wilson* makes clear, "the *Denny* test is a three-prong test; it never becomes a one-or two-prong test." *Wilson*, 362 Wis. 2d 193, ¶ 64. If a defendant fails to make an adequate showing on any of the three prongs, the third-party perpetrator evidence is inadmissible. And as the State explained, Avery failed to meet his burden on all three prongs of the test. But even demurring on motive, his opportunity evidence is flatly insufficient to

establish that Bobby could have committed the crime or staged the crime scene, and his direct connection evidence doesn't establish a connection between Bobby and the actual killing. Accordingly, no jury would ever be presented with what Avery has submitted here, and therefore there is no possibility that it could affect the outcome of a new trial. *Bembenek*, 140 Wis. 2d at 256–57.

C. Even if this evidence were admitted and this theory of defense were presented, there is no reasonable probability of a different result at a new trial.

Even assuming that this was sufficient to meet *Denny* and Avery had a new trial presenting this defense instead of the police bias defense, there is no possibility that any jury hearing it would have a reasonable doubt about Avery's guilt. As explained above, there are far too many irreconcilable inconsistencies between Avery's allegations about Bobby Dassey and the actual evidence produced at trial. Particularly damning would be Avery's complete failure to account for his DNA on the hood latch of the RAV-4 and Ms. Halbach's remains—again, including a fragment from "virtually every" bone in the human body—being found in his burn pit, and nothing to explain how Bobby could possibly be responsible for the bullet with Ms. Halbach's DNA on it being found in his garage and matched to the gun above his bed.

Avery's new defense would essentially be asking the jury to ignore the forensic evidence introduced against him. When presented with the common-

sense explanation that the evidence was located where it was because Avery shot and killed the victim and then attempted to hide the evidence of his crime versus Avery's attempt to paint Bobby as a porn-obsessed, scientifically savvy, and extraordinarily stealthy criminal mastermind who inexplicably wanted to frame his uncle, no one would have a reasonable doubt about Avery's guilt.

"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." *Wilson*, 362 Wis. 2d 193, ¶ 70. Here, overwhelming evidence that Bobby did not commit this crime exists in the utter absence of any facts tying him to the actual killing or to even a single piece of the forensic evidence. Avery's theory requires so many speculative leaps ignoring the actual facts of the case that reasonable movie-goers would be hard-pressed to sit through it. Any reasonable juror being asked to search for the truth in a murder trial would reject it without fail.

III. Avery has failed to plead sufficient facts to establish a violation of *Brady v. Maryland* and the record conclusively proves that he could not do so, so no hearing is necessary.

A. Avery failed to provide sufficient facts to establish this audio clip's materiality.

Under the Fourteenth Amendment, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the

evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The evidence must be "favorable to the accused, either because it is exculpatory or impeaching," it "must have been suppressed by the State, either willfully or inadvertently," and it "must be material" to the defendant's guilt or punishment. *State v. Wayerski*, 2019 WI 11, ¶ 35, 385 Wis. 2d 344, 922 N.W.2d 468. Evidence is "material" and therefore must be disclosed "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. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *State v. Garrity*, 161 Wis. 2d 842, 850, 469 N.W.2d 219 (Ct. App. 1991) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

However, "showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more," *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), and "[a] defendant's request for *Brady* Material . . . does not require a prosecutor to wade through all government files in search of potentially exculpatory evidence." *State v. Harris*, 2004 WI 64, ¶ 15, 272 Wis. 2d 80, 680 N.W.2d 737 (citation omitted). Importantly for the issue raised here, *Brady* does not require the prosecution to disclose evidence that is merely "potentially exculpatory." *Id.* ¶ 16. Stated differently, the State is not constitutionally

required to turn over "the type of information that could form the basis for further investigation by the defense." *Id.*; *see also State v. Greenwold*, 181 Wis. 2d 881, 885, 512 N.W.2d 237 (Ct. App. 1994) (recognizing the Supreme Court's differentiation between "potentially useful evidence" and exculpatory evidence required to be disclosed under *Brady*).

Avery has again failed to meet his pleading burden because he has not submitted anything that would establish an actual *Brady* claim even if true. There are several glaring failures with what Avery has presented.

First, Avery's dogged insistence that Bobby Dassey "was the State's primary witness against Mr. Avery at his trial" remains false no matter how many times he repeats it. (Doc. 1065:38.) Bobby established only that Ms. Halbach arrived at the Avery Salvage Yard on the day in question and that he saw Ms. Halbach walking toward Avery's trailer shortly before she disappeared. (Doc. 581:35–66, 89–99; 591:7–51.) The State's 16 law enforcement witnesses and 12 forensic scientists who explained the enormous amount of forensic evidence pointing directly to Avery as the killer were all far more material than Bobby, and Avery fails to explain how attempting to impeach Bobby with this purported evidence would have turned the tide at trial.

Second, Avery's submissions are insufficient to establish any facts related to this claim. Avery has presented nothing more than an

unauthenticated piece of paper on which some unidentified person apparently typed their interpretation of what was said in an audio clip at some unidentified time. (Doc. 1071:12.) Absent from what Avery submitted to this Court is any copy of this audio clip, let alone any documentation about when it was received by the Sheriff's office, who answered, who transcribed this clip, when they did so, what they were using as a reference, any timestamps, or anything else that would provide some verification that what Avery submitted is actually true and accurate. It is a bare piece of paper with some words typed upon it. That is not evidence.[10]

Assuming that everything Avery submitted is accurate, though, he still hasn't established that this was material evidence that was required to be disclosed to the defense. There are literally no details contained in the audio clip that would indicate that Sowinski had materially exculpatory information; Sowinski said nothing other than that he had something that he

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[10] Avery notably also did not provide any affidavit from Sergeant Senglaub or any investigator who spoke to him that would show that Sowinski was actually connected to him when this call was allegedly made, and does not establish that anything Sowinski says now was actually what he told Senglaub at the time. (*See* Doc. 1072:8; 1065–75.) The audio clip establishes nothing substantive, and the record shows that Sowinski was not telling this new story until defense counsel somehow "refreshed" his memory 17 years later about what he believed he saw and when—with no documentation that would show how this memory refreshment could have been achieved. (*Compare* Exhibit 1 *with* Doc. 1065:76–81, 1071.) Accordingly, Avery's failure to submit anything from Senglaub means he has additionally failed to submit sufficient facts that would show that law enforcement was actually in possession of Sowinski's purported information in 2005.

didn't know if it was "good information" or "bad information" about "the girl who is missing from Hilbert." (Doc. 1071:12.) That is everything contained in the audio clip. Nothing in those few sentences could even conceivably be considered materially exculpatory evidence that the prosecution should have been on notice to turn over, and indeed, Avery actually does not attempt to argue that the contents of the phone call are materially exculpatory or impeaching. (Doc. 1065:32–37.) What he argues is that if the defense had been provided with this snippet of audio, they could have tracked down and interviewed Sowinski. (Doc. 1065:32–39; 1072.)

But that does not make this phone call clip *Brady* material; it makes it an avenue of investigation that could have led anywhere, which is insufficient to establish that it was materially exculpatory. *See Greenwold*, 181 Wis. 2d at 885. And significantly, absent from Attorney Buting's or Attorney Strang's affidavits is any allegation that they would have pursued Avery's new *Denny* theory if they had Sowinski's new information. (Doc. 1065:88–96.) They say only that they would have "pursued that information [that Sowinski called the Sheriff's department] diligently" and would have "made a specific request for further information about the substance of that call from Sgt. Senglaub." (Doc. 1065:95.) There is no allegation that they would have attempted to present this fanciful theory that Bobby Dassey was somehow responsible for the murder, either at the pretrial *Denny* hearing or at trial, if they had

spoken to Sowinski. (Doc. 1065:88–96.) And it is easy to see why: no reasonable jury would have believed it. The police-frame-up theory was a far more believable defense. Again, evidence is only material if there's a reasonable probability that it would have made a difference in the outcome of the trial. *Garrity*, 161 Wis. 2d at 850. A defense that would not have been presented would not have made a difference in the outcome of the trial, therefore Avery's affidavits are insufficient to establish facts to support a *Brady* claim.

So, all Avery has established and argued is that if he'd been provided this phone call clip, he would have had "information that could form the basis for further investigation by the defense." *Harris*, 272 Wis. 2d 80, ¶ 16; (Doc. 1065:33; 1072). That is demonstrably insufficient to state a *Brady* claim. *Harris*, 272 wis. 2d 80, ¶ 16.

B. Avery's *Brady* claim regarding Kevin Rahmlow was previously litigated but also fails on the merits.

Avery attempts to relitigate his *Brady* claim that Kevin Rahmlow allegedly told law enforcement that saw Ms. Halbach's RAV-4 off of the Avery property on November 3, 2005. (Doc. 1065:44–46.) By his own admission, he already made this argument to this Court in his motion for reconsideration in October of 2017, on the grounds that Rahmlow's information was newly discovered evidence of a *Brady* violation, and he again relied on it as part of

his July 2018 supplemental motion alleging that the contents of the Dassey computer would have allowed him to establish Bobby as a *Denny* suspect. (Doc. 1065:44; 227:31–32; 963.) This Court denied the myriad new claims Avery raised in his motion for reconsideration on the grounds that new claims were not an appropriate reason to reconsider an earlier decision. (Doc. 820:3–5.)

"A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue." *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Avery already litigated this claim. In 2017, he claimed Rahmlow's information was newly discovered evidence warranting reconsideration of this Court's October 2017 decision pursuant to *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, 275 Wis. 2d 397, 685 N.W.2d 853. (Doc. 227:3–4, 31–32.) The fact that this Court did not individually address it when denying his motion for reconsideration is immaterial; it was presented to this Court previously under one particular legal theory and this Court properly denied it, meaning Avery cannot relitigate it now. *Witkowski*, 163 Wis. 2d at 990. Just as "an appellate court is not a performing bear, required to dance to each and every tune played on an appeal," neither is a circuit court required to individually address in detail claims that are improperly before it if it explains why they

are improperly raised, which this Court did in its prior decision. *State v. Waste Management of Wisconsin, Inc.*, 81 Wis. 2d 555, 261 N.W.2d 147 (1978). This Court's failure to address it on the merits previously does not permit Avery to continuously reraise it until this Court does so.

C. The record conclusively demonstrates that Avery could not establish a *Brady* violation at a hearing.

Even if this claim were not previously litigated, it would fail, because the record conclusively demonstrates that what Rahmlow says in his affidavit about telling Sergeant Andrew Colborn on November 4 that he saw the victim's RAV-4 on a highway cannot possibly be true. (Doc. 1075:58–60.) Sergeant Colborn ended his shift on November 3, 2005, around 11:00 p.m. (Doc. 594:66, 80.) The affidavit Rahmlow submitted unequivocally states that midday on November 4 "[w]hile [he] was in the Cenex station, a Manitowoc County Sheriff's Department officer came into the station," whom he claims he told about seeing the victim's car, and that it wasn't until December 2016 that he "recognized the officer who [he] talked to at the Cenex station" and that it was Colborn. (Doc. 1075:59.)

But Colborn was off work on November 4, 2005, meaning he would not have been in uniform or driving a squad car that day. (Doc. 594:80.) Even assuming (and it is a big assumption) that Colborn actually went into a Cenex station on November 4, Rahmlow by his own admission does not know

Colborn personally—Rahmlow had no idea who Colborn was until he saw him on TV in 2016—and consequently nothing Rahmlow states in his affidavit or that is claimed in Avery's motion can possibly have happened. (Doc. 1065:44–49.) Colborn would not have been identifiable as a Manitowoc County Sheriff's Officer while he was off duty and thus out of uniform in a gas station, so there is no way that Rahmlow saw him come into the gas station, identified him as a Sheriff's officer, and told him this. The record thus conclusively demonstrates that the State did not suppress any information about Rahmlow's tale because there was nothing to suppress—the evidence did not exist.

Finally, Avery has once again failed to plead sufficient facts that this information from Rahmlow could have been material. As explained above, Avery did not plead sufficient facts to satisfy the three prongs of *Denny* and allege that Bobby was a plausible perpetrator, so the jury would not have heard that theory, which is the only way there would have been any exculpatory context to this information. Assuming that Rahmlow's information standing alone would have been admissible, there's no reasonable probability of a different result at the trial. Rahmlow's seeing a car similar to the victim's on the side of the road between November 3 and November 5 does nothing whatsoever to exonerate Avery—Avery himself could easily have driven it there. After all, the State had no way of knowing

what Avery did with the evidence between October 31 and November 5. At best, Rahlmow's evidence would have allowed the State to fill in its own gaps in how Avery kept the victim's car hidden between her disappearance and the car's discovery on November 5. There is not a reasonable probability the jury would have reached a different outcome if presented with Rahmlow's testimony.

IV. Circuit courts have no authority to grant a new trial in the interests of justice when the request is made in a Wis. Stat. § 974.06 motion.

Avery's final request is that this Court grant him a new trial in the interest of justice pursuant to Wis. Stat. § 805.15(1). (Doc. 1065:46–49.) There is no need to belabor why Avery fails to meet the requirements for such relief, because the Wisconsin Supreme Court has unequivocally held that circuit courts have no authority to grant new trials in the interest of justice in criminal cases pursuant to Wis. Stat. § 805.15(1). *State v. Henley*, 2010 WI 97, ¶ 5, 328 Wis. 2d 544, 787 N.W.2d 350. Nor can such claims be raised in a Wis. Stat. § 974.06 motion because they are neither jurisdictional nor constitutional. *See id.* ¶¶ 54–55. "Interest of justice" claims can only be considered by the circuit court if they are presented in a defendant's Wis. Stat. § 974.02 motion on direct appeal. *Id.* ¶ 63. As this is not such a motion, this Court lacks the authority to grant Avery any relief on this claim.

CONCLUSION

Avery has not pled sufficient facts to meet the three prongs of *Denny*, and the record conclusively disproves much of what he states, which means his *Brady* and newly discovered evidence claims could not prevail even if he established the facts he alleges at a hearing. Even if he had met his pleading burden, though, what he submitted did not establish he could meet the newly discovered evidence or *Brady* tests because he cannot show that there is a reasonable probability of a different result at trial if the jury were presented with Sowinski's or Rahmlow's evidence. This Court should deny Avery's motion without an evidentiary hearing.

Dated this 23rd day of November 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/Lisa E.F. Kumfer
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FILED
11-23-2022
Clerk of Circuit Court
Manitowoc County, WI
2005CF000381

Steven Avery <stevenaverylawyers@gmail.com>

We need to talk!

Thomas Sowinski <tquest87@yahoo.com> Sat, Dec 26, 2020 at 10:42 PM
To: stevenaverylawyers@gmail.com

Just finished 2nd season.
I lived there at the time. I was a motor route driver that was on the property everyday to deliver newspapers.

A few days before they found the Rav I was delivery papers at about 1-2 am and saw Bobby dassey and another old man pushing the Rav down the road towards the junkyard.
No lights at all, I almost hit them. They were very spooked. As you know, it's a dead end street. After delivery paper I had to go right back past them. Dassey stood in the road next to the Rav trying to stop me from getting by. As I approached my headlights were on them 100%. Other guy hid behind open passenger door that was open from pushing the vehicle.
I didn't slow down and drove in the ditch to get by, waving as I said "paperboy, gotta go"

Dassey had no shirt on and the other guy had a very scraggly beard and seemed to be in his 60s
I did call police and they said they would contact me, they never did.
After season one, I emailed an attorney of Stevens and no response.
I've decided to reach out one more time as this information seems vital especially after what I just watched.
I live in Denver now but lived in manitowc for over 20 years.

Sent from Yahoo Mail for iPhone

Ex. 1

FILED
11-23-2022
Clerk of Circuit Court
Manitowoc County, WI
2005CF000381

Sent from Yahoo Mail for iPhone

On Thursday, January 7, 2016, 1:43 PM, tquest87 <tquest87@yahoo.com> wrote:

Hello. My name is Thomas Sowinski and I delivered newspapers to the Avery residence everyday for years. I delivered papers at the time of the halbach situation. Somewhere between Oct 31st and November 5th 2005, not sure which day. I turned down avery road to delivery their paper when I almost ran into 2 people pushing a dark colored small suv down the road with absolutely no lights on. It was dark ad I delivered the papers as soon as possible each day so I could get home in time to get my son ready for school and drop him off. As I passed them I realized I had stumbled onto something that seemed out of place. I spooked both of them tremendously. I drove down the dead end and put the paper in the tube and turned around to come back down the road. I knew I was in a shady situation so I approached them with a good amount of speed to get around them fast. As I approached the guy pushing from the driver side stopped and tried to stop ke in the middle of the road. I went half in the ditch and just waved to calm the men into thinking I was oblivious to what was going on. I didn't she who the man was on the passenger side but the young man, maybe 18 or so that tried to stop me was not brendan dassey. His build was thin and fit and about 5'9" tall. Days later after seeing the footage on t.v. of the rav 4 being found on the property it clicked that it wad probaby the suv I had seen that night. I called police and notified them. They didn't Semmes interested at all and said thanks for the info. Never asked me to fill out a report or even ask for my name or phone number. At the time I just figured they had enough evidence and we're not concerned with my information. After seeing the documentary on netflix I decided that someone other than manitowoc county officials needs to here this. They were pushing in the direction towards the house from the highway.

I feel obligated to share this now that I know some of the circumstances involving the way manitowoc handled the case

Sent from my T-Mobile 4G LTE Device

Ex. 2

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11-23-2022
Clerk of Circuit Court
Manitowoc County, WI
2005CF000381

FILED
07-28-2021
Clerk of Circuit Court
Manitowoc County, WI
2005CF000381

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 28, 2021

**Sheila T. Reiff
Clerk of Court of Appeals**

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP2288-CR

Cir. Ct. No. 2005CF381

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN A. AVERY,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Manitowoc County: ANGELA W. SUTKIEWICZ, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Davis, J.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. In 2007, following a jury trial, Steven A. Avery was convicted of first-degree intentional homicide, party to the crime, and possession of a firearm by a felon. We affirmed his convictions on appeal. The issues in this new case concern collateral proceedings: whether the circuit court erred in denying Avery's WIS. STAT. § 974.06 (2019-20)[1] motion and two supplemental motions without a hearing, as well as his motions to vacate and for reconsideration of the first of these motions. We hold that Avery's § 974.06 motions are insufficient on their face to entitle him to a hearing and that the circuit court did not erroneously exercise its discretion in denying the motions to vacate and for reconsideration. Accordingly, we affirm.

OVERVIEW

¶2 We previously summarized the facts of this case in our decision on Avery's direct appeal, *see* ***State v. Avery***, 2011 WI App 124, 337 Wis. 2d 351, 804 N.W.2d 216, and we will discuss below those facts relevant to his collateral attack on his conviction. But for context, this case began in early November 2005 with the disappearance of Theresa Halbach, a twenty-five-year-old professional photographer. Volunteer searchers found Halbach's RAV4 on the forty-acre site of Avery's Auto Salvage, a salvage yard business where Avery and other family members lived and worked. It was believed that Halbach had photographed vehicles at this site several days earlier, per Avery's request. According to State witness Bobby Dassey, Halbach was last seen walking towards Avery's trailer.

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[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

¶3 After finding the RAV4, police searched the Avery property and, over the course of the next four months, discovered and identified evidence including: burned bone fragments in and around a burn pit, with DNA matching Halbach's; both Avery's and Halbach's blood in the RAV4; the remnants of electronic devices and a camera, the same models as Halbach's, in a burn barrel; Halbach's RAV4 key in Avery's bedroom, with Avery's DNA on it; Avery's DNA on the hood latch of the RAV4 (deposited, the State later claimed, by Avery's sweaty hands); and a bullet and bullet fragments in Avery's garage, containing Halbach's DNA.

¶4 The case was tried over a five week period in February and March of 2007. The State's theory was that Avery shot Halbach in the head, in his garage, and threw her in the cargo area of the RAV4. He then burned the electronics and camera, cremated Halbach in a burn pit, transferred the remains to a burn barrel, and hid the RAV4 until he could crush it in the Avery car crusher. The defense argued that law enforcement was biased against Avery, who was pursuing a wrongful conviction lawsuit against Manitowoc County and the Sheriff's Department,[2] and, as a result, planted evidence implicating Avery. The real killer, the defense argued, took advantage of this "investigative bias" to also plant evidence on the Avery property, once early media publicity made it clear that Avery was a key suspect.

¶5 The jury found Avery guilty of first-degree intentional homicide and felon in possession of a firearm. Avery received a life sentence without the

[2] Avery was wrongfully convicted of a 1985 sexual assault and was exonerated in 2003 on the basis of DNA evidence linking the crime to another person.

possibility of extended supervision. In 2009, Avery commenced his direct appeal by filing a motion for postconviction relief, pursuant to WIS. STAT. § 974.02, requesting a new trial. That motion was denied, Avery appealed, and this court affirmed in the aforementioned decision. *See **Avery***, 337 Wis. 2d 351, ¶3.

¶6 In 2013, Avery filed a pro se WIS. STAT. § 974.06 motion (the 2013 motion), requesting a new trial. That motion was denied, and Avery appealed. That appeal was stayed and later dismissed on Avery's motion, shortly after he initiated the postconviction proceedings that are the subject of this appeal. In 2017, Avery filed the first of the six motions that are the subject of this appeal.[3] These motions will be analyzed individually, with further discussion of relevant law, but some basic principles apply generally.

¶7 WISCONSIN STAT. § 974.06 provides a mechanism for vacating, setting aside, or correcting a sentence once the time for direct appeal has passed, on constitutional or jurisdictional grounds or where "the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack." Sec. 974.06(1); ***State v. Romero-Georgana***, 2014 WI 83, ¶32, 360 Wis. 2d 522, 849 N.W.2d 668. Section 974.06(4),[4] however, creates a procedural barrier to

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[3] Avery's appeal is from two orders: the circuit court's October 3, 2017 order denying his June 2017 postconviction motion and the court's November 28, 2017 order denying his motions to vacate and for reconsideration of the June 2017 motion. We address these as Motions #1 through #3. After filing his appeal, Avery moved to supplement the appellate record, and to stay the appeal and remand, in two separate motions. We retained jurisdiction and directed Avery to raise his claims to the circuit court in the form of supplemental postconviction motions. We address these as Motions #4 and #5. In April 2021, Avery filed a motion to this court to stay his appeal and remand. We have not yet acted on that motion, so we address and decide it as Motion #6.

[4] In full, WIS. STAT. § 974.06(4) states:

(continued)

review, in that it requires the defendant to raise all grounds for relief in his or her first (postconviction or appellate) motion. ***State v. Balliette***, 2011 WI 79, ¶¶35-36, 336 Wis. 2d 358, 805 N.W.2d 334. Thus, a defendant is normally barred from raising issues in a § 974.06 motion that were *or could have been* raised on direct appeal or in a previous § 974.06 motion. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). An exception to this rule exists where the defendant can show a "sufficient reason" for not raising the issue in any prior postconviction proceeding. ***Id.***; § 974.06; ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶48-50.

¶8 Where, as here, a defendant appeals the circuit court's denial of a WIS. STAT. § 974.06 motion *without* an evidentiary hearing, then the question before us is narrow: whether remand for a hearing is warranted because the circuit court erred in denying the motion on its face. *See* ***Balliette***, 336 Wis. 2d 358, ¶38. Pursuant to § 974.06(3)(c), the court shall "[g]rant a prompt hearing" unless "the motion and the files and records of the action conclusively show that the [defendant] is entitled to no relief." Our supreme court has also determined, however, that a baseline level of specificity applies to all postconviction motions, including those under § 974.06. *See* ***Balliette***, 336 Wis. 2d 358, ¶¶42-43, 58-59. Thus, in order for the reviewing court to meaningfully assess the claim, the

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> All grounds for relief available to a person under this section must be raised in [the defendant's] original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

defendant must allege "sufficient material facts—*e.g.*, who, what, where, when, why, and how—that, if true, would entitle [the defendant] to the relief he [or she] seeks." ***State v. (John) Allen***, 2004 WI 106, ¶¶2, 23, 274 Wis. 2d 568, 682 N.W.2d 433; ***Romero-Georgana***, 360 Wis. 2d 522, ¶37. This requirement promotes finality once the defendant has been convicted and sentenced, "minimize[s] time-consuming postconviction hearings unless there is a clearly articulated justification for them," and recognizes that "the pleading and proof burdens … have shifted to the defendant in most situations after conviction." ***Balliette***, 336 Wis. 2d 358, ¶¶53, 58. Accordingly, in the context of a § 974.06 motion, the defendant must describe, with specificity, his or her "sufficient reason" for failing to raise the claim in any earlier proceeding—that is, the defendant must show why his or her claim is not procedurally barred under § 974.06(4).[5] *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶37.

¶9 We will further discuss some of the contours of this "sufficient reason" exception below, but one point bears mentioning here: ineffective assistance of postconviction counsel can be, and often is, cited as the reason for the defendant's not bringing some claim on direct appeal. The specificity requirement, however, applies just as much in this context. The defendant cannot merely present legal conclusions, summarily arguing that postconviction counsel was ineffective for failing to bring the claims he or she now views as meritorious. ***Id.***, ¶¶36, 42. Instead, to be entitled to a hearing, the defendant must raise sufficient material facts demonstrating prior counsel's ineffectiveness—that is,

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[5] Of course, a defendant is not required to do so when there has been no prior postconviction proceeding. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶35, 360 Wis. 2d 522, 849 N.W.2d 668

that counsel was constitutionally deficient and that such performance was prejudicial to the defendant. ***Id.***, ¶¶37-39, 56; *see* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Importantly, to show deficiency in this context, the defendant must allege sufficient facts showing that his or her new claim is "clearly stronger" than the claims postconviction counsel in fact brought. ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶45-46.

¶10 Whether the circuit court erred in not ordering a hearing involves two potential inquiries, with separate standards of review. The circuit court *must* hold a hearing where the motion is sufficient on its face, unless the record as a whole otherwise conclusively demonstrates that the defendant is not entitled to relief. ***Balliette***, 336 Wis. 2d 358, ¶¶18, 50; ***State v. Howell***, 2007 WI 75, ¶¶75-77 & n.51, 301 Wis. 2d 350, 734 N.W.2d 48. Whether a WIS. STAT. § 974.06 motion meets this standard—including whether there is a "sufficient reason" for overcoming the procedural bar of ***Escalona-Naranjo***—is a question of law that we review de novo. ***Romero-Georgana***, 360 Wis. 2d 522, ¶30. If, on the other hand, the motion does not raise sufficient facts, "or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief," then the circuit court has the discretion to grant or deny a hearing. ***Balliette***, 336 Wis. 2d 358, ¶18 (quoting ***John Allen***, 274 Wis. 2d 568, ¶9). In such case, we review for an erroneous exercise of discretion. ***Romero-Georgana***, 360 Wis. 2d 522, ¶30.

MOTION #1: JUNE 2017 MOTION

¶11 In August 2016, Avery, now represented by counsel, brought a motion for postconviction scientific testing. In November 2016, the circuit court granted the motion, permitting Avery to conduct independent testing of nine trial

exhibits: seven samples of bloodstain cuttings, swabs, or blood flakes taken from Halbach's RAV4; Halbach's RAV4 key; and a 1996 sample of Avery's blood.

¶12 Based largely on the results of this testing and other investigations, Avery filed a WIS. STAT. § 974.06 motion in June 2017 (the June 2017 motion), requesting a new trial. His motion raises a number of claims[6] falling into three categories for purposes of overcoming the ***Escalona-Naranjo*** procedural bar. First, Avery alleges that trial counsel was ineffective for failing to fully investigate, or present expert testimony in support of, his theory that he was framed. Second, he brings several claims based on alleged ***Brady***[7] violations. Third, he raises claims based on the results of new investigations of a bullet, the hood latch swab of the RAV4, and the RAV4 key, all of which he characterizes as newly discovered evidence.

¶13 The circuit court found that most of these claims were procedurally barred under ***Escalona-Naranjo*** because Avery had not alleged a "sufficient reason" for not raising them in his 2013 motion or on direct appeal. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. The court further held that the claims based on "new scientific tests," when considered in the context of the full record, did not allege sufficient facts that, if true, would entitle Avery to relief. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶37. The court noted that the new reports on

[6] Avery reframes some of these claims and arguments on appeal, but our review is of the sufficiency of the underlying motion. We analyze that motion on its face, deeming new or newly argued issues forfeited. *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-12 & n.2, 235 Wis. 2d 486, 611 N.W.2d 727. In addition, some of Avery's claims, such as his allegations of prosecutorial misconduct, are not renewed on appeal; these we deem abandoned and will not discuss. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998). These principles apply to our analyses of Avery's subsequent motions.

[7] ***Brady v. Maryland***, 373 U.S. 83 (1963).

the bullet, hood latch swab, and key were "equivocal in their conclusions" and "ambiguous"; therefore, given "the totality of evidence submitted at trial … it cannot be said that a reasonable probability exists that a different result would be reached at a new trial based on these reports." Accordingly, the court denied Avery's motion without a hearing.

¶14 We review the sufficiency of this motion de novo; if we determine that Avery was not entitled to a hearing as a matter of law, we then review the circuit court's decision to deny him a hearing for an erroneous exercise of discretion. *See* ***id.***, ¶30. The first, threshold step in this analysis is determining whether Avery has stated a sufficient reason for not raising these claims in his 2013 motion and on direct appeal.

Ineffective Assistance of Trial Counsel

¶15 Avery's claims relating to ineffective assistance of trial counsel are not—and cannot—be based on new or newly disclosed evidence unavailable to trial counsel. By definition, these claims are based on alleged errors of trial counsel, the argument being that Avery was thereby denied his constitutional right to counsel. As with any WIS. STAT. § 974.06 claim, Avery must show that there was a "sufficient reason" that these claims were not raised on direct appeal and in his 2013 pro se motion. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. And to establish a "sufficient reason" for not raising ineffective assistance of trial counsel claims on direct appeal, Avery must show that his new claims are "clearly stronger" than the claims postconviction counsel actually brought. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶45-46.

¶16 We begin by considering whether Avery has shown a sufficient reason for not having raised these claims in his 2013 pro se petition. We then turn

to whether Avery has shown a sufficient reason for not raising these claims on direct appeal. It is at this point that the ***Escalona-Naranjo*** analysis dovetails with the merits of Avery's ineffective assistance of trial counsel claims, because if his new claims are facially insufficient as a matter of law, then postconviction counsel cannot have been ineffective for failing to raise them on direct appeal. Therefore, after we analyze the potential procedural bar of the 2013 petition, we turn directly to whether Avery's remaining claims demonstrate a reasonable probability that, but for trial counsel's unprofessional errors, he would not have been convicted at trial. *See* ***Strickland***, 466 U.S. at 694.

Sufficient reason for failure to raise the claims in the 2013 motion

¶17 As a starting point, although Avery may argue ineffective assistance of postconviction counsel as a sufficient reason for not raising these claims on direct appeal, that argument is *not* available to excuse failings in his 2013 motion. That is because Avery did not have a constitutional right to counsel following his direct appeal. As our supreme court recently observed, there is no constitutional right to counsel on a collateral attack and, consequently, the "vast majority" of WIS. STAT. § 974.06 motions are filed by pro se litigants. *See* ***State ex rel. Wren v. Richardson***, 2019 WI 110, ¶27 & n.21, 389 Wis. 2d 516, 936 N.W.2d 587. The exception would swallow the rule if the mere assertion of pro se status were sufficient to overcome the procedural barrier of ***Escalona-Naranjo***. This legal point precludes successive postconviction motions from turning into something akin to Russian nesting dolls, wherein a litigant can simply allege a continuous series of ineffective assistance of counsel claims to justify previous failures to raise an issue. Instead, where there are successive § 974.06 motions, any new motion must be based on something other than ineffective assistance of postconviction counsel.

¶18 Avery appears to recognize this point, foregoing any claim based on the mere fact that he was without counsel. Nonetheless, his June 2017 motion largely focuses on the quality of his self-representation, providing the following justification for not raising any of his current claims in his pro se 2013 motion:

> [N]umerous unique circumstances are present here that provide sufficient reasons the current claims were not previously presented. Mr. Avery had no way of knowing the factual and legal basis [for] the claims set forth herein. As a learning disabled, indigent prisoner, Mr. Avery simply could not have known them. His attempt to file a meritorious pleading was thwarted by his lack of legal knowledge.
>
> The current motion is the product of over a thousand hours of attorney time, hundreds of hours expended by private investigators, numerous consultations with experts, the expenditure of funds to retain those experts, and more. To expect an indigent prisoner acting *pro se* to compile a meritorious motion under these circumstances would be unreasonable. Mr. Avery's lack of legal knowledge, cognitive deficiencies and the complexity of this unique case provide the sufficient reason that the current claims should be addressed on the merits.

Thus, we construe Avery to offer six (somewhat overlapping) explanations that, taken together, might provide a sufficient reason for not raising his claims in 2013: (1) he was unaware of the legal basis for the claims, (2) he was unaware of the factual basis for the claims, (3) he was acting pro se, (4) he was indigent, (5) he has a learning disability, and (6) this case is particularly complex.

¶19 These explanations do not justify Avery's failure to bring the majority of his claims. Again, the quality of Avery's representation in his prior motion cannot in and of itself constitute a sufficient reason for not raising an issue earlier. Accordingly, we reject Avery's first argument that he "lacked awareness of the legal basis for a claim." "Lack of awareness of the legal basis for a claim" is a term of art that does not merely mean that Avery was not a lawyer or lacked

legal knowledge. Rather, it means that he could not previously have anticipated a change in the substantive law that opened up a new basis for collateral attack. *See* ***State v. (Aaron) Allen***, 2010 WI 89, ¶44, 328 Wis. 2d 1, 786 N.W.2d 124; ***State v. Howard***, 211 Wis. 2d 269, 287-88, 564 N.W.2d 753 (1997), *overruled on other grounds by* ***State v. Gordon***, 2003 WI 69, 262 Wis. 2d 380, 633 N.W.2d 765. Here, Avery's claims are based on well-settled law. *See, e.g.*, ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶39-41.

¶20 As to reasons (2) through (6), Avery gives us bare-bones factual conclusions but does not meaningfully explain why the circumstances he describes precluded him from raising most of these issues earlier. *See* ***John Allen***, 274 Wis. 2d 568, ¶¶12, 23. Regarding reason (2), unawareness of the factual basis of the claims, Avery does not explain, and we cannot envision, why he did not have all the facts necessary in 2013 to raise these claims (which, after all, are premised on the further investigation of evidence and witnesses known to Avery at the time of trial). *See* ***State v. Tolefree***, 209 Wis. 2d 421, 426, 563 N.W.2d 175 (Ct. App. 1997). As to reason (3), as explained above, a defendant's pro se status, standing alone, cannot excuse his or her failure to raise claims in a WIS. STAT. § 974.06 motion.

¶21 With one exception—discussed below—Avery's remaining reasons are similarly deficient. Avery simply claims that he has a learning disability and was indigent in 2013, and that his case is complex. He does not cite any law, or develop any detailed argument, as to why these facts, alone or taken together, explain his failure to raise these claims. It appears well established from federal habeas law, from which we can borrow, that reasons such as these are not the sort of grounds on which a procedural bar can be avoided. *See* ***Harris v. McAdory***, 334 F.3d 665, 668-69 (7th Cir. 2003) (petitioner's pro se status, borderline mental

retardation, and organic brain dysfunction did not provide sufficient cause to excuse procedural default of ineffective assistance claim; cause must be based on an "external impediment").

¶22 The one exception we will recognize concerns Avery's contention that, on his own, it would have been impossible for him to have undertaken the extensive investigations later carried out by current postconviction counsel, which resulted in new theories as to how he was framed and additional factual support for previous theories. For example, if Avery believed that forensic testing would have shown that his DNA was planted on the RAV4 key, he of course could have raised the issue in his 2013 motion. But to do so with any chance of success, he would have had to allege that postconviction counsel was ineffective for not raising an ineffective assistance of *trial* counsel claim on that basis, and to succeed on *that* claim, he would have had to show that this new claim was "clearly stronger" than those actually brought on direct appeal. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶45-46. Absent forensic testing supporting the basis for such a showing, this would be an all but impossible task. Thus, "unique circumstances" might exist 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 and, on that basis, can claim a sufficient reason for not previously raising claims based on those theories. We do not perceive the policies underlying ***Escalona-Naranjo***—namely, the need for finality in litigation—to preclude this result. Indeed, to hold otherwise could unfairly punish defendants who bring postconviction motions based on all facts known to or reasonably discoverable by them. For ***Escalona-Naranjo*** purposes, claims based on newly conducted investigations, which could not have been previously undertaken, would appear to be little different than claims based on newly

discovered evidence, *see* ¶43, and we will treat them as such in determining whether they are procedurally barred by virtue of Avery's prior pro se postconviction motion.

¶23 That said, the majority of Avery's ineffective assistance of trial counsel claims are *not* based on investigations that Avery, now represented by counsel, was only recently able to perform.[8] On the other hand, we have identified

[8] There are a number of claims, some overlapping, that cannot be said to be based on new scientific or forensic experiments or investigations by Avery's experts, and which we therefore will not address except to list here. Several of these claims relate to issues that Avery's new experts did explore—and which we discuss in more detail below—but the claims in this list are not themselves dependent on the results of new investigations. Several of these claims also appear, superficially, to be based on some new test or experiment (such as a recreation with a key and a bookshelf), but, crucially, these claims are not dependent on Avery's ability to hire new experts, spend money on new tests, etc. We are allowing Avery to overcome the procedural bar of his 2013 petition by demonstrating that he did not have the resources to earlier uncover the factual bases for his claims, but this cannot extend to simple experiments or recreations that require no expert contribution and/or that could have been easily conducted at some point prior.

(continued)

seven claims, all premised on the results of forensic testing, that could conceivably fall in this category. So as to address, as nearly as allowable, the merits of his motion, we will assume that Avery has alleged a sufficient reason for not raising these seven claims in his 2013 motion. These claims are that trial counsel was ineffective for failing to:

> 1. Present a blood spatter expert, who would have found that Avery's blood was planted in the RAV4.
>
> 2. Present a blood spatter expert, who would have found that Halbach was not thrown in rear of the RAV4 after being fatally injured.
>
> 3. Present a blood spatter expert, who would have determined that the theory counsel presented at trial as

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These claims are that trial counsel was ineffective for failing to: (1) cross-examine some of the State's expert witnesses instead of retaining their own; (2) thoroughly investigate other suspects so as to identify a suspect meeting the requirements of ***State v. Denny***, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984); (3) use available evidence supporting the theory that the RAV4 was moved onto Avery's property by the real killer; (4) investigate Avery's pre-trial belief that his blood was taken from blood drippings in his trailer sink and planted in the RAV4 (this claim, standing alone, does not rely on new investigations; we discuss related claims below); (5) present a DNA expert's opinions about blood being planted in the RAV4 (Avery does not indicate that current postconviction counsel retained such an expert; counsel did retain a "blood spatter expert," whose findings form the basis for other claims discussed below); (6) demonstrate that Halbach's key was planted in Avery's bedroom, by recreating how the key was found; (7) demonstrate that the RAV4 key found in Avery's trailer was a subkey or secondary key, as should have been evident from the 1999 Toyota RAV4 manual; (8) detect and raise a Fourth Amendment challenge regarding DNA testing that allegedly violated the scope of a search warrant; (9) investigate a "chain of custody fabrication" that allegedly allowed law enforcement to illegally collect and then plant Avery's DNA on the RAV4 hood latch (we discuss below claims based on the results of experiments on the RAV4 hood latch); (10) present an expert on police practices and investigations, who would have demonstrated errors in the handling of the investigation; (11) conduct "a simple experiment" to demonstrate that a witness could not have smelled burning plastic (Halbach's electronics and camera) in Avery's burn barrel, as the witness testified to at trial; and (12) investigate "a variety of topics," all based on evidence known to counsel before trial. Avery also argues that Halbach's ex-boyfriend was the real killer, but he does not present any cognizable claim based on this argument. That is, Avery speculates that the ex-boyfriend meets the ***Denny*** "legitimate tendency" test for introducing trial evidence that a third party committed the crime, but without pointing to any true newly discovered evidence, explaining why trial counsel rendered ineffective assistance during his ***Denny*** hearing in this regard, or otherwise demonstrating why such conclusion entitles him to a new trial.

to how Avery's blood was planted in the RAV4 was untenable.

4. Present a trace materials expert, who would have found that the RAV4 key recovered from Avery's bedroom was Halbach's subkey or secondary key.

5. Present a DNA expert, who would have found that Avery's DNA was planted on the subkey by law enforcement.

6. Present a DNA expert, who would have found that Avery's DNA was planted on the RAV4 hood latch.

7. Present a forensic fire expert, who would have found that Halbach's body was not burned in Avery's burn pit

Merits of Avery's claims of ineffective assistance of trial counsel

¶24 We now turn to whether Avery's ineffective assistance of trial counsel claims have alleged "sufficient material facts—*e.g.*, who, what, where, when, why, and how—that, if true, would entitle [him] to the relief he seeks," *see* ***John Allen***, 274 Wis. 2d 568, ¶2, bearing in mind that he is not entitled to a hearing where the record conclusively demonstrates otherwise, *see* ***Balliette***, 336 Wis. 2d 358, ¶18. In short, Avery must show that a hearing would not be frivolous. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶64.

¶25 Avery cannot make this showing. First, he has wholly failed to demonstrate deficient performance: that trial counsel's "representation fell below an objective standard of reasonableness" by counsel's not retaining experts similar to those he later retained. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶40 (citation omitted). Avery apparently assumes that his findings speak for themselves and that, given the strength of his later claims, the necessity for such experts should

have been obvious at the time of trial.[9] Avery also assumes, again without explanation, that any experts retained by trial counsel would have reached the same conclusions as his later experts. But even accepting these premises, Avery has not demonstrated prejudice: that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See* ***id.***, ¶41 (quoting ***Strickland***, 466 U.S. at 694).

¶26 Avery's first three claims concern trial counsel's failure to retain a blood spatter expert. Avery argues in his motion that counsel was ineffective because such an expert would have found that his "blood was planted in the RAV4." His retained expert's actual findings, however, are not nearly so conclusive. The expert did not conclude that Avery's "blood was planted" or rule out Avery as the source of the blood. Rather, he determined that the presence of Avery's blood was "consistent with being randomly distributed from a source because his blood is present in some locations but absent in some [other] reasonably anticipated locations" and that "[t]he absence of blood stains in these

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[9] Relatedly, Avery fails to demonstrate how the defense strategies that trial counsel did pursue rendered counsel's performance constitutionally deficient. As an example, he points to trial counsel's failure to obtain a blood spatter expert but does not address why counsel's chosen strategy for explaining the presence of his blood in the RAV4 represented deficient performance *at the time of trial*, without the benefit of hindsight. This is a repeated shortcoming in Avery's briefing, both to the circuit court and on appeal, and represents exactly the type of "Monday-morning quarterbacking" that we strive to avoid in evaluating a claim of ineffective assistance of counsel. *See* ***Weatherall v. State***, 73 Wis. 2d 22, 25-26, 242 N.W.2d 220 (1976) ("[P]ostconviction counsel … stress[es] what he would have done differently had he conducted the defense at time of trial. Our court has called this hindsight-is-better-than-foresight approach to be 'Monday-morning quarterbacking' and has made clear that … it is the right of a defendant and trial counsel to select the particular defense, from among the alternatives available, upon which they elect to rely." (footnotes and citation omitted)); ***Strickland v. Washington***, 466 U.S. 668, 689 (1984) ("Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.").

locations is inconsistent with an active bleeder" (the State alleged at trial that Avery's finger was actively bleeding while he was in the RAV4). The expert further determined that the bloodstains were "consistent with an explanation other than Mr. Avery being in the RAV4 and depositing his blood in those locations with his actively bleeding cut finger."[10]

¶27 Certainly, these conclusions tend to support Avery's general theory that he was framed, and their presentation may have been useful at trial. But Avery's burden in a postconviction motion is not merely to point to helpful evidence but to show how its introduction at trial could reasonably have led to a different outcome. *See* ***Strickland***, 466 U.S. 668 at 694. He 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.

¶28 Next, Avery argues that counsel was ineffective because a blood spatter expert would have refuted the State's narrative that Halbach was thrown in the rear of the RAV4 after being fatally injured. Avery asserts that, to the contrary, Halbach "was struck on the head after she opened the rear cargo door" and was then "struck repeatedly by" a mallet or hammer—without explaining why

[10] For the purpose of this motion, we accept that these conclusions are based on sound methods. It is unclear, however, how this expert determined that a person actively bleeding in the RAV4 would have left a different blood pattern than what was found in Halbach's vehicle. According to the expert's affidavit referenced in the June 2017 motion, he recreated how blood could be taken from Avery's sink and selectively planted in the RAV4. The June 2017 motion states that (presumably some different) "blood spatter experiments conducted with actual blood on the subject's middle finger conclusively demonstrate that the blood would have been deposited on" additional locations within the RAV4. That experiment is not described in the referenced affidavit, however, so we do not know the methodology supporting this conclusion.

an alternative finding as to how she was killed supports his theory that he was framed.

¶29 Third, Avery contends that a blood spatter expert could have advised counsel that its trial strategy for explaining the presence of his blood in the RAV4 was flawed (i.e., that such strategy would have failed to persuade the jury). This assertion is entirely speculative; as a matter of law, such guesswork falls well short of demonstrating ineffective assistance of counsel.

¶30 Fourth, Avery argues that counsel was ineffective for not retaining a trace materials expert, who would have found that the RAV4 key recovered from Avery's bedroom was Halbach's secondary key or subkey. But it is, again, completely speculative to assume that the subkey was therefore planted (and not, instead, that Halbach herself was using her subkey and not her main key on the day of her death).

¶31 Avery's fifth and sixth claims concern the retention of a DNA expert. According to Avery, such an expert would have determined that his "DNA was planted on the key" by law enforcement. Avery again misstates the evidence. His expert analyzed DNA from "[a]n exemplar key, reportedly held by Mr. Avery as if to start a car, i.e., gripped by ungloved fingers for twelve (12) minutes." The expert determined that ten times less DNA was deposited on the exemplar key than on the key recovered by law enforcement. The expert further concluded that "[i]f the … key was indeed 'enhanced,' [i.e., tampered with] then it is likely that some … personal item of Mr. Avery's was used for this purpose," such as "a toothbrush or a cigarette butt." Thus, once again, the findings of Avery's expert are significantly more ambiguous than what is presented in his motion. We have no reason to doubt the truth of these findings (although we note that the expert did

not observe Avery holding the key), but simply determining that Avery deposited significantly less DNA in a controlled experiment does not indicate that Avery could not or did not deposit more DNA under other conditions, and it certainly does not demonstrate that law enforcement planted DNA on the key. Thus, even accepting the truth of these new findings, we cannot conclude that there is a reasonable probability that their introduction at trial would have led to a different result.

¶32 Avery's sixth claim is that counsel was ineffective for not retaining a DNA expert, who would have determined that DNA from Avery's sweaty hands "was never deposited [by Avery] on the RAV4 hood latch," demonstrating that "Mr. Avery was being framed." In what is becoming a pattern, Avery has misrepresented the facts. The DNA expert Avery has now hired did *not* determine that Avery "never deposited" the DNA and did *not* state that Avery was framed. Instead, the expert performed a series of experiments on an identical vehicle, wherein volunteers opened the car hood using the hood latch. Only four of the fifteen volunteers deposited DNA, and those four deposited significantly less DNA than present in the swab from Halbach's RAV4 hood latch. From this experiment, the expert extrapolated the possibility that law enforcement could have retrieved and relabeled a swab of Avery's groin (which was collected and discarded for exceeding the scope of a search warrant) as coming from the hood latch. The expert admitted, however, that "the convenience of this explanation … and the fact that it accounts for the physical findings observed from the analysis … does not prove evidence tampering, or more precisely, evidence reassignment." Thus, again, we are left with facts that, even if true, would not entitle Avery to relief: in a controlled experiment, the minority of volunteers who deposited sweat on the RAV4 deposited significantly less sweat than on the swab recovered by law

enforcement. There is no context to these findings—no showing of why Avery, under noncontrolled conditions, could not have deposited more sweat than the volunteers, much less any showing that the DNA was therefore planted. Without such context, this evidence is not exculpatory or even particularly relevant, and Avery's attempt to link it to the alleged reassignment of his groin swab is wholly unsupported by any facts of record.

¶33 Avery's seventh and final claim is that trial counsel was ineffective for not presenting a forensic fire expert, who would have found that Halbach's "body was not burned in the Avery burn pit and [that] her bones were therefore planted." Avery's cited factual support once again does not live up to the advance billing. His forensic fire expert did state that he "disagree[d] with [the State's expert's] opinion that the main destruction of the body took place in" the Avery burn pit. But Avery does not explain why, from this conclusion, it follows that Halbach's remains were planted, because he does not explain why he himself would have been unable to cremate some portion of Halbach's body in another location—including in his burn barrel, where additional bone fragments were found. More important, Avery does not explain where or how prejudice arises, given that his own forensic anthropologist testified to this same conclusion at trial. Avery's expert further concluded that, contrary to the State's theory at trial, Halbach's body could not have been burned to the extent it was burned in only four hours. Again, this is a fact without context; at most, presenting such evidence at trial would have enabled the jury to weigh two competing expert opinions on how Halbach was cremated. Avery again has presented no reasoned basis for concluding that the outcome of trial would have been different.

¶34 In sum, the seven ineffectiveness claims in Avery's June 2017 motion that are based on new investigations fail on the merits. Avery has not

shown that trial counsel provided objectively deficient representation by not hiring experts similar to those he later hired. Instead, Avery merely assumes that the need for such experts should have been obvious at the time, based on the later findings of his own experts. These later findings, however, are either equivocal, irrelevant, or both. In addition, Avery has not explained how these findings would have negated or undermined the cumulative effect of the other trial evidence. Thus, Avery has failed to show that, even if all these findings were admitted at trial, the result would have been different. Consequently, Avery has not alleged sufficient material facts entitling him to a hearing on his claims of ineffective assistance of counsel.

Brady *Violations*

¶35 Avery next argues that the State withheld favorable evidence in its possession, in violation of ***Brady v. Maryland***, 373 U.S. 83 (1963). He first alleges that the State suppressed a voicemail recording that Halbach left on the answering machine of her photography client, whom she met on the same day that she visited Avery's property. Next, he alleges that the State withheld an unedited video of flyover footage of Avery's property, and instead released to Avery an edited version with just three minutes of footage. Finally, Avery argues that "investigators concealed their knowledge that [Halbach's] RAV4 was driven onto" the property of Avery's next door neighbor.

¶36 Avery does not claim that these alleged ***Brady*** violations were unknown and undiscoverable at the time of his 2013 motion or on direct appeal. His given explanation for not raising any of his new claims in 2013 is general and relates to his status as a pro se prisoner litigant; his explanation for not raising his new claims on direct appeal does not reference the ***Brady*** claims. Thus, Avery has

not overcome the procedural bar of ***Escalona-Naranjo*** by demonstrating a sufficient reason for not raising his ***Brady*** claims earlier. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82.

¶37 In any case, Avery's June 2017 motion does not sufficiently allege any ***Brady*** violations. "A defendant has a due process right to any favorable evidence 'material either to guilt or to punishment' that is in the State's possession …." ***State v. Wayerski***, 2019 WI 11, ¶35, 385 Wis. 2d 344, 922 N.W.2d 468 (quoting ***Brady***, 373 U.S. at 87). A defendant is entitled to a new trial based on the denial of such right by showing that: (1) the evidence is favorable to the defendant, either because it is exculpatory or impeaching; (2) the evidence was suppressed by the state, either willfully or inadvertently; and (3) the evidence is material. ***Wayerski***, 385 Wis. 2d 344, ¶35. The standard for materiality is the same as under the prejudice prong of ***Strickland***: "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." ***State v. (Kevin) Harris***, 2004 WI 64, ¶14, 272 Wis. 2d 80, 680 N.W.2d 737.

¶38 Avery has not demonstrated any of the above elements for any of his claims, but what is clearest on its face is that this evidence—where it even exists—is immaterial. Avery's first claim centers on the fact that, on the day Halbach visited his property, she left a voicemail that she could not locate the residence of one of her other photography clients, whom she also visited that day. Avery argues that had this voicemail been played at trial, it would have "refuted the[] theory that [Halbach's] final appointment was [with] Mr. Avery." At trial, however, the photography client testified that, after Halbach left the voicemail on the client's answering machine, she found the client's house, took photographs, and left within fifteen minutes. Then, approximately twenty to thirty minutes after

Halbach left the voicemail (as established through her phone records), other witness testimony placed her as driving to, and then on, Avery's property. The voicemail is therefore consistent with the evidence, which is that Halbach left a voicemail, visited a client, and then visited Avery's property. There is no basis for Avery's assumption that the content of the voicemail would have refuted the State's theory about when or how Halbach was killed.

¶39 Avery's next claim is that he received an edited version of a flyover video of his property that may have contained favorable evidence. As far as we can tell, this claim is based only on Avery's unsubstantiated belief that a second video must exist because the airplane was in the air for four hours but the video he received was only three minutes long. There is no evidence of a ***Brady*** violation here because Avery merely speculates that evidence not even known to exist was suppressed.

¶40 Finally, Avery argues that investigators knew, but did not disclose to him, that Halbach's RAV4 was driven onto the property of Avery's next door neighbor. It is difficult to follow this argument, but it is based on an affidavit from the neighbor, who does *not* state that the RAV4 was on his property, but rather attests to a conversation with law enforcement agents in which *they* stated their belief as to how Halbach's vehicle was driven onto Avery's property (presumably, after Halbach's death, but the agents could have been referring to Halbach's driving route on the day of her death). Avery suggests that the information in the affidavit supports his claim that law enforcement framed him for the crime by driving the RAV4 through the neighbor's property and planting it on his. This argument is unintelligible and, in any case, we cannot perceive any ***Brady*** violation. There was no evidence here to suppress, and the facts in the affidavit are inconsequential.

Newly Discovered Evidence

¶41 Finally, Avery raises two[11] claims based on newly discovered evidence. He contends that "new scientific evidence demonstrates that the damaged bullet … in Mr. Avery's garage was not shot through [Halbach's] head causing her death." He also argues that, according to new tests, the swab labeled as coming from Halbach's hood latch (containing Avery's DNA) was not, in fact, taken from the hood latch.[12]

¶42 In theory, a defendant should be able to more easily overcome the ***Escalona-Naranjo*** procedural bar when basing claims on newly discovered evidence—which, after all, concern evidence not available in prior proceedings. This is not the case here, however, as is demonstrated by simply turning to the merits of Avery's claims.

¶43 To obtain a new trial based on newly discovered evidence, a defendant must show that: "(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***State v. Edmunds***, 2008 WI App 33, ¶13, 308 Wis. 2d 374, 746 N.W.2d 590

[11] A third claim repackages one of Avery's ineffectiveness claims, arguing that the results of the experiment with the RAV4 hood latch (wherein volunteers touched an identical RAV4, which was then swabbed and tested) constitute newly discovered evidence. Avery cannot have it both ways. Above, we assumed for the purpose of this motion that trial counsel's failure to obtain such results might constitute ineffective assistance of counsel. We will not now analyze a claim based on the premise that these same results were undiscoverable at the time of trial. In any case, it seems evident that trial counsel could have performed this simple experiment, so it is not apparent how the results of this experiment could constitute newly discovered evidence.

[12] This claim is based on different evidence than that forming the basis for Avery's ineffective assistance claim on this same issue.

(citation omitted). If the defendant meets these criteria, then the circuit court must determine "whether a reasonable probability exists that a different result would be reached in a trial." *Id.* (citation omitted). To be entitled to a hearing on postconviction claims of newly discovered evidence, the defendant must allege sufficient material facts satisfying these elements. ***John Allen***, 274 Wis. 2d 568, ¶2.

¶44 Avery cannot meet one of more of these elements for either of his claims. As a threshold matter, he has not shown that his purportedly "new" evidence is, in fact, new. Avery asserts that the equipment yielding his test results was "previously unavailable," was "new technology," and/or was manufactured in 2016. But aside from these cursory statements, Avery does not address whether technology available at the time of trial could have yielded the same results.[13]

¶45 Beyond that, Avery's evidence is largely irrelevant. The premise of his first claim is that, if the damaged bullet found in his garage did not deliver Halbach's fatal shot to the head, then he could not be the perpetrator. But the State never argued that either of the bullets recovered from Avery's garage killed Halbach. At trial, the State showed that Avery's gun fired the bullet and that the bullet had Halbach's DNA on it. But the State did not argue that this specific bullet entered Halbach's skull or killed her (nor was it necessary that it do so in order to implicate Avery in her murder). There is nothing to suggest that shots fired into Halbach's skull were the only shots fired at her or that every bullet fired

[13] For example, the State points out that its trace expert at trial used the exact same technology and performed the same type of elemental analysis on charred bone fragments before trial that Avery's expert performed in 2017. Both experts used a "scanning electron microscope with an energy dispersive x-ray analyzer" for their analysis, and there is no statement in the affidavit of Avery's expert as to why his test could not have been performed in 2006.

at her contained skull fragments—there were, after all, eleven casings and only two bullets found in the garage. The presence of Halbach's DNA on a bullet found in Avery's garage is particularly damning evidence—regardless of whether it was the bullet that entered her skull—and strongly implicates Avery absent evidence that Halbach's DNA was planted (a supposition that, even now, Avery has done little to develop). At the very least, Avery's new evidence—if it in fact is new—is consistent with the State's theory of the crime.

¶46 Avery next argues that his expert observed the hood latch swab and determined that "[s]wabs collected from the hood latches of two exemplar vehicles (a 2012 Rav 4 and a 2007 Volvo S60) each showed a considerably heavier loading of debris" than the swab from the RAV4 hood latch. The expert apparently reached this result, however, by observation alone, concluding that "[w]hereas particles on the [RAV4] hood latch swab … could only be seen with the aid of a microscope, a swab from each exemplar vehicle showed a heavy, dark streak of collected debris that is clearly visible to the unaided eye." We are left to wonder how new testing methods or equipment could possibly aid this analysis. In any event, the expert did not determine that the purported RAV4 swab "was not used to swab the hood latch," as Avery claims—much less that this swab was reassigned or otherwise used to frame Avery. There is no possibility that the presentation of this evidence would have yielded a different trial result.

Conclusion As To The June 2017 Motion

¶47 Because Avery has not shown that he is entitled to a hearing on any claim, we review the circuit court's denial of a hearing for an erroneous exercise of discretion. *See* ***Romero-Georgana***, 360 Wis. 2d 522, ¶30. We find that the court did not err in this regard. We agree with the court's assessment that, had

Avery's "equivocal" and "ambiguous" conclusions been introduced at trial, there would have been no reasonable probability of a different result. The circuit court appropriately exercised its discretion.

¶48 We have given Avery the benefit of several doubts as to why he did not raise these claims earlier. Even considered on the merits, the claims asserted in his June 2017 motion are speculative, conclusory, and in some cases misleading. The circuit court did not err in denying these claims without a hearing.

MOTION #2: OCTOBER 2017 MOTION FOR RELIEF FROM ORDER

¶49 Three days after the circuit court denied his WIS. STAT. § 974.06 motion, Avery filed a motion for relief pursuant to WIS. STAT. § 806.07(1)(a). The stated basis for the motion was that, a month prior to the court's order, defense counsel and prosecutors had agreed to additional testing of Halbach's RAV4 and of bones found in the Manitowoc County gravel pit, that the parties had agreed that Avery would amend the June 2017 motion, and that Avery "intended to inform the court that an amended motion would be filed" but "did not anticipate the court filing its order" before he could do so.[14]

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[14] On appeal, Avery implies that the State misled him about the need to expeditiously inform the circuit court of his wish to amend/supplement the June 2017 motion. For example, Avery states, "When current postconviction counsel inquired as to whether the circuit court should immediately be informed of the agreement, [the prosecutor] stated that once he had finalized the scheduling of the RAV-4 examination … a stipulated order could be presented to the circuit court." This statement appears to be Avery's counsel's own uncorroborated description of events; there is no basis in the record for this or any related argument that the State misrepresented the postconviction process. In any case, as the circuit court explained, the State cannot determine whether and how motions to the court are amended or supplemented, and Avery had no grounds for assuming otherwise. Moreover, this argument was not presented to the circuit court and is thereby forfeited. *See **Huebner***, 235 Wis. 2d 486, ¶¶10-12 & n.2. Accordingly, we address this point no further.

¶50 The circuit court denied the motion, explaining that, after receiving the June 2017 motion, "[n]o communication" was made "requesting that the court withhold its final decision [or] indicating that the original motion was incomplete and would be supplemented." The court acknowledged that the defense and prosecution might very well have discussed amending the June 2017 motion in anticipation of the court's granting a hearing, but

> the court was not informed of any such negotiations until after the final ruling in this matter had been issued. None of the agreements were submitted to the court for its approval until after the final decision was made in the defendant's original motion. It is for the court, and not the parties, to determine if amendments to motions previously filed will be permitted [and] to establish scheduling for matters pending before it.... Agreements should have been submitted for approval of the court prior to the final decision on the original motion being reached. The defense cannot try to amend a motion that was filed without reservation only after it receives an adverse ruling.

¶51 WISCONSIN STAT. § 806.07(1)(a) provides that the court "may relieve a party … from a judgment, order or stipulation for … [m]istake, inadvertence, surprise, or excusable neglect." We review the circuit court's decision on a motion for relief under § 806.07(1) for an erroneous exercise of discretion, meaning we will sustain the court's ruling where it applied the appropriate law to the facts on record so as to "achiev[e] a reasoned and reasonable determination." ***Milwaukee Women's Med. Serv., Inc. v. Scheidler***, 228 Wis. 2d 514, 524, 598 N.W.2d 588 (Ct. App. 1999) (citation omitted).

¶52 As explained above, a movant is not entitled to an evidentiary hearing merely because he or she filed a WIS. STAT. § 974.06 motion. In the typical case, the circuit court will evaluate the facial sufficiency of the motion before ordering the State's response or scheduling a hearing. *See* § 974.06(3); ***Romero-Georgana***, 360 Wis. 2d 522, ¶¶30, 37. Thus, circuit courts routinely

receive and deny § 974.06 motions where there is no basis for a hearing; as one would expect, courts are not required to, and generally do not, update the movant about when a decision on the motion is forthcoming.

¶53 Avery appears to acknowledge these basic principles of postconviction procedure. Nonetheless, he argues that the circuit court erroneously exercised its discretion here because, in denying his motion for relief, it ignored the existence of a 2007 order.[15] This 2007 "order on preservation of blood evidence and independent defense testing" directs the State to preserve swabs and bloodstain samples collected from the RAV4 and containing Avery's DNA, and allows such items to be submitted for independent testing "without further order of this Court."

¶54 Avery's argument with respect to the 2007 order misses the mark entirely. *Even if* all of the items the parties contemplated testing in 2017 had been described in this order, the order has no bearing on the presentation, timing, or amendment of any WIS. STAT. § 974.06 motion. The circuit court correctly concluded that it was not required to revisit its decision on the June 2017 motion upon being belatedly informed that Avery wished to amend that motion. Thus, the court did not erroneously exercise its discretion in declining to vacate an order adverse to Avery so as to allow amendment of "a motion that was filed without reservation."

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[15] The State argues that this argument was forfeited because it was raised for the first time on appeal. We agree that, at the very least, the argument was not well developed below. For completeness, however, we will exercise our discretion to address this argument on the merits. *See **Huebner***, 235 Wis. 2d 486, ¶¶10-12 & n.2.

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MOTION #3: OCTOBER 2017 MOTION FOR RECONSIDERATION

¶55 Shortly after filing his WIS. STAT. § 806.07 motion, Avery filed a motion to reconsider.[16] As relevant to this appeal,[17] he alleges that newly discovered evidence warrants reconsideration of the court's denial of his June 2017 motion.

¶56 A party may prevail on a motion for reconsideration by presenting newly discovered evidence, but such motion is not a platform "to introduce new evidence that could have been introduced" as part of the original proceeding. ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶¶44, 46, 275 Wis. 2d 397, 685 N.W.2d 853. The term "newly discovered" presupposes that the evidence was unknown at the time of final judgment—that is, it was not under the control or knowledge of the movant, or discoverable by reasonable diligence. *See* ***id.***, ¶¶46-48. "We review a trial

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[16] The motion to reconsider was followed by several subsequent "supplements," in which the motion was revised. For convenience, we discuss these as a single motion.

[17] In addition to the arguments addressed in this section, Avery's motion for reconsideration argues that the circuit court made manifest errors of fact and law in denying his June 2017 motion. We review the June 2017 motion in the first portion of this decision and conclude that the court did not err, except as noted in this footnote. Therefore, we address in this section only those arguments based on claims of newly discovered evidence.

In its decision on the June 2017 motion, the circuit court mischaracterized Avery's allegations relating to ineffective assistance of postconviction counsel. Avery raised these allegations so as to explain why his claims were not procedurally barred by ***Escalona-Naranjo,*** 185 Wis. 2d 168, 517 N.W.2d 157 (1994) (that is, why he did not raise his claims on direct appeal). The circuit court misconstrued Avery to allege ineffective assistance of *appellate* counsel and concluded that Avery was required to file a ***Knight*** petition with this court in order to do so. *See* ***State v. Knight***, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). On appeal, Avery correctly points out that this was an error. Regardless, our review of the sufficiency of the June 2017 motion is de novo, and we conclude that Avery did not demonstrate ineffective assistance of postconviction counsel. Therefore, the circuit court's error was harmless.

court's decision on a motion for reconsideration under the erroneous exercise of discretion standard." ***Id.***, ¶6.

¶57 A motion to reconsider on the basis of new evidence would seem to be of doubtful utility in cases, like this, where the movant is free to file successive motions. *See* WIS. STAT. § 974.06(2), (4). Nonetheless, we perceive no legal barrier to Avery's bringing such a motion, and the State does not argue as much, except to point out that this motion cannot be the means of avoiding the procedural bar of ***Escalona-Naranjo***. In this context, to be entitled to reconsideration on the basis of newly discovered evidence, the movant must show that the evidence was unknown and not reasonably discoverable when the first § 974.06 motion was filed and that the evidence reasonably relates to those claims brought in the first motion. *See* ***Koepsell's Olde Popcorn Wagons, Inc.***, 275 Wis. 2d 397, ¶¶44, 46-48. Alternatively, the movant may simply bring a new § 974.06 motion and demonstrate his or her "sufficient reason" for not raising the claim in the prior § 974.06 motion by showing that the evidence underlying that claim was then unknown and not reasonably discoverable.

¶58 Avery makes no showing in his motion to reconsider as to why he could not, with reasonable diligence, have included this "new" evidence in his June 2017 motion. Instead, he uses this third motion as a vehicle for raising new claims. None of these claims or evidence, however, have any bearing on the claims raised in the June 2017 motion, so it is unclear which *original claims* the circuit court was being asked to reconsider, or why. In any case, the majority of this evidence cannot reasonably be considered unavailable or undiscoverable at the

time Avery filed his June 2017 motion.[18] Nor, if we simply treat this motion as a new WIS. STAT. § 974.06 motion, does Avery demonstrate why these claims are

[18] Avery's motion for reconsideration raises claims based on evidence that cannot reasonably be considered "newly discovered" (i.e., unavailable and not discoverable through reasonable diligence at the time of the June 2017 motion). *See* ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶¶44, 46-48, 275 Wis. 2d 397, 685 N.W.2d 853. Therefore, we will not address these claims further, except to list and briefly discuss them here. These are that: (1) the State withheld evidence that Halbach's vehicle was seen on the street days after her disappearance (claim based on 2017 affidavit of witness attesting that, in 2005, he observed a vehicle matching a missing person's poster description of Halbach's car and informed law enforcement of that fact, but with no showing that Avery was unable, through reasonable diligence, to discover this information prior to filing the June 2017 motion); (2) trial and postconviction counsel were ineffective for not presenting impeachment testimony on key witnesses, or, in the alternative, the State violated Avery's right to due process by knowingly using false testimony at trial (claims based on evidence collected at the time of Halbach's disappearance and presumably known to Avery at the time of trial, with no representation that Avery learned of this evidence only after filing the June 2017 motion and could not reasonably have discovered it earlier); (3) there is another possible suspect meeting the ***Denny*** test (claim based on evidence showing how long it takes to drive away from Avery's property); (4) there is another possible suspect meeting the ***Denny*** test (claim based on evidence gathered by examining images found on a computer; Avery states that the computer search was the result of "2017 technology" but does not explain whether technology available earlier would have uncovered these images or why, through reasonable diligence, he could not have uncovered these images prior to filing the June 2017 motion); (5) alleged ***Brady*** violation based on 2005 evidence purportedly withheld, concerning who might have had possession of Halbach's day planner after her death (Avery does not explain when he received this evidence or why it was not reasonably discoverable prior to June 2017); (6) there is another possible suspect meeting the ***Denny*** test (claim based on statements made to police in 2005 about Avery's sister, and not Avery, requesting that Halbach photograph a car on Avery's property, but with no showing that this evidence was unknown or not reasonably discoverable prior to June 2017); (7) there is another possible suspect meeting the ***Denny*** test (based on evidence that Avery's sister attempted to hide files on her computer that might link her son to the crime; this information was reported to the police prior to trial and Avery does not allege that he was unaware of this evidence at trial or explain why the evidence was not reasonably discoverable prior to June 2017). Motion #3 also contains arguments that are the subject of Motion #4, and which we will therefore discuss in the following section.

Because these claims were brought in a motion to reconsider, we conclude only that the circuit court did not erroneously exercise its discretion in declining to revisit the June 2017 motion in light of the content of this motion. Neither we nor the circuit court have squarely considered whether these claims are procedurally barred under ***Escalona-Naranjo*** or whether Avery pled sufficient material facts entitling him to a hearing (although our analysis overlaps with the former inquiry). Such consideration would have to come on a separately filed WIS. STAT. § 974.06 motion, and we express no opinion as to whether such claims would be barred in the event such a motion is filed.

not procedurally barred under ***Escalona-Naranjo*** (setting aside the question of why the claims were not alleged in the June 2017 motion, Avery has not explained why they were not alleged in the 2013 motion or on direct appeal).[19]

¶59 We do note that buried in the motion are two claims based on evidence that appears on the face of the claims to be "newly discovered." According to Avery, in October 2017, his sister, Barb Tadych (who lived on the Avery property and whose son, Bobby Dassey, Avery identifies as an alternative suspect in the crime) told him two pieces of information that would impeach her son's testimony about last seeing Halbach walk toward Avery's trailer on the day of her disappearance. In Avery's view, his sister "admitted that she knew that [Halbach] had left the property" on the day in question. This evidence, however, is equivocal and does not clearly establish that Halbach in fact left the property on the day of her death or that any witness was aware of or lied about this fact at trial.[20] Moreover, the evidence does not bolster any claim in the June 2017 motion

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[19] On appeal, Avery inexplicably argues that the State is "estopped from raising … procedural bar arguments" relating, presumably, to *both* this October 2017 motion to reconsider *and* his earlier June 2017 motion—based on the sole fact that the State represented in September 2017 that it would not oppose amendment of the June 2017 motion. Assuming without deciding that the doctrine of estoppel might apply to the postconviction process under some circumstances, here, the State's representation clearly had no bearing on a motion already filed and, as a matter of law, could not relieve Avery of his burden in any subsequent WIS. STAT. § 974.06 motion to demonstrate why newly raised claims were not procedurally barred.

[20] The first piece of evidence is recorded statements in an October 2017 phone call between Avery and Barb Tadych and her husband, Scott Tadych. Avery identifies the full relevant portion of the transcript as follows:

Steven Avery: Bobby's home.
Barb Tadych : He wasn't always home.
Steven Avery: Well, you—well, most of the time he was home.
Barb Tadych : No.
Scott Tadych: He doesn't know fucking shit.
Steven Avery: And he said he [sic] left. She left.
Scott Tadych: That's right.

(continued)

so as to warrant reconsideration of that motion. Even viewed on its own merits, the evidence does not entitle Avery to a WIS. STAT. § 974.06 hearing because he has not shown that it is material. *See* ***Edmunds***, 308 Wis. 2d 374, ¶13. At best, we have two unsworn statements by Barb Tadych that Dassey told *her* something that is potentially inconsistent with his trial testimony. This is hearsay that would be inadmissible at a new trial, meaning that it cannot constitute newly discovered evidence as a matter of law. *See* ***State v. Bembenek***, 140 Wis. 2d 248, 253, 409 N.W.2d 432 (Ct. App. 1987).

¶60 Avery chose to frame these claims in the context of a motion to reconsider, but without applying that legal standard or (in the alternative) explaining why he had a "sufficient reason" for not bringing the claims in previous motions, pursuant to ***Escalona-Naranjo***. As discussed in the above section on the

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Barb Tadych :	Yeah, she left.
Steven Avery:	Yeah.
Barb Tadych :	Yeah.
Steven Avery:	Well, he didn't testify for [sic] that.
Barb Tadych :	[sighs]

The second piece of evidence is an October 2017 posting on Barb Tadych's Facebook page. Avery identifies the full relevant portion of the posting as follows:

Barb Tadych:	Well I have your answer for all of you that was wondering, just got off the phone with Bobby and I asked him and he told me that: He seen her [presumably, Halbach] pull in but that was it because he left to go hunting then. He said that is the truth.
[Commenter or Facebook friend]:	so he never seen her walk towards steven home
Barb Tadych:	No.

June 2017 motion, we are willing to give Avery the benefit of the doubt, where possible, as to why he did not raise certain claims in 2013 or on direct appeal. But we cannot ignore the law, and thus we cannot simply determine whether the merits of his motion-to-reconsider claims warrant an evidentiary hearing, where the only (narrow) question before us is whether the circuit court erroneously exercised its discretion in not reconsidering *the June 2017 motion* on the basis of purported new evidence contained within those claims.[21]

¶61 We conclude that the circuit court did not erroneously exercise its discretion in denying this motion. The court noted that Avery provided no explanation for filing the June 2017 motion while "considerable investigation was still being conducted by the defense":

> Knowing that not all the facts were … ready for presentation to the court, and with no deadline for filing his motion set by the court or statute, the defendant proceeded to file the motion prematurely....
>
> The motion was pending before this court for a few months before the court issued its ruling. During that period, the defendant did not ask the court to stay its ruling pending the conclusion of testing, request time to supplement the motion or take any other action requesting that the court delay its final decision in this matter. The motion was submitted to this court and the court ruled on the motion.

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[21] Although the merits of these claims are not properly before us, we have reviewed them in our broader review of this appeal. We note that the evidentiary basis for some of these claims is lacking. For example, one claim is based on Avery's assertion that Ryan Hillegas, Halbach's ex-boyfriend, later possessed a day planner that was in her car on the day of her death. The evidence Avery submits, however, does not and cannot reasonably be construed to support this conclusion. Moreover, other claims do not appear on their face to entitle Avery to a hearing. For example, one claim, as far as we can tell, is based on a recreation of what Halbach's movements would have been had she driven away from Avery's property on the date of her death. From this experiment—which is unsupported by any explanation as to how Avery might prove the underlying hypothetical scenario, that Halbach did in fact leave—Avery seeks to implicate Bobby Dassey and Scott Tadych, his brother-in-law, in Halbach's murder.

This explanation is reasonable and sound, and represents an appropriate exercise of discretion.

MOTION #4: JULY 2018 SUPPLEMENTAL MOTION

¶62 Avery appealed from the circuit court's October 2017 and November 2017 orders denying his June 2017 motion and his motions to vacate and reconsider, respectively. In May 2018, Avery moved this court directly "to supplement the Record on Appeal with a CD disclosed to Defendant for the First time on April 17, 2018." Avery asserted that supplementation of the appellate record was appropriate because the contents of the CD related to claims already presented to the circuit court. We stated that this assertion "misses the point, which is that we are not a fact-finding court and cannot consider items not presented to the circuit court." We determined, however:

> Based on the assertion that Avery recently received previously withheld discovery or other new information, we retain jurisdiction but remand this case to enable Avery to file an appropriate supplemental postconviction motion in the circuit court … within thirty days of the date of this order. The circuit court shall hold proceedings on the supplemental postconviction motion within sixty days after the motion is filed.

¶63 In July 2018, Avery filed his motion to supplement (the July 2018 motion), alleging a ***Brady*** violation.[22] Recall that, prior to trial, Avery unsuccessfully moved to introduce third-party liability evidence, pursuant to ***State v. Denny***, 120 Wis. 2d 614, 357 N.W.2d 12 (Ct. App. 1984). In his July 2018

[22] The State points out that a motion already decided (i.e., the June 2017 motion) cannot be "supplemented" and that, therefore, the July 2018 motion is a successive motion. Regardless, this court has determined and ordered that the July 2018 motion (as well as the subsequent March 2019 motion, or Motion #5) shall be treated as a supplement to the June 2017 motion.

motion, Avery alleges that the State withheld significant evidence both favorable to his ***Denny*** motion and relevant for impeachment purposes: a final investigative report of Detective Mike Velie, saved on a CD (the Velie CD). Velie created the report through forensic examination of the hard drive of a computer used by Dassey, whom Avery identifies as a possible ***Denny*** suspect. The Velie CD contains "thousands of images" of violent pornography that, Avery argues, "reveal a propensity for sexual violence" by Dassey (Avery elsewhere attempts to explain why, of several people who used the computer, only Dassey could have downloaded these images). The CD also contains "a timeline" that purportedly "impeaches [Dassey's] trial testimony" and "criteria, word searches, registry, recovered pornography, internet history, windows registry, and all MSN messages." According to Avery, he did not receive the Velie CD until April 2018.

¶64 The circuit court determined that there was no ***Brady*** violation because there was no evidence suppressed. We agree.[23] It is undisputed that the computer was examined and its contents copied to seven DVDs. It is undisputed that Avery's counsel received these seven DVDs prior to trial. Finally, it is undisputed that, with limited and irrelevant exception,[24] the Velie CD does not

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[23] As this claim was to be treated as a supplemental motion, pursuant to this court's order, Avery was not required to allege a "sufficient reason" under ***Escalona-Naranjo*** for not raising the claim in his June 2017 motion. We assume without deciding that Avery had a sufficient reason for not raising this claim in his 2013 motion or on direct appeal, based on the purported unavailability of the evidence.

[24] Velie attests:

> The only information on the CD titled "Dassey computer, Final Report, Investigative Copy" that is not contained in the 7 DVDs would be the typical administrative and procedural files, folders, and techniques routinely used by a digital forensic examiner during a forensic examination of digital evidence.

(continued)

contain any additional information than what is on the seven DVDs. Consequently, the Velie CD is not suppressed evidence but merely an investigative summary of evidence provided to Avery.

¶65 Avery appears to acknowledge these facts on appeal but argues that he should have had access to information derived from Velie's "unique word searches," pornographic images "refined" for relevancy, and the like. This is not the law: ***Brady*** on its terms applies to favorable and material suppressed *evidence*, and Avery has presented no authority extending this principle to the prosecution's withholding of *secondary compilations or analyses* of such. *See* ***United States v. McGuinness***, 764 F. Supp. 888, 896 (S.D.N.Y. 1991) ("***Brady*** applies only to facts that are not already known to the defendant. The government need not facilitate the compilation of exculpatory material that, with some industry, defense counsel could marshall on their own." (citations omitted)).

Avery's computer expert attests that Avery did not receive "critical information" about *how* Velie analyzed the computer but does not conclude that the Velie CD contains additional information not provided to Avery:

> In my opinion, based upon a reasonable degree of certainty in the field of computer forensic science, the CD contains information and files extracted from the 7 DVDs that, in Detective Velie's opinion, were relevant to the investigation of Ms. Halbach's murder.
>
> While the information contained on the CDs is derived from the forensic image contained across the DVDs, trial defense counsel was not provided critical information including *the criteria used* by Detective Velie in performing his forensic computer examination as well as *the results of that examination*.

(Emphasis added.)

¶66 Avery raises two related arguments concerning the disclosure of the DVDs themselves. He argues that the State deliberately misled him about the importance of the DVDs by stating in an email that they "did not include much of evidentiary value." Even if this statement mischaracterized the evidence, however, an off-the-cuff description of disclosed evidence cannot form the basis for a ***Brady*** violation. Avery further argues that he was only provided the DVDs approximately one month before his ***Denny*** hearing, leaving him "completely impaired" in his ability to introduce relevant evidence in that proceeding. But this argument properly concerns alleged ineffective assistance of trial counsel (see below), because such conclusory statements do not adequately explain why trial counsel could not have analyzed the DVDs in time for the motion hearing, sought to postpone the hearing, or taken any number of other steps to effectively leverage this evidence.

¶67 In the July 2018 motion, Avery does indeed argue that trial counsel was ineffective for failing to forensically examine the seven DVDs prior to trial. He does so summarily, however, and in a manner that leaves us unable to meaningfully analyze this claim. Regarding potential use of this evidence in his ***Denny*** motion, Avery does not address the prejudice prong of the ***Strickland*** test, which, in our view, encompasses at least two key inquiries. To admit evidence at trial that Dassey could have killed Halbach, Avery would have had to provide some evidence at the pretrial ***Denny*** hearing *directly connecting* Dassey to the crime. *See* ***State v. Scheidell***, 227 Wis. 2d 285, 296, 595 N.W.2d 661 (1999) (evidence that another party committed the crime may be admissible pursuant to ***Denny*** if the defendant can show: (1) the third party's motive, (2) the third party's opportunity to commit the crime, and (3) some evidence directly connecting the third party to the crime). That Dassey possibly possessed violent pornographic

images might have conceivably satisfied a separate requirement, motive, but is insufficient in and of itself to allow admission of third-party liability evidence.[25] *See **id.*** Avery failed to meet the "direct connection" requirement in his original ***Denny*** motion and has not presented additional evidence on this point in Motion #4. Thus, even assuming trial counsel was deficient in not analyzing the DVDs, Avery cannot demonstrate a reasonable probability of a different outcome at the ***Denny*** hearing or at trial.[26] *See **Strickland***, 466 U.S. at 694.

¶68 Regarding the use of this evidence for impeachment purposes, even accepting that the CD contains "a timeline that impeaches [Dassey's] trial testimony" (we are skeptical of this point, *see* note 25), Avery does not explain how impeaching Dassey about his use of the computer would have changed the

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[25] Although only tangentially relevant to our decision, we note that Avery's counsel misrepresented some key facts underlying this claim in the motion to the circuit court and briefing to this court. Avery asserts that only Dassey could have downloaded the images, created folders containing photographs of Halbach, and "search[ed] for key terms relevant to the murder." He states that Dassey "was the only individual at home" when this computer activity took place, but references for support only the affidavit of his computer expert, who does not and cannot opine on Dassey's schedule, and a sheriff's department interview with Dassey containing none of this information. Avery also characterizes the pornographic images as "bear[ing] a striking resemblance to [Halbach] and to the nature of the crime committed against her." As far as we can tell, there is no support for this conclusion in the evidence on record. That Avery misrepresented the facts is immaterial to deciding his ***Brady*** and ineffectiveness claims. We point them out because of the high-profile nature of this case, the greater possibility that interested members of the public will read the briefing and motions, and the resulting need, where misrepresentations are particularly egregious, to note where Avery's arguments wholly stray from the facts.

[26] 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.

outcome of the trial. At most, the jury would have disbelieved Dassey's testimony that, on the day Halbach last visited the Avery property: he saw Halbach walk towards Avery's trailer, he did not see her leave the property, Halbach's RAV4 was in the driveway when he left to go hunting, and the RAV4 was gone when he returned several hours later (Avery identifies these as the key pieces of testimony). 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. Without any showing or argument as to why the impeachment of Dassey would have undermined the cumulative effect of the other evidence, we cannot conclude that the trial's outcome would have been different. We conclude that the circuit court did not err in denying the July 2018 motion without a hearing.

MOTION #5: MARCH 2019 SUPPLEMENTAL MOTION

¶69 In January 2019, Avery again moved this court directly to stay the appeal and remand for the circuit court's consideration of specific claims relating to the State's 2011 release to Halbach's family of suspected human bone fragments. We determined that, "given the specific circumstances of this case," we would stay the appeal and remand, pursuant to WIS. STAT. § 808.075(5), for action on this issue. We again ordered remand to the circuit court to permit Avery to pursue a supplemental postconviction motion on specific claims, and we directed the court to conduct any necessary proceedings. The circuit court denied the motion without a hearing.

¶70 The gist of Motion #5 is that the State released to Halbach's family suspected human bone fragments recovered from the Manitowoc County gravel

pit, thereby violating: (1) a circuit court order; (2) WIS. STAT. § 968.205, requiring the state to preserve certain biological material evidence connected to a criminal conviction; and (3) Avery's constitutional rights. As a WIS. STAT. § 974.06 motion may raise only jurisdictional, constitutional, and like claims, we consider only the third argument. *See* § 974.06(1); ***Balliette***, 336 Wis. 2d 358, ¶34; ***State v. Carter***, 131 Wis. 2d 69, 81-82, 389 N.W.2d 1 (1986).

¶71 Avery alleges that, in 2011, the State improperly released to Halbach's family bone fragments from the gravel pit, which Avery wished to test to determine if they contained Halbach's DNA and might thereby indicate that Halbach was not killed on Avery's property. Avery argues that "[t]he State, by its actions in returning [the] bones … has implicitly admitted that the bones were not only human but that they belonged to Ms. Halbach." Avery frames this as a violation of ***Arizona v. Youngblood***, 488 U.S. 51, 57-58 (1998), under which a defendant's due process rights are violated where the state either (1) fails to preserve "apparently exculpatory" evidence or (2) acts in bad faith by failing to present "potentially exculpatory" evidence. *See* ***State v. Greenwold***, 189 Wis. 2d 59, 67-68, 525 N.W.2d 294 (Ct. App. 1994).

¶72 Avery represents that he was not aware, and could not reasonably have been aware, of the release of the bones until after he filed his fourth motion. We will assume, therefore, that this claim is not procedurally barred under ***Escalona-Naranjo***.

¶73 The State argues that the ***Youngblood*** analysis only properly applies to the destruction of pretrial evidence. We agree generally but need not explore this point, because Avery's claim fails on its own terms.[27]

¶74 The premise of Avery's argument is that the State released to Halbach's family evidence that was either apparently or potentially exculpatory: bone fragments from the gravel pit that may have been Halbach's. This evidence, when first collected, was labeled as containing some human bone fragments. At trial, however, the undisputed testimony of the State's forensic anthropologist was that, on further analysis, the bone fragments could not be definitively identified as human, much less as belonging to Halbach. On this record, therefore, this evidence is not apparently exculpatory: it does not indicate that another person killed Halbach. *See* ***Youngblood***, 488 U.S. at 56 n.* (evidence is not "apparently exculpatory" where those having custody over it did not know of its exculpatory

[27] ***Youngblood*** and progeny concern whether the destruction of pretrial evidence violates a defendant's due process right to a fair trial, the remedy being dismissal of charges. *See* ***Arizona v. Youngblood***, 488 U.S. 51, 54-58 (1998); ***State v. Greenwold***, 189 Wis. 2d 59, 65-69, 525 N.W.2d 294 (Ct. App. 1994). We recognize that ***State v. Parker***, 2002 WI App 159, ¶¶13-14, 256 Wis. 2d 154, 647 N.W.2d 430, somewhat summarily states, "We see no reason why this line of cases [addressing the pretrial destruction of evidence] should not apply to the situation at hand"—that situation being the destruction of evidence posttrial but before the direct appeal was concluded. As there the defendant's argument was merely that the destruction of evidence deprived him of his *right to appeal* and the *right to effective assistance of appellate counsel*, it appears that the ***Parker*** court was simply noting a potential constitutional violation separate and apart from any ***Youngblood*** violation. ***Parker***, 256 Wis. 2d 154, ¶4. We do not readily perceive how ***Youngblood*** itself—concerning the right to a fair trial and dismissal of charges as a potential remedy—applies to a claim brought on a collateral attack. We agree with the State that ***District Attorney's Office for Third Judicial District v. Osborne***, 557 U.S. 52, 67-72 (2009), supports this conclusion; there the United States Supreme Court found that respondent did not have the same due process right in the postconviction context to access evidence in control of the state. *See* ***Reid v. State***, 984 N.E.2d 1264, 1267 (Ind. Ct. App. 2013) ("***Osborne*** … indicates that an individual does not have a right under the Due Process Clause to access lost or destroyed evidence during post-conviction proceedings." (citation omitted)). Because Avery has not alleged a ***Youngblood*** violation, we need not delve more fully into this point.

value and the evidence "was simply an avenue of investigation that might have led in any number of directions").

¶75 Nor can Avery establish that this evidence is potentially exculpatory, because even assuming that these bone fragments are Halbach's, Avery does not explain the significance of this fact. 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. But 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. Moreover, Avery cannot show bad faith, meaning "(1) the officers were aware of the potentially exculpatory value or usefulness of the evidence they failed to preserve; and (2) the officers acted with official animus or made a conscious effort to suppress exculpatory evidence." *See* ***State v. Luedtke***, 2015 WI 42, ¶46, 362 Wis. 2d 1, 863 N.W.2d 592 (citation omitted). The record reflects only that the State released bone fragments of indeterminate origin after Avery's direct appeal was fully litigated, when there appeared no direct or immediate need to preserve this evidence. And contrary to Avery's argument, the very fact that the State released the bones does not mean that these are Halbach's or that the State acted in bad faith to "destroy" this evidence. The Halbach family requested these bone fragments for purposes of its own—likely for closure—but that does not vest these fragments with evidentiary significance.[28]

[28] Avery suggests that the State also acted in bad faith in 2018, during the postconviction process, by actively misleading him about whether it still possessed the bone fragments. The point at which to measure the State's bad faith, however, is when it allegedly destroyed the evidence—here, in 2011, when it released the bone fragments to Halbach's family. *See* ***State v. Luedtke***, 2015 WI 42, ¶41, 362 Wis. 2d 1, 863 N.W.2d 592 (defendant must show that "the State acted in bad faith *by destroying evidence* that was potentially exculpatory" (emphasis added; citations omitted)).

MOTION #6: APRIL 2021 MOTION TO STAY AND REMAND

¶76 On November 9, 2020, we notified the parties that this case had been submitted to the court for decision on briefs. On April 12, 2021, Avery filed another motion with this court to stay his appeal and remand for evaluation of a new claim. This claim concerns an alleged ***Brady*** violation, the factual basis for which Avery purportedly obtained on April 11, 2021. Specifically, the claim is based on the affidavit of Thomas Sowinski, a Manitowoc motor route driver who attests that, days after Halbach's death, while on his paper route in the early morning hours, he spotted a shirtless Dassey and an unidentified older man pushing Halbach's vehicle down Avery Road towards the junkyard. Sowinski further attests that, after he delivered the paper, Dassey attempted to block his exit, causing him to swerve and drive into a shallow ditch. Sowinski claimed to have called the Manitowoc sheriff's office later that day to report what he had seen but was told they "already know who did it." He also claims to have attempted to contact Avery's trial attorneys after Season 1 of Making a Murderer, but never heard back from them.

¶77 When Avery filed this motion, we had already twice stayed his appeal, each time because he asserted that the new claims related to those previously litigated and that it would be most expeditious to resolve them as part of the instant appeal. By the time Avery filed this new motion, however, we had already evaluated the legal and factual bases for claims already raised. We therefore were, and are, in the position to conclude that this newly raised ***Brady*** claim bears little or no relation to those claims already before us. This is, instead, a distinct issue that that the circuit court should resolve on a standalone basis through a new WIS. STAT. § 974.06 motion.

¶78 Moreover, Avery's latest motion arrived while our decision on his appeal was forthcoming. It would be an inefficient use of court resources to now, and once again, delay this appeal's resolution. We appreciate that Avery likely wishes us to consider this new ***Brady*** claim in the context of claims previously raised, but we must weigh that implicit consideration against those discussed above. Simply put, Avery's appeal cannot continue indefinitely. Accordingly, this decision operates as an order denying Avery's April 12, 2021 motion to stay and remand. If Avery wishes to raise this claim, he must file a new WIS. STAT. § 974.06 motion with the circuit court. Pursuant to ***Escalona-Naranjo***, Avery will need to demonstrate why he could not have previously raised this claim, including in his June 2017 motion, before the merits can be reached.

CONCLUSION

¶79 Avery raises a variety of alternative theories about who killed Halbach and how, but as the State correctly notes, a WIS. STAT. § 974.06 motion is not a vehicle to retry a case to a jury. A criminal defendant is constitutionally entitled as of right to a jury trial and, if convicted, a direct appeal. If he or she later seeks to collaterally attack the conviction on constitutional or jurisdictional grounds, a § 974.06 motion is appropriate. But key to any § 974.06 motion are sufficient, nonconclusory showings both as to why the issue was not raised in an earlier postconviction proceeding *and* why the claim has facial merit. These requirements are not optional and cannot be met through broad conclusions or by misstating evidence.

¶80 We express no opinion about who committed this crime: the jury has decided this question, and our review is confined to whether the claims before us entitle Avery to an evidentiary hearing. We conclude that the circuit court did

not erroneously exercise its discretion in denying hearings on Motions #1, #4, and #5; in not vacating its order on Motion #1; and in not reconsidering its ruling on Motion #1. As for Motion #6 and the portion of Motion #3 (the motion to reconsider) raising new claims, we leave open the possibility that Avery may raise these claims in a new WIS. STAT. § 974.06 motion. We remind Avery, however, that he will need to overcome the ***Escalona-Naranjo*** procedural bar on these claims, which includes providing a sufficient reason for not raising them in his June 2017 motion. Moreover, Avery will need to satisfy the previously discussed specificity requirements before such claims may proceed to a hearing. *See* ***John Allen***, 274 Wis. 2d 568, ¶¶2, 23.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.